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PERSONAL JURISDICTION AND THE INTERNET

*The Internet breaks down barriers between physical jurisdictions. When a buyer and seller consummate a commercial transaction through a World Wide Web site, there is no need for the traditional physical acts that often determine which jurisdiction's law will apply and whether the buyer or seller will be subject to personal jurisdiction in the courts where the other is located.*¹

I. INTRODUCTION

As the twenty-first century approaches, legal scholars must anticipate how technological and societal changes will affect our current legal doctrine. The scope of the law needs to encompass the expanding growth of technology along with the changing needs of society. Perhaps one of the most significant technological advancements of our time is the Internet.² Unfortunately, legislatures have adopted few laws regulating Internet communications.³

While expanding the speed and ease of communication, the Internet and accompanying technology have created a myriad of situations in which litigation might arise.⁴ Libel, copyright, and trademark infringement over the Internet have been and will continue to be popular areas for litigation.⁵ This increase in litigation directly relates to the lack of regulations which Internet users encounter.⁶ For example, pornography over the Internet, or

¹Bradley A. Slutsky, *Jurisdiction Over Commerce on the Internet*, (June 24, 1997) <<http://www.kslaw.com/menu/jurisdic/html>>.

² See Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 341-42 (1996) (discussing how the Internet's rapid growth will affect today's legal doctrine); William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 199-200 (1995) (predicting new computer-related relationships will strain current legal principles); see *infra* notes 8-15 (explaining the Internet).

³ See Byassee, *supra* note 2, at 199-200 (calling for recognition of and sensitivity to the differences between new technology and the law); Zembek, *supra* note 2, at 341 (citing public demands to know the legal boundaries of cyberspace).

⁴ See Zembek, *supra* note 2, at 341. See also *supra* note 3 and accompanying text (commenting on the relationship of technology and the legal doctrine).

⁵ *Id.*

⁶ *Id.* at 342-43.

“cyberporn,” has also been a topic of intense debate.⁷ The Communications Decency Act of 1996,⁸ and the litigation that followed, have given descriptions and definitions to new terminology.⁹ This terminology is critical to analyzing how these new areas will affect our laws.

The Internet is a world-wide network of interlinked computers.¹⁰ This vast network consists of millions of host computers that provide information and services to consumers.¹¹ Host computers that provide Internet services, also called web sites,¹² each have a unique Internet address just as each home has a unique mailing address.¹³ These web sites allow users to exchange digital information such as electronic mail (e-mail), computer programs, images, or music.¹⁴ The collection of web sites available over the Internet is known as the World Wide Web,¹⁵ and each site is accessed by an individual user with the help of a computer, a modem, and some type of Internet access software.¹⁶

Given the accessibility of the Internet by people all over the world, it is not difficult to foresee the potential jurisdictional issues that might arise in the event of litigation. The most fundamental area to be explored is the issue of personal jurisdiction.¹⁷ Personal jurisdiction, as it relates to Internet communications, is a particular area of law that is currently under scrutiny by the courts.¹⁸ New technological advances via the Internet have

⁷ See Byassee, *supra* note 2, at 203-11 (discussing pornography on the Internet).

⁸ 47 U.S.C. § 223 (West 1997).

⁹ See generally *Shea v. Reno*, 930 F. Supp. 916 (1996) (interpreting new restraints on Internet communication and defining vital terms). See also *MTV Networks v. Curry*, 867 F. Supp. 202, 204-05 (S.D.N.Y. 1994) (defining the Internet, host computers, e-mail, and computer bulletin boards); Philip Elmer-Dewitt, *Battle for the Soul of the Internet*, Time Magazine, July 25, 1994, at 50.

¹⁰ *MTV Networks*, 867 F. Supp. at 204 & n.1.

¹¹ *Id.*

¹² *Id.* at 204 & n.2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 296 (S.D.N.Y. 1996) (quoting *Shea v. Reno*, 930 F. Supp. 916, 929 (1996)).

¹⁶ See generally *Zembek*, *supra* note 2 (explaining Internet access).

¹⁷ See *Byassee*, *supra* note 2, at 199 (describing jurisdictional questions as the most difficult to reconcile through modern legal doctrine); *Zembek*, *supra* note 2, at 341 (stating that the “most fundamental issue of personal jurisdiction is being ignored”).

¹⁸ See generally *Byassee*, *supra* note 2 (discussing personal jurisdiction over the Internet); *Zembek*, *supra* note 2 (stating that jurisdictional issues in cyberspace need to be

created legal uncertainty.¹⁹ Current legal precedent and accompanying doctrine may well address some of the potential problems, but many other sources of litigation remain unclear.²⁰

II. HISTORY OF PERSONAL JURISDICTION

A court may exercise power over a particular defendant if the defendant is subject to personal jurisdiction.²¹ Limits on a court's ability to exercise personal jurisdiction arise from two sources, the United States Constitution and state long-arm statutes.²² The Due Process Clause of the Fourteenth Amendment of the United States Constitution permits state courts to exercise personal jurisdiction over an out-of-state defendant only if sufficient "minimum contacts" exist with the forum state.²³ The party seeking personal jurisdiction over the out-of-state defendant must first show that the out-of-state defendant's actions fell within the parameters of the state's long-arm statute and meet the requirements of the Fourteenth Amendment.²⁴

States' long-arm statutes vary,²⁵ some states have long-arm statutes which allow their courts to exercise jurisdictional power to the full extent allowed under the Due Process Clause of the Constitution.²⁶ Other states have statutory restrictions that specify enumerated situations when courts may exercise personal jurisdiction over an out-of-state defendant.²⁷ Some

further explored).

