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Personal Jurisdiction and the Internet: Can the Traditional Principles and Landmark Cases Guide the Legal System into the 21st Century?

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Introduction

{1} As the Internet advances and develops as a more acceptable means of global communication and commerce, the issue of personal jurisdiction becomes an area of increasing importance. [1] With more commercial activity occurring on the Internet, businesses and individuals alike must be cautious and prepared regarding their potential liability. [2] By merely creating a web site and placing information and/or goods on the Internet, the party responsible for that web site (the web host) is potentially exposed to worldwide liability. [3] Because the traditional personal jurisdiction cases originate in the pre-Internet era, courts must determine the appropriate tests and analyses for personal jurisdiction based solely on Internet contacts.

Personal Jurisdiction Prior to the Internet

{2} The problem of maintaining an individual's right to due process while exercising personal jurisdiction is one that the judicial system has struggled with for years. [4] The presence of the Internet, and the ease and speed of its use to conduct business and enter into legal transactions on a global basis only intensify this problem. [5] To apply the principles of personal jurisdiction to the Internet, a brief overview of personal jurisdiction is warranted.

{3} The Due Process Clause of the 14th Amendment to the United States Constitution [6] allows a court to require a non-resident defendant to stand trial only in the forum state where the court properly exercises personal jurisdiction over the defendant. [7] Assuming the requirements of the forum state's long-arm statute are satisfied, a court may assert personal jurisdiction over a non-resident defendant by exercising either general or specific jurisdiction. [8] A court may exercise general jurisdiction over a non-resident defendant only if the defendant is physically present in the forum state or maintains continuous and systematic contacts with that forum state. [9] Specific jurisdiction, however, may be exercised over a non-resident defendant via the long-arm statute of a forum state if the defendant has "minimum contacts" with the forum state in such a way that maintenance of a suit against the defendant does not offend the "traditional notions of fair play and substantial justice" and that the defendant should have or would reasonably have been able to foresee being haled into court in the forum state. [10] Perhaps the key element to finding specific personal jurisdiction is that the defendant must have minimum contacts with the forum state. [11]

{4} The minimum contacts test itself contains three elements necessary to find personal jurisdiction. [12] First, the defendant must have purposefully availed himself of benefits from association with the forum state. [13] Purposeful availment exists when the defendant purposefully directs its action or actions towards the forum state and shows a substantial connection with the forum state. [14]

{5} Second, the claim must arise from the defendant's activities with the forum state. [15] If the defendant's contacts with the forum state are not related to the altercation, then sufficient minimum contacts do not exist and the action against the defendant in that forum cannot stand. [16]

{6} The third element for finding minimum contacts is that the court's exercise of jurisdiction over the defendant must be reasonable. [17] Factors in determining reasonableness include the burden placed on the defendant, the forum state's interest in the outcome, the plaintiff's interests in obtaining relief, the judicial system's interest in a most efficient resolution, and furthering social policies shared by the states. [18] When the minimum contacts analysis is satisfied, due process is also satisfied and the court may exercise personal jurisdiction over the out-of-state defendant. [19]

{7} The Supreme Court in *Asahi Metal Industry Co., Ltd. v. Superior Court* most recently added a new

factor in personal jurisdiction cases. [20] Justices O'Connor and Brennan wrote opinions for two different pluralities. [21] O'Connor reasoned that merely placing goods in the "stream of commerce" was not enough to establish personal jurisdiction over the party responsible for the placement of the goods. [22] O'Connor felt that there must be some additional act by the defendant to evince recognition and willingness to be haled into any court in any forum where the defendant's goods may go. [23] Brennan, on the other hand, thought that the mere act of placing goods in the stream of commerce should be enough for the producer of those goods to be on notice that it might be haled into court in other jurisdictions. [24] The question now is what test is applicable when an individual's sole means of contact with another forum is via the Internet.

Personal Jurisdiction on the Internet

{8} Although the Internet was designed in 1969, [25] prior to the early 1990's it was not a readily accessible or efficient means of conducting business, performing various transactions, or communicating in general. Once the Internet became widespread and even worldwide, courts were faced with challenges regarding the traditional notions of personal jurisdiction. The problem with the Internet is its makeup. In explaining how the Internet is designed, one court recently set out a "legal layperson's" definition of the Internet:

The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks Small networks . . . are in turn connected to other networks in a manner which permits each computer in any network to communicate with computers on any other network on the system. This global Web of linked networks and computers is referred to as the Internet. [26]

{9} It should be easy to see how, when information is placed on the Internet, its inability to recognize geographic borders presents a problem. [27] With such a new and vastly different arena of problems to which courts must apply the traditional principles of personal jurisdiction, some courts looked to advertising cases for assistance. [28]

{10} In the earliest Internet personal jurisdiction cases, courts were reluctant to find personal jurisdiction based merely on computer-related Internet activity and contacts. [29] The early fear was that a finding of personal jurisdiction, without thoroughly thinking out the nature, extent and use of the Internet, may lead to worldwide personal jurisdiction and the imposition of liability due merely to one's presence on the Internet. Shortly afterward, however, courts realized that due to the extensive business use of the Internet, lawsuits asserting personal jurisdiction over out-of-state parties due solely to Internet activity were to become a very real, and very frequent, part of the court docket.

