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William C. Walter

Deanne M. Mosley

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THE APPLICATION OF TRADITIONAL PERSONAL JURISDICTION JURISPRUDENCE TO CYBERSPACE DISPUTES

*William C. Walter**
*Deanne M. Mosley***

"I shot an arrow into the air,
It fell to earth, I knew not where;
For, so swiftly it flew, the sight
Could not follow it in its flight."[1]

I. INTRODUCTION

The explosive growth of the Internet[2] and cyberspace[3] has presented courts with many issues of first impression.[4] It has been suggested that no issue is more important than cyberspace jurisdiction, in which electronic activity subjects a

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*William C. Walter, Associate, Brunini, Grantham, Grower & Hewes; United States Military Academy, West Point, New York (B.S. 1986); University of Mississippi (J.D. 1995 cum laude).
**Deanne M. Mosley, Associate, Langston, Frazer, Sweet & Freese, P.A.; University of Mississippi (B.P.A. 1991 magna cum laude); University of Mississippi (J.D. 1994).

1. Henry Wadsworth Longfellow, *The Arrow and the Song*.

2. "The Internet is the world's largest computer network, often described as a 'network of networks.'" CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1260 n.2 (6th Cir. 1996) (citations omitted). The Supreme Court of the United States has described the Internet as "'a unique and wholly new medium of worldwide human communication.'" Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2334 n.4 (1997) (citing American Civil Liberties Union v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)). Congress has defined the "Internet" as the "international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(e)(1) (Supp. 1998). Developed approximately 25 years ago by the Department of Defense's Advanced Research Project Agency to link universities, government agencies, and other research organizations' computer systems, the Internet served approximately 90 million individuals in 1997. Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 36 (D. Mass. 1997).

3. The term "cyberspace" is generally accepted to be "a place 'without physical walls or even physical dimensions' in which interaction occurs as if it happened in the real world and in real time, but constitutes only a 'virtual reality.'" Hearst Corp. v. Goldberger, No. 96-Civ-3620, 1997 U.S. Dist. LEXIS 2065, at *5 n.2 (S.D.N.Y. Feb. 26, 1997) (citations omitted). "Cyberspace" is an abbreviation for the "consensual hallucination that has many aspects of physical space, but is merely computer-generated abstract data." Richard S. Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 343 n.12 (1996). William Gibson, a science fiction author, is credited with creating the term "cyberspace" in his novel, "Neuromancer." William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 198 n.5 (1995).

4. New issues have been raised regarding personal jurisdiction, copyrights, trademarks, and the First Amendment. *Hasbro*, 994 F. Supp. at 37. *Cf.* Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., No. 79 Civ. 3525, 1996 U.S. Dist. LEXIS 8435 (S.D.N.Y. June 19, 1996) (finding that injunction against distribution of magazine within United States also prohibited Internet distribution); Hall v. LaRonde, 66 Cal. Rptr. 2d 399, 402 (Cal. Ct. App. 1997) (stating that "the long arm of the Internet reaches from California to New York. We hold that the use of electronic mail and the telephone by a party in another state may establish sufficient minimum contacts with California to support personal jurisdiction."); Mallinckrodt Med., Inc. v. Sonus Pharms., Inc., 989 F. Supp. 265 (D.D.C. 1998) (finding that posting message on America Online bulletin board is not purposefully or foreseeably aimed at District of Columbia and does not constitute doing business under District of Columbia long-arm statute); Quality Solutions, Inc. v. Zupanc, 993 F. Supp. 621, 623 (N.D. Ohio 1998) (holding that trade journal listing and maintenance of accessible Internet site "constitutes tortious injury resulting from the regular solicitation of business under paragraph four of the Ohio Long Arm Statute"). In spite of these decisions, it is undisputed that the development of the law in this area is in "its infant stages." Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123 (W.D. Pa. 1997).

non-resident defendant to liability in a distant forum.[5] The courts' struggle to apply traditional jurisdictional jurisprudence, based upon geographic boundaries,[6] to a seemingly infinite and boundary-less cyberspace[7] has resulted in differing conclusions.[8]

This Article will examine the way in which courts have decided cyberspace jurisdictional issues. As explained below, courts have invariably sought to impose traditional personal jurisdictional rules upon the cyberspace disputes before them, oftentimes with mixed results and outcomes. Before undertaking that discussion, however, the Article reviews the well-established jurisprudence which has evolved regarding personal jurisdiction.

II. TRADITIONAL PERSONAL JURISDICTION JURISPRUDENCE

In deciding whether it may properly assert jurisdiction over a defendant who resides in a state other than the state in which the court sits, a court will engage in a two-part analysis.[9] First, the forum state's law must provide for the assertion

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5. The Sixth Circuit Court of Appeals has stated that "[t]he Internet represents perhaps the latest and greatest manifestation of . . . historical, globe-shrinking trends." CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996). Accordingly, "there is less perceived need today for the federal constitution to protect defendants from 'inconvenient litigation,' because all but the most remote forums are easily accessible for the pursuit of both business and litigation." *Id.* (citations omitted).

6. It has been suggested that "[g]eography is not the touchstone of fairness. In an age when business is routinely conducted by electronic technology, and air travel brings the two national coasts within hours of each other, state boundaries are less relevant to the determination of fairness." Green v. William Mason & Co., 996 F. Supp. 394, 396-97 (D.N.J. 1998).

7. Cyberspace does not exist within a jurisdiction. *See* Zembek, *supra* note 3, at 342 n.7. Many view geography as virtually meaningless to the Internet. *See, e.g.*, American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 169 (S.D.N.Y. 1997).

> It is probably safe to say that more ideas and information are shared on the Internet than in any other medium. But when we try to pin down the location of this exchange, we realize how slippery our notion of the Internet really is. Perhaps this is because "cyberspace" is not a "space" at all. At least not in the way we understand space. It's not located anywhere; it has no boundaries; you can't "go" there.

Bruce W. Sanford & Michael J. Lorenger, *Teaching An Old Dog New Tricks: The First Amendment In An Online World*, 28 CONN. L. REV. 1137, 1140 (1996).

8. The courts that have examined personal jurisdiction and cyberspace are split. Hearst Corp. v. Goldberger, 1997 U.S. Dist. LEXIS 2065, at *23 (S.D.N.Y. Feb. 26, 1997). The United States Court of Appeals for the Second Circuit has analogized that attempting to apply established legal precedents "in the fast-developing world of the internet is somewhat like trying to board a moving bus . . . ." Bensusan Restaurant Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997). Also, many agree that imposing traditional jurisprudence upon cyberspace subjects the web user to inconsistent regulation throughout the globe. Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 463 (D. Mass. 1997). Calling the Internet the "legal battleground of the future," some commentators believe that the current legal system is an "inadequate" template. Sanford, *supra* note 7, at 1138. While some commentators have called for new jurisprudence to address cyberspace, others believe that traditional jurisprudence has been sufficient in all cyberspace issues that have been raised. State of New York v. Lipsitz, 663 N.Y.S.2d 468, 473 (N.Y. App. Div. 1997). *See also* Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications*, 65 FORDHAM L. REV. 2241, 2242 (1997) (stating courts have faced challenges in applying traditional jurisdiction jurisprudence to Internet-related issues, but traditional jurisdictional jurisprudence is sufficient to address these issues).