¹⁹ See Elmer-Dewitt, *supra* note 9, at 50 (detailing new issues and conflicts that have arisen with the growth of the Internet).

²⁰ See Byassee, *supra* note 2, at 199-200 (calling for recognition of the differences, not arguing the inadequacies). *But see* Zembek, *supra* note 2, at 345 (stating that many "cyber-actions" cannot be categorized under current law).

²¹ See generally JOSEPH GLANNON, *CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS*, 23-28 (3d ed. 1997) (explaining jurisdiction).

²² U.S. CONST. amend. XIV. See, e.g., MASS. ANN. LAWS ch. 223A, § 3 (Law. Co-op. 1996); CAL. CIV. PROC. CODE § 410.10 (West 1996); N.Y. C.P.L.R. 302 (Consol. 1996).

²³ GLANNON, *supra* note 21, at 4. See *Int'l Shoe v. Washington*, 326 U.S. 310, 319 (1945) (ruling that the maintenance of suit does not offend the notions of fair play and substantial justice).

²⁴ U.S. CONST. amend. XIV. See, e.g., MASS. GEN. LAWS ch. 223A, § 3 (Law. Co-op. 1996); CAL. CIV. PROC. CODE § 410.10 (West 1996); N.Y. C.P.L.R. 302 (Consol. 1996).

²⁵ See GLANNON, *supra* note 21, at 23-28 (discussing state long-arm statutes).

²⁶ See CAL. CIV. PROC. CODE § 410.10 (West 1996).

²⁷ See, e.g., MASS. GEN. LAWS ch. 223A, § 3 (Law. Co-op. 1996); N.Y. C.P.L.R. 302 (Consol. 1996); 110 ILL. REV. STAT. 2-209 (1996).

limits are placed on the particular cause of action, while other limits are based on the activities of the defendant.²⁸

The Supreme Court expounded upon state court's jurisdiction with the landmark decision in *International Shoe v. Washington*.²⁹ This case overruled the "presence" standard and allowed jurisdiction over any party with sufficient "minimum contacts" with the forum state.³⁰ The decision explained that the maintenance of the suit in the forum state shall be allowed only "according to our traditional conceptions of fair play and substantial justice."³¹ In this case, the Supreme Court adopted the current two-prong approach to personal jurisdiction: minimum contacts and reasonableness.³²

In order for the out-of-state defendant to be subject to suit, minimum contacts must be found between the defendant and the forum state.³³ If these contacts to the forum state are found to be continuous and systematic, the state courts would have "general jurisdiction" over the defendant.³⁴ When general jurisdiction exists, the court will have a sufficient basis for exercising jurisdiction for any cause of action against the defendant.³⁵ If the court decides contacts are less than continuous and systematic, a court may only exercise jurisdiction if the action arose against the out-of-state defendant from the particular contact of that defendant with the state.³⁶ Courts refer to this concept as "specific jurisdiction" and grant it in cases involving such isolated acts as a breach of contract³⁷ or the settlement of a life insurance policy.³⁸

²⁸ MASS. GEN. LAWS ch. 223A, § 3 (Law. Co-op. 1996).

²⁹ 326 U.S. 310 (1945).

³⁰ See *International Shoe*, 326 U.S. 310, 319 (1945) (ruling that a state may not make binding judgments on an individual lacking contacts with that state). *But see* *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877) (deciding that personal service and notice are key elements of personal jurisdiction).

³¹ *International Shoe*, 326 U.S. at 320.

³² See *id.* at 319-20 (requiring minimum contacts and reasonableness).

³³ See *id.* at 310 (elaborating on the notion of minimum contacts). See also *infra* note 87 (expaining the doctrine of minimum contacts).

³⁴ See generally *Helecopteros Nacionales de Columbia v. Hall*, 461 U.S. 955 (1984) (holding that casual contacts are not enough to find general jurisdiction). See *GLANNON supra* note 20, at 12 (defining continuous and systematic contact).

³⁵ See *Perkins v. Benguet*, 342 U.S. 437, 448 (1952) (deciding that when activities are sufficiently continuous, due process allows the exercise of jurisdiction).

³⁶ See *Perkins*, 342 U.S. at 448-49 (ruling that, if general jurisdiction is found, then the issue need not arise from the contacts). See generally *Helecopteros*, 461 U.S. 955.

