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## Internet Jurisdiction and Minimum Contacts

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# INTERNET JURISDICTION AND MINIMUM CONTACTS

## I. INTRODUCTION

The Internet is becoming more important in everyday life, both in the business world and personal lives.<sup>1</sup> People log onto their computers daily to check e-mail, track the status of stocks, and conduct numerous business activities, such as selling, advertising, and contracting for services and products.<sup>2</sup> As a result of this growing interest in and need for the Internet, there are numerous opportunities to reach out to people in other parts of the country, as well as in the world, simply by turning on a computer.

With this growth of the Internet, one relatively new legal problem, which has only begun to be dealt with, is determining jurisdiction in regard to Internet disputes.<sup>3</sup> Because the Internet has no territorial boundaries, it is difficult to define exactly what the Internet is.<sup>4</sup> This is where the center of controversy lies.<sup>5</sup> As one case points out, "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."<sup>6</sup> The Internet has made it possible for individuals to conduct business throughout the world with only a computer and an Internet connection.<sup>7</sup> Courts are beginning to realize that with this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction in relation to the Internet is in its infancy.<sup>8</sup>

As a result of this relatively new issue, an intriguing and unclear question arises: Can a court have personal jurisdiction over a person based merely on that person's contacts with the state through the Internet?<sup>9</sup> In a recent Massachusetts case, a judge wrote, "I cannot ignore the fact that the medium through which many of the significant Massachusetts contacts occurred is anything but traditional; it is a site in cyberspace, a Web-site."<sup>10</sup> Since there is not a physical location

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1. See Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 65 *FORDHAM L. REV.* 2241, 2242 (1997).

2. See Michael J. Dunne & Anna L. Musacchio, Survey, *Jurisdiction Over the Internet*, 54 *BUS. LAW.* 385 (1998).

3. See generally Kalow, *supra* note 1.

4. See *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997).

5. See *id.* at 462.

6. *Id.*

7. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123 (W.D. Pa. 1997).

8. See *id.*

9. See *id.*

10. *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997).

showing where the events or acts occurred, the courts must use other methods to determine where jurisdiction lies when there is a dispute involving separate jurisdictions.<sup>11</sup>

This Note examines how courts in different forums have resolved the issue of personal jurisdiction and minimum contacts with regard to the Internet. It also assists in defining what will likely constitute sufficient contacts for a court to assert personal jurisdiction. Part II provides an overview of the history of the Internet and defines the web, along with various uses of the Internet. Part III discusses briefly the concept of minimum contacts in the United States federal court system and explains its relationship to the Internet. Part IV compares the different types of web sites and the cases that apply to the issue of minimum contacts and the Internet. Finally, Part V discusses the courts' trends in making their decisions and what is relevant for a finding of personal jurisdiction.

## II. WHAT IS THE INTERNET?

The Internet was born in 1969 as a joint project between the government and the world of academia, and it was originally called ARPANET, for Advanced Research Project Agency.<sup>12</sup> The network linked the computers of the military, defense contractors, and university laboratories that were conducting defense-related projects and research.<sup>13</sup> The purpose was to maintain access through redundant links so that research and communications could continue even if some of the individual links were damaged because of a possible war.<sup>14</sup> For example, a computer sending a message from Washington, D.C. to California could first send the message to Chicago, Iowa City, and Seattle before it reached its ultimate destination.<sup>15</sup> The next time a message was sent from the same computer in Washington, D.C. to the same computer in California, however, it could be sent via an entirely different route.<sup>16</sup>

Today, the Internet has evolved into a system whereby all types of individuals and organizations can share and access information through a network of computers that operate worldwide.<sup>17</sup> The Internet allows users to visit millions of different web sites and web pages by the use of a

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11. *See id.*

12. *See* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (providing in-depth explanations of the Internet and its uses based on hearings and information given by experts and users of the Internet), *aff'd*, 521 U.S. 844 (1997).

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998).

hyperlink.<sup>18</sup> Simply put, a web page is a file that has numerous names, words, messages, pictures, sounds, and links to other information.<sup>19</sup> Each web page has an address, or web site, and this web site is considered the equivalent of a telephone number or street address, using an identifying name in the address.<sup>20</sup>

Associated with each web site is a domain name, which is used to direct users to a specific website just as a street address is used to direct people to specific homes.<sup>21</sup> Attached to the end of each domain name is one of five different domains, which are also called top level domain (TLD) names: (1) “.edu” for education related sites, (2) “.gov” for government entities, (3) “.com” for commercial entities, (4) “.org” for organizations, and (5) “.net” for networks.<sup>22</sup> At one time, there was a distinction between these TLDs.<sup>23</sup> However, since 1995, there is not a distinction, and commercial businesses can use “.net,” “.org,” or “.com.”<sup>24</sup>

The Internet has no central point, and there are no limits to what a person can do and see once logged onto the Internet.<sup>25</sup> A user logged on the Internet in North Dakota can check stock prices,<sup>26</sup> learn information regarding a university as well as complete an application to attend that university,<sup>27</sup> take a virtual tour of Australia,<sup>28</sup> retrieve information about certain cities,<sup>29</sup> and send a resume to a company on-line.<sup>30</sup> That same user in North Dakota can join a discussion group that includes other users from all corners of the world.<sup>31</sup> This opens up the world incredibly and demonstrates that the Internet truly “is unrestricted by terrestrial borders or physical limitations.”<sup>32</sup>

18. See Motty Shulman, Note and Comments, <http://www.Personal-jurisdiction.com>, 23 NOVA L. REV. 781, 790 (1999) (defining hyperlinking as a process where an Internet user clicks with a mouse on a word, picture, or image and is immediately linked to a different document).

19. See *ACLU v. Reno*, 929 F. Supp. 824, 836 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

20. See *id.*

21. See *Visual Works, Inc. v. Volkswagen of America, Inc.*, 283 F.3d 264, 266 (4th Cir. 2000).

22. See *id.*

23. See *id.*

24. See *id.*

25. See Shulman, *supra* note 18, at 791.

26. See, e.g., *E\*TRADE* (visited Sept. 15, 2000) <<http://www.etrade.com>> (allowing visitors to check current stock prices and to buy and trade stock on-line).

27. See, e.g., *University of North Dakota Grand Forks* (visited Sept. 15, 2000) <<http://www.und.nodak.edu>> (allowing prospective students to obtain information about a North Dakota university and to complete an on-line application).

28. See, e.g., *Welcome to Australia* (visited Sept. 15, 2000) <<http://www.australia.com>>.

29. See, e.g., *GrandForks.com* (visited Sept. 15, 2000) <<http://www.grandforks.com>> (providing information about Grand Forks, North Dakota, as well as providing links to other sites on the Internet).

30. See, e.g., *Faegre & Benson, LLP* (visited Sept. 15, 2000) <<http://www.faegre.com>> (allowing a resume and cover letter to be filled out and sent over the Internet).

31. See *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 721 n.1 (E.D. Pa. 1999) (explaining different ways of communicating on the Internet via e-mail and discussion groups).

32. Shulman, *supra* note 18, at 791.

There are three types of Internet web sites that exist on a "sliding scale," and each type of web site has unique characteristics that differentiate them.<sup>33</sup> The first type of web site is a passive site.<sup>34</sup> A passive web site normally only provides information and does not allow for interaction between the web site user and the site.<sup>35</sup> At the opposite end of this sliding scale are web sites in which actual business is conducted between two parties over the Internet.<sup>36</sup> Somewhere in the middle, between these two ends of the spectrum, are those sites where there is some level of interaction but neither an actual contract nor business conducted.<sup>37</sup> This classification of the various web sites often helps courts resolve the issue of personal jurisdiction in relation to both long-arm statutes and the analysis of minimum contacts.<sup>38</sup>

### III. MINIMUM CONTACTS IN THE FEDERAL COURT SYSTEM—PERSONAL JURISDICTION

Most internet jurisdiction cases are decided on the basis of due process principles,<sup>39</sup> and as a result, it is important to be familiar with both long-arm statutes and due process principles, such as minimum contacts. According to Rule 4(e) of the Federal Rules of Civil Procedure, federal courts are authorized to exercise personal jurisdiction over a nonresident defendant to whatever extent is permitted by the laws of the state where the action is brought.<sup>40</sup> All federal courts follow a two-step analysis to determine whether personal jurisdiction is proper.<sup>41</sup> First, the court determines whether jurisdiction is proper under that

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33. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.* (defining the middle ground as a web site where there is an exchange of information between the user and the host computer).

38. See *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 724-25 (E.D. Pa. 1999) (discussing the various types of cases brought involving web sites and Internet contacts).

39. See *Dunne & Musacchio*, *supra* note 2, at 389.

40. Rule 4(e) of the Federal Rules of Civil Procedure provides as follows:

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

41. See *Steelman v. Carper*, 124 F. Supp. 2d 219, 222 (D. Del. 2000).

particular state's long-arm statute.<sup>42</sup> Once the court has determined whether jurisdiction is proper under the long-arm statute, the court must still ensure that the exercise of personal jurisdiction comports with due process under the United States Constitution, the second part of the analysis.<sup>43</sup> A court must analyze each of these steps separately in order to determine whether there is jurisdiction.