9. Stuart v. Spademan, 772 F.2d 1185, 1189 (5th Cir. 1985); Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1165-66 (5th Cir. 1985); KENT D. STUCKEY, INTERNET AND ONLINE LAW § 10.02[1] (Law Journal Seminars-Press 1998). The plaintiff has the burden of proving that the trial court may assert personal jurisdiction over the defendant. General Equip. Mfrs. v. Coco Bros., Inc., 702 F. Supp. 608, 610 (S.D. Miss. 1988).

of jurisdiction.[10] Second, the assertion of jurisdiction over the defendant must be constitutionally permissible in that it must comport with the requirements of due process.[11]

A. State Statutes Governing Jurisdiction

Some states' long-arm statutes simply allow jurisdiction over nonresidents to the full extent allowed by the Due Process Clause of the Fourteenth Amendment.[12] However, these statutes are not representative, as most states have enacted long-arm statutes which specify the types of conduct which will enable their courts to assert jurisdiction over nonresident defendants.[13] Mississippi's long-arm statute, found at § 13-3-57 of the Mississippi Code, is more typical and provides, in relevant part, as follows:

> Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and law of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.[14]

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10. Smith v. DeWalt Prods. Corp., 743 F.2d 277, 278 (5th Cir. 1984); Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1232 (5th Cir. 1973). When a federal court sits in diversity, it will apply the long-arm statute of the state in which it is located. FED. R. CIV. P. 4(e); *see* Arrowsmith v. UPI, 320 F.2d 219 (2d Cir. 1963); Fava Custom Applicators, Inc. v. Cummins Mid-America, Inc., 907 F. Supp. 224, 225 (N.D. Miss. 1995). *See also* Bailiff v. Manville Forest Prods. Corp., 792 F. Supp. 509, 510 (S.D. Miss. 1990) ("[a] defendant is subject to the personal jurisdiction of a federal court in a diversity action only to the extent permitted a state court in the state where that federal court sits").

11. Allred v. Moore & Peterson, 117 F.3d 278, 281 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 691 (1998). The *Allred* court succinctly summarized this approach as follows: "'The state court or federal court sitting in diversity may assert jurisdiction if: (1) the state's long-arm statute applies, as interpreted by the state's courts; and (2) if due process is satisfied under the fourteenth amendment to the United States Constitution.'" *Id.* at 281 (quoting Cycles, Ltd. v. W.J. Digby, Inc., 889 F.2d 612, 616 (5th Cir. 1989)); *see also* Mitchell v. Random House, Inc., 703 F. Supp. 1250, 1252 (S.D. Miss. 1988), *aff'd*, 865 F.2d 664 (5th Cir. 1989); Martin & Martin v. Jones, 616 F. Supp. 339, 341 (S.D. Miss. 1985); Allen v. Jefferson Lines, Inc., 610 F. Supp. 236, 238 (S.D. Miss. 1985). The second factor limits the power of a state's courts to exercise personal jurisdiction over nonresident defendants. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

12. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1973 & Supp. 1999) (stating that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States").

13. STUCKEY, *supra* note 9, § 10.02[1]. *See* Dalton v. R & W Marine, Inc., 897 F.2d 1359, 1361 (5th Cir. 1990); Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996). The obvious effect of these statutes is to permit state and federal courts to exercise personal jurisdiction to the outer limits of due process. *Dalton*, 897 F.2d at 1361.

14. MISS. CODE ANN. § 13-3-57 (Supp. 1998). Mississippi's long-arm statute has withstood constitutional challenges on several occasions by out-of-state defendants caught in its snare. *See, e.g.*, Edwards v. Associated Press, 512 F.2d 258, 260 (5th Cir. 1975) (holding that "the statute as construed does not offend the due process clause of the Fourteenth Amendment").

Thus, to establish jurisdiction over a nonresident defendant, the plaintiff, in Mississippi, must do so under either the "contract," the "tort," or the "doing business" prong of the statute.[15] If the nonresident defendant's conduct can be characterized as fitting into any of these categories, the defendant will be subject to the jurisdiction of Mississippi's courts, provided that the assertion of such jurisdiction does not violate the Due Process Clause.[16]

B. Due Process Analysis

Once a court determines that it may properly exercise jurisdiction over a nonresident defendant via the forum state's long-arm statute, the court must next test the constitutionality of the exercise.[17] As a general rule, the due process analysis consists of the following two-part test: "(1) the nonresident defendant must have certain minimum contacts with the forum state; and (2) subjecting the nonresident defendant to the jurisdiction of the forum state must be consistent with traditional notions of fair play and substantial justice."[18] This two-pronged analysis was summarized by the United States Supreme Court, in 1984, as follows:

> The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant . . . . Due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" . . . When a controversy is

15. *See* Murray v. Remington Arms Co., Inc., 795 F. Supp. 805, 807 (S.D. Miss. 1991); R. Clinton Constr. Co. v. Bryant & Reaves, Inc., 442 F. Supp. 838, 850 n.10 (N.D. Miss. 1977); C.H. Leavell & Co. v. Doster, 211 So. 2d 813, 814 (Miss. 1968). The Mississippi Legislature amended the statute in 1980 to include the language "or nonresident," which applies only to the "tort" prong of the statute. Herrley v. Volkswagen of Am., Inc., 957 F.2d 216, 218 (5th Cir. 1992). Numerous courts have held, however, that nonresidents may not utilize the "doing business" portion of the statute to gain jurisdiction over nonresident defendants. *See* Mills v. Dieco, Inc., 722 F. Supp. 296, 298 (N.D. Miss. 1989); Golden v. Cox Furniture Mfg. Co., Inc., 683 F.2d 115, 117 (5th Cir. 1982); Washington v. Norton Mfg., Inc., 588 F.2d 441, 444-45 (5th Cir. 1979). It has been stated that "the law is perfectly clear that only the tort portion of the long-arm statute is available to non-resident[]" . . . plaintiffs. Cowart v. Shelby County Health Care Corp., 911 F. Supp. 248, 249 (S.D. Miss. 1996).

16. Sorrells v. R & R Custom Coach Works, 636 So. 2d 668, 671 (Miss. 1994). Where a single contract exists between the out-of-state defendant and a Mississippi plaintiff, jurisdiction is satisfied under the "contract" provision of the long-arm statute. *Id; see also* Kaydee Metal Prods. Corp. v. Sintex Mach. Tool Mfg. Corp., 342 F. Supp. 902, 906 (N.D. Miss. 1972); Breedlove v. Beech Aircraft Corp., 334 F. Supp. 1361 (N.D. Miss. 1971) (holding that the defendant need only commit a single tort within Mississippi to become subject to the long-arm statute's reach). Moreover, the "tort" prong of the statute is satisfied when only part of the tort is committed in Mississippi. Rippy v. Crescent Feed Commodities, Inc., 710 F. Supp. 1074, 1077 (S.D. Miss. 1988).

17. Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1167 (5th Cir. 1985); *Sorrells*, 636 So. 2d at 672 (stating that "the next inquiry focuses upon the rights protected by the Due Process Clause and conformance with those constitutional dictates").

18. *Thompson*, 755 F.2d at 1168-69. These requirements have been set out over the years by a familiar body of United States Supreme Court case law. *Id.* at 1168 n.6 (citing Kulko v. Superior Court of Cal., 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945)); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Asahi Metal Indus., Inc. v. Superior Court of Cal., 480 U.S. 102 (1987) (plurality opinion).

> related to or "arises out of" a defendant's contacts with the forum, the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of *in personam* jurisdiction . . . .
>
> Even when the cause of action does not arise out of or relate to the forum corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation . . . .[19]

1. Minimum Contacts

In determining whether "minimum contacts"[20] exist between the nonresident defendant and the forum state, the court will look to the quantity and nature of the defendant's contacts, the contacts' connection with the cause of action, and the interest of the forum state in protecting its citizens.[21]

a. Specific Jurisdiction

As previously stated, when the claim sued upon arises out of or is directly related to the defendant's forum-related activities, the defendant may be held to have the "minimum contacts" necessary to sustain the assertion of jurisdiction by the forum state's court.[22] In such a case, the court is said to have "specific" or "special" jurisdiction over the defendant.[23] However, even if the lawsuit does arise out of the nonresident defendant's activities within the forum, "specific

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19. *Helicopteros Nacionales*, 466 U.S. at 413-14 (citing Pennoyer v. Neff, 95 U.S. 714 (1877); *International Shoe*, 326 U.S. at 310 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); Shaffer v. Heitner, 433 U.S. 186 (1977); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

20. The purpose of the "minimum contacts" doctrine is to protect nonresident defendants from the burdens of litigating in distant, inconvenient forums and to ensure that states do not reach beyond the limits imposed by state sovereignty concepts of the federal system. *See World-Wide Volkwagen*, 444 U.S. at 286.

21. *See Shaffer*, 433 U.S. at 186; *Helicopteros Nacionales*, 466 U.S. at 414 nn.8-9; Glater v. Eli Lilly & Co., 744 F.2d 213 (1st Cir. 1984); Bumgarner v. Carlisle Med., Inc., 809 F. Supp. 461, 463 (S.D. Miss. 1993) (stating that minimum contacts between nonresident defendant and forum state may be satisfied by either specific or general jurisdiction); Angelica Corp. v. Gallery Mfg. Corp., 904 F. Supp. 993 (E.D. Mo. 1995); Electro-Catheter Corp. v. Surgical Specialties Instrument Co., Inc., 587 F. Supp. 1446 (D.C.N.J. 1984); Campbell v. Gasper, 102 F.R.D. 159 (D.C. Nev. 1984).

22. *See Helicopteros Nacionales*, 466 U.S. at 414 (citing Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966)); Kuenzle v. HTM Sport-Und Freizeitgerate AG, 102 F.3d 453, 455 (10th Cir. 1996) (stating that court may exercise personal jurisdiction over nonresident defendant where defendant has purposefully directed his activities at residents of forum and litigation results from injuries which arise out of or relate to those activities); First Trust Nat'l Ass'n v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre, 996 F. Supp. 585, 589 (S.D. Miss. 1998) (stating that courts may assert "specific jurisdiction" over nonresident defendant whose purposeful contacts with forum state are related to particular controversy at issue); First Miss. Corp. v. Thunderbird Energy, Inc., 876 F. Supp. 840, 843 (S.D. Miss. 1995) (stating that minimum contacts are satisfied by single act by which nonresident defendant purposefully avails itself of privilege of conducting activities within forum state).

23. *Glater*, 744 F.2d at 213; Hunt v. Erie Ins. Group, 728 F.2d 1244 (9th Cir. 1984); Brainerd v. Governors of the Univ. of Alberta, 873 F.2d 1257 (9th Cir. 1989); Sher v. Johnson, 911 F.2d 1357 (9th Cir. 1990); Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc., 786 F.2d 1055 (11th Cir. 1986); Federal Ins. Co. v. Lake Shore, Inc., 886 F.2d 654 (4th Cir. 1989); Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773 (5th Cir. 1986); *see generally* Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913 (1985).

jurisdiction" has additional requirements.[24] If the defendant's "contacts" with the forum are merely fortuitous, the court should refrain from exercising personal jurisdiction over the defendant.[25] Rather, the plaintiff must show that the defendant purposefully directed its activities toward the residents of the forum state or, in other words, "purposely availed" itself of the privilege of conducting business or activities within that state, thus invoking the benefits and protections of local law.[26] Moreover, the defendant must not only have been able to reasonably foresee that its activities may cause injury within the forum state,[27] but "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[28]

b. General Jurisdiction

On the other hand, if the nonresident defendant engages in "systematic and continuous" activity within the forum state, the court may hold that this is a suf-

24. *See* Coats v. Penrod Drilling Corp., 5 F.3d 877, 884 (5th Cir. 1993) (holding that, for "specific jurisdiction" to lie, defendant must have purposely directed his activities at resident of forum); Bell Paper Box, Inc. v. Trans Western Polymers, Inc., 53 F.3d 920, 922 (8th Cir. 1995) (stating that nonresident's contact with forum must be more than random, fortuitous, or attenuated, and defendant must have purposefully availed itself of privilege of conducting activities within forum state).

25. Doe v. American Nat'l Red Cross, 112 F.3d 1048 (9th Cir. 1997) (holding that, to be subject to personal jurisdiction based upon specific jurisdiction, nonresident defendant must engage in some form of affirmative conduct allowing or promoting transaction of business within forum state). *See* Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal., 480 U.S. 102 (1987) (Justice O'Connor, in a portion of her opinion for the Court that was joined only by the Chief Justice and Justices Powell and Scalia, wrote that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state"). *See also* Sorrells v. R & R Coach Works, Inc., 636 So. 2d 668, 674 (Miss. 1994) (stating that defendant's placing product into stream of commerce "does not constitute an act purposefully directed toward" forum state); *compare World-Wide Volkswagen*, 444 U.S. at 297-98 (stating that minimum contacts are established where defendant placed "its products in the stream of commerce with the expectation that they will be purchased by consumers in the forum state").

26. *See* Kulko v. Superior Court of Cal., 436 U.S. 84, 94 (1978); Hanson v. Denckla, 357 U.S. 235 (1958). It has been said that the "purposeful availment" requirement ensures that nonresidents are aware that they are subject to suit in the forum state so that they can protect themselves against the expenses of litigating there by buying insurance or, if the risks are too great, by severing their ties with that state. *World-Wide Volkswagen*, 444 U.S. at 297. This requirement is satisfied "where the [forum-related] contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985). *See also* Calder v. Jones, 465 U.S. 783, 789 (1984); Terracom v. Valley Nat'l Bank, 49 F.3d 555, 560 (9th Cir. 1995) (stating that the "purposeful availment" requirement prevents defendants from being haled into jurisdiction through random, fortuitous, or attenuated contacts); Trierweiler v. Croxton and Trench Holding Corp., 90 F.3d 1523 (10th Cir. 1996).