³⁷ See generally *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (finding

In order for a court to subject a non-resident defendant to a lawsuit, in addition to minimum contacts, the court must find that the defendant purposely availed himself of the benefits and protection of the laws of the state.³⁹ This doctrine dictates that a party is subject to personal jurisdiction if he could reasonably anticipate being haled into court in that state.⁴⁰ The Supreme Court has held that a nationally published magazine could reasonably foresee being haled into court for libel actions in any state where the magazine is sold.⁴¹ The Court, however, did not find jurisdiction over an automobile dealer for selling a car involved in an accident in another state.⁴²

Even when a court finds minimum contacts, a defendant may still defeat a finding of personal jurisdiction if he can prove that it would be unfair for the court to exercise jurisdiction.⁴³ The court will base this test on the interests of the defendant, the plaintiff, and the forum state.⁴⁴ For example, in 1985, the Supreme Court ruled that in a business relationship the burden is on the defendant to prove that it is unreasonable for him to defend himself in the forum state.⁴⁵ The Supreme Court, however, is split on

jurisdiction over the defendant based on the purposeful making of a contract).

³⁸ See generally *McGee v. International Life Ins. Co.*, 385 U.S. 220 (1957) (finding specific jurisdiction based on a life insurance policy entered into in the forum state).

³⁹ See *Hanson v. Denckla*, 357 U.S. 235, 253-54 (1958) (quoting *International Shoe*, 326 U.S. at 319) (stating that the defendant must "purposely avail itself of the privilege of acting within the state").

⁴⁰ See *Hanson*, 357 U.S. at 253-54 (requiring purposeful availment before granting jurisdiction). See also *Calder v. Jones*, 465 U.S. 783, 792 (1984) (determining that jurisdiction is proper when intentional tortious acts are directed into the forum state); *Keeton v. Hustler Magazine*, 465 U.S. 770, 775 (1984) (holding that circulating magazines in the forum state constitutes adequate minimum contacts). But see *World Side Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980) (citing knowledge that a car driven into the forum state is not purposeful availment).

⁴¹ See *Calder*, 465 U.S. at 790 (ruling that actions intentionally directed to the forum state satisfy minimum contacts); *Keeton*, 465 U.S. at 781 (finding jurisdiction over the defendant who "continuously and deliberately exploited" the market of the forum state).

⁴² See *World Wide Volkswagen*, 444 U.S. at 286 (deciding that mere foreseeability does not satisfy the requirement of purposeful availment).

⁴³ See generally *GLANNON*, *supra* note 21, at 5-8 (discussing the reasonableness requirement).

⁴⁴ See generally *Burger King v. Rudzewicz*, 471 U.S. 462, 473-74 (1985) (ruling that the defendant should reasonably anticipate being sued in Florida based on a contractual relationship).

⁴⁵ *Id.* at 473-74.

the personal jurisdiction of a defendant who sells goods that are not directed to the forum state but may wind up there through a "stream of commerce."⁴⁶

III. INTERNET AND PERSONAL JURISDICTION: CASE LAW

In recent years, courts have dealt with issues of personal jurisdiction in cases involving the Internet. Although the facts of these cases have varied, they have all had one characteristic in common: the judges have employed restraint in expanding the concept of personal jurisdiction.⁴⁷

In *Pres-Kap, Inc. v. System One, Direct Access, Inc.*,⁴⁸ the Florida Court of Appeal grappled with the issue of jurisdiction involving a computerized airline reservation system.⁴⁹ The issue raised was whether the non-resident defendant travel agent had sufficient minimum contacts to be subject to personal jurisdiction in Florida.⁵⁰ After plaintiff failed to repair the reservation system, the defendant stopped payment under the contract for the use of the system.⁵¹ The plaintiff sued for breach of contract in Florida and the defendant moved to dismiss the case for lack of personal jurisdiction.⁵² The trial court denied the defendant's motion.⁵³

On appeal, the court decided that the appropriate test for determining whether personal jurisdiction exists was whether the defendant could "reasonably anticipate being hailed into a Florida court."⁵⁴ They determined the only contacts between the defendant and Florida were rental payments made to the plaintiff in Miami and right of entry to a computer

⁴⁶ Compare *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 105-16 (1987) (finding no substantial connection between the defendant's actions and the forum state), with *Asahi Metal*, 480 U.S. at 116-21 (Brennan, J., concurring) (concluding that the defendant did purposely avail itself of California laws).

⁴⁷ See *infra* notes 49-127.

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

⁴⁹ *Id.* at 1351-52.

⁵⁰ *Id.* See generally *International Shoe v. Washington*, 326 U.S. 310 (1945) (setting the "minimum contacts" standard).

⁵¹ *Pres-Kap, Inc.*, 636 So.2d at 1352. The defendant complained to the plaintiff's New York office, but the defendant claimed that nothing was repaired. *Id.* In March 1991, the defendant ceased payments on the leased computer terminals and in July the terminals were removed by the plaintiff. *Id.*

⁵² *Id.* Plaintiff sued for breach of the lease agreement. *Id.*

⁵³ *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351, 1352 (Fla. Ct. App. 1994).

