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A Minimum Contracts And Fairness Examination Of Personal Jurisdiction Over Providers Of Free Downloads On The Internet

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A MINIMUM CONTACTS AND FAIRNESS EXAMINATION OF PERSONAL JURISDICTION OVER PROVIDERS OF FREE DOWNLOADS ON THE INTERNET

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I. INTRODUCTION

It is 12:03 a.m. on a Monday morning. A tired and hungry Joshua Kinney[1] is putting final touches on his brief to a District Court, which is due by 9:30 a.m. As he double checks whether his memorandum comports with the standards set out by the court,[2] he realizes that the brief has to be written in the "courier new" font. To his disappointment, his word processor does not support the "courier new" font. After a quick search on the Internet, Joshua finds a web site, which offers a free upgrade download that will enable his word processor to support the requisite font. After a sigh of relief, Joshua downloads the upgrade program. However, when trying to change the font of his brief, the new program malfunctions and, not only deletes his brief, but crashes[3] his $3,000.00 laptop. Should Joshua, a Chicago, Illinois resident, be able to bring a suit in his home state against the Pennsylvania maker of the program and the New Jersey web site owner?

There is a concern regarding the establishment of global jurisdiction for activities conducted on the Internet.[4] Various courts have tried to set guidelines for dealing with personal jurisdiction[5] over activities

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[1] Joshua Kinney is a fictional character and his story is a fictional event.

[2] *See generally* http://courts.state.ny.us/ctapps/500rules.htm#500.1 (last visited April 14, 2003).

[3] It should be noted that when this Note uses the term "crash," or variants thereof, it means that the computer has been damaged to the point where there is no other choice but to reinstall the operating system, such as Windows. The installation disks or CDs are usually provided at the time of purchase of the computer.

[4] Am. Bar Ass'n Global Cyberspace Jurisdiction Project, *London Meeting Draft: Achieving Legal and Business Order in Cyberspace: Jurisdiction Issues Created by the Internet,* at 59 n.1 (July 10, 2000), *available at* http://www.kentlaw.edu/cyberlaw/docs/drafts/draft.rtf (text copy on file with author) ("Mere maintenance of a web site cannot subject a defendant to global jurisdiction if the new technology is to be capable of meaningful use. If each web site subjected its sponsor to global jurisdiction, many would forego use of the technology for fear of its secondary costs.").

[5] It should be noted that this Note uses the term "personal jurisdiction" to refer to specific personal jurisdiction and not general personal jurisdiction. Specific

conducted through cyberspace.[6] In 1997, a Pennsylvania District Court set up a "sliding scale" test,[7] which weighed interactivity and the commercial nature of a web site to determine whether the site was subject to personal jurisdiction. In addition, some courts have adopted the "effects test," laid out by the Supreme Court in a 1983 libel case, which looked to where the effects of one's action were felt, in order to determine whether personal jurisdiction over him was proper.[8] However, although the tests might have provided a proper solution for Internet jurisdictional issues at the time they were put into effect, those tests are no longer appropriate, due to the rapid changes in the interactivity of the Internet. They are not proper for dealing with tortious activities that could be conducted through the newly available technologies on the Internet. Accordingly, such activities, namely providing free downloads, should be reexamined under the traditional notions of personal jurisdiction.

This Note shows that the existing mechanical and limited tests for personal jurisdiction over Internet activities, which worked for a limited time, do not take into account new technological advances in cyberspace, namely the ability to download free software. Accordingly, personal jurisdiction over such activities must be evaluated in light of traditional notions of minimum contacts and "fair play and substantial justice."[9] Part II provides an examination of the historical developments of specific personal jurisdiction in the contexts of territorial and cyberspace medium. Part III explains how the download technology works. It then sets out three hypothetical situations in which a party is injured by downloading free software and explains why the existing tests for personal jurisdiction in cyberspace are too mechanical or too limited to provide adequate

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jurisdiction gives courts authority to adjudicate against a particular defendant based on his contacts with the forum state. "Specific jurisdiction arises when the specific acts of the defendant related to the plaintiff's claim evidence purposeful activity toward the forum state." *Kluin v. American Suzuki Motor, Corp.,* 56 P.3d 829, 835 (Kan. 2002). General jurisdiction, on the other hand, exists when the defendant's contacts with the forum state are so "continuous and systematic" that the state is justified in exercising personal jurisdiction even if the cause of action is unrelated to defendant's contacts with the forum. *Id.*

[6] "Cyberspace" is a metaphor for non-physical space created by computer systems. Webopedia, Cyberspace, *at* http://www.webopedia.com/TERM/c/cyberspace.html (last visited April 14, 2003).