27. *See World-Wide Volkswagen*, 444 U.S. at 295. This has been called the "effects" doctrine. *See also* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998).

28. *World-Wide Volkswagen*, 444 U.S. at 297. Some courts apply a third factor in considering whether an adequate basis for specific jurisdiction exists. For instance, in *Panavision Int'l*, the court stated:

> We apply a three-part test to determine if a district court may exercise specific jurisdiction: (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable.

Panavision Int'l, 141 F.3d at 1320 (quoting Omeluk v. Langsten Slip & Batyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995)). However, the third factor listed above is not limited to the exercise of specific jurisdiction, but applies to all analyses involving the assertion of personal jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 297.

ficient basis for finding that the defendant has "minimum contacts" with the forum state, even where the claim arises from the defendant's activities outside of the state.[29]

2. Traditional Notions of Fair Play and Substantial Justice

If the court determines that the nonresident defendant has the requisite minimum contacts with the forum state, it will then resolve the question of whether it would be fair, just, and reasonable to require the defendant to defend itself in the forum state.[30] In this portion of its analysis, the court will evaluate whether the litigation would impose an undue burden on the out-of-state defendant,[31] the convenience to the plaintiff, the efficient workings of the interstate legal system, and the interests of the states in furthering fundamental substantive social policies.[32]

III. APPLICATION TO CYBERSPACE

The application of this settled legal framework to disputes arising from cyberspace poses interesting questions and problems. As one commentator suggested, "the key issue in disputes arising in the online environment becomes whether the electronic links between a defendant and the forum state qualify as conduct required by the state's long-arm statute and constitute the minimum contacts required by the Constitution."[33]

The majority of courts have examined the cyberspace jurisdiction issue with regard to specific jurisdiction.[34] However, some courts have stated that a basis for general jurisdiction may exist.[35]

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29. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); *see* Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 142 F.3d 26 (1st Cir. 1998) (holding that "general jurisdiction" exists where litigation at hand is not directly based on defendant's forum-related activities, but defendant has engaged in continuous and systematic activity, unrelated to case, in forum state); Martin & Martin v. Jones, 616 F. Supp. 339, 341 (S.D. Miss. 1985) (citing Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1171 (5th Cir. 1985)); *see, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Mississippi Interstate Express, Inc. v. Transpo, Inc., 681 F.2d 1003 (5th Cir. 1982); Hirsch v. Blue Cross, Blue Shield of Kansas City, 800 F.2d 1474 (9th Cir. 1986); Haisten v. Grass Valley Med. Reimbursement Fund, Ltd., 784 F.2d 1392 (9th Cir. 1986); Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985).

30. *Burger King Corp.*, 471 U.S. at 476 (holding that court must determine whether exercise of jurisdiction over defendant comports with traditional notions of "fair play and substantial justice") (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).

31. *See Haisten*, 784 F.2d at 1392 (holding that California court could exercise jurisdiction over nonresident insurer where insurer did not show compelling reason why exercise of jurisdiction would be unreasonable, and where insurer purposefully directed its activities toward California).

32. *See Burger King Corp.*, 471 U.S. at 476-78 (stating that this portion of the due process test is intended to prevent plaintiffs' abuse of jurisdiction "to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent") (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972)); Austin v. North Am. Forest Prods., 656 F.2d 1076, 1089 (5th Cir. 1981) (stating that factors to be considered are "whether the forum state has any special interest in exercising jurisdiction, and whether the convenience of the parties favors litigating in another state").

33. STUCKEY, *supra* note 9, § 10.02[2].

34. Kalow, *supra* note 8, at 2250.

35. *See* Edias Software Int'l, L.L.C. v. Basis Int'l Ltd., 947 F. Supp. 413, 417 (D. Ariz. 1996).

In their application of traditional jurisdictional jurisprudence to cyberspace, the courts must be ever mindful of its distinctive nature.[36] Many courts have analogized the posting of information on a web site to *Asahi Metal Industry Co., Ltd. v. Superior Court of California*'s putting a product into the stream of commerce, which results in jurisdiction if the nonresident defendant intended to reach a particular state.[37] For example, in *Hasbro, Inc. v. Clue Computing, Inc.*, the court found jurisdiction based upon the web site, accessible by Massachusetts residents, combined with other activities, which could be interpreted as regularly soliciting business in Massachusetts.[38]

Generally, however, the presence of a web site alone will not subject a nonresident to personal jurisdiction.[39] Otherwise, many courts are concerned that finding jurisdiction based solely upon an Internet web site would equate to world-

36. Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 36 (D. Mass. 1997). The *Hasbro* court determined that "current Internet jurisdictional case law has generally followed the *Asahi* reasoning, relying upon facts other than the Web site in exercising jurisdiction." *Id.* at 42. The United States District Court for the Southern District of New York properly observed that "much of the legal analysis of Internet-related issues has focused on seeking a familiar analogy for the unfamiliar." American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 161 (S.D.N.Y. 1997). Even the Supreme Court of the United States, at oral argument regarding the Communications Decency Act, questioned whether the appropriate analogy for the Internet was television, radio, newspaper, 900-line, or village green. *Id.* (citations omitted). Also, a number of metaphors have been applied to the Internet, such as a highway to illustrate the expansiveness of the Internet, a shopping mall representing the commercial feature of the Internet, and a telephone line allowing people and computers to communicate. *Edias Software*, 947 F. Supp. at 419 (citations omitted). In general, the courts must take a flexible approach to ensure that *International Shoe's* minimum contact requirement remains the constitutional standard for cyberspace jurisdiction. Christopher W. Meyer, Note, *World Wide Web Advertising: Personal Jurisdiction Around the Whole Wide World?* 54 WASH. & LEE L. REV. 1269, 1336 (1997).

37. *See, e.g., Hasbro*, 994 F. Supp. at 42; *see supra* note 25 and accompanying text.

38. *Hasbro,* 994 F. Supp. at 44. However, the court noted its concerns regarding three recent cases which "found that the existence of a Web site alone is enough to allow jurisdiction in any state." *Id.* at 46; *see* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996); Heroes, Inc. v. Heroes Found., 958 F. Supp. 1 (D.D.C. 1996); and Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996) (all three cases involved alleged trademark infringement with jurisdiction established because of the sites).