⁵⁴ *Id.* (citing *World Wide Volkswagen*, 444 U.S. 286).

database owned by the defendant accessed via computer terminals.⁵⁵ The court dismissed the plaintiff's argument that the existence of a contract with a Florida citizen was sufficient to satisfy the minimum contacts standard.⁵⁶ The court found no evidence that the defendant had any knowledge as to the location of the computer database, and, even if the defendant had such knowledge, it would not create a reasonable expectation of suit in Florida.⁵⁷ The court took issue with the source of the defendant's financial gain which arose "from a New York, not a Florida based transaction."⁵⁸ For these reasons, the appeals court overturned the trial court's denial of the defendant's motion to dismiss.⁵⁹

The appeals court's decision focused on the possible implications of a contrary decision.⁶⁰ The court stated that to uphold the trial court's decision would result in subjecting the user of any on-line service to suit in the state where the "supplier's billing office or database happened to be located."⁶¹ The court went on to hold that the exercise of jurisdiction goes far beyond any consumer's reasonable expectations and would certainly violate the "traditional notions of fair play and substantial justice."⁶²

In a dissenting opinion, Judge Barkdull argued that, by accessing the computer database in Florida, the defendant purposefully availed itself of the information contained therein.⁶³ This situation dictates that the defen-

⁵⁵ *Id.* at 1353.

⁵⁶ *Id.* The court stated that the contract cannot convert this "obviously New York-based transaction into a Florida transaction" in order to show that the defendant could have reasonably anticipated defending a suit in Florida. *Id.*

⁵⁷ *Id.*

⁵⁸ *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351, 1353 (Fla. Ct. App. 1994).

⁵⁹ *Id.*

⁶⁰ *Id.* See also Michael J. Santisi, *Pres-Kap, Inc. v. System One, Direct Access, Inc.: Extending the Reach of the Long-Arm Statute Through the Internet?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 433, 441-51 (1995) (arguing against the rationale used in the *Pres-Kap* case).

⁶¹ *Pres-Kap*, 636 So. 2d at 1353.

⁶² *Id.* See generally *Burger King v. Rudzewicz*, 471 U.S. 462 (1985) (explaining the "fairness" test for minimum contacts); *International Shoe v. Washington*, 326 U.S. 310 (1945) (deciding the minimum contacts test); *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla. 1989) (applying minimum contacts test).

⁶³ See *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351, 1354 (Fla. Ct. App. 1994) (Barkdull, J., dissenting) (maintaining that the defendant's actions constituted purposeful availment).

dant could reasonably expect to be haled into a Florida court.⁶⁴ The dissenting judge felt that the court should exercise jurisdiction over the defendant since the information in Florida contributed to the financial gain of his New York company.⁶⁵

Perhaps the first case to deal with contacts to the forum state via the internet was *CompuServe v. Patterson*.⁶⁶ This Sixth Circuit case involved a dispute between an Internet access provider and one of its software distributors.⁶⁷ The plaintiff sought to prove that the defendant's conduct with the forum state was substantial enough for the court to exercise personal jurisdiction over the defendant.⁶⁸

CompuServe is a computer information service with headquarters in Columbus, Ohio.⁶⁹ Although all of CompuServe's facilities are located in Ohio, subscribers may access its services from any computer terminal in the world.⁷⁰ Consumers pay a monthly fee to gain access to computing and information services via the Internet, as well as software that CompuServe or third parties have provided.⁷¹ Parties who choose to distribute "shareware" must enter into a contract to do business with CompuServe.⁷² This basic contract, called a "Shareware Registration Agreement,"⁷³ allows CompuServe to furnish its subscribers with the software that the shareware providers create.⁷⁴ The agreement, which a subscriber enters into electronically, stipulates that the parties formed the contract in Ohio and that it shall "be governed by and construed in accordance with" Ohio law.⁷⁵

⁶⁴ *Id.*

⁶⁵ *Id.* See also Santisi, *supra* note 59, at 441 (discussing the *Pres-Kap* dissent).

⁶⁶ 89 F.3d 1257 (6th Cir. 1996).

⁶⁷ *Id.* at 1258-59 (detailing appeal of granted motion to dismiss for lack of personal jurisdiction).

⁶⁸ See *id.* at 1259 (determining if minimum contacts exist enough to exercise personal jurisdiction of a non-resident defendant); see generally *International Shoe v. Washington*, 326 U.S. 310 (1945) (deciding the minimum contacts test).

⁶⁹ *CompuServe v. Patterson*, 89 F.3d 1257, 1258 (6th Cir. 1996).

⁷⁰ *Id.*

⁷¹ *Id.* at 1258-59.

⁷² *Id.* at 1259.

⁷³ *Id.* at 1260. This Shareware Registration Agreement incorporates the CompuServe Service Agreement and the Rules of Operation. *Id.*

⁷⁴ *CompuServe v. Patterson*, 89 F.3d 1257, 1259 (6th Cir. 1996).

⁷⁵ *Id.* at 1261.

The defendant Patterson began to electronically submit software files to CompuServe in 1991.⁷⁶ Patterson created software to aid in the navigation of the Internet.⁷⁷ Soon after Patterson began to market his product, CompuServe developed a similar product.⁷⁸ Patterson notified CompuServe that its marketing of its products infringed on his company's common law copyrights and that CompuServe's actions constituted deceptive trade practices.⁷⁹ CompuServe then filed a declaratory judgment action in the federal district court in the Southern District of Ohio denying any wrongdoing.⁸⁰ Patterson responded with a motion to dismiss for lack of personal jurisdiction.⁸¹

Patterson argued that the Ohio court had no jurisdiction over him because he had never entered Ohio.⁸² Patterson stated that his contacts were merely via a computer hookup and were not sufficient to warrant a finding of personal jurisdiction.⁸³ The district court agreed with Patterson's arguments and dismissed the case.⁸⁴ CompuServe appealed this ruling to the Court of Appeals for the Sixth Circuit.⁸⁵

Noting that this was a case of first impression, the appeals court thoroughly examined the history of personal jurisdiction in this matter.⁸⁶ The court sought to answer the question: "Did CompuServe make a prima facie showing that Patterson's contacts with Ohio, which have been almost entirely electronic in nature, are sufficient under the Due Process Clause, to support the district court's exercise of personal jurisdiction over him?"⁸⁷

⁷⁶ *Id.*

⁷⁷ *Id.* at 1261-62.