CompuServe: The First Landmark Internet Personal Jurisdiction Case

{11} *CompuServe v. Patterson* is largely considered to be the first authority to develop an analysis for Internet personal jurisdiction. [30] In *CompuServe*, the Ohio-based plaintiff and the Texas-based defendant communicated solely via the Internet. In addition, they transacted business over the Internet in matters such as the creation of a shareware agreement and the transmission of computer software. When Patterson demanded \$100,000 from CompuServe for trademark infringement, CompuServe filed a declaratory judgment action in Ohio's federal court, declaring that it had not infringed Patterson's trademarks and was not "guilty of unfair or deceptive trade practices." [31] Patterson claimed lack of personal jurisdiction. [32] While the trial court agreed with Patterson, on appeal the Sixth Circuit applied Justice O'Connor's reasoning in *Asahi* to Internet contacts, thereby creating a framework for

integrating cyberspace with personal jurisdiction. [33] The court's holding in *CompuServe* established the factors necessary to satisfy minimum contacts that are limited to the Internet. [34]

{12} First, the court considered whether Patterson purposefully availed himself of the privilege of doing business in Ohio. [35] The court ruled that Patterson satisfied this requirement by (1) being party to a shareware contract which was governed by Ohio law, and (2) exchanging multiple Internet communications with CompuServe's service in Ohio. [36]

{13} As a second factor to determine minimum contacts via the Internet, the court considered whether CompuServe's claim arose from Patterson's activities within the forum state. [37] While Patterson could have marketed his software via alternative methods, the *CompuServe* court found that because Patterson limited his software marketing to going solely through CompuServe's service in Ohio, activities within the forum state - from which the cause of action emerged - were established. [38] Additionally, the court found that Patterson's electronic communication with CompuServe in Ohio, in which Patterson accused CompuServe of trademark infringement, also satisfied the requirement that CompuServe's claim came out of the forum state. [39]

{14} Finally, the court considered whether the facts satisfied the reasonableness test. [40] The court found that even though Patterson may suffer a burden by defending a suit in Ohio, the suit was reasonable because (1) CompuServe's interest was \$10 million in potential damages, (2) the decision would have a substantial impact on other contracts for providers like Patterson, and (3) Patterson had knowledge that he would benefit from the shareware contract and that it connected him to Ohio law. [41]

{15} The court in *CompuServe* ruled that Patterson did have minimum contacts sufficient to qualify for personal jurisdiction in Ohio, CompuServe's forum state. [42] In forming its holding, the court analogized the use of Internet activity to placing an object in the stream of commerce, [43] as discussed in *Asahi*. [44] Because Patterson not only placed his product into the stream of commerce but also entered into a contract with CompuServe, the *CompuServe* court held there were ample contacts to exercise personal jurisdiction. [45]

{16} Since *CompuServe*, many cases have emerged concerning Internet personal jurisdiction. While the courts generally have adhered to the *CompuServe* analysis, incorporating Justice O'Connor's stream of commerce opinion, several tests have developed in order to more accurately and easily determine whether or not personal jurisdiction based on Internet contacts is proper. Many courts have analogized minor activity over the Internet to the mere placement of advertisements in national magazines and have recognized that such activity, without more action on the part of the advertising party, is insufficient to permit personal jurisdiction in the forum state where the advertisement reaches. [46] On the other hand, where the level of interactivity on the Internet increases, so too does the chance of finding personal jurisdiction. [47] Some courts, however, are willing to look for other activity beyond an Internet web site to determine if a party has purposefully availed itself of a forum state's laws and therefore should anticipate being haled into court there. [48] Finally, some courts look to the effects of the actions taken by the defendant to determine whether the forum state "is the focal point both of the story and the harm suffered." [49] These courts tend to examine whether the non-resident defendant intended to cause injury in the forum state and whether that defendant knew that the "effects" of that injury would be felt in the forum state. [50]

Nature of the Web Site Analysis

{17} While case opinions may seem wide-open regarding personal jurisdiction over Internet users, the

general trend, first established in *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, appears to have emerged as the foremost applied analysis. [51] In *Zippo*, the plaintiff, based in Pennsylvania, was well known for its lighters and held a trademark on the name "Zippo." The defendant, however, was from California and operated an interactive Internet news service. The defendant had registered "zippo" among various Internet domain names.

{18} Upon learning of the defendant's Internet home page, the plaintiff sued the defendant in Pennsylvania for trademark dilution, infringement, and false designation. The defendant moved to dismiss for lack of personal jurisdiction, claiming no other contact with the forum state of Pennsylvania other than via the Internet. According to the defendant, only two percent (2%) of its customers were in Pennsylvania. The defendant had, however, contracted with several Internet access providers in Pennsylvania to promote the news service. [52]

{19} The *Zippo* court, based on its review of relevant case law, stated 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." [53] Based on this ratio, the court developed a "sliding scale" of personal jurisdiction based on Internet usage:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g. CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996). At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. E.g. Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996). The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. E.g. Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996). [54]