39. Generally, Internet web site advertisements and print advertisements alone are not sufficient to prove that nonresident defendants purposefully availed themselves of a particular forum. Osteotech, Inc., v. Gensci Regeneration Sciences, Inc., 6 F. Supp. 2d 349, 354 (D.N.J. 1998) (citing Weber v. Jolly Hotels, 977 F. Supp. 327, 333 (D.N.J. 1997) (determining that an Internet web site is insufficient to confer personal jurisdiction under a general jurisdiction theory when the information provided serves as an advertisement and not as a means of conducting business) and Gehling v. St. George's School of Med., Ltd., 773 F.2d 539, 542 (3d Cir. 1985) (holding that advertising in national publications "does not constitute 'continuous and substantial' contacts with the forum state")). Some courts have distinguished Internet advertisements, which cannot be thrown away and are available 24 hours a day, from magazine advertisements, which may be quickly disposed of, and from television advertisements, which are momentary. Haelan Prods., Inc. v. Beso Biological, No. 97-0571, 1997 U.S. Dist. LEXIS 10565, at *10 (E.D. La. July 11, 1997); *cf. Weber*, 977 F. Supp. at 333-34 (stating that Internet advertising is the same as advertising in a national magazine); Blackburn v. Walker Oriental Rug Galleries, Inc., 999 F. Supp. 636, 639 (E.D. Pa. 1998) (holding that defendant's passive web site is essentially an advertisement and does not create jurisdiction); Auto Channel, Inc. v. Speedvision Network, L.L.C., 995 F. Supp. 761, 765 (W.D. Ky. 1997) (stating that "mere fact that Internet users in Kentucky can view advertisements on web pages . . . falls far short of demonstrating that Defendants advertise in Kentucky"); E-Data Corp. v. MicroPatent Corp., 989 F. Supp. 173, 176-77 (D. Conn. 1997) (stating that jurisdiction based upon advertising alone would be inconsistent with the Supreme Court's reasoning in *World-Wide Volkswagen*); *Inset Sys.*, 937 F. Supp. at 161 (finding jurisdiction based upon web site); *Maritz*, 947 F. Supp. at 1333 (stating that defendant "consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally. Thus [defendant's] contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal jurisdiction over defendant."); Telco Communications v. An Apple A Day, 977 F. Supp. 404 (E.D. Va. 1997) (finding jurisdiction based upon advertising and soliciting on the Internet).

wide jurisdiction.[40] In determining whether web activity may grant jurisdiction, courts have employed a flexible, "sliding scale," which consists of the following three classifications of Internet activity: (1) "situations where a defendant clearly does business over the Internet" through which the defendant "enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet," which creates jurisdiction;[41] (2) "'situations where a defendant has simply posted information on an Internet web site which is accessible to users in foreign jurisdictions,' i.e., a 'passive Web site that does little more than make information available to those who are interested in it,'" which does not create jurisdiction;[42] and (3) "[t]he middle ground,[43] . . . interactive Web sites where a user can exchange information with the host computer," which is a situation requiring the court to consider "the level of interactivity and commercial nature of the exchange of information that occurs on the Web site in order to determine whether the exercise of jurisdiction over the defendant would be proper."[44]

A. Contractual Relationships

Traditionally, when an out-of-state defendant enters into a contract with a resident of the forum state, courts have not hesitated, under certain circumstances, to assume jurisdiction over the defendant.[45] Indeed, Mississippi's long-arm statute expressly provides for jurisdiction over nonresidents who "make a contract with a resident of this state to be performed in whole or in part by any party in this

40. *Osteotech*, 6 F. Supp. 2d at 356. *See also* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 420 (9th Cir. 1997); *Hasbro*, 994 F. Supp. at 41-47 (citing Hearst Corp. v. Goldberger, No. 96-Civ-3620, 1997 U.S. Dist. LEXIS 2065 (S.D.N.Y. Feb. 26, 1997) (granting jurisdiction would create national or worldwide jurisdiction)).

41. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). At this side of the sliding scale are the cases where defendants are subjected to jurisdiction as a result of contractual relationships involving the exchange of information over the Internet, such as the downloading and transmitting of files. *See, e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (concluding jurisdiction proper).

42. *Zippo*, 952 F. Supp. at 1124. This side of the sliding scale consists of cases with passive web sites, where the defendant may only advertise on the Internet. *See, e.g.*, Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D. N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997) (holding that personal jurisdiction cannot be exercised); *cf. Inset Sys.*, 937 F. Supp. at 164 (finding personal jurisdiction proper because "advertising via the Internet is solicitation of a sufficient repetitive nature").

43. *Zippo*, 952 F. Supp. at 1124. The middle of the sliding scale is made up of cases dealing with interactive web sites, where courts must determine the extent and nature of activity. *See, e.g.*, *Maritz*, 947 F. Supp. at 1328.

44. Vitullo v. Velocity Powerboats, Inc., No. 97 C 8745, 1998 U.S. Dist. LEXIS 7120, at *14-15 (N.D. Ill. Apr. 24, 1998) (citing *Zippo*, 952 F. Supp. at 1123-24); *see also* Transcraft Corp. v. Doonan Trailer Corp., No. 97 C 4943, 1997 U.S. Dist. LEXIS 18687 (N.D. Ill. Nov. 12, 1997) (adopting the *Zippo* framework). *See, e.g.*, Blumenthal v. Drudge, 992 F. Supp. 44, 57 (D.D.C. 1998) (finding jurisdiction proper in District of Columbia resulting from web site interactivity with D.C. residents, distribution of Drudge Report through America Online, electronic mail, and the world wide web to D.C. residents, solicitation and receipt of contributions from D.C. residents, availability of the web site to D.C. residents, defendant's interview with C-SPAN in D.C.; and defendant's communications with D.C. residents as information sources).

45. *See, e.g.*, Peterson v. Highland Music Inc., 140 F.3d 1313 (9th Cir. 1998), *cert. denied*, Gusto Records, Inc. v. Peterson, ___U.S.___, 119 S. Ct. 446 (1998); Roth v. Garcia Marquez, 942 F.2d 617 (9th Cir. 1991); First Miss. Corp. v. Thunderbird Energy, Inc., 876 F. Supp. 840 (S.D. Miss. 1995).

state . . . ."[46] Generally, however, the mere entering into a contract with a resident of the forum will not confer jurisdiction upon the forum state's courts.[47] Nor is a contract's choice of law provision alone sufficient to confer jurisdiction.[48] The element almost universally required is that some part of the contract be performed within the boundaries of the forum state.[49]

In the landmark case of *CompuServe, Inc. v. Patterson*, the United States Court of Appeals for the Sixth Circuit carefully entered into the tangled web of cyberspace jurisdiction.[50] Patterson subscribed to CompuServe[51] and entered into a "Shareware Registration Agreement" with CompuServe, which allowed Patterson to place items of shareware on CompuServe's system to be used and purchased by others.[52] The district court held that the electronic connection between Patterson and CompuServe was not sufficient to support personal jurisdiction.[53] However, despite the fact that Patterson's contacts were "almost entirely electronic in nature,"[54] the Sixth Circuit found that it was reasonable for Ohio, the state of the computer network service, to exercise jurisdiction over Patterson.[55]

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46. MISS. CODE ANN. § 13-3-57 (Supp. 1998); *see supra* note 14 and accompanying text.

47. *See, e.g.*, Sunbelt Corp. v. Noble, Denton & Assoc., Inc., 5 F.3d 28 (3d Cir. 1993); Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217 (3d Cir. 1992); Jones v. Petty-Ray Geophysical Geosource, Inc., 954 F.2d 1061 (5th Cir. 1992); McLaurin v. Nazar, 883 F. Supp. 112 (N.D. Miss. 1995), *aff'd*, 71 F.3d 878 (5th Cir. 1995) (holding that merely contracting with resident of forum state is insufficient to subject nonresident to forum's jurisdiction); Angelica Corp. v. Gallery Mfg. Corp., 904 F. Supp. 993 (E.D. Mo. 1995); Hoag v. Sweetwater Int'l, 857 F. Supp. 1420 (D. Nev. 1994).