[7] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D. Pa. 1997). *See infra* notes 52-54.

[8] Calder v. Jones, 465 U.S. 783 (1983); *See infra* note 66.

[9] *See generally* Int'l Shoe v. Washington, 326 U.S. 310 (1945); *But cf.* Michelle R. Jackson-Carter, *International Shoe and Cyberspace: The Shoe Doesn't Fit When It Comes to the Intricacies and Nuances of Cyberworld,* 20 WHITTIER L. REV. 217 (1998) (examines four possible solutions to the problem of obtaining jurisdiction in the cyberspace forum and calls for "congressional initiation of Internet legislation.").

solutions for negligent activities conducted on the Internet. Part IV calls for a reexamination of the three hypotheticals in light of the traditional minimum contacts and fairness test to avoid the mechanical and limited application of the existing tests to new problems. Finally, Part V concludes that personal jurisdiction over negligent parties providing free downloads on the Internet must be considered in light of minimum contacts and fairness to avoid pigeonholing newly emerging technologies into the existing "sliding scale" and "effects" tests.

II. HISTORICAL DEVELOPMENT OF PERSONAL JURISDICTION IN THE CONTEXTS OF TERRITORY AND CYBERSPACE

A. Specific Personal Jurisdiction Over Territorial Boundaries

Personal jurisdiction[10] has its origins in the territorial power of the court. Traditionally, under international law, courts respected the sovereignty of each country and only exercised personal jurisdiction over defendants who were physically present within the forum.[11] In *Pennoyer v. Neff*,[12] personal jurisdiction was extended to cases where the defendant was a resident of the forum or where he consented to the jurisdiction of the forum.

However, as society became more mobile, the traditional tests of consent and presence became too mechanical.[13] Therefore, in a 1945 landmark case, *International Shoe Co. v. Washington*,[14] the United States Supreme Court extended the traditional notions of *Pennoyer* to accommodate a mobile society in which commerce was becoming a

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[10] *In personam* jurisdiction is the legal authority of a court "to render and enforce a judgment" over the parties in a particular judicial action. Without such authority, the final judgment of a particular court has no legal significance. David Bender, *Jurisdiction in Cyberspace* 34 (PLI Pat., Copy., Trademarks, & Literary Prop. Course Handbook Series No. G0-00AY, 2000) (*available on* WL at 590 PLI/Pat 27).

[11] *See* JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 69 (West Group, 8th ed. 2001) ("The concepts of jurisdiction found in the *Pennoyer* opinion were derived from nineteenth-century international law."); Phillip B. Kurkland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of the State Courts – From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 585 (1958) (noting that the framework of *Pennoyer* was "borrowed from laws relating to wholly independent sovereignties which were not relevant to jurisdictions joined in a federation.").

[12] Pennoyer v. Neff, 95 U.S. 714 (1877). Other than establishing bases for *in personam* jurisdictions, the United States Supreme Court said that *in rem* personal jurisdiction may be established if the defendant owns property which is located in this forum. *Id.* at 724-25.

[13] *See generally* Kurkland *supra* note 11.

[14] Int'l Shoe, Co. v. Washington, 326 U.S. 310 (1945).

globalized enterprise. In rejecting the mechanical presence and consent doctrines, the Supreme Court held that "[w]hether due process is satisfied must depend ... upon the quality and nature of [defendant's] activity."[15] Under the "quality and nature" analysis, a court is supposed to examine the defendant's activity to see whether it is "continuous and systematic" or whether the cause of action arises out of or is connected to defendant's activities within the forum state.[16] Furthermore, the Court held that "due process requires...that...a defendant...have minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[17] Although the Court did not specify how many contacts are sufficient[18] to satisfy the minimum contacts requirement of due process,[19] the Court did say that the contacts must be such that the defendant enjoys the "benefits and protection of the law"[20] of that forum and, if the state exerts jurisdiction over him, it can "hardly be said to be undue."[21]

Thirteen years later, the Supreme Court of the United States found minimum contacts to exist in instances where the "defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[22] The Court furthermore distinguished purposeful availment from "unilateral activity,"[23] which is an activity by a third party that establishes a connection between the defendant and the forum. Unilateral activity does not give rise to purposeful availment.[24]

In 1961, the Illinois Supreme Court exercised personal jurisdiction over a defendant manufacturer[25] by extending minimum contacts to