{20} Using the spectrum that it had just developed, the *Zippo* court then held that in the instant case the defendant was "doing business over the Internet" when it conducted electronic online commerce with Pennsylvania residents. [55] By repeatedly and consciously processing Pennsylvania residents' applications, the defendant purposely availed itself of benefits from association with Pennsylvania, thereby permitting personal jurisdiction in that forum. [56] Further, the court stated that had the defendant not wanted to be amenable to jurisdiction in Pennsylvania, the defendant could have simply chosen not to sell its services to Pennsylvania residents. [57] The court therefore ruled that personal jurisdiction over the defendant existed in Pennsylvania. [58]

{21} Analyzing the spectrum of Internet personal jurisdiction, it appears that *Zippo* has effectively created a more modern test for Internet users while still comporting with Justice O'Connor's opinion in *Asahi*. It appears that *Zippo* and the abundance of cases that follow its reasoning and use its spectrum tend to recognize that, due to the vast and instant nature of the Internet, it would be unfair to force Internet users to expect or reasonably anticipate being haled into any forum state where their web content may reach or be reached. Due to the complex and fact specific nature of the *Zippo* personal jurisdiction spectrum, further analysis is warranted.

"Doing Business Over the Internet" Web Sites

{22} At one end of the spectrum are web sites where the users are actively "doing business over the Internet." The *Zippo* court referred to *CompuServe* as an example of this type of interactivity. [59] In *CompuServe, Inc. v. Patterson*, the Ohio-based plaintiff was an Internet service provider and also facilitated the distribution of shareware through its worldwide network. [60] The Texas-based defendant subscribed to the plaintiff's services and entered into an agreement for the plaintiff to market his shareware. A key ingredient was the agreement between the parties stipulating that Ohio law governed. When the plaintiff later filed suit against the defendant for declaratory judgment in Ohio, the defendant moved to dismiss for lack of personal jurisdiction. [61]

{23} The *CompuServe* court noted that today there is less of a need for constitutional protection from "inconvenient litigation" due to the greater accessibility to all but the most remote forums. [62] Because of the agreement, awareness, and activity between the parties, the court ruled that personal jurisdiction existed in Ohio over the defendant. [63]

Passive Web Sites

{24} *Bensusan Restaurant Corp. v. King*[64] represents the line of cases that involves "passive" Web sites. The plaintiff in *Bensusan* operated a jazz bar in New York City called "The Blue Note" and owned all rights, title, and interest in and to the registered mark for that name. The defendant operated a jazz bar in Missouri by the same name and had a Web page on the Internet advertising for the bar and including contact information in Missouri for tickets. The Web page contained no interactivity with the Internet user, however, and provided no means of purchasing tickets other than by referring the appropriate contact information to interested patrons.

{25} In New York, the plaintiff brought an action against the defendant alleging trademark infringement, dilution, and unfair competition. The defendant moved to dismiss for lack of personal jurisdiction. The threshold issue was whether a Web site with a Missouri telephone number to order "the allegedly infringing product" was an offer to sell the product in New York. [65] In its decision, the *Bensusan* court stated "the mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling, or otherwise making an effort to target its product in New York." [66] The court went on to say that the defendant had done nothing to purposefully avail himself of the benefits of New York. [67] "Creating a site, like placing a product into the stream of commerce, may be felt nationwide . . . but, without more, it is not an act purposefully directed toward the forum state." [68] Distinguishing *CompuServe*, the *Bensusan* court held that personal jurisdiction did not exist. [69]

Interactive Web Sites

{26} The final, and probably the broadest, group of Web sites under the *Zippo* spectrum does not necessarily actively do business over the Internet but maintains some sort of user interactivity with the Web host. *Maritz, Inc. v. Cybergold, Inc.* is indicative of this line of cases. [70] In *Maritz*, the Missouri-based plaintiff sued the California-based defendant for trademark infringement and the defendant moved for dismissal based on lack of personal jurisdiction. The defendant operated a Web site providing information about upcoming services and maintained a mailing list to promote advertisements to its users. Recognizing that the Internet is a new medium and completely different from mail or telephone, the *Maritz* court ruled that analogy to these media is "less than satisfactory in determining whether defendant has 'purposefully availed' itself to this forum." [71]

{27} Of the several parts of the "minimum contacts" test for personal jurisdiction, the nature and quality of the contacts, the quantity of the contacts, and the relation of the cause of action to the contacts were

considered the most important. [72] As to the nature and quality of the contacts, where the defendant claimed it operated only a passive Web site, the *Maritz* court determined that there was a significant level of interaction with the Internet user. [73] The defendant's intent was to reach all Internet users, regardless of location. [74] In addition, the defendant "automatically and indiscriminately" responded to all users accessing the Web site, "consciously" deciding to transmit information to all Internet users. [75] The court therefore held that the defendant's contacts were of such a quality and nature to favor personal jurisdiction. [76]

{28} As to the quantity of the contacts, the court found that the defendant had transmitted information into Missouri a number of times, suggesting the defendant purposefully availed itself of the "privilege of conducting activities in Missouri." [77] Finally, as to the relation of the cause of action to the contacts, the court held that the litigation in progress resulted from the alleged injuries that related to or arose out of the defendant's Web site. [78] Therefore, personal jurisdiction was extended over the defendant.