48. Plus Sys., Inc. v. New England Network, Inc., 804 F. Supp. 111, 118 (D. Colo. 1992) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)); GCI 1985-1 Ltd. v. Murray Properties Partnership of Dallas, 770 F. Supp. 585, 589-90 (D. Colo. 1991).

49. *Jones*, 954 F.2d at 1068.

50. CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).

51. CompuServe, a computer information service, was headquartered in Columbus, Ohio. *Id.* at 1260. Patterson, a resident of the State of Texas, alleged that he had never visited Ohio. *Id.*

52. *Id.* The Shareware Registration Agreement, creating an independent contractor relationship, was entered into by Patterson in Texas and transmitted to CompuServe in Ohio. *Id.* at 1261. The agreement stated that it was entered into in Ohio. *Id.* at 1260. Patterson alleged that he sold less than $650.00 of software to Ohio residents as a result of the relationship with CompuServe. *Id.* at 1261.

53. *Id.* at 1259-60. The appellate court found that the district court failed to recognize the most important elements of the relationship between CompuServe and Patterson—"that Patterson chose to transmit his software from Texas to CompuServe's system in Ohio, that myriad others gained access to Patterson's software via that system, and that Patterson advertised and sold his product through that system." *Id.* at 1264.

54. *Id.* at 1262. The court compared this ruling to its previous pronouncement that:

> [p]hysical presence of an agent is not necessary . . . for the transaction of business in a state. The soliciting of insurance by mail, the transmission of radio broadcasts into a state, and the sending of magazines and newspapers into a state to be sold there by independent contractors are all accomplished without the physical presence of an agent; yet all have been held to constitute the transaction of business in a state.

Id. at 1264 (citation omitted).

55. *Id.* at 1263. The court expressly limited the applicability of its ruling. *Id.* at 1268. The court stated that it need not and did not decide whether "Patterson would be subject to suit in any state where his software was purchased or used . . . [or whether CompuServe could] sue any regular subscriber to its service for nonpayment in Ohio . . . ." *Id; see also* Plus Sys., Inc. v. New England Network, Inc., 804 F. Supp. 111 (D. Colo. 1992) (holding, under Colorado's "due process" long-arm statute, that nonresident defendant's contractual contacts with forum were almost entirely electronic); *cf.* Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So. 2d 1351 (Fla. Dist. Ct. App. 3d 1994) (holding that nonresident defendant was not subject to jurisdiction of forum state courts where only contact with forum was failure to make payments in forum state to forum state resident).

B. Web Sites

In general, courts seem unwilling to assert jurisdiction over nonresident defendants when their only contact with the forum state is based upon residents' participation in a passive web site.[56] Whether a court will assert jurisdiction over a nonresident who maintains an interactive web site depends upon the quantity and quality of the nonresident's contacts with the residents of the forum.[57]

The United States Court of Appeals for the Ninth Circuit first analyzed the application of personal jurisdiction in the context of cyberspace in *Cybersell, Inc. v. Cybersell, Inc.*[58] Cybersell Arizona registered the name "Cybersell" as a service mark and operated a web site using the mark.[59] Prior to the approval of Cybersell Arizona's registration application, Cybersell Florida created an essentially passive web page with the logo "CyberSell" on its home page.[60] Cybersell Arizona filed suit in the United States District Court in Arizona against Cybersell Florida for trademark infringement, unfair competition, fraud, and RICO violations.[61] Cybersell Florida sought dismissal based upon lack of personal jurisdiction.[62] The issue presented to the court was whether the use of an alleged infringing service mark in a home page on the World Wide Web creates personal jurisdiction in the state where the holder of the mark has its principal place of business.[63] After an examination of the distinction between interactive web sites and passive web sites,[64] the court concluded that it would not "comport with 'traditional notions of fair play and substantial justice'" for a Florida web site adver-

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56. *See, e.g.*, Resolution Trust Corp. v. First of Am. Bank, 796 F. Supp. 1333 (C.D. Cal. 1992). In *Resolution Trust*, the court held that a nonresident's use of a nationwide clearinghouse, located in California, for bank payments did not subject it to jurisdiction in California. *Id.* at 1335-36.

57. *See infra* notes 64, 65 and accompanying text.

58. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997). Plaintiff, Cybersell, Inc., is an Arizona corporation which will be referred to as Cybersell Arizona. *Id.* Cybersell, Inc., the defendant, is a Florida corporation, which will be referred to as Cybersell Florida. *Id.*

59. *Id.* at 415. The application granting registration of the name "Cybersell" was approved and granted on October 30, 1995. *Id.* The web site was operated from August 1994 until February 1995, when the web site was taken down for reconstruction. *Id.*

60. *Id.* Cybersell Florida was formed in the summer of 1995 by two Florida residents. *Id.*

61. *Id.* at 416. Ironically, on the same day, Cybersell Florida filed a declaratory action in the Middle District of Florida. *Id.* The Florida declaratory action was transferred and consolidated with the District of Arizona action. *Id.* Arizona jurisdictional case law allowed Arizona to exercise "personal jurisdiction over a nonresident litigant to the maximum extent allowed by the federal constitution." *Id.* (citations omitted). Therefore, a nonresident litigant could be subjected to litigation in Arizona, "so long as doing so comports with due process." *Id.*

62. *Id.*

63. *Id.* at 415. Cybersell Arizona alleged that Cybersell Florida could be subjected to litigation in Arizona "because cyberspace is without borders and a web site which advertises a product or service is necessarily intended for use on a world wide basis." *Id.*

64. *Id.* at 418. "Interactive" web sites allow users to exchange information with the host computer. *Id.* The *Cybersell* court noted that "[c]ourts that have addressed interactive sites have looked to the 'level of interactivity and commercial nature of the exchange of information that occurs on the Web site' to determine if sufficient contacts exist to warrant the exercise of jurisdiction." *Id.* (citations omitted). The court also relied upon the dated premise that "no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state." *Id.* (citing Smith v. Hobby Lobby Stores, 968 F. Supp. 1356 (W.D. Ark. 1997) (no jurisdiction over Hong Kong defendant who advertised in trade journal posted on the Internet without sale of goods or services in Arkansas)).

tiser, without any contacts with Arizona, other than maintaining a web site accessible over the Internet for anyone, including Arizonans, to be held amenable to suit in Arizona.[65] The court stated that the "common thread" applied to resolve similar jurisdictional questions was "'the likelihood that personal jurisdiction can be constitutionally exercised which is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.'"[66]