⁷⁸ *Id.* at 1262.

⁷⁹ *CompuServe v. Patterson*, 89 F.3d 1257, 1258 (6th Cir. 1996). Patterson claimed that the terms "WinNAV," "Windows Navigator," and "FlashPoint Windows Navigator" were all trademarks that CompuServe was using without permission. *Id.* CompuServe changed the name of its program, but Patterson continued to demand \$100,000 to settle his potential claims. *Id.*

⁸⁰ *Id.* at 1261 (asserting that CompuServe neither infringed on any copyrights nor engaged in any deceptive acts).

⁸¹ *Id.*

⁸² *Id.* at 1261-63.

⁸³ *Id.* at 1262.

⁸⁴ *CompuServe v. Patterson*, 89 F.3d 1257, 1261 (6th Cir. 1996) (explaining how the district court dismissed the claims made by CompuServe).

⁸⁵ *Id.*

⁸⁶ *Id.* at 1265-69.

⁸⁷ *Id.* at 1262.

The court responded by analyzing the different constitutional aspects of personal jurisdiction.⁸⁸ The court found that CompuServe had succeeded in proving the first two prongs of the jurisdiction test. First, the court found that Patterson had availed himself of the privilege of acting in the forum state.⁸⁹ Second, his contacts with Ohio were related to the facts of the controversy and, therefore, the burden shifted to the defendant to disprove jurisdiction.⁹⁰

The appeals court gave a lengthy discussion of the fairness test.⁹¹ The court considered a number of factors: 1) the burden on the defendant; 2) the interest of the plaintiff in obtaining relief; 3) the interest of the forum state; and 4) the interests of other states in resolving such disputes.⁹² The appeals court reversed the trial court's ruling based on the issue of fairness.⁹³ The appeals court determined that although it may be burdensome for Patterson to defend the suit in Ohio, he was put on notice that he was "making a connection with Ohio" when he entered into the agreement with CompuServe.⁹⁴ The court acknowledged Ohio's interest in resolving this dispute involving an Ohio company and Ohio copyright law.⁹⁵ The appeals court found a sufficient connection between Patterson and CompuServe for Ohio to assert jurisdiction over the defendant.⁹⁶ The appeals court stated that someone "who employs a computer network service like

⁸⁸ *Id.* at 1263-68. The court analyzed three aspects necessary to satisfy constitutional requirements for a finding of minimum contacts in order to exercise personal jurisdiction: the "purposeful availment" requirement; the requirement that the cause of action arises from Patterson's activities in Ohio; and the "reasonableness" requirement. *Id.*

⁸⁹ *CompuServe v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996) (holding that Patterson was the "purchaser" of services and no doubt purposefully transacted business in Ohio).

⁹⁰ *Id.* at 1267-68. The court stated that Patterson could have marketed and sold his products elsewhere with similar results, yet he only sold his software to CompuServe in Ohio. *Id.* at 1284. Any kind of copyright infringement must have occurred in Ohio. *Id.* at 1285. The court also stated that Patterson's threats to seek an injunction against CompuServe, which gave rise to the present case, were indeed contacts made in Ohio. *Id.*

⁹¹ *Id.* at 1268 (discussing the reasonableness requirement).

⁹² *Id.* (citing *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169-70 (6th Cir. 1988)); see also *supra* notes 30-33 (discussing reasonableness requirement).

⁹³ *Id.* at 1268.

⁹⁴ *CompuServe v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996).

⁹⁵ *Id.* at 1268.

⁹⁶ *Id.*

CompuServe to market a product can reasonably expect disputes with that service to yield lawsuits in the service's home state."⁹⁷

As important as the holding of the case is to the future of personal jurisdiction, the dicta contained within the court's decision is equally engaging. The court enumerated certain aspects of this area of law that the decision did not cover.⁹⁸ It made no decision as to whether Patterson could be subject to personal jurisdiction in any state where his software was purchased or used.⁹⁹ The opinion also did not discuss whether CompuServe would have jurisdiction to sue any subscriber to its service for non-payment in Ohio.¹⁰⁰

Like the Sixth Circuit, the Third Circuit in *Bensusan Restaurant Corporation v. King*¹⁰¹ has also addressed and answered specific questions that deal with personal jurisdiction via the internet.¹⁰² The parties, both of whom engaged in the entertainment business, each operated a nightclub under the name, "The Blue Note."¹⁰³ The defendant posted a web site to advertise his club in Columbia, Missouri.¹⁰⁴ To prevent confusion, this web site mentioned the plaintiff's club in New York.¹⁰⁵ The plaintiff brought suit in the United States District Court for the Southern District of New York claiming trademark infringement, unfair competition, and trademark dilution.¹⁰⁶ The defendant answered with a motion to dismiss for lack of personal jurisdiction.¹⁰⁷ In deciding the motion to dismiss, the

⁹⁷ *Id.*

⁹⁸ *Id.* at 1268.