#### A. LONG-ARM STATUTES

Each state has been given the power to exercise personal jurisdiction, and the limits to this power are found in the Due Process Clause of the Fourteenth Amendment.<sup>44</sup> Through the Federal Rules of Civil Procedure, the United States has defined what the limits are for the boundaries of determining jurisdiction, and in addition, each state has its own statute dealing with the issue.<sup>45</sup> These statutes sometimes make the limits narrower than those given by the Federal Rules of Civil Procedure, but regardless of whether they extend jurisdiction to that allowed by the federal rules, or limit the jurisdiction, they are called "long-arm statutes."<sup>46</sup> North Dakota,<sup>47</sup> Minnesota,<sup>48</sup> and Iowa<sup>49</sup> are examples of

42. *See id.*

43. *See id.*

44. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."); *see also* *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 108 (1987); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984) (finding that the Due Process Clause of the Fourteenth Amendment limits the power of a state to assert in personam jurisdiction over a defendant who is not a resident of that state).

45. *See* FED. R. CIV. P. 4. Text is quoted in *supra* note 40.

46. *See* *Scranton Grain Co. v. Lubbock Mach. & Supply Co.*, 186 N.W.2d 449, 452 (N.D. 1971) (referring to North Dakota's statute giving the power to exercise personal jurisdiction as a "long-arm statute").

47. *See* N.D. R. CIV. P. 4(b)(2). Rule 4(b)(2) reads as follows:

Personal jurisdiction based upon contacts. A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's having such contact with this state that the exercise of personal jurisdiction does not offend against traditional notions of justice or fair play or the due process of law, under one or more of the following circumstances:

- (A) transacting any business in this state;
- (B) contracting to supply or supplying service, goods, or other things in this state;
- (C) committing a tort within or without this state causing injury to another person or property within this state;
- (D) committing a tort within this state, causing injury to another person or property within or without this state;
- (E) owning, having any interest in, using, or possessing property in this state;
- (F) contracting to insure another person, property, or other risk within this state;
- (G) acting as a director, manager, trustee, or officer of a corporation organized under the laws of, or having its place of business within, this state;
- (H) enjoying any other legal status or capacity within this state; or
- (J) engaging in any other activity, including cohabitation or sexual intercourse, within this state.

long-arm statutes that extend jurisdiction to that allowed by federal due process and minimum contacts.<sup>50</sup>

By briefly examining the origins of the long-arm statutes, the reasoning for their existence becomes clearer.<sup>51</sup> At common law, if a person or land was not in the territory of a court's jurisdiction, the court was unable to assert jurisdiction over that person or land.<sup>52</sup> This created the prerequisite that in order for a judgment to be valid, the court needed physical power over the defendant, and thus the concept of physical jurisdiction derived.<sup>53</sup> Problems arose, however, when a defendant was not within a court's territory or had not consented to jurisdiction, because then the defendant could not be subjected to the jurisdiction of the courts within that forum.<sup>54</sup>

At this time, society as a whole was changing and becoming more complex since transportation and communication had greatly improved.<sup>55</sup> Due to the mobility of society, courts needed a solution that would allow the citizens of a particular forum the ability to redress their wrongs in a convenient forum, and as a result, long-arm statutes were created to achieve jurisdiction over out-of-state defendants.<sup>56</sup> Originally drafted to allow a state's residents to assert jurisdiction over motorists

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*Id.*

48. See MINN. STAT. § 543.19(1) (1994). Minnesota's statute reads as follows:

As to a cause of action arising from any acts enumerated in this subdivision, a court of this state with jurisdiction of the subject matter may exercise personal jurisdiction over any foreign corporation or any nonresident individual, or the individual's personal representative, in the same manner as if it were a domestic corporation or the individual were a resident of this state.

*Id.*

49. See IOWA R. CIV. P. 56.2. Iowa's rule provides in relevant part:

Every corporation, individual, personal representative, partnership or association that shall have the necessary minimum contact with the state of Iowa shall be subject to the jurisdiction of the courts of this state, and the courts of this state shall hold such corporation, individual, personal representative, partnership or association amenable to suit in Iowa in every case not contrary to the provisions of the Constitution of the United States.

*Id.*

50. See *In re North Dakota Personal Injury Asbestos Litig.* No. 1, 737 F. Supp. 1087, 1092 (D.N.D. 1990) (stating that the North Dakota Supreme Court has ruled that Rule 4 should be exercised "to the fullest extent permitted by due process"); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 29 (Minn. 1995) (stating that courts are permitted by section 543.19 of the Minnesota Statutes to assert jurisdiction to the extent allowed by the federal constitutional requirements of due process); *Twaddle v. Twaddle*, 582 N.W.2d 518, 520 (Iowa Ct. App. 1998) (finding that Iowa Rule of Civil Procedure 56.2 allows Iowa to reach jurisdictionally to the fullest extent of the outer limits of due process).

51. See *North Dakota Personal Injury Asbestos Litig.*, 737 F. Supp. at 1092.

52. See *id.*

53. See *id.*

54. See *id.*

55. See *id.*; see also *Developments in the Law, State-Court Jurisdiction*, 73 HARV. L. REV. 911 (1960) (giving a thorough history of the development of the use of long-arm statutes and the reasoning for their creation).

56. See *North Dakota Personal Injury Asbestos Litig.*, 737 F. Supp. at 1092.

involved in accidents, long-arm statutes were expanded over time and drafted in broad language.<sup>57</sup> These statutes now extend jurisdiction to all persons conducting business within a state as well as to persons acting outside of the state, if that action affects someone within the state.<sup>58</sup> Some states have statutes that do not extend jurisdiction as fully as the limits permitted by due process, and in that situation the courts must first analyze the long-arm statute and then the concept of due process.<sup>59</sup> However, in states like North Dakota, Minnesota, and Iowa, the two-step analysis collapses into one analysis coextensive with the Due Process Clause because jurisdiction can be exercised to the limits of the United States Constitution.<sup>60</sup>

## B. DUE PROCESS AND MINIMUM CONTACTS

Due Process requires that if a defendant is not present within the state in which an action is being brought, then that defendant must "have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."<sup>61</sup> The plaintiff in all cases will bear the burden of showing that there is personal jurisdiction through a prima facie showing of jurisdictional facts.<sup>62</sup> This can be demonstrated through facts supporting either general or specific jurisdiction over the defendant.<sup>63</sup> General jurisdiction is the authority of a court to hear any cause of action involving a defendant; the action does not need to arise out of or be related to the defendant's contacts with the forum.<sup>64</sup> Specific jurisdiction can be asserted by the court when the action stems directly from, or is closely related to, the defendant's contacts with the forum.<sup>65</sup>

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57. *See id.*

58. *See id.*

59. *See* *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (finding that first the jurisdiction must be proper under the New York long-arm statute, and secondly, that the jurisdiction must also be proper under the Due Process Clause of the United States Constitution), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

60. *See* *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 723 (E.D. Pa. 1999) (looking at two-step inquiries of long-arm statutes and due process).

61. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

62. *See* *Johnson v. Tuff N Rumble Mgmt., Inc.*, No. 99-1374, 1999 U.S. Dist. Lexis 12361, at \*2 (E.D. La. Aug. 5, 1999).

63. *See* *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998).

64. *See* *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952).

65. *See* *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984) (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966)).



### 1. *General Jurisdiction*

A court has the authority to hear any claim involving a defendant by asserting general jurisdiction.<sup>66</sup> General jurisdiction permits a court to exercise jurisdiction over a defendant who is not a resident if “that party can be called on to answer any claim against [the defendant], regardless of whether the subject matter of the cause of action has any connection to the forum.”<sup>67</sup> The activities engaged in by the defendant must be systematic and continuous in the forum state.<sup>68</sup>

In *Perkins v. Benguet Consolidated Mining Co.*,<sup>69</sup> the Court had to resolve a situation where the state court asserted general jurisdiction over a defendant foreign corporation. The president and general manager of a Philippine mining corporation had maintained an office in Ohio during the Japanese occupation of the Philippine Islands.<sup>70</sup> From this office the president conducted company activities such as keeping files, holding meetings, carrying on correspondence, and using banks within Ohio for company business.<sup>71</sup> Even though the action that was brought against the Philippine corporation had nothing to do with these activities, the court found that there was reasonable and just jurisdiction because the corporation’s actions were continuous and systematic.<sup>72</sup> As a result, the court held that to find general jurisdiction, the court must determine that the defendant has had “continuous and systematic contacts” with the forum state.<sup>73</sup>

In one of the many Internet jurisdiction cases found at the U.S. District Court level, the U.S. District Court for the District of Oregon stated that it was not aware of any case dealing with the Internet where the court had asserted general jurisdiction with its foundation being solely the existence of an Internet web site.<sup>74</sup> Additionally, in California, a trial court refused to find jurisdiction based on general jurisdiction, reasoning that if it allowed computer interaction via the web to be

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66. *See Perkins*, 342 U.S. at 445.

67. *Mellon Bank (East) PSFS v. Farino*, 960 F.2d 1217, 1221 (3d Cir. 1992).

68. *See Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414-16 (1984).

69. 342 U.S. 437 (1984).

70. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952).

71. *See id.*

72. *See id.*

73. *See id.*; *see also Helicopteros*, 466 U.S. at 416 (finding that even though the company had purchased millions of dollars worth of products, negotiated a contract, and trained employees within the forum state, these were not “continuous and systematic contacts” sufficient to find general jurisdiction); *Gehling v. St. George’s Sch. of Med., Ltd.*, 773 F.2d 539, 542 (3d Cir. 1985) (finding that international publications do not constitute “continuous and substantial contacts” with the forum state, and thus, general jurisdiction was not appropriate).