The Ninth Circuit Court of Appeals reexamined cyberspace jurisdictional issues in *Panavision International, L.P. v. Toeppen*.[67] Panavision brought suit in California, alleging that Toeppen "was in the business of stealing trademarks, registering them as domain names on the Internet and then selling the domain names to the rightful trademark owners."[68] Toeppen, a resident of the state of Texas, argued that he was improperly subjected to jurisdiction in California.[69] The United States Court of Appeals for the Ninth Circuit found that the exercise of jurisdiction over Toeppen was proper and did not offend due process[70] because Toeppen's conduct injured Panavision in California.[71] However, the court was quick to note that jurisdiction could not be maintained based solely upon registering a trademark and posting a web site.[72] In order to subject a nonresident to jurisdiction, there must be "'something more' to demonstrate that the defendant

65. *Cybersell*, 130 F.3d at 415. The court, recognizing that some courts have considered the "number of 'hits' received by a web page from residents in the forum state," also noted that no Arizonan ever "hit" Cybersell Florida's web site, except for Cybersell Arizona. *Id.* at 419. Also, there was no evidence of any Arizonan signing up for Cybersell Florida's service, of any contracts entered into in Arizona, of any sales made in Arizona, of any telephone calls made from Arizona, of any income earned from Arizona, or of any Internet messages sent to Arizona. *Id.*

66. *Id.* Accordingly the court held that Cybersell Florida's contacts with Arizona were insufficient to establish "purposeful availment," as Cybersell Florida did not commit any act or consummate any transaction, or perform any act to purposefully avail itself to Arizona. *Id.* at 419-20. Otherwise, the court cautioned, "every complaint arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located." *Id.* at 420; *see also* SF Hotel Co. v. Energy Invs., Inc., 985 F. Supp. 1032, 1034-35 (D. Kan. 1997) (finding no jurisdiction where defendant only maintained a passive web site with no provision for direct communication between defendant and web site accessor).

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

68. *Id.* at 1319.

69. *Id.* at 1318. Toeppen alleged that his only contact with California was "insignificant, emanating solely from his registration of domain names on the Internet, which he did in Illinois." *Id.* Toeppen further alleged that he did not enter California or direct any activity toward Panavision in California. *Id.* at 1322.

70. *Id.* at 1323. The court applied the following three-part test to determine if specific jurisdiction could be exercised:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable.

Id. at 1320 (citing Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995)).

71. *Panavision Int'l*, 141 F.3d at 1322. Toeppen had argued that if any injury occurred, it occurred in cyberspace, not California. *Id.* Toeppen also argued that Panavision, a large organization, did not suffer an injury only in one location. *Id.* n.2. However, the court rejected these arguments and held that a corporation may suffer "the brunt of the harm" where it maintains its principal place of business. *Id.*

72. *Id.* at 1322.

directed his activity toward the forum state."[73] The "something more" requirement may be satisfied in numerous ways.[74] When Florida corporations, with a web site, sell boats to a Michigan dealer who shows the boats at an Illinois boat show, the "something more requirement" for jurisdiction in Illinois has been fulfilled.[75] Also, "something more" may be an Internet site combined with a toll-free telephone number and advertisements in four national trade publications.[76]

In a case involving passive web sites, *Weber v. Jolly Hotels*, the court specifically found that the exercise of jurisdiction over a nonresident defendant who merely advertises on the Internet would violate the Due Process Clause of the Fourteenth Amendment.[77] In *Weber*, the court rejected the proposition that Internet advertising is tantamount to purposeful availment or directing activity at a particular forum.[78] It has been rationalized that a web site's sponsor cannot purposefully direct activity, as the information does not seek out residents, but waits for the resident to access it.[79]

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73. *Id; see also* Gifford v. Bruce Strumpf, Inc., No. 97-70-B, 1997 U.S. Dist. LEXIS 11876, at *5 (D. Me. Aug. 7, 1997) (stating that "mere posting on the Internet of information that is accessible to non-resident users is insufficient, without more, to confer personal jurisdiction"). Here, the "something more" requirement was satisfied by Toeppen's "scheme to register Panavision's trademarks as his domain names for the purpose of extorting money . . . ." *Panavision Int'l*, 141 F.3d at 1322. It can be concluded that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

74. The United States District Court for the Northern District of Texas found that it had specific jurisdiction over defendants who had maintained a web site accessible to Texas residents, solicited customers at a trade show in Texas, received orders from Texas distributors, and advertised in a magazine that may have had Texas readers. Telephone Audio Prods., Inc. v. Smith, No. 3:97-CV-0863-P, 1998 U.S. Dist. LEXIS 4101, at *8-9 (N.D. Tex. Mar. 26, 1998). However, the court declined to determine if "maintenance of a website alone or in addition to isolated contacts with the forum is sufficient to maintain general jurisdiction." *Id.* at *6 n.4. The district court noted that some courts had found personal jurisdiction based upon a web site and something more. *Id.* at *8 n.5 (citing Gary Scott Int'l, Inc. v. Baroudi, 981 F. Supp. 714, 717 (D. Mass. 1997) (voluntarily creating a national market through web site solicitation and other sales constitutes purposeful availment); Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 470 (D. Mass. 1997) (purposeful availment is satisfied when a web site, arguably in violation of plaintiff's trademark rights and a licensing agreement, plainly attracts the forum's residents); *Zippo*, 952 F. Supp. at 1126 (conducting electronic commerce constitutes purposeful availment); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1334 (E.D. Mo. 1996) (maintaining a web site was sufficient for minimum contacts); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (advertising via the Internet and maintaining a toll-free number are sufficient for defendant to purposefully avail itself of the privilege of doing business in the forum)). The *Telephone Audio Productions* court specifically did not determine "if the maintenance of the website alone is sufficient to sustain personal jurisdiction." *Telephone Audio Prods, Inc.*, 1998 U.S. Dist. LEXIS 4101, at *8 n.5. However, it did determine that the web site, combined with the other contacts, was sufficient for specific jurisdiction. *Id.* at *9 n.5.

75. Vitullo v. Velocity Powerboats, Inc., No. 97 C 8745, 1998 U.S. Dist. LEXIS 7120, at *9 (N.D. Ill. Apr. 24, 1998). Neither of the Florida corporations had ever registered to do business in Illinois or ever designed, manufactured, leased, or sold products in Illinois. *Id.* at *4.

76. Haelan Prods., Inc. v. Beso Biological, No. 97-0571, 1997 U.S. Dist. LEXIS 10565, at *14-15 (E.D. La. July 11, 1997). The district court, however, cautioned that the Internet site, without something more, would not be sufficient. *Id.* at *14.

77. Weber v. Jolly Hotels, 977 F. Supp. 327, 334 (D.N.J. 1997).

78. *Id.* The defendant, an Italian corporation, placed photographs, information, and telephone numbers regarding its hotels on the Internet. *Id.* at 329.

79. Agar Corp., Inc. v. Multi-Fluid, Inc., No. 95-5105, 1997 U.S. Dist. LEXIS 17121, at *8 (S.D. Tex. June 25, 1997). The *Agar* court determined that, while the nonresident defendant "may have reasonably anticipated visits to its website by Texas residents and companies, it did not, nor could it, purposefully direct information to Texas via its website." *Id.* at *10.