{29} Bolstering its opinion, *Maritz* went on to note that "while modern technology has made nationwide commercial transactions simpler and more feasible . . . it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts." [79] The court also determined that the traditional notions of "fair play and substantial justice" did not prevent exercising personal jurisdiction over the defendant. [80] Considerations included the burden on the defendant, the forum state's interest, and the plaintiff's interest in convenient and effective relief. [81] According to the court, the defendant proffered nothing to defeat the court's determination. [82] Other cases have recently followed in the same path as *Maritz*, holding that personal jurisdiction exists for various reasons when the defendant maintains a Web site involving different degrees of interactivity. [83]

Other Contacts

{30} While the *Zippo* spectrum and the cases discussed *supra* represent the general trend in establishing personal jurisdiction in Internet cases, other cases have added their own interpretations. *Inset Systems, Inc. v. Instruction Set, Inc.* involved a trademark dispute between a Connecticut-based plaintiff and a Massachusetts-based defendant. [84] The defendant operated a Web site that, if analyzed under *Zippo*, fell in the middle-to-passive range. The court, however, concluded that the continuous and enduring nature of a Web advertisement, in addition to accessibility to anyone in any state and the existence of a toll-free telephone number available to anyone in the United States, constituted a purposeful direction of advertising activities toward Connecticut such that the defendant could reasonably anticipate being haled into court there. [85] The court further noted the relatively minimal distance between the states in finding fair play and substantial justice. [86]

{31} While the court in *Telco Communications v. An Apple A Day* acknowledged the *Zippo* spectrum, it determined that *Inset* established a more convincing precedent. [87] *Telco* involved defamatory press releases placed on the defendant's Web page which, but for *Inset*, would be characterized as a passive site under *Zippo* and would not permit personal jurisdiction. According to the court, some further act in the plaintiff's forum state was required and "[w]ithout use of . . . a Virginia facility . . . there would have been no [injury in Virginia]." [88] In addition, the defendants knew that the plaintiff was based in Virginia when the defendants issued the press releases. As a result, the defendants could reasonably have anticipated being haled into court there. [89]

The Effects Test

{32} Some courts have employed an "effects test" to determine whether or not personal jurisdiction should be exercised over a defendant. [90] *Panavision International, L.P. v. Toeppen* is the most recent

illustration of this analysis. [91] In *Panavision*, the California-based plaintiff held registered trademarks to the names "Panavision" and "Panaflex" in connection with movie equipment. [92] When the plaintiff attempted to register "Panavision.com" to obtain an Internet domain name, it was unable to do so. [93] The plaintiff discovered that the defendant, based in Illinois, had already registered that domain name. [94] The defendant stated, however, that he would sell the domain name rights to the plaintiff for \$13,000. [95] As it turned out, the defendant had performed this very same routine with numerous other companies, registering their trademark names as Internet domain names and then offering to sell the domain name rights back to the companies, a process known as "cybersquatting." [96]

{33} The plaintiff subsequently filed suit against the defendant in the federal court for the District of California, alleging claims under the Federal Trademark Dilution Act of 1995 [97] and under the California Anti-dilution statute. [98] The district court determined that it had personal jurisdiction over the defendant in California. The defendant appealed.

{34} The Ninth Circuit first considered whether the exercise of personal jurisdiction over the defendant was proper in California. [99] While it found that general jurisdiction was not available since the defendant was domiciled in Illinois and his activities in California were not considered to be substantial or continuous and systematic, [100] the *Panavision* court applied a three part test to determine if it could exercise specific personal jurisdiction. [101] The court looked at purposeful availment, noting that this requirement is satisfied if the defendant takes purposeful, direct, or deliberate action toward the forum state. [102] Applying purposeful availment to the Internet, the Ninth Circuit reviewed its earlier decisions in *Cybersell, Inc. v. Cybersell, Inc.* [103] and *CompuServe v. Patterson*. [104] The *Panavision* court noted that in *Cybersell*, its reference to "the effects felt in California" was an application of the "effects doctrine" to determine purposeful availment. [105]

{35} Examining the "effects doctrine" more closely, the Ninth Circuit noted that in tort cases, personal jurisdiction may be attached if the defendant directs his conduct toward the forum state or the conduct has an effect in the forum state. [106] The court went on to say that the instant case was analogous to a tort case. [107] The defendant purposefully registered the plaintiff's trademarks as domain names with the intent of extorting money from the plaintiff. [108] The plaintiff suffered the brunt of the harm in California and the defendant knew that was likely since plaintiff's principle place of business and working industry was there. [109]

{36} The defendant argued that he did not direct any activity at the plaintiff in the state of California nor did he enter the state. [110] The defendant claimed that if any injury occurred from his registration of the domain names, the injury occurred in cyberspace. [111] While the court agreed that the mere act of registering a domain name or posting a web site is not enough to confer personal jurisdiction in the forum state where such actions are felt, there must be something additional that demonstrates that the defendant intentionally directed such acts toward the forum state. [112] The court felt that the defendant's acts of extortion toward the plaintiff satisfied this requirement. [113]