⁹⁹ See *CompuServe v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996). See also *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 296 (discussing reasonableness requirement of subjecting an out-of-state defendant to personal jurisdiction).

¹⁰⁰ *Id.* at 1289.

¹⁰¹ 937 F. Supp. 295 (1996).

¹⁰² *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 299 (S.D.N.Y. 1996) (affirming a motion to dismiss for lack of personal jurisdiction by the defendant).

¹⁰³ *Id.* at 297.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 297-98. King's web site contained a disclaimer that his club is "not to be confused" with The Blue Note of New York City. *Id.* The disclaimer also had a "hyperlink" that allowed the Internet user to directly connect to the plaintiff's web site. *Id.*

¹⁰⁶ *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 298 (S.D.N.Y. 1996). The plaintiff brought the action only after notifying King. *Id.* King altered his web site but the changes were not satisfactory for Bensusan. *Id.*

¹⁰⁷ *Id.* at 298; see also FED. R. CIV. P. 12(b)(2) (defining motion to dismiss for lack of personal jurisdiction).

court relied on the factual allegations made in the plaintiff's complaint and the two applicable prongs of New York long-arm statute.¹⁰⁸ The court analyzed each prong separately.¹⁰⁹

In analyzing the first prong, the court focused on the idea that a New York court may exercise personal jurisdiction over a non-resident defendant "who commits a tortious act within the state" as long as the cause of the action asserted arises from the tortious act.¹¹⁰ Courts have interpreted this statute as stating that the act of offering to sell a product can support the exercise of jurisdiction.¹¹¹ The issue remained, however, as to whether the creation of a web site is an offer to sell a product in New York.¹¹² The district court found that it could not properly exercise jurisdiction under this statute over the Missouri resident because it takes "several affirmative steps by the New York resident . . . to obtain access to the web site."¹¹³ The court further acknowledged that the mere fact that a person can illicit information on a product does not amount to advertising in New York.¹¹⁴ The decision stated that no court could exercise jurisdiction in the absence of an activity directed at the people of New York, per C.P.L.R. § 302(a)(2).¹¹⁵

¹⁰⁸ *Bensusan*, 937 F. Supp. at 298-99. If a plaintiff makes a prima facie showing of jurisdiction, they will defeat a motion to dismiss for lack of personal jurisdiction. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 298-99 (S.D.N.Y. 1996). See *Pilates Inc. v. Pilates Inst. Inc.*, 891 F. Supp. 175, 179 (S.D.N.Y. 1996) (interpreting C.P.L.R. §302(a)(1), part of New York's long-arm statute).

¹¹¹ See *Bensusan*, 937 F. Supp. at 299. See, e.g., *Editorial Musical Latino Americana, S.A. v. Mar Int'l Records, Inc.*, 829 F. Supp. 62, 64-65 (S.D.N.Y. 1993) (holding that a single sale may support jurisdiction); *German Educ. Television Network, Ltd. v. Oregon Pub. Broad. Co.*, 569 F. Supp. 1529 (S.D.N.Y. 1983) (finding that the act of selling products could subject defendant to personal jurisdiction); *Hertz Sys., Inc. v. Hervis Corp.*, 549 F. Supp. 796, 797-98 (S.D.N.Y. 1982) (interpreting statute to find jurisdiction over defendant based on an offer to sell).

¹¹² *Bensusan*, 937 F. Supp. at 299.

¹¹³ *Id.* The court stated that a New York resident must access the Internet using their computer, then telephone the box office in Missouri to order tickets, and finally pick up the tickets in Missouri since King will not send the tickets to the buyer. *Id.* This, the court adds, should clear up any confusion about where the club is located, however even if the buyer is still confused, any type of infringement would have to occur in Missouri. *Id.*

¹¹⁴ *Id.* at 299.

¹¹⁵ See generally *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

Next, the court interpreted the second prong of the long-arm statute to allow the court to exercise jurisdiction over any non resident who "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."¹¹⁶ The plaintiff sought to show that the defendant participated in interstate commerce; however, the statute explicitly states that substantial revenue must be obtained from interstate commerce.¹¹⁷ The plaintiff argued that it was foreseeable to the defendant that he may be sued in New York because the plaintiff's club is located there.¹¹⁸ The court felt that this argument did not sufficiently satisfy an expectation of consequences in New York; specifically, no discernible effort was made to serve a market in New York.¹¹⁹ The court's two pronged analysis and the insufficiency of the plaintiff's argument led the court to conclude that it could not exercise personal jurisdiction over the defendant.¹²⁰

The court then addressed a constitutional Due Process issue when it sought to determine whether an assertion of jurisdiction over the defendant would offend the "traditional notions of fair play and substantial justice."¹²¹ The court decided that by creating a web site, the defendant had not purposely availed himself of benefits in New York.¹²² As a result, the plaintiff's argument that the defendant should have foreseen that users could access the site in New York was insufficient to satisfy Due Process.¹²³

The *Bensusan* decision also distinguished its facts from the *CompuServe* case.¹²⁴ In *CompuServe*, the defendant specifically targeted the forum

¹¹⁶ *Id.* at 300.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* (finding that King's knowledge that *Bensusan*'s club was located in New York is insufficient).