In *Bensusan Restaurant Corp. v. King*, the court focused upon a state statute governing jurisdiction.[80] King, a resident of Missouri, began operating a club, named "The Blue Note," in Missouri in 1980.[81] King permitted a Missouri web site design company to create a web site for his club.[82] Bensusan Restaurant Corporation, located in New York, alleged that its New York City club, named "The Blue Note," was registered as a federal trademark.[83] Subsequently, Bensusan Restaurant Corporation filed suit against King in the Southern District of New York.[84] The district court dismissed the suit for lack of personal jurisdiction, and the Second Circuit affirmed.[85] Since the acts giving rise to the lawsuit occurred in Missouri, the court found that Bensusan failed to allege that a tortious act was committed in New York, as required under the New York long-arm statute.[86]

C. Electronic Mail

In the context of communication by e-mail, there seems to be no reason that the traditional analysis employed by the courts to communications via any other medium would not apply. That is, a nonresident defendant who transmits tortious information over the Internet may be subject to personal jurisdiction to the same extent as those who do so by telephone or by mail.[87] The Supreme Court, in *Burger King Corp. v. Rudzewicz*,[88] addressed this dilemma, stating:

> Jurisdiction . . . may not be avoided merely because the defendant did not physically enter the forum State . . . . [I]t is an inescapable fact of modern commercial life that a *substantial amount of business is transacted solely by mail and wire communications* across state lines, thus obviating the need for physical presence within a State . . . . So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.[89]

Simply put, in such a case, the standard three-part "specific jurisdiction" test employed by the *Burger King* Court must be met. The subject activity/communication must be purposefully directed to the forum, the lawsuit must arise out of

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80. Bensusan Restaurant Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997).

81. *Id.* at 26.

82. *Id.* at 27.

83. *Id.* The New York City club, "The Blue Note," was registered as a federal trademark on May 14, 1985. *Id.* at 26.

84. *Id.* at 27. Plaintiff alleged common law unfair competition and violations of Sections 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114(1), 1125(a), and Section 3(c) of the Federal Trademark Dilution Act of 1995, 15 U.S.C. § 1125(c). *Bensusan*, 126 F.3d at 27.

85. *Id.*

86. *Id.* at 29. The authorization and creation of the web site occurred in Missouri, and "the use of the words 'Blue Note' and the Blue Note logo on the site . . . were performed by persons physically present in Missouri and not in New York." *Id.* Furthermore, even if Bensusan's injury occurred in New York, jurisdiction would still be lacking under the New York long-arm statute. *Id.*

87. For a collection of cases addressing the assertion of jurisdiction over nonresident defendants' tortious communications originating outside the forum state, see 24 A.L.R.3d 532 (1969).

88. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

89. *Id.* at 476 (emphasis added).

or relate to the communication, and the exercise of jurisdiction must comport with traditional notions of fair play and substantial justice.[90] Of course, whether communicating by electronic mail or a more traditional medium, the defendant need not be present in the forum state to find himself subject to personal jurisdiction there; he need only "purposefully" direct his efforts toward forum state residents.[91]

Thus, in *Cody v. Ward*,[92] the court held that a California resident who transmitted allegedly fraudulent misrepresentations to a Connecticut resident by phone, electronic mail, and an on-line computer service talk forum was subject to jurisdiction in Connecticut.[93] The court reasoned that the defendant's contacts with the Connecticut plaintiff "were substantial enough that he should reasonably have anticipated being sued" in Connecticut.[94] Likewise, in *Hall v. LaRonde*,[95] the court observed that "[t]here is no reason why the requisite minimum contacts cannot be electronic."[96] The court held that a New York resident, who conducted all contract negotiations with a Californian by electronic mail and telephone, was subject to the jurisdiction of California courts in a lawsuit alleging breach of that contract and stated that "the use of electronic mail and the telephone by a party in another state may establish sufficient minimum contacts with California to support personal jurisdiction."[97] Also, in *Resuscitation Technologies, Inc. v. Continental Health Care Corp.*,[98] the court held that it had personal jurisdiction over a nonresident who engaged in substantial electronic mail communication with the plaintiff, a resident of the forum state.[99] Although the defendant argued that he had never set foot in the forum state, the court stated that "'[t]he footfalls' were not physical, they were electronic. They were, nonetheless, footfalls."[100]

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90. *Id.; see, e.g.*, Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1486 (9th Cir. 1993) (holding assertion of personal jurisdiction proper where nonresident defendant committed intentional tortious acts which were expressly aimed at forum state, which caused harm to plaintiff in that state, and which defendant knew or should have known would be suffered in forum state); Calder v. Jones, 465 U.S. 783, 790 (1984) (stating that nonresident defendant who directs tortious activities toward forum state should reasonably expect to be "haled into court there"); Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1195-98 (9th Cir. 1988); Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 859 (11th Cir. 1990); *cf.* Thompson v. Chrysler Motors Corp., 755 F.2d 1162, 1171 (5th Cir. 1985) (stating that where nonresident defendant operates entirely outside of forum state, mere fact that defendant's activities cause an effect within the state and that such effect was foreseeable, is not alone sufficient to justify assertion of personal jurisdiction).

91. Charlie Fowler Evangelistic Ass'n, Inc. v. Cessna Aircraft Co., 911 F.2d 1564, 1565 (11th Cir. 1990); *see also* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998); Ziegler v. Indian River County, 64 F.3d 470, 473-74 (9th Cir. 1995); Gordy v. Daily News, L.P., 95 F.3d 829, 836 (9th Cir. 1996) (holding that New York newspaper, which published allegedly defamatory article regarding California plaintiff, was subject to jurisdiction of California court); Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 258-59 (11th Cir. 1996).

92. Cody v. Ward, 954 F. Supp. 43 (D. Conn. 1997).

93. *Id.* at 45-47.

94. *Id.* at 47 (citing *Burger King Corp.*, 471 U.S. at 474-75).

95. Hall v. LaRonde, 66 Cal. Rptr. 2d 399 (Cal. Ct. App. 1997).

96. *Id.* at 402.

97. *Id.* at 400.

98. Resuscitation Techs., Inc. v. Continental Health Care Corp., No. IP 96-1457-C-M/S, 1997 U.S. Dist. LEXIS 3523 (S.D. Ind. Mar. 24, 1997).

99. *Id.* at *17-18.

100. *Id.* at *17.

IV. CONCLUSION

The jurisprudence of personal jurisdiction has steadfastly evolved throughout a period of remarkable change in our society. From the time of *International Shoe* (1945) and extending to the year *Asahi* was decided (1987), the methods of commerce, travel, and communication changed so drastically that, with every new development, the concern that the traditional rules of law were not designed to deal with the change surfaced. This fear has proved to be unfounded, for not only was the law of personal jurisdiction crafted in general terms, but the courts have shown themselves to be flexible in applying established legal principles to modern problems.

The situation we face today with the advent and widespread use of the Internet does not create a new "area" requiring the adoption of new substantive law. Instead, the Internet is merely a vehicle, much like communication by wire in the 19th century, by which commerce and communication can be performed. The faithful application of traditional jurisdictional jurisprudence will prove that it is, indeed, an adequate template for cyberspace jurisdictional issues.