{37} The Ninth Circuit then went on to determine whether the claim asserted arose out of the defendant's forum related activities and whether the exercise of personal jurisdiction over the defendant was reasonable. [114] The defendant's forum related activities satisfied the "effects test" analysis. [115] The court looked at seven factors before determining that exercise of personal jurisdiction over the defendant was indeed reasonable. [116]

Analysis of the Tests

{38} The *Zippo* spectrum tends to be the most widely followed and utilized method of analysis in

considering Internet personal jurisdiction. The reason for this seems clear: this test appears to be the most natural progression for the theory of personal jurisdiction as developed from the days of *International Shoe* up through Justice O'Connor's opinion in *Asahi*. Due to the expanse and speed of the Internet, Justice Brennan's opinion in *Asahi*, stating that there should usually be nothing more required to establish personal jurisdiction once an object is placed in the stream of commerce, [117] appears to be much too broad and overreaching. It would mean that as soon as anyone put anything on the Internet, anyone located anywhere who feels they may be harmed by this may sue in their own forum state and that state would be able to exercise personal jurisdiction. That clearly is not in the best interests of the legal system or the users of the Internet across the country and the world. Indeed, such a ruling would retard the growth of the Internet, causing people to fear setting up even passive web sites. As a result, O'Connor's "something more" helps establish the proper goal of exercising personal jurisdiction over those who reasonably should be able to anticipate being haled into court into another forum where their product may reach.

{39} The *Zippo* test allows courts to determine more clearly whether or not an Internet user should anticipate being haled into the court of another forum. If the web site is passive, then it is like an advertisement only and the defendant should not be expected to account for any location that may see the site. If, however, the web site actively does business over the Internet, then the web host should be considered to be transacting business wherever that site may be reached and therefore should reasonably expect to be haled into other forum states' courts. In the middle ground, the courts will look to the extent of the interactivity. If the web site does not really allow the web host to do anything with the user, then personal jurisdiction probably is not appropriate in other forum states. If the site allows a good degree of interactivity with the user, shy of actively doing business, then personal jurisdiction probably is appropriate.

{40} In addition, some courts will combine the *Zippo* test with a sort of "totality of contacts" analysis wherein the interactivity of the defendant's web presence will be a factor as well as the defendant's other actions in, with, and/or around the forum state. [118] The courts may consider such additional factors as the existence of wire communications with or within the forum state, external newsgroup or published advertisements, or customers located within the forum state. This means of analysis still satisfies the "something more" requirement rather than merely placing an item out in the stream of commerce.

{41} The "effects test" does not appear very different in principle or ideal from the spectrum analysis that is used by *Zippo*. The key factor is whether the defendant's actions were aimed directly at or have a direct effect in the forum state. This tends to follow Justice O'Connor's opinion that personal jurisdiction should not be extended without something more than merely placing an item in the stream of commerce. In *Panavision*, the item placed in the stream of commerce was the defendant's Internet web pages containing the domain names that were trademarks of the plaintiff. The "something more" was the fact that the defendant's sole purpose for creating these web pages was to extort money from the plaintiff in return for the rights to the domain names. In addition, the defendant's intent to extort from the plaintiff injured the plaintiff in its forum state. This test should probably be seen as a parallel to the *Zippo* analysis rather than an alternative. Some courts have based their decisions on the level of interactivity of the defendant's web site in addition to whether or not their actions had a specific effect directed at and felt in another forum state. [119] Other courts have used the "effects test" as well as looking at the totality of the defendant's contacts. [120]

{42} Whatever the courts use, it appears that the underlying concepts and goals are the same. Mere passive activity does not suffice unless something additional is found or done that would allow the defendant to reasonably expect to be haled into court in another jurisdiction.

Conclusion

{43} While personal jurisdiction evolved up through the 1980's, there really were no major advancements or changes in the way business was conducted or the way people communicated that would cause concern about jurisdiction being arbitrarily sought in alternative forum states. However, with the advent of the Internet, the legal system encountered a whole new world. All of a sudden, it appeared that minor actions within the Internet could possibly expose Internet users to liability in any jurisdiction. The courts were now faced with a new scenario within which to apply an established analysis.

{44} Because of the expanse and speed of the Internet, most courts felt that Justice O'Connor's opinion in *Asahi* - that something else should be expected in addition to the placement of an item in the stream of commerce - was the most appropriate and applicable analysis to extend to Internet personal jurisdiction cases. The court in *CompuServe* stated as much. Shortly thereafter, *Zippo* established a spectrum of Internet interactivity which would aid courts in determining whether defendants had satisfied the necessary additional requirement making personal jurisdiction appropriate. The more passive a web site is, the less likely that personal jurisdiction may be established. The more interactive a web site is, the more likely establishing personal jurisdiction is proper.

{45} While some courts have applied variations to these analyses, the general and commonly accepted trend is to apply a *Zippo* analysis. Some cases have looked at a defendant's other actions to determine whether or not personal jurisdiction is proper. Factors to consider are additional contacts, location, effects on the plaintiff and the plaintiff's location, and the knowledge and intent of the defendant.

{46} The *Zippo* test, "effects" test, and the "totality of contacts" analysis appear to be the best ways currently to determine whether or not an Internet user should expect to be haled into court in another jurisdiction due to his presence on the Internet. By examining the totality of the circumstances and not merely where the Internet content is reached, strict liability is avoided. Determining personal jurisdiction using the totality of the circumstances also appears to adequately place responsibility where it should be regarding Internet businesses and active users.