74. *See Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 910 (D. Or. 1999).

defined as “continuous and systematic contacts,” then there would be no purpose to the personal jurisdiction requirement because every Internet user would be subject to jurisdiction.<sup>75</sup> General jurisdiction has never been found in cases dealing with Internet web sites because courts realize that it would subject every Internet user to jurisdiction in any forum.<sup>76</sup> The courts have, however, held defendants who use the Internet subject to jurisdiction through specific jurisdiction, and as a result, in cases dealing with Internet web sites, a finding of specific jurisdiction is imperative.<sup>77</sup>

## 2. *Specific Jurisdiction*

Specific jurisdiction permits a court to exercise jurisdiction when “the cause of action arises directly from a defendant’s contacts with the forum state.”<sup>78</sup> A court may exercise specific jurisdiction, or personal jurisdiction, over a party when that party has minimum contacts with the state or forum.<sup>79</sup> In *International Shoe Co. v. Washington*,<sup>80</sup> the United States Supreme Court said that activities considered to be the contacts should not be measured mechanically or quantitatively.<sup>81</sup> Rather, the minimum contacts should depend on “the quality and nature of the activity in relation to the fair and orderly administration of the laws” because it was for this purpose that the Due Process Clause was created.<sup>82</sup> Thus, in order for a court to find personal jurisdiction based on minimum contacts, the defendant must have some type of contact, tie, or relationship with the forum.<sup>83</sup>

This contact, tie, or relationship with the forum must be purposeful and intentional so that the party conducts activities within the forum state that signify that the party is also invoking the benefits and protections of

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75. See *id.* (citing *McDonough v. Fallon McElligott, Inc.*, No. CIV. 95-4037, 1996 WL 753991, at \*3 (S.D. Cal. Aug. 5, 1996)).

76. See *id.*

77. See *id.* (stating that the court was not aware of any case in which a court had asserted general jurisdiction based on the existence of a web site).

78. *Id.*

79. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)). “Historically the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant’s person.” *Id.* “[Now] 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.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

80. 326 U.S. 310 (1945).

81. See *International Shoe*, 326 U.S. at 319.

82. See *id.*

83. See *id.*

that state's laws.<sup>84</sup> If there has been no purposeful or intentional act within that forum, then the court will be unable to find jurisdiction.<sup>85</sup>

Not only does the contact have to be purposeful and intentional, it also must be foreseeable that this contact will result in the defendant being brought into court in that forum.<sup>86</sup> The simple fact that a party may foreseeably be brought into a different jurisdiction does not mean, however, that the party may be automatically haled before that court.<sup>87</sup> If foreseeability were the only factor, then "a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there . . . [or] a Wisconsin seller of a defective automobile jack could be haled before a district court for damage caused in New Jersey."<sup>88</sup> Although it may be foreseeable that a party can be brought into a particular forum, the Supreme Court has held that without something more than foreseeability, personal jurisdiction cannot be established.<sup>89</sup>

Even though it must be foreseeable, if a court is attempting to establish personal or specific jurisdiction over a defendant, it is not required that the defendant be physically present in the forum.<sup>90</sup> Jurisdiction may be properly asserted over a defendant if that defendant

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84. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The application of the rule of contact with a forum state varies in the quality and nature of activities by the defendant. See *id.* Since the quality and nature of activities vary, there has to be some act by which the defendant has purposefully availed itself of the privilege of conducting activities within the forum state in a manner that invokes the benefits and protections of that state's laws. See *id.*

85. See *id.*; cf. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (finding that the defendant's circulation of a national magazine with libelous information in the forum state constituted sufficient minimum contacts because the magazine "continuously and deliberately exploited the New Hampshire market").

86. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980).

87. See *id.* at 295-96.

88. *Id.* at 296-97 (using examples from *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (4th Cir. 1956) and *Reilly v. Phil Tolkani Pontiac, Inc.*, 372 F. Supp. 1205, 1207 (D.C.N.J. 1974)).

89. See *id.* at 295-96. The Court gave two examples showing that there needs to be more than just mere foreseeability for a finding of personal jurisdiction. See *id.* It may be foreseeable that a Delaware trustee might move to Florida and seek to exercise a power of appointment there, but without more activity or contacts, the Florida court could not exercise jurisdiction. See *id.* (using the facts of *Hanson v. Denckla*, 357 U.S. 235 (1958), for this example). Similarly, it may be foreseeable that a divorced wife might move from New York to California with a minor daughter living with the mother, but without more than just that, the California court could not exercise jurisdiction over the ex-husband who remained in New York. See *id.* at 296 (using the facts of *Kulko v. California Superior Court*, 436 U.S. 84 (1978), for this example).

90. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985) (finding jurisdiction because of a "substantial and continuing relationship" with the forum and not because of presence in the forum). In *Burger King*, the defendant was never actually present within the particular forum. See *id.* at 466-67. However, the defendant had entered into a contact with a resident from the forum attempting to assert jurisdiction. See *id.* at 487. As a result, the Court found jurisdiction because the defendant had established a relationship with the plaintiff who was established in the foreign forum. See *id.* The defendant also had fair notice from the contract documents that he might be subject to suit in that forum. See *id.*

directed its tortious conduct toward the forum state and knew that the effects of that conduct might cause harm.<sup>91</sup>

As a result, in order to assert jurisdiction based on specific or personal jurisdiction, the court must decide that the actions of the defendant were sufficient minimum contacts.<sup>92</sup> The court must also determine that these contacts were purposeful and intentional,<sup>93</sup> and that it was foreseeable to the defendant that these actions could result in being brought before that forum.<sup>94</sup>

Internet cases have caused a great deal of conflict among the various circuits because the level and type of Internet activity needs to be analyzed in order to determine whether or not there is specific jurisdiction.<sup>95</sup> As one author said, "Courts have not only been faced with the challenge of deciding whether to apply new jurisdictional rules to Internet-related disputes, but also have encountered difficulties in properly analyzing these cases within traditional personal jurisdiction decisional models."<sup>96</sup> Some courts, although in the minority, allow jurisdiction based on the mere existence of a web page, while others require a great deal more than just a web site or web page to find jurisdiction.<sup>97</sup>

Different views have been presented regarding solutions to the problems associated with determining whether there is jurisdiction.<sup>98</sup> These views range from applying a purposeful availment approach similar to the approach in Justice O'Connor's plurality opinion in *Asahi Metal Industry v. Superior Court*,<sup>99</sup> to separately examining each case and determining whether there are sufficient minimum contacts to support a finding of jurisdiction.<sup>100</sup> Even with the various tests utilized by the

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91. See *Calder v. Jones*, 465 U.S. 783, 788-90 (1984) (stating that a magazine article concerning the activities of a California resident, even though not written in California, caused the brunt of the harm in California).

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

93. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980) (finding that the mere fortuitous circumstance that a single automobile sold by defendant had passed through another forum did not constitute contacts that were purposeful and intentional).

94. See *Denckla*, 357 U.S. at 250-53 (finding that it may be foreseeable that a Delaware trustee might move to Florida and seek to exercise a power of appointment there, but without more activity or contacts, the Florida court could not exercise jurisdiction).

95. See *Dunne & Musacchio*, *supra* note 2, at 389.

96. Kalow, *supra* note 1, at 2242.

97. *Compare* *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (finding jurisdiction after the defendant advertised via the Internet), *with* *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907 (D. Or. 1999) (finding that the mere existence of an interactive web site did not rise to the level of conduct creating jurisdiction).

98. See Kalow, *supra* note 1, at 2242.

99. 480 U.S. 102, 113-16 (1987) (looking at a two-pronged analysis to determine, first, whether the non-resident defendant deliberately availed himself of the laws of the forum state, and then whether the jurisdiction over the defendant would be fair and reasonable).

100. See *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 731 (E.D. Pa. 1999) (finding no jurisdiction because there was insufficient minimum contacts).

courts, there is still division in the circuits when it comes to determining whether a court can exercise its jurisdiction, and this is demonstrated by the cases discussed in this Note.

#### IV. THREE CATEGORIES OF INTERNET JURISDICTION CASES

Although the issue of personal jurisdiction based on some type of Internet activity is new, there are three broad categories that have evolved into which most cases fall. One category of cases finds that there is jurisdiction whenever there is business conducted over the Internet, and these could be considered active Internet activity.<sup>101</sup> Another category of Internet cases includes those Internet activities that are merely passive, meaning that there is no interaction between the user and the creator of the web site.<sup>102</sup> The final category of cases are those that fall somewhere in-between the previous two categories, where there is some interaction between the two parties over the Internet and yet the interaction is not outright business.<sup>103</sup> The category and the type of activity conducted by the defendant influences the finding of personal jurisdiction.<sup>104</sup>

##### A. ACTIVE WEB SITES

In cases dealing with active web sites, the court will usually find that there is personal jurisdiction if the Internet activity involves doing business over the Internet.<sup>105</sup> An active web site is one where the parties can interact back and forth, make purchases, enter into contracts, and conduct other activities that involve the participation of both parties, usually in business transactions.<sup>106</sup> Courts usually find that there is jurisdiction, first, when the long-arm statute is satisfied, such as when there is actual business being conducted; and second, when the defendant has conducted that activity or business with the requisite intent to constitute minimum contacts.<sup>107</sup>

*CompuServe, Inc. v. Patterson*<sup>108</sup> is considered the seminal case dealing with active web sites and personal jurisdiction.<sup>109</sup> In a dispute

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101. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

102. See *id.*

103. See *id.*

104. See *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 726 (E.D. Pa. 1999).

105. See *id.* at 724 (giving examples of Internet activity constituting business, such as contracts between the defendant and the plaintiff entered into over the Internet and the purchasing of products over the Internet).