¹²⁰ *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 300 (S.D.N.Y. 1996).

¹²¹ *See id.* at 300-01 (analyzing the Due Process aspect of personal jurisdiction); *see generally* *Darby v. Compagnie Nationale Air France*, 769 F. Supp. 1255 (S.D.N.Y. 1991) (quoting *International Shoe*, 326 U.S. at 316).

¹²² *Bensusan*, 937 F. Supp. at 301. This is equivalent to placing a product into the stream of commerce, which the United States Supreme Court has interpreted to be not purposely directed toward the forum state. *Id.* at 301. *See generally* *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

¹²³ *Id.* *See also generally* *Fox v. Boucher*, 794 F.2d 34, 37 (2d Cir. 1986); *Beckett v. Prudential Ins. Co. of Am.*, 893 F. Supp. 234, 239 (S.D.N.Y. 1995).

¹²⁴ *See Bensusan*, 937 F. Supp. at 301 (discussing *CompuServe* case).

state by subscribing to the service and entering into a contract with the plaintiff.¹²⁵ The defendant also advertised his software over the Internet via CompuServe.¹²⁶ The court concluded that the defendant “reached out” into the forum state.¹²⁷ In the present case, the court recognized that the defendant could not have directed any contact into New York.¹²⁸

IV. MASSACHUSETTS

The United States District Court for the District of Massachusetts decided an Internet trademark infringement case when it found a California corporation subject to personal jurisdiction in the Massachusetts courts.¹²⁹ In *Digital Equipment Corporation v. AltaVista Technology, Inc.*,¹³⁰ the plaintiff, Digital Equipment Corporation, (“Digital”) purchased the right to the name “AltaVista” from the defendant, AltaVista Technology, Inc. (“ATI”).¹³¹ Digital then licensed back to ATI the right to use “AltaVista” in certain enumerated ways.¹³² In the court action, Digital sought a preliminary injunction claiming that ATI breached the licensing agreement by improperly using “AltaVista” on their web site.¹³³

Discussion of this case should begin with insight on Massachusetts’ long-arm statute.¹³⁴ The First Circuit has consistently held that it must

¹²⁵ *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 300 (S.D.N.Y. 1996); see also *supra* notes 76-82 and accompanying text (analyzing the *CompuServe* case).

¹²⁶ *Id.* at 301. See also *supra* notes 76-82 and accompanying text (discussing the rationale used in *CompuServe*).

¹²⁷ *Bensusan*, 937 F. Supp. at 301. See also *supra* notes 93-104 and accompanying text (detailing *CompuServe*).

¹²⁸ *Bensusan*, 937 F. Supp. at 301.

¹²⁹ See generally *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456 (D. Mass. 1997) (asserting jurisdiction based on contacts via the Internet).

¹³⁰ 960 F. Supp. 456 (D. Mass. 1997).

¹³¹ *Id.* at 459.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See MASS. GEN. LAWS ch. 223A, § 3 (Law. Co-op. 1996). The exercise of personal jurisdiction over a non-resident is governed by the Massachusetts long-arm statute and its corresponding precedent. *Id.* The Massachusetts long-arm statute says in relevant part: “A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person’s (a) transaction any business in the commonwealth . . . (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly . . . derives substantial revenue from the . . . services rendered, in this commonwealth. *Id.*”

first look to state law when deciding whether jurisdiction is appropriate.¹³⁵ Even though the Massachusetts Supreme Judicial Court has interpreted the statute to allow the exercise of jurisdiction to the full extent of the United States Constitution, this constitutional analysis will reach only "when some basis for jurisdiction enumerated in the statute has been established."¹³⁶ The plaintiff has the burden of establishing facts to support a finding of jurisdiction under the statute and to establish minimum contacts sufficient to satisfy Due Process analysis.¹³⁷

ATI argued that the court in Massachusetts had no personal jurisdiction over it as a California corporation.¹³⁸ Although ATI admitted that the litigation arose from a contract with a Massachusetts corporation, the company felt that a contract alone should not satisfy minimum contacts.¹³⁹ The court concluded that (1) ATI entered into a contract interpreted "under and accordance" with the laws of Massachusetts, (2) breach of this contract gave rise to the litigation, (3) ATI operated a web site accessible to users in Massachusetts, (4) ATI solicited its software products on the web site, (5) the company sold its software products to at least three Massachusetts residents, and (6) the trademark infringement has "caused considerable confusion in Massachusetts."¹⁴⁰

The court analyzed these factual findings in conjunction with three sections of the Massachusetts long-arm statute: ATI's transacting business in Massachusetts, ATI's allegedly causing tortious injury in Massachusetts via its web-site, and ATI's engaging in a persistent course of conduct in

¹³⁵ See generally *Caso v. LaFayette*, 370 F.2d 707 (1st Cir. 1966) (quoting *Pulson v. American Rolling Mill Co.*, 170 F.2d 193 (1st Cir. 1948)). See also *Gray v. O'Brien*, 777 F.2d 864 (1st Cir. 1985) (quoting *Hahn v. Vermont Law School*, 698 F.2d 48, 49-50 (1st Cir. 1983)). But see *Caso* 370 F.2d at 709 (quoting *Byrd v. Blue Ridge Elec. Coop.*, 356 U.S. 525 (1958) and *Hanna v. Plumer*, 380 U.S. 460 (1965)) (resolving choice of law issues).