ENDNOTES

[1] See Alan Brill, *A Lawyer's Place In Cyberspace*, Am. Law., Dec., 1995, at 10 (discussing that due to the multitude of computers linked to the Internet worldwide, users can easily cross jurisdictional boundaries on the Internet).

[2] See Eric D. Suben, *Intellectual Property On-Line*, 43 APR Fed. Law. 22, 22 (1996) (analyzing changes in communication through computers and the liability that may arise from the content displayed on the Internet). See also Sally M. Abel, *Trademark Issues in Cyberspace: The Brave New Frontier*, 528 Prac. L. Inst. 323, 383 (1998) (discussing the uncertainty of trademark use thanks to the "instantaneous nature of the web").

[3] See Jeff Weingart, *Jumping Jurisdictional Hurdles*, Conn. L. Trib., Oct. 7, 1996, at 13 (noting that, due to the Internet, businesses in the 1990's have greatly expanded worldwide presence; as a result of more global competition, conflicts will naturally arise from Internet-based transactions and activities).

[4] See Michael W. Kier, *Todd Shipyards Corp. v. Cunard Line, Ltd.: Procedural Due Process and an Arbitrator's Punitive Damage Award*, 42 Case W. Res. L. Rev. 1085, 1094 (1992) (discussing the relationship between due process and societal values and how that relationship is constantly evolving). See also Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 101 (1988) (writing that the purpose of due process is to guard against "prosecutorial overreaching" and

ensure conformity with a "fundamental sense of justice").

[5] See Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 Alb. L.J. Sci. & Tech. 339, 347-48 (1996) (discussing injuries via cyberspace and the issue of whether the injured person may recover from the Internet web host in a manner that comports with due process limitations; i.e., what court may assert personal jurisdiction over a non-resident defendant).

[6] U.S. Const. amend. XIV.

[7] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

[8] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984).

[9] *Id.*

[10] *World-Wide Volkswagen*, 444 U.S. at 291-92.

[11] See *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (establishing the standard for minimum contacts to meet the requirement of personal jurisdiction for due process).

[12] See *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1116 (6th Cir. 1994).

[13] *Id.*

[14] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). The Burger King court determined that when purposeful availment is satisfied, the defendant is assured of not being brought into court "as a result of random, fortuitous, or attenuated contacts." *Id.* Examples of purposeful availment by the defendant include substantial connection(s) with the forum state, deliberate involvement with significant activities, or continuing obligations with residents of the forum state. *Id.* In such instances, the defendant "should reasonably anticipate being haled into court there." *Id.* at 475-76. The court, however, determined that it would not find substantial activities for purposeful availment if the activity is unilateral. *Id.* at 474. Further, with the development and changes in technology and commerce through mailings and wire communications across state lines, the *Burger King* court felt that presence of the defendant's activities within the forum state is not necessary for purposeful availment. *Id.* at 476.

[15] *Reynolds*, 23 F.3d at 1116.

[16] *Id.*

[17] *Id.* See *World Wide Volkswagen*, 444 U.S. at 293 (stating that due process has been relaxed due to changes in commerce and technology, causing an increase in commerce nationalization via the increase of interstate business; this has made it far less burdensome for a nonresident individual or business to be sued across state lines). See also *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996) (determining that when purposeful availment and activities of the defendant arising from the claim are satisfied in a prima facie case of minimum contacts, there is an inference that the reasonableness factor is satisfied).

[18] *Reynolds*, 23 F.3d at 1117.

[19] See *World-Wide Volkswagen*, 444 U.S. at 291-92 (discussing that minimum contacts protects defendants from litigating in a distant and inconvenient forum).

[20] See *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987) (considering whether placing goods in the "stream of commerce" - with knowledge that they may end up and cause harm in another forum state - constitutes purposeful availment or whether something further is required).

[21] *Id.*

[22] *Id.* at 112.

[23] *Id.* "[P]lacement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State . . . [A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.*

[24] *Id.* at 116. Absent certain international and political aspects of the case, Brennan would hold that placement of an item in the stream of commerce, with knowledge that the item would ultimately be marketed in the forum State, ordinarily would be sufficient to establish purposeful availment. *Id.*

[25] John C. Yates and Michael R. Greenlee, *Intellectual Property on the Internet: Balance of Interests Between the Cybernauts and the Bureaucrats*, 8 No. 7 J. Proprietary Rts. 8 (1996).

[26] *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 830-31 (E.D. Pa. 1996).

[27] See Yates and Greenlee, *supra* Note 29, at 14 (discussing the risks of trademark infringement due to the national scope of trademark laws in contrast to the international reach of the Internet and recognizing that "defending exclusive geographic zones on the Internet is impossible").

[28] See Martin B. Schwimmer, *Domain Names and Everything Else: Trademark Issues In Cyberspace*, 528 Prac. L. Inst. 263, 288 (1998).

[29] See *Pres-Kap Inc. v. System One Direct Access Inc.*, 636 So. 2d 1351, 1353 (Fla. 3d DCA 1994).

[30] *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

[31] *Id.* at 1261.