106. See *Zippo*, 952 F. Supp. at 1124.

107. See *id.*

108. 389 F.3d 1257 (6th Cir. 1996).

109. See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996); see also *Superguide Corp. v. Kegan*, 987 F. Supp. 481, 487 (W.D.N.C. 1997) (finding jurisdiction because the Internet contacts were for the commercial benefit of the defendant and were directly related to the subject matter of

over trademark infringement, the court found that CompuServe proved the defendant's contacts with Ohio were sufficient to exercise jurisdiction.<sup>110</sup> CompuServe was a computer network giant that had contracted with various individuals, including the defendant, to provide access through the Internet to different computing and information services.<sup>111</sup> Patterson was one of the individuals who created the software used by CompuServe.<sup>112</sup> Patterson and CompuServe entered into an agreement whereby Patterson could place his software on CompuServe's system.<sup>113</sup> The product at the center of the trademark action was a program designed by Patterson that was intended to help people find their way around the larger Internet network.<sup>114</sup>

The lawsuit was initiated when CompuServe began to market a similar product with various markings and names.<sup>115</sup> Patterson, believing that the product was too similar to his own, notified CompuServe that it was infringing on the trademarks owned by Patterson and Patterson's company.<sup>116</sup> CompuServe changed the name, but Patterson continued to complain.<sup>117</sup> As a result, an action was brought in Ohio, with CompuServe relying on the court's diversity subject matter jurisdiction.<sup>118</sup> The district court held that it lacked personal jurisdiction, and CompuServe appealed.<sup>119</sup>

The appellate court observed that the Internet was yet another form of trends shrinking the globe and eliminating distances.<sup>120</sup> The court further noted that the Internet allows anyone who has a computer with a modem and phone line to operate an affordable international business right from a home desktop.<sup>121</sup> After making these observations, the court realized that people operating businesses remain entitled to the Due Process Clause, which means that potential defendants should be

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the suit); *Gary Scott Int'l, Inc. v. Baroudi*, 981 F. Supp. 714, 717 (D. Mass. 1997) (finding that the advertisement of the defendant's product over the Internet along with announcing his intention to sell a large quantity of his product to a chain that does business in Massachusetts was enough to find jurisdiction).

110. *See CompuServe*, 89 F.3d at 1260.

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.* at 1261.

115. *See id.* Patterson notified CompuServe in December of 1993 that the terms "winNAV," "Windows Navigator," and "FlashPoint Windows Navigator" were common law trademarks owned by Patterson and his company. *See id.*

116. *See id.*

117. *See id.* Patterson made his complaints to CompuServe via e-mail and then finally demanded \$100,000 to settle his potential claims. *See id.* At this point, CompuServe filed a motion to obtain a declaration that it had not infringed on any common law trademarks of Patterson or FlashPoint Development, the company owned by Patterson. *See id.* It also sought a declaration that it was not otherwise guilty of unfair or deceptive trade practices. *See id.*

118. *See id.*

119. *See id.* at 1261 n.6.

120. *See id.* at 1262.

121. *See id.*

able to "structure their primary conduct with some assurance as to where the conduct will and will not render them liable to suit."<sup>122</sup> As a result, the court stated that the real question was whether the defendant, Patterson, should have reasonably anticipated being haled into court in Ohio based on his activities.<sup>123</sup>

The court stressed that Patterson's relationship with CompuServe was the pivotal point in the analysis, concluding that there was no doubt that Patterson had purposefully transacted business in Ohio.<sup>124</sup> In looking at the activities, the court observed that Patterson chose to transmit the software to CompuServe in Ohio, many users gained access to Patterson's software through CompuServe's system, and Patterson also advertised through that system with the intention of making sales.<sup>125</sup> Furthermore, the relationship between the parties had been ongoing for about three years by use of a contract, indicating that Patterson intended to continue marketing software through the plaintiff.<sup>126</sup> These were the relevant factors used by the court in deciding that Patterson was subject to personal jurisdiction in Ohio.<sup>127</sup> The court acknowledged that it would probably be burdensome for Patterson to go to Ohio for this lawsuit.<sup>128</sup> However, the court found that Patterson was aware that he was making a connection with Ohio by entering into a shareware agreement with CompuServe, and since he was hoping to profit from this connection, he was also subject to jurisdiction.<sup>129</sup>

*Maritz, Inc. v. Cybergold, Inc.*<sup>130</sup> also involved an action alleging trademark infringement where the court had to determine whether personal jurisdiction existed.<sup>131</sup> Maritz argued that Cybergold was infringing on its trademark and that the violation occurred in Missouri, because Maritz was located in Missouri.<sup>132</sup> The court determined that Missouri's long-arm statute reached the defendants because a tortious act was committed.<sup>133</sup> As a result, the court then had to determine

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122. *Id.*

123. *See id.* at 1264.

124. *See id.* at 1265.

125. *See id.*

126. *See id.*

127. *See id.* The court admitted that merely entering into a contract is not enough to establish that the defendant has minimum contacts. *See id.* The court also stated that placing a product into the stream of commerce without more would be a very dubious ground for jurisdiction. *See id.* However, by taking these two factors together as well as other factors, and because the defendant did both of these things deliberately, the court found that there were enough contacts to assert jurisdiction by Ohio. *See id.*

128. *See id.* at 1268.

129. *See id.*

130. 947 F. Supp. 1328 (E.D. Mo. 1996).

131. *See Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1329 (E.D. Mo. 1996).

132. *See id.* at 1331.

133. *See id.* The court looked at Missouri law and found that the Missouri long-arm statute

whether sufficient minimum contacts existed so that the exercise of personal jurisdiction would not violate the requirements of due process.<sup>134</sup>

Cybergold had an Internet web site on the World Wide Web, with the server located in Berkeley, California.<sup>135</sup> The web site contained information regarding Cybergold's new upcoming service and also included an explanation that there would be a future mailing list.<sup>136</sup> The plan for this site was that if a user wanted to be on the mailing list, they would have to provide Cybergold with their areas of interest, and then Cybergold would create an electronic mailbox into which advertisements would be forwarded.<sup>137</sup>

Cybergold maintained that its web site was a "passive website."<sup>138</sup> Whenever anyone requested information, Cybergold would respond to every Internet user who accessed its web site requesting information.<sup>139</sup> Cybergold knew that the information would be transmitted globally, and it also had the intent to reach all Internet users in any location geographically.<sup>140</sup> The court held that since Cybergold had made a conscious decision to send advertising information to all Internet users through its web site, those contacts were of such a quality and nature as to constitute a finding of personal jurisdiction and did not violate the defendants' due process.<sup>141</sup>

In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,<sup>142</sup> the manufacturer of "Zippo" tobacco lighters, Zippo Manufacturing Company, located in Pennsylvania, brought a trademark infringement action against the defendant concerning an Internet domain name.<sup>143</sup> The defendant's web site contained information about its company, advertisements, and also included an application for an Internet news service.<sup>144</sup> There were three different levels of membership provided by the news service.<sup>145</sup> Once individuals subscribed, they would receive a

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permitted jurisdiction over a defendant corporation. *See id.* (citing MO. REV. STAT. § 506.500). The statute provided for jurisdiction when there was a tortious act that had its effect in Missouri. *See id.* The court also found that the Missouri long-arm statute reached acts by Cybergold because they caused a Missouri resident economic injury. *See id.*

134. *See id.* at 1332.

135. *See id.* at 1330.

136. *See id.*

137. *See id.*

138. *See id.* at 1333.

139. *See id.*

140. *See id.*

141. *See id.*

142. 952 F. Supp. 1119 (W.D. Pa. 1997).

143. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1120-21 (W.D. Pa. 1997).

144. *See id.* at 1121.

145. *See id.* The three levels of membership were free/public, "original," and "super." *See id.* Each successive level would provide access to a greater number of Internet newsgroups. *See id.* If a customer wanted to subscribe to either the "original" or "super" group he or she would have to fill out an on-line application and also make payment by credit card. *See id.* The payment could be made



password permitting the individual to read and download the different Internet newsgroup messages.<sup>146</sup>

The court analyzed the defendant's contacts with the state of Pennsylvania and determined that all of those contacts occurred almost exclusively over the Internet.<sup>147</sup> Zippo Dot Com did not have an office in Pennsylvania or employees or agents in the state.<sup>148</sup> The only way the defendant advertised its services was by posting information regarding its service on its web page, which was accessible to all users of the Internet, including those in Pennsylvania.<sup>149</sup>

Of the defendant's approximately 140,000 subscribers, only two percent, or 3,000 individuals, were from Pennsylvania.<sup>150</sup> The subscribers entered into agreements to receive the defendant's service.<sup>151</sup> Along with these contracts, the defendant also entered into agreements with various Internet providers to allow the users of those Internet providers access to the defendant's service.<sup>152</sup> Two of those subscribers were from Pennsylvania.<sup>153</sup>

The main issue before the court was whether the conducting of electronic business or commerce was sufficient to constitute the "purposeful availment" of doing business in the state of Pennsylvania as required by the due process analysis.<sup>154</sup> The court decided that these contacts did meet the requirements for jurisdiction, especially since the basis of the lawsuit was the downloading of electronic messages.<sup>155</sup> Not only did the defendant intend for the users to download electronic messages, but the defendant also sold passwords, sought subscribers, and entered into contracts with residents of Pennsylvania.<sup>156</sup> As a result, the court found that it had jurisdiction over the defendant.<sup>157</sup>

In *Panavision International, L.P. v. Toeppen*,<sup>158</sup> Toeppen, the defendant, registered Panavision's trademark as its own personal domain name on the Internet, and it then offered to sell the name to Panavision for \$13,000.<sup>159</sup> Toeppen stated that if Panavision would agree to this offer, then he would not register any other Internet addresses that would be the

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over the Internet or by telephone. *See id.*

146. *See id.*

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

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

155. *See id.* at 1126.