¹³⁶ *Gray*, 777 F.2d at 866. See also *Morrill v. Tong*, 390 Mass. 120, 128, 453 N.E.2d 1221, 1227 (1983); *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 4-7, 389 N.E.2d 76, 79-80 (1980).

¹³⁷ *Morrill*, 390 Mass. at 129, 453 N.E.2d at 1227 (quoting *Good Hope*, 378 Mass. at 6, 389 N.E.2d at 79-80). MASS. GEN. LAWS ch. 223A, § 3 (Law. Co-op. 1996). See generally *World Wide Volkswagen*, 444 U.S. 286.

¹³⁸ *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 460-62 (D. Mass. 1997).

¹³⁹ *Id.* at 462.

¹⁴⁰ *Id.* at 462-64.

Massachusetts by maintaining a web-site outside of Massachusetts.¹⁴¹ ATI's actions coupled with the presence of a contract with Digital prompted the court to find that the "contract with the plaintiff was one part of a broader range of activities that, literally, amounted to the transaction of business in Massachusetts," satisfying Section 3(a) of the long-arm statute.¹⁴² By making misrepresentations in Massachusetts via the Internet, the court found Section 3(c) of the statute to be satisfied because the lawsuit "arises from" ATI's allegedly tortious acts.¹⁴³ The court also determined that a web-site that can be accessed by Massachusetts residents is persistent enough course of action to meet the requirements of Section 3(d).¹⁴⁴ In determining that ATI's activities, which gave rise to the underlying claims, occurred in Massachusetts, the court held that ATI's activities satisfied the Due Process analysis of personal jurisdiction.¹⁴⁵

The court found that the second and third prong of the personal jurisdiction test were satisfied.¹⁴⁶ The court found that ATI knew Digital was located in Massachusetts and therefore any act that would have a harmful effect on Digital and the citizens of Massachusetts satisfied the purposful availment prong.¹⁴⁷ Next, the court analyzed the reasonableness of exercising jurisdiction over the out-of-state defendant.¹⁴⁸ The court applied the test to the facts of the present case and found that all factors point to "the Court's assertion of jurisdiction over ATI."¹⁴⁹ This decision seems to

¹⁴¹ See *Digital*, 960 F. Supp. 456, 464-68 (comparing M.G.L. 223A, § 3 (a, c-d) to the facts of the case). The court found facts which satisfy the respective parts of the Massachusetts long-arm statute. *Id.* at 464.

¹⁴² *Id.* at 465-66 (quoting *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 769, 625 N.E.2d 549, 552-53 (1994)) (commenting on MASS. GEN. LAWS. ch. 223A, § 3(a)).

¹⁴³ *Id.* at 466-67 (discussing § 3(c) of the Massachusetts Long-arm statute).

¹⁴⁴ *Id.* at 467 (explaining § 3(d) of the Massachusetts Long-arm statute).

¹⁴⁵ *Id.* at 468 (summarizing the first prong of the personal jurisdiction test).

¹⁴⁶ *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 470-71 (D. Mass. 1997).

¹⁴⁷ *Id.* at 470.

¹⁴⁸ See *id.* at 470-72 (focusing on the reasonableness of exercising personal jurisdiction).

¹⁴⁹ *Id.* at 471. The court used a five factor test to determine reasonableness and fairness in asserting jurisdiction. *Id.* at 470. These factors being: the burden of appearance of the defendant; the interest in the forum state in adjudicating the claim; the convenience of the particular venue; the administration of justice; and relevant policy arguments. *Id.* at 470-71.

agree with most of the jurisdictions that have adjudicated this very same issue.¹⁵⁰

V. CONCLUSION

The United States Supreme Court's handling of the issue of personal jurisdiction of non-resident defendants has changed and evolved throughout the last century. This evolution has been a result of changes in technology and the modernization of legal thought. The four cases detailed in this article represent only the infancy of the doctrine of personal jurisdiction via the Internet. As the Supreme Court has altered its stance on personal jurisdiction throughout the years, one can only assume that the same will be true with respect to cases involving the Internet. This article is in no way exhaustive as the legal tides seem to change daily. It is only an effort to demonstrate how the state and federal courts will try to take Supreme Court precedent and adapt it to new modern areas of law.

Michael MacClary

¹⁵⁰ *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 472 (D. Mass. 1997). *See also* *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616, 622-23 (C.D. Cal. 1996) (finding reasonableness enough to satisfy the Burger King standard); *EDIAS Software Int'l v. BASIS Int'l Ltd.*, 947 F. Supp. 413, 419-20 (D. Ariz. 1996) (holding facts lead to appropriate exercise of jurisdiction by the court).