[32] *Id.* at 1260.

[33] *Id.* at 1262. This case presented a question of first impression for the Sixth Circuit: whether contacts "almost entirely electronic in nature, are sufficient, under the Due Process Clause," to support personal jurisdiction. *Id.*

[34] See *Id.* at 1263-69 (discussing the minimum contacts in *CompuServe*). Because of the uniqueness of the case, the court also stated it did not hold that the defendant "would be subject to suit in any state where his software was purchased or used" and that CompuServe could not "sue any regular subscriber to its service [outside of Ohio] for nonpayment in Ohio [CompuServe's forum state]." *Id.* at 1268.

[35] *Id.* at 1263.

[36] *Id.* at 1264. The shareware agreement contained a provision that it was "governed by and construed in light of Ohio law." *Id.* at 1266. Exchanging multiple Internet communications included (1) Patterson electronically transmitting his software several times from Texas to CompuServe's system in Ohio, (2) Patterson advertising his software through CompuServe's system in Ohio, and (3) Patterson selling as a third party provider to Internet users who downloaded Patterson's software from the CompuServe system in Ohio. *Id.* at 1264.

[37] *Id.* at 1267.

[38] *Id.* As a result of marketing exclusively in Ohio, however, claims arising outside of Ohio will arguably be limited. *Id.*

[39] *Id.* This was because Patterson sought an injunction of CompuServe's software sales via their system in Ohio. *Id.*

[40] *Id.* at 1267-68.

[41] *Id.* at 1268.

[42] *Id.*

[43] *Id.* at 1265. "[M]erely entering into a contract with CompuServe would not, without more, establish that Patterson had minimum contacts with Ohio. By the same token, Patterson's injection of his software product into the stream of commerce, without more, would be at best a dubious ground for jurisdiction." *Id.*

[44] *Asahi*, 480 U.S. at 102.

[45] *CompuServe v. Patterson*, 89 F.3d at 1265.

[46] *See IDS Life Ins. Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258 (N.D. Ill. 1997) (holding that general advertising and use of the Internet are "not the type of purposeful activity related to the forum that would make the exercise of jurisdiction fair, just or reasonable"); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), (stating that "creating a site, like placing a product into the stream of commerce, may be felt nationwide - or even worldwide - but, without more, it is not an act purposefully directed toward the forum state"); *Cybersell Inc. v. Cybersell Inc.*, 130 F.3d 414 (9th Cir. 1997) (holding that the defendant had not purposely availed itself to the plaintiff's forum state by using a registered name "on an essentially passive web page advertisement" and recognizing that "[o]therwise, 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").

[47] *See Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Penn. 1997). *See also* Note 87, *infra*.

[48] *See EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996) (holding that personal jurisdiction was proper where the defendant not only posted certain information over the Internet, but also, among other things, entered into a contract with a company from the forum state, contacted individuals located in the forum state, sold products for distribution in the forum state, and sent employees to visit the forum state); *Inset Systems Inc. v. Instruction Set Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (holding that personal jurisdiction was proper where defendant advertised on the Internet

and provided a toll-free number across the country, as well as the fact that as many as 10,000 Internet users could access defendant's web site and, finally, that the burden was minimal on the defendant when the forum state was not far away).

[49] *Calder v. Jones*, 465 U.S. 783, 788 (1984).

[50] *See California Software, Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356 (C.D. Cal. 1986) (holding that personal jurisdiction was proper because the defendants had intentionally directed communications over their online service to third parties outside of California with the intent to cause harm in California); *EDIAS Software Int'l*, 947 F. Supp. 413 (*See Note 54 supra*) (holding that defendant "directed the e-mail, Web page, and forum message at Arizona because Arizona is [plaintiff's] principal place of business"); *Cybersell*, 130 F.3d 414, at Note 52, *supra*; *Panavision Int'l L.P. v. Toebben, et al.*, 141 F.3d 1316 (9th Cir. 1998) (holding that because defendant's conduct "had the effect of injuring [plaintiff] in California where [plaintiff] has its principal place of business and where the movie and television industry is centered" the "effects test" was satisfied).

[51] *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Penn. 1997).

[52] *Id.*

[53] *Id.* at 1124.

[54] *Id.* (citations in original).

[55] *Id.* at 1125-1126.

[56] *Id.* at 1126.

[57] *Id.* at 1126-1127.

[58] *Id.*

[59] *See supra*, discussion of *CompuServe* as the first landmark personal jurisdiction case.

[60] *CompuServe, Inc. v. Patterson*, 89 F.3d at 1257 (6th Cir. 1996).

[61] *Id.*

[62] *Id.* at 1262.

[63] *Id.* *See also Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738 (W.D. Tex. 1998) (involving a breach of contract action against an Internet casino web page and establishing personal jurisdiction where defendant has conducted business by entering into contracts with citizens of other states to play casino games over the Internet).

[64] *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

[65] *Id.* at 299.

[66] *Id.*

[67] *Id.* at 301.