156. *See id.*

157. *See id.* at 1128.

158. 141 F.3d 1316 (9th Cir. 1998).

159. *See Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1319 (9th Cir. 1998).

property of Panavision Corporation.<sup>160</sup> Toeppen had already taken the names of other companies, registered them as his own, and sold the names to the companies for large amounts of money.<sup>161</sup> Panavision sued Toeppen for trademark infringement.<sup>162</sup>

The court applied a three-part test and found that personal jurisdiction existed.<sup>163</sup> First, there was an intentional act on the part of Toeppen by taking Panavision's name.<sup>164</sup> Second, the court stated that the brunt of the harm was felt in California by Panavision, thereby meeting the second part of the test.<sup>165</sup> Finally, Toeppen knew that the harm would be felt in California because it was Panavision's primary place of business, as well as the heart of the motion picture and television industry.<sup>166</sup> The court also emphasized that Toeppen had engaged in this scheme to extort money from Panavision, further showing that the brunt of the harm would be felt in California.<sup>167</sup> Considering these factors together, the court justified a finding of personal jurisdiction over Toeppen.<sup>168</sup>

In *Millennium Enterprises, Inc. v. Millennium Music, L.P.*,<sup>169</sup> the court held that the maintenance of an Internet web site was insufficient to subject the defendant to personal jurisdiction in a trademark infringement action. The defendants advertised and sold products at both their retail outlets, and also over an Internet web site.<sup>170</sup> However, most sales were made through its retail outlets.<sup>171</sup> Between 1994 and 1997, the defendant purchased a small amount of compact discs from a distributor in Portland, Oregon.<sup>172</sup> In 1998, the plaintiffs received a credit document from the Portland distributor in error, at which time the plaintiffs became aware of the existence of the defendants, resulting in the action.<sup>173</sup>

The court determined that jurisdiction could only be found by analyzing the defendant's contacts with Oregon: the sale of one compact disc to a resident of Oregon, purchasing inventory for a distributor in

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160. *See id.*

161. *See id.* Some of the other companies with which Toeppen had done this were Delta Airlines, Neiman Marcus, and Eddie Bauer. *See id.*

162. *See id.*

163. *See id.* at 1321 (citing *Calder v. Jones*, 465 U.S. 783, 789-90 (1984)).

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.* at 1322.

168. *See id.* at 1327.

169. 33 F. Supp. 2d 907 (D. Or. 1999).

170. *See Millennium Enters., Inc. v. Millennium Music, L.P.*, 33 F. Supp. 2d 907, 908 (D. Or. 1999).

171. *See id.*

172. *See id.* at 909.

173. *See id.*

Oregon, and maintenance of an Internet web site.<sup>174</sup> The court examined these contacts individually; it determined that there was no jurisdiction with the first contact because the sale was merely an attempt by the plaintiff to manufacture some type of contact with Oregon that would be sufficient to establish personal jurisdiction.<sup>175</sup> The court also looked at the purchase from the Oregon distributor, but found that this was merely a sporadic purchase that could not support the finding of personal jurisdiction, unless the cause of action was directly related to or arose from that purchase.<sup>176</sup>

The court then determined that the web site was insufficient to find that there was jurisdiction.<sup>177</sup> The court stated that even though the defendant had a web site that was an advertisement and from which people could purchase compact discs, the sales were not purposefully directed at that forum.<sup>178</sup> The court moved away from finding personal jurisdiction based merely on the existence of an Internet web site.<sup>179</sup> The court wanted "something more" to show that the activities of the defendant were purposefully directed at the forum.<sup>180</sup> Finding that the maps located on the defendant's web site were local in nature, and that it had not sold any compact discs over the Internet to that forum, the court stated that the "something more" was not there.<sup>181</sup>

The court did acknowledge that this web site fell into the active category of web sites, because by using this site it was possible to conduct business and make purchases over the Internet.<sup>182</sup> However, the court made a shift away from the previous findings by other courts and did not find jurisdiction merely because the web site was interactive.<sup>183</sup> The court said that the category of Internet contacts needed further refinement so that it included the fundamental requirement of personal jurisdiction.<sup>184</sup> This fundamental requirement is some "deliberate action" that occurs in the forum state and takes the form of business or other transactions between the defendant and the forum's residents.<sup>185</sup> The deliberate action may also be conduct by the defendant that is

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174. *See id.* at 911-13.

175. *See id.* at 911. On August 21, 1998, an Oregon resident purchased a compact disc from the defendants over their web site. *See id.* at 909. This sale, however, was not entirely legitimate, since the purchase was made at the request of the plaintiff's attorney. *See id.*

176. *See id.* at 912.

177. *See id.* at 921-22.

178. *See id.* at 921.

179. *See id.* at 922.

180. *See id.*

181. *See id.*

182. *See id.* at 920.

183. *See id.* at 921.

184. *See id.*

185. *See id.*

directed at the residents of that forum, and the court found that there were no sales or advertising directed at that forum.<sup>186</sup>

In *Millennium*, the court held that the defendant had not intentionally or purposefully targeted its activities at Oregon as is required for the due process analysis, but rather intended to target residents in its own area through the web sites.<sup>187</sup> The court also found that the decisions in *Inset Systems, Inc. v. Cybergold, Inc.*<sup>188</sup> and *Maritz*, which both found personal jurisdiction merely on the basis of a web site, were lacking in their reasoning.<sup>189</sup> These cases did not assert the proposition that the defendant's activity be purposefully directed at or have a substantial connection with the forum state.<sup>190</sup> The defendant had to have some warning that Internet activities might subject the defendant to jurisdiction in a different forum.<sup>191</sup>

The court in *Millennium* stated: "The possibility of such overreaching jurisdiction raises the specter of 'dramatically chilling what may well be the most participatory marketplace of mass speech that this country—and indeed the world—has seen.'"<sup>192</sup> The court stated that it would not abandon the basic principle that parties must take some action in directing their activities toward a forum in order to find jurisdiction.<sup>193</sup> After extensive analysis, the court determined that there were insufficient contacts to find jurisdiction.<sup>194</sup>

Based on the analysis in these decisions, any time there is a web site that can be considered active, the court will most likely find that personal jurisdiction exists.<sup>195</sup> A finding of jurisdiction is dependant, however, on showing that the defendant purposefully availed himself or herself of the forum, the claim arises out of that activity, and the exercise of jurisdiction is reasonable.<sup>196</sup> Thus, if there is a web site that can be

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186. *See id.*

187. *See id.* at 922. The court found that the web site did not target residents in Oregon because the web site said "Come visit us!" *See id.* The web site also had a map of the location of the stores, and there were local maps showing little more than the cross-streets surrounding the stores. *See id.* The court found that, based on the defendants' invitation to visit their stores, a person could realize that the defendants were trying to target those persons in their vicinity. *See id.*

188. 937 F. Supp. 161 (D. Conn. 1996).

189. *See id.* (citing *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996)).

190. *See id.*

191. *See id.*

192. *Id.* at 923 (quoting *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997)).

193. *See id.*

194. *See id.* at 923-24.

195. *See Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 724 (E.D. Pa. 1999) (finding that personal jurisdiction clearly exists when the Internet activity involved doing business over the Internet with residents of a foreign jurisdiction).

196. *See Millennium Enters., Inc. v. Millennium Music, L.P.*, 33 F. Supp. 2d 907, 910 (D. Or. 1999).

considered active, a plaintiff must show that the defendant reached out to that jurisdiction.<sup>197</sup> Further, a plaintiff must show that the activities that resulted in harm were directed at that jurisdiction.<sup>198</sup> Finally, the plaintiff must prove that it was foreseeable that the injury would be felt in that jurisdiction.<sup>199</sup> Often, however, a web site will not reach the level of an active web site, with the result that a different test will be utilized by the courts in order to analyze the web site and Internet activity.<sup>200</sup>

## B. PASSIVE WEB SITES

Passive web sites, at the other end of the sliding scale, are sites that serve as mere advertisements or simply provide information.<sup>201</sup> With regard to passive web sites, the courts' decisions have broken into two distinct groupings.<sup>202</sup> The first line of cases finds jurisdiction where a passive web site is involved.<sup>203</sup> Conversely, the second line of cases declines to assert jurisdiction where only a passive web site is involved.<sup>204</sup>

### 1. *Asserting Jurisdiction on the Mere Existence of a Passive Web Site*

*Inset* is often cited by courts to support a finding that merely advertising over the Internet is enough to assert jurisdiction.<sup>205</sup> This proposition, however, is a minority position.<sup>206</sup> In *Inset*, the court held that an Internet advertisement and a toll-free number for inquiries were sufficient to establish minimum contacts.<sup>207</sup> The court supported its

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197. *See id.*

198. *See id.*

199. *See id.*

200. *See Barrett*, 44 F. Supp. 2d at 724-25.

201. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

202. *See Barrett*, 44 F. Supp. 2d at 725.

203. *See, e.g., TELCO Communications v. An Apple A Day*, 977 F. Supp. 404, 408 (E.D. Va. 1997); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164 (D. Conn. 1996).