[68] *Id.*

[69] See also *SF Hotel Co. v. Energy Invs.*, 985 F. Supp. 1032 (D. Kan. 1997) (holding that defendant hotel company maintained only a passive Web site providing general information about the hotel with no provision for interaction or communication between the Internet user and the defendant); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (holding that the defendant had not purposely availed itself to the plaintiff's forum state by using a registered name "on an essentially passive web page advertisement" and recognizing that "[o]therwise, 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"); *Mallinckrodt Medical, Inc. v. Sonus Pharmaceuticals, Inc.*, No. 97-1732, 1998 WL 6546 (D.D.C. Jan 5, 1998) (holding that the act of merely posting a message on an electronic bulletin board, which users may or may not choose to access, is not sufficient to confer personal jurisdiction over a non-resident defendant); *Blackburn v. Walker Oriental Rug Galleries*, No. CIV.A. 97-5704, 1998 WL 166861 (E.D. Pa. April 7, 1998) (holding that a Web site containing nothing more than specific information about defendant's rugs and an e-mail link is passive where there is no option to buy rugs and no arguments have been proposed to suggest the Web site is anything more than passive).

[70] *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

[71] *Id.* at 1332.

[72] *Id.*

[73] *Id.* at 1333.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 1334 (quoting *California Software, Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356 (C.D. Cal 1986)).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] See *Copperfield v. Cogedipresse*, 26 Media L. Rep. (BNA) 1185 (C.D. Cal. 1997) (holding that although the site in question was definitely interactive, the interactivity was limited and the commercial aspect of the site was almost entirely advertising and therefore was not enough to confer personal

jurisdiction); *Mieczkowski v. Masco Corp.*, 997 F. Supp. 782 (E.D. Tex. 1998) (concluding that the Web site at issue was in the middle ground of cases, clearly serving at first as an advertisement and then also in an interactive and informative shopping forum that goes beyond mere advertising); *Blumenthal v. Drudge*, No. 97-1968, 1998 U.S. Dist. LEXIS 5606 (D.D.C. April 22, 1998) (holding that the "constant exchange of information and direct communication that District of Columbia Internet users are able to have with Drudge's host computer via his web site is the epitome of web site interactivity"); *Vitullo v. Velocity Powerboats, Inc.*, No. 97 C 8745, 1998 WL 246152 (N.D. Ill. April 27, 1998) (holding that where the Web page cannot conduct sales but does allow Internet users to contact the defendant via e-mail and also promotes product events in various states, the defendant's Web page is in the middle category of the Zippo spectrum requiring the court to consider whether the Web page was specifically intended to reach customers of that state).

[84] *Inset Systems, Inc. v. Information Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).

[85] *Id.* at 165.

[86] *Id.*

[87] *Telco Communications v. An Apple A Day*, 977 F. Supp. 404 (E.D. Va. 1997).

[88] *Id.* at 407 (quoting *Krantz v. Air Line Pilots Assoc., Int'l*, 245 Va. 202 (1993)).

[89] *Id.* at 408. See also *American Network v. Access Am./Connect Atlanta*, 975 F. Supp. 494 (S.D.N.Y. 1997) (holding that among the factors, the defendant was aware of the plaintiff's mark and location and therefore could reasonably anticipate being sued in plaintiff's state); *EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996) (holding that personal jurisdiction was proper where the defendant not only posted certain information over the Internet, but also had, among other things, entered into a contract with a company from the forum state, had contacted individuals located in the forum state, had sold products for distribution in the forum state, and had sent employees to visit the forum state).

[90] See Note 56, *supra*.

[91] *Panavision Int'l, L.P. v. Toeppen, et al.*, 141 F.3d 1316 (9th Cir. 1998).

[92] *Id.* at 1319.

[93] *Id.*

[94] *Id.* The web site already in existence merely displayed pictures of Pana, Illinois. *Id.*

[95] *Id.*

[96] *Id.*

[97] 15 U.S.C. § 1125(c)

[98] California Business and Professions Code § 14330

[99] *Panavision*, 141 F.3d at 1320.

[100] *Id.*

[101] *Id.* "(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.* (quoting *Omeluk v. Langsten Slib and Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995)).

[102] *Id.* (citing *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995)).

[103] *See* Note 52, *supra*.

[104] *See* discussion *supra*, "*Doing Business Over the Internet.*"

[105] *Panavision*, 141 F.3d at 1321.

[106] *Id.* (citing *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995)). *See Calder v. Jones*, 465 U.S. 783 (1984) (establishing the "effects test" for acts intentionally aimed at a forum state).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 1322.

[111] *Id.*

[112] *Id.* (citing *Cybersell*, 130 F.3d at 418).

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.* at 1323. The seven factors to determine the question of reasonableness were (1) the extent of the defendant's purposeful interjection, (2) the defendant's burden in defending the action against him, (3) the extent of the conflict with the defendant's state's interests, (4) the forum state's interest, (5) the most efficient judicial resolution, (6) the importance of the forum to the plaintiff's interests, and (7) the existence of an alternative forum. *Id.* (citing *Burger King*, 471 U.S. at 476-77).

[117] *See* Note 28, *supra*.

[118] *See* Note 93, *supra*

[119] *See Copperfield*, 26 Media L. Rep. (BNA) 1185; *Blumenthal*, No. 97-1968, 1998 U.S. Dist. LEXIS 5606; *Cybersell*, 130 F.3d 414.

[120] See *EDIAS*, 947 F. Supp. 413.

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