204. *See, e.g., ESAB Group, Inc. v. Centricut, LLC*, 34 F. Supp. 2d 323, 334 (D.S.C. 1999) (finding that in this action for patent infringement there was no jurisdiction because even though there was an advertisement on the Internet as well as the potential to order on-line, a party had to first call a toll-free number and set up an account before they could place orders on-line); *CFOS 2-Go, Inc. v. CFO 2 Go, Inc.*, No. C 97-4676 IS, 1998 WL 320821, at \*3 (N.D. Cal. June 5, 1998) (finding that there was no personal jurisdiction because the information on the Internet was limited to contact information and a business description); *Transcraft Corp. v. Doonan Trailer Corp.*, No. 97-C-4943, 1997 WL 733905, at \*9 (N.D. Ill. Nov. 17, 1997) (finding that there was no jurisdiction because the web site was more of a national advertisement and as a general rule in this state national advertisements are insufficient to find jurisdiction, and opinions to the contrary are few in number and poorly reasoned); *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356, 1365 (W.D. Ark. 1997) (finding that advertising on the Internet was not a sufficient contact for the court to find that there was jurisdiction).

205. *See Barrett*, 44 F. Supp. 2d at 725 (looking at the holding of *Inset Systems, Inc. v. Instruction Set Inc.*, 937 F. Supp. 161, 162 (D. Conn. 1996)).

206. *See id.*

207. *See Inset*, 937 F. Supp. at 164. The plaintiff offered the argument that since the defendant had used the Internet and its toll-free number to try to conduct business within the state of Connecticut,

finding of sufficient contacts by contrasting Internet advertisements to radio and television advertisements.<sup>208</sup> Unlike radio advertisements which are only broadcast at certain times, or newspaper advertisements which are often quickly disposed of, the court reasoned that an advertisement on the Internet is available continually at the stroke of a few computer keys.<sup>209</sup> As a result, the court held, in direct contrast to other courts, that advertising on the Internet constituted solicitation of a nature that was repetitive enough to satisfy minimum contacts and due process.<sup>210</sup>

A similar holding was set forth in *TELCO Communications v. An Apple A Day*.<sup>211</sup> In *TELCO*, the plaintiff filed an action for defamation, as well as tortious interference with a contractual relationship and reasonable business expectation.<sup>212</sup> These actions were based on the fact that the defendant issued two press releases and called a securities analyst, thereby allegedly depressing TELCO's stock prices.<sup>213</sup> The defendant moved to dismiss for lack of personal jurisdiction.<sup>214</sup>

The court viewed the case as a fairly complex question regarding what conduct occurred, because the alleged improper conduct occurred on the Internet.<sup>215</sup> The court analyzed the cases previously decided involving Internet jurisdiction at the time<sup>216</sup> and agreed with the interpretation from *Inset*,<sup>217</sup> that posting an Internet advertisement was enough to show that the defendant had solicited business under the Connecticut long-arm statute.<sup>218</sup>

The court in *TELCO* found that the defendants had been conducting their business over the Internet through advertisements and

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minimum contacts comporting with due process were satisfied. *See id.*

208. *See id.* at 165.

209. *See id.*

210. *See id.*

211. 977 F. Supp. 404 (E.D. Va. 1997).

212. *See TELCO Communications v. An Apple A Day*, 977 F. Supp. 404, 405 (E.D. Va. 1997).

213. *See id.*

214. *See id.*

215. *See id.* at 406.

216. *See id.* (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126 (W.D. Pa. 1997) (finding that the defendant did more than just advertise by seeking subscribers and entering contacts); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (finding that even though the defendant had a "passive website" the defendant had the intent to reach all Internet users in all geographic locations); *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (finding that the advertisement of a night club through a web site was insufficient contact to confer jurisdiction), *aff'd*, 126 F.3d 25 (2d Cir. 1997); *Inset Sys., Inc. v. Instruction Set*, 937 F. Supp. 161, 165 (D. Conn. 1996) (finding that a web site advertisement was enough to find jurisdiction)).

217. *See id.* at 406.

218. *See Inset*, 937 F. Supp. at 165 (citing CONN. GEN. STAT. § 33-411(c)(2) (repealed January 1, 1997) ("Every foreign corporation shall be subject to suit in this state, by a resident of this state . . . on any cause of action arising . . . out of any business solicited in this state . . . if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without the state . . .")). The court in *Inset* found that the Connecticut long-arm statute had been satisfied because the defendant had repeatedly solicited business in the state of Connecticut via the Internet and the toll-free number. *See id.*

solicitation.<sup>219</sup> It determined that these activities could be accessed by Virginia residents at home twenty-four hours a day and that the defendants did this regularly for the purposes of the long-arm statute.<sup>220</sup> The court also used a “but for” test, stating that “[b]ut for the Internet service providers and users present in Virginia, the alleged tort of defamation would not have occurred in Virginia,” and as a result, the court found jurisdiction.<sup>221</sup>

Not many courts have followed this line of reasoning because it holds anyone who uses the Internet subject to personal jurisdiction in a particular forum at any time.<sup>222</sup> In a later case, a justice commenting on *Inset* stated that “[t]he weight of case law . . . seems to favor the analysis that requires something more than a Web site that acts as a worldwide advertisement to trigger personal jurisdiction.”<sup>223</sup> In contrast to cases finding jurisdiction, the next line of cases concerns actions involving passive web sites where the courts have declined to find jurisdiction.

## 2. *Cases Declining to Assert Jurisdiction with Web Sites that are Merely Passive*

Most courts have declined to exercise jurisdiction in cases where the defendant is using the Internet as an advertisement device. In *Cybersell, Inc. v. Cybersell, Inc.*,<sup>224</sup> the plaintiff brought an action alleging trademark infringement regarding the service mark, “Cybersell.”<sup>225</sup> Both parties wanted to use the same mark for their web site.<sup>226</sup> The defendant argued that the court should find that jurisdiction existed merely “because cyberspace is without borders,” and any product or service that is advertised on the Internet is intended for use on a world-wide basis.<sup>227</sup> The court disagreed with this premise and stated that if it did this, it would not be comporting with the “traditional notions of fair play and substantial justice.”<sup>228</sup> The court reasoned that it would not be fair or

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219. See *TELCO Communications v. An Apple A Day*, 977 F. Supp. 404, 407 (E.D. Va. 1997).

220. See *id.* at 408. The court found that the finding of jurisdiction was proper in terms of the long-arm statute because there were press releases given to the forum, as well as business being conducted in that forum. See *id.*

221. *Id.*

222. See *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 725 (E.D. Pa. 1999).

223. *Id.* at 725.

224. 130 F.3d 414 (9th Cir. 1997).

225. See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 415 (9th Cir. 1997).

226. See *id.*

227. *Id.*

228. *Id.* (quoting *Core-Vent Corp. v. Nobel Indus. AB*, 11 F. 3d 1482, 1485 (9th Cir. 1993) quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

just to exercise jurisdiction over a party whose only contact with a forum is its web page.<sup>229</sup>

The court in *Cybersell* concluded that Cybersell had not conducted any activity via the Internet that was sufficient to find jurisdiction in Arizona.<sup>230</sup> Specifically, the court found that the defendant did nothing to encourage visitors from Arizona, stating there were no visitors from Arizona except for the plaintiff.<sup>231</sup> Furthermore, the defendant did not have an "800" number.<sup>232</sup> As a result, the court held that the defendant had not done anything resembling an act or transaction, and it also had not done anything to invoke the benefit or protection of the Arizona law.<sup>233</sup> Thus, the defendant's contacts with Arizona were insufficient to show purposeful availment.<sup>234</sup> The court categorized the defendant's activity as "passive" and found no jurisdiction.<sup>235</sup>

*Barrett v. Catacombs Press*,<sup>236</sup> decided in April of 1999, provides a thorough overview of Internet jurisdiction. *Barrett* involved defamation that allegedly occurred over the Internet through the use of a discussion list.<sup>237</sup> The plaintiff discovered that alleged defamatory statements concerning him were posted on the defendant's web site.<sup>238</sup> He sent an e-mail giving notice to the defendant that a lawsuit might be initiated.<sup>239</sup> The plaintiff also alleged that the defendant had made use of a hypertext link back to the defendant's web site when she posted messages on different listserv or USENET discussion groups.<sup>240</sup> All of the USENET

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229. *See id.*

230. *See id.* at 419.

231. *See id.*

232. *See id.*

233. *See id.*

234. *See id.* at 419-20.

235. *See id.* at 420.

236. 44 F. Supp. 2d 717 (E.D. Pa. 1999).

237. *See Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 721-22 (E.D. Pa. 1999). A discussion list is part of an automatic mailing list service in which communications about particular subjects are sent to a group of people who have expressed interest in that topic and signed onto the list. *See id.*

238. *See id.* at 722.

239. *See id.*

240. *See id.* at 721 n.1. The following description of a listserv or USENET discussion group is from *ACLU v. Reno*, 929 F. Supp. 824, 834-35 (E.D. Pa. 1996):

24. One-to-many messaging. The Internet also contains automatic mailing list services (such as "listservs"), [also referred to by witnesses as "mail exploders"] that allow communications about particular subjects of interest to a group of people. For example, people can subscribe to a "listserv" mailing list on a particular topic of interest to them. The subscriber can submit messages on the topic to the listserv that are forwarded (via e-mail), either automatically or through a human moderator overseeing the listserv, to anyone who has subscribed to the mailing list. A recipient of such a message can reply to the message and have the reply also distributed to everyone on the mailing list. This service provides the capability to keep abreast of developments or events in a particular subject area. Most listserv-type mailing lists automatically forward all incoming messages to all mailing list subscribers. There are thousands of such mailing list



groups had numerous participants, some as many as tens of thousands.<sup>241</sup> The court noted, however, that the plaintiff failed to offer any evidence to support these allegations.<sup>242</sup> Therefore, the court found that it could not assert jurisdiction based on a lack of evidence as to the defamatory statements.<sup>243</sup>

The defendant in *Barrett* stated that her activities and the information placed on the world wide web were not targeted at Pennsylvania, and that the words were simply part of a large public debate on particular issues.<sup>244</sup> The court found that the defendant had not engaged in any

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services on the Internet, collectively with hundreds of thousands of subscribers. Users of "open" listservs typically can add or remove their names from the mailing list automatically, with no direct human involvement. Listservs may also be "closed," i.e., only allowing for one's acceptance into the listserv by a human moderator.

25. Distributed message databases. Similar in function to listservs – but quite different in how communications are transmitted – are distributed message databases such as "USENET newsgroups." User-sponsored newsgroups are among the most popular and widespread applications of Internet services, and cover all imaginable topics of interest to users. Like listservs, newsgroups are open discussions and exchanges on particular topics. Users, however, need not subscribe to the discussion mailing list in advance, but can instead access the database at any time. Some USENET newsgroups are "moderated" but most are open access. For the moderated newsgroups, all messages to the newsgroup are forwarded to one person who can screen them for relevance to the topics under discussion. USENET newsgroups are disseminated using ad hoc, peer to peer connections between approximately 200,000 computers (called USENET "servers") around the world. For unmoderated newsgroups, when an individual user with access to a USENET server posts a message to a newsgroup, the message is automatically forwarded to all adjacent USENET servers that furnish access to the newsgroup, and it is then propagated to the servers adjacent to those servers, etc. The messages are temporarily stored on each receiving server, where they are available for review and response by individual users. The messages are automatically and periodically purged from each system after a time to make room for new messages. Responses to messages, like the original messages, are automatically distributed to all other computers receiving the newsgroup or forwarded to a moderator in the case of a moderated newsgroup. The dissemination of messages to USENET servers around the world is an automated process that does not require direct human intervention or review.
26. There are newsgroups on more than fifteen thousand different subjects. In 1994, approximately 70,000 messages were posted to newsgroups each day, and those messages were distributed to the approximately 190,000 computers or computer networks that participate in the USENET newsgroup system. Once the messages reach the approximately 190,000 receiving computers or computer networks, they are available to individual users of those computers or computer networks. Collectively, almost 100,000 new messages (or "articles") are posted to newsgroups each day.

*Id.*

241. *See Barrett*, 44 F. Supp. 2d at 722.

242. *See id.*

243. *See id.*

244. *See id.* The plaintiff had a web site called "Quackwatch," which provided information about quackery, health frauds, and consumer decisions. *See id.* The web site also had a discussion group that the defendant joined. *See id.* As a result of messages posted by the defendant, allegedly defamatory statements appeared on the defendant's web site. *See id.* After this, the defendant allegedly posted further statements to other discussion groups involving other medical professionals. *See id.*

non-Internet activities or contacts with the forum state; therefore, it could only look at the strength of the defendant's ties with the forum based on her Internet use.<sup>245</sup> It found that the defendant had maintained two informational web sites and that each of these sites contained defamatory information and articles regarding the plaintiff.<sup>246</sup> The court decided, however, that if it followed the rationale of *Inset*, it would be subjecting everyone who used the Internet to post information to nationwide jurisdiction.<sup>247</sup> The court also stated that just because information may be available throughout the world via the Internet does not mean the defendant has the intention of targeting residents of a particular state with that information, thus concluding that there was no purposeful availment.<sup>248</sup> As a result, in any kind of Internet-based action, the court held that it would consider in its analysis the purpose of the defendant's actions, and whether those actions were foreseeable and purposeful.<sup>249</sup>

The court also distinguished the defendant's activities from other cases, noting that she was not involved in commercial activity.<sup>250</sup> The court stated that the defendant was not like commercial entrepreneurs who usually try to avail themselves of the privileges of conducting business in another forum.<sup>251</sup> Because the defendant was not attempting to profit commercially from her endeavors, it was less likely that she expected to be brought into a forum different from that in which she was operating.<sup>252</sup> Accordingly, since the defendant did not purposefully avail herself of the privilege of conducting business or other activities within the forum state, the court held there was no jurisdiction.<sup>253</sup>

In summary, if a court finds that a web site is passive, it can take one of two approaches. It can follow the ruling of *Inset* and find that jurisdiction exists simply because the defendant has a web site and should know that he or she could be brought into jurisdiction in that forum.<sup>254</sup> However, if the court does not agree with that reasoning, the court can follow the second approach and refrain from finding jurisdiction, and determine that the passive web site is just an advertisement and not

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245. *See id.* at 726-27.

246. *See id.* at 727.

247. *See id.*; *see also* *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (finding that a minimum contacts test is satisfied by an Internet advertisement and a toll-free number for inquiries).

248. *See* *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 727 (E.D. Pa. 1999).

249. *See id.*

250. *See id.* at 728. (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996) (using the Internet for commercial purposes); *Gary Scott Int'l, Inc. v. Baroudi*, 981 F. Supp. 714, 717 (D. Mass. 1997) (finding that there was jurisdiction based in part on sales over the Internet)).

251. *See id.* at 728.

252. *See id.*

253. *See id.* at 740.

254. *See, e.g., Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996).

geared towards any particular forum.<sup>255</sup> The majority of the courts follow the approach holding that jurisdiction may not be asserted based on the mere existence of a passive web site.<sup>256</sup> Whichever approach is taken, it will usually appear to be quite clear that the web site is passive based on the facts.<sup>257</sup> This is not the case in the final category of cases, in which the courts need to take all the factors into account when examining a web site that is not clearly passive and yet not clearly active.

### C. INTERMEDIATE WEB SITES

The final category of cases involving Internet web sites are those in which business contracts or activities are not necessarily being conducted, but the web site is serving as more than a mere advertisement or information bank.<sup>258</sup> In this category, there are often other factors considered by the court in order to determine whether or not there is jurisdiction.<sup>259</sup> These types of cases are often more difficult to classify because there are other non-Internet contacts factored into the court's decision regarding jurisdiction that are not related to the Internet.<sup>260</sup>

In *Bensusan Restaurant Corp. v. King*,<sup>261</sup> the plaintiff was the operator of a New York jazz club called "The Blue Note," and the defendant was the operator of a Missouri club, also called "The Blue Note."<sup>262</sup> The defendant, King, created a web site to promote his club.<sup>263</sup> The site was readily available to anyone in the world who had

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255. See, e.g., *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 420 (9th Cir. 1997).

256. See *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 727 (E.D. Pa. 1999) (stating that this court follows that approach).

257. See *id.* at 729.

258. See *id.* at 724-26 (looking at the different cases discussing the Internet and the finding of personal jurisdiction); see also *PurCo Fleet Servs., Inc. v. Towers*, 38 F. Supp. 2d 1320, 1324-25 (D. Utah 1999) (finding that the numerous contacts through e-mail, numerous visits made by the defendant to the state of Utah, along with a desire on the part of the defendant purposefully to hurt the plaintiff's business were enough to find jurisdiction); *Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34, 44-46 (D. Mass. 1997) (finding that because the company used the web site to do much more than just advertise its business, including Internet consulting, training, system administration and network design, the court was able to find personal jurisdiction); *Resuscitation Techs., Inc. v. Continental Health Care Corp.*, No. IP 96-1457-C-M/S, 1997 WL 148567, at \*6 (S.D. Ind. Mar. 24, 1997) (finding that the Internet activity in this case was carried on with the intention of creating a company having a significant commercial impact on the state of Indiana, thus justifying the finding of jurisdiction); *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 5 (D.D.C. 1996) (finding personal jurisdiction because in addition to the defendant's web site there was also an ad published in the *Washington Post*).

259. See *Barrett*, 44 F. Supp. 2d at 724-26. The courts will look at other factors that are non-Internet factors, such as travel to the forum, telephone and mail contacts with that forum, and newspaper advertisements in that forum. See *id.*

260. See *id.* at 726.

261. 937 F. Supp. 295 (S.D.N.Y. 1996).

262. See *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 297 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

263. See *id.*

Internet access.<sup>264</sup> The site contained general information regarding the club and included a calendar of events and ticketing information.<sup>265</sup> The site also had information concerning ticket orders that were available to be picked up on the night of the show.<sup>266</sup> Based on this web site and the identical party names, Bensusan brought an action to prevent King from maintaining his web site by alleging trademark infringement, trademark dilution, and unfair competition.<sup>267</sup>

The issue before the court was whether by the creation of a web site a person was making an offer to sell a product in a certain forum or state if there was also a phone number attached to the web site.<sup>268</sup> The plaintiff argued that since the defendant's web site was accessible in New York, the defendant should have foreseen that residents of New York would access the site.<sup>269</sup> The plaintiff further argued that since this could be foreseen, the defendant should have taken steps to ensure that the site would only be accessible to users in a certain geographic area.<sup>270</sup> The court rejected this argument, stating that "[r]egardless of the technical feasibility of such a procedure, . . . mere foreseeability of an in-state consequence and a failure to avert that consequence is not sufficient to establish personal jurisdiction."<sup>271</sup> The court reasoned that even though a New York resident with Internet access was able to gain access to the web site and view information about the club in Missouri, the user still had to take several affirmative steps to utilize the site and information.<sup>272</sup> For example, the user would have to telephone the box office in Missouri to obtain tickets for a show at that club, and would also have to pick up the tickets in Missouri because the defendant did not mail or send the tickets.<sup>273</sup>

Accordingly, the court held that the ability to gain information on the allegedly infringing product did not equate to advertising, promoting, selling, or targeting of the product in a certain forum.<sup>274</sup> The court noted there were no allegations that the infringing goods were brought into New York, or that there was any other activity by King directed at New York.<sup>275</sup> As a result, the court did not assert jurisdiction over King

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264. *See id.*

265. *See id.*

266. *See id.*

267. *See id.* at 298.

268. *See id.* at 299.

269. *See id.* at 300.

270. *See id.*

271. *Id.*; accord *Fox v. Boucher*, 794 F.2d 34, 37 (2d Cir. 1986).

272. *See Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 299 (S.D.N.Y. 1996).

273. *See id.*

274. *See id.*

275. *See id.*

because there were no contacts outside of the web site that could be construed as targeting New York as a forum.<sup>276</sup>

In *Blumenthal v. Drudge*,<sup>277</sup> the plaintiff brought an action alleging defamation based on a statement published by the defendant on the Internet.<sup>278</sup> The defendant's actions included a web site accessible at no cost to anyone with access to the Internet, a hyperlink to a site with the latest edition of the Drudge report, and numerous other hyperlinks to other sites of potential interest to those accessing the site.<sup>279</sup> The court looked specifically at the following factors in making its decision:

[T]he Drudge Report has been regularly transmitted over the Internet to Drudge's subscribers and repeatedly posted on Drudge's web site, where it has been available 24 hours a day to District residents; that Drudge personally maintains a list of e-mail addresses, which enables him to distribute the Drudge Report to anyone who requests it, including e-mail addresses in the District of Columbia; and that he has solicited contributions and collected money from persons in the District of Columbia who read the Drudge Report.<sup>280</sup>

The court also included as a factor the fact that the defendant had traveled to the District of Columbia twice, and was in contact with District of Columbia residents in order to receive gossip concerning District of Columbia residents.<sup>281</sup>

Adding these contacts together, the court found that the defendant had an interactive web site used by District of Columbia residents, and that the defendant also had non-Internet contacts of a sufficient quantity to find personal jurisdiction.<sup>282</sup> Further support in the assertion of personal jurisdiction was that "by virtue of the subjects he covers," and his solicitation of gossip from District of Columbia residents and officials, the defendant had specifically targeted readers in that forum.<sup>283</sup>

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276. *See id.*

277. 992 F. Supp. 44 (D.C. Cir. 1998).

278. *See Blumenthal v. Drudge*, 992 F. Supp. 44, 46 (D.D.C. 1998).

279. *See id.* at 47. The Drudge Report is an electronic publication that is a gossip column focusing on gossip from Hollywood and Washington, D.C. *See id.* In 1996, the defendant entered into a six-month agreement with a publisher, and upon expiration of that agreement, he entered into an agreement with America Online. *See id.*

280. *Id.* at 54.

281. *See id.*

282. *See id.* at 56.

283. *See id.* at 57.

Therefore, the court was able to find that the defendant had purposefully availed himself of the benefits and protection of that forum's jurisdiction, and that the requirements of due process and minimum contacts were met.<sup>284</sup>

There are also cases where one of the parties has agreed to a forum selection clause in a contract entered into over the Internet, and if this is the case, the court does not need to find minimum contacts.<sup>285</sup> In *Decker v. Circus Circus Hotel*,<sup>286</sup> the court found that there were insufficient contacts based on the activities of the defendant to support a finding of jurisdiction.<sup>287</sup> However, the contract between the parties had a forum selection clause, and as a result, the court utilized this to determine jurisdiction.<sup>288</sup> The court reasoned that because of the forum selection clause, the defendant could not reasonably anticipate being brought into a court in New Jersey, which was a different forum than that specified in the defendant's contract.<sup>289</sup> As a result of lack of actual contacts with the state and the forum selection clause, the court held that it could not exercise jurisdiction over the defendant.<sup>290</sup> It is likely courts would enforce a forum selection clause, regardless of the type of Internet web site, provided that the forum selection clause is done correctly.<sup>291</sup>

The intermediate web sites are most difficult for courts in determining whether there is jurisdiction.<sup>292</sup> The reason for the difficulty lies in the fact that often there are more substantial contacts over the Internet than just a passive advertisement, yet not enough for a finding of definite contacts aimed at a particular forum.<sup>293</sup> An added problem to these cases is that often there are more contacts not related to the Internet that the courts need to take into account when determining jurisdiction.<sup>294</sup> The main criterion in this gray area is that the court will most likely require "something more" than just contact via a web site.<sup>295</sup> All of the

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284. *See id.* at 57-58.

285. *See Decker v. Circus Circus Hotel*, 49 F. Supp. 2d 743, 748 (D.N.J. 1999).

286. 49 F. Supp. 2d 743 (D.N.J. 1999).

287. *See Decker*, 49 F. Supp. 2d at 750.

288. *See id.*

289. *See id.* Compare *id.* at 748 (recognizing that the forum selection clause should be enforced), with *Thompson v. Handa-Loupez, Inc.*, 998 F. Supp. 738, 741 (W.D. Tex. 1998) (stating that there was a clause that looked like a forum selection clause, but that it was rather a clause that stated that disputes shall be governed by the laws of California and resolved exclusively by final and binding arbitration), and *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 469 (D. Mass. 1997) (finding an invalid forum selection clause because Digital improperly phrased the forum selection clause).

290. *See Decker*, 49 F. Supp. 2d at 750.

291. *See id.* at 748; *see also Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991).

292. *See Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 726 (E.D. Pa. 1999).

293. *See id.*

294. *See id.*

295. *See id.*

different types of cases tend to meld into each other, and the most important consideration is whether the finding of personal jurisdiction comports with the concepts of the long-arm statutes, due process, and minimum contacts.<sup>296</sup> A distinguishing characteristic among all the cases seems to be a movement away from the finding of personal jurisdiction based on the mere fact that there is Internet activity.<sup>297</sup> Instead, the courts will analyze the actual activity of the parties in order to determine whether there is personal jurisdiction based on minimum contacts and due process.<sup>298</sup> In *Inset*, the court stated that there was a web site, so the defendant should have known that the defendant would be subject to jurisdiction in a foreign state.<sup>299</sup> Most courts have moved away from this position, and instead analyze whether defendants have purposefully availed themselves of the privilege of doing business in a particular forum.<sup>300</sup>

## V. CONCLUSION

The Internet has grown rapidly in a short number of years, and it is now common for people to own their own computers, to check their e-mail, and surf the web for entertainment on a daily basis.<sup>301</sup> It is extremely popular and combines different types of media so that young and old can enjoy and benefit from its use.<sup>302</sup> Not only do private persons use the Internet, but businesses are learning daily that they cannot be fully successful unless they are connected to the Internet.<sup>303</sup>

Due to this increased popularity and growing dependence on the Internet, attorneys need to be aware of the Internet-related issues. There are many questions regarding how courts will distinguish between the different types of web sites, with the result that it is important to understand what type of jurisdictional analysis the courts are applying. Most courts use a two-part analysis to determine the issue of personal jurisdiction.<sup>304</sup> First, the court decides whether or not the state's long-arm statute has been satisfied, and second, it determines whether the

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296. See *Millennium Enters. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 909 (D. Or. 1999).

297. See *id.* at 915.

298. Compare *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (holding that there was jurisdiction because there was a web site), with *Millennium*, 33 F. Supp. 2d at 923 (holding that there was not jurisdiction even though there was a web site because of the importance of considering other factors).

299. See *Inset*, 937 F. Supp. at 165.

300. See *Millennium*, 33 F. Supp. 2d at 923.

301. See generally *ACLU v. Reno*, 929 F. Supp. 824, 831-34 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

302. See Kalow, *supra* note 1, at 2245.

303. See Kalow, *supra* note 1, at 2245-46.

304. See Richard Raysman & Peter Brown, *Computer Law: Internet Jurisdiction Update*, N.Y.L.J., Aug. 10, 1999, at 3; see also *Steelman v. Carper*, 124 F. Supp. 2d 219, 222 (D. Del. 2000).

contacts meet the standard for minimum contacts under the interpretation of the Due Process Clause of the Fourteenth Amendment.<sup>305</sup> It is vital to be aware, however, that the cases are not consistent in their holdings and do not assign the same amount of weight to various activities.<sup>306</sup>

“The Internet, despite its massive size, is still in its infancy. [Attorneys who practice in this area must] recognize that what is new and novel today may be obsolete or antiquated tomorrow.”<sup>307</sup> As a result, when dealing with cases involving jurisdiction based on Internet contacts, it is important to be familiar with both the long-arm statute of the state in which the attorney is practicing, and the traditional principles of due process and minimum contacts.

*Lora J. Lewicki*

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305. See Raysman & Brown, *supra* note 304, at 3; see also Steelman, 124 F. Supp. 2d at 222.

306. Compare *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (finding jurisdiction based on a web site serving as an advertisement), with *Millennium Enters. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 923 (D. Or. 1999) (finding that there was not jurisdiction even though actual sales were conducted over the Internet, because the sales were not conducted with that specific forum).

307. Shulman, *supra* note 18, at 808.



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