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[15] *Id.* at 319; *See* Kurkland *supra* note 11 at 589-90.
[16] *Int'l Shoe*, 326 U.S. at 317-19.
[17] *Id.* at 316.
[18] *See* McGee v. Int'l Life Ins., Co., 355 U.S. 220, 223 (1957) (a single contact, if grave enough, may satisfy the minimum contacts required to assert personal jurisdiction that satisfies the Due Process Clause).
[19] *See* U.S. CONST. amend XIV, § 1.
[20] *Int'l Shoe*, 326 U.S. at 320.
[21] *McGee*, 355 U.S. at 319.
[22] Hanson v. Denckla, 357 U.S. 235, 253 (1958) (holding that the trust company defendant did not purposely avail itself of privileges of conducting activities within the forum, because the decedent unilaterally moved to the forum state).
[23] *Id.* at 253.
[24] *Id.* at 251-53 (court examines the difference between *McGee* and *Hanson*).
[25] Gray v. American Radiator, 176 N.E.2d 761, 766 (Ill. 1961). In this case the Illinois Supreme Court applied minimum contacts to establish personal jurisdiction over a defendant whose acts (of manufacture) occurred without the state, but the injury resulting from a faulty product occurred within the state. The issue in the case was whether a state may assert personal jurisdiction over a nonresident corporation whose only contact with the forum occurred when its

include the "stream of commerce" doctrine, which allows jurisdiction over a defendant's business whose defective product had flowed into the forum through the channels of interstate commerce.[26] The Court held that such assertion of personal jurisdiction comported with the traditional notions of "fair play and substantial justice" standard set forth in Burger *King v. Rudzewicz*.[27] New forms of transportation and communication removed defendant's inconvenience to adjudicate in a foreign state.[28]

In *World-Wide Volkswagen Corp. v. Woodson*,[29] the United States Supreme Court set a limit on the "stream of commerce" doctrine. The Court held that the mere fact that a product made its way into the forum

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manufactured product shipped into the state by a third party allegedly caused an injury to one of the forum residents. In addressing this issue, the court held that "doing a given volume of business is [not] the only way in which a nonresident can form the required connection with [the forum] State." *Id.* at 764.

[26] *Id.* at 766. (this case arose out of a personal injury caused to the plaintiff when a radiator exploded in Illinois. The court said that "[w]ith the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other States. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here. As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products.").

[27] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). The Court shed light onto the reasonableness component of personal jurisdiction. Justice Brennan said that even if there is minimum contacts and purposeful availment, it does not mean that there will be personal jurisdiction. Reasonableness factors must be weighed against purposeful availment. *Id.* at 476-77. He listed five factors. *Id.* at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980).

1. Convenience to plaintiff
2. Burden on the defendant
3. Interest of the forum in adjudicating the dispute
4. Interest of the state in implementing relevant social policies
5. Interest of judicial system in implementing control policies to resolve controversy

Under these factors, if the court finds "substantial inconvenience" and no way to ameliorate this inconvenience, then it will not have personal jurisdiction over the defendant, regardless of whether there was purposeful availment. *Id.* at 477.

[28] *Gray*, 176 N.E.2d at 766; *Cf. Green v. Advance Ross Electronics Corp.*, 427 N.E.2d 1203 (Ill. 1981) (although, like in *Gray*, the acts occurred without the state causing injury within the state, the court held that the "consequences ... are too remote from the misconduct," and, therefore, there is no personal jurisdiction in this case).

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

state does not necessarily mean that there are minimum contacts between the defendant and the forum state.[30] For there to be minimum contacts there must be forseeability.[31] This doctrine was further expanded by the plurality in *Asahi Metal Industry v. Superior Court of California*, which established the "stream of commerce plus" test. [32] The plurality held that the mere fact that the defendant manufacturer placed its product into the stream of commerce and was aware that it might reach the forum state is not enough to satisfy the minimum contacts needed for the exercise of personal jurisdiction.[33] According to Justice Sandra Day O'Connor, purposeful action directed toward a forum state is what is needed to satisfy the "plus" factor of the "stream of commerce plus" test.[34]

B. Existing Tests for Specific Personal Jurisdiction over the Boundaries of Cyberspace

1. Minimum Contacts in the New Territory of Cyberspace

Since the traditional territorial approach to personal jurisdiction is harder to apply to the cyberspace paradigm, the courts, beginning in 1996, reexamined minimum contacts in a new context. At first, courts were reluctant to find jurisdiction without a non-Internet contact. For example, in *Hasbro v. Clue Computing*,[35] Hasbro, the producer of the board game CLUE, brought a trademark infringement claim against Clue Computing for registering the domain name "clue.com." In asserting personal jurisdiction over the defendant, a Massachusetts court found that the defendant's web site was interactive because it allowed users to send e-mail to the company as a separate contact.[36] The court also considered services that the defendant performed for a Massachusetts

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[30] *Id.* at 295.

[31] Foreseeability is "not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *Id.* at 297.

[32] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1986).

[33] *Id.* at 113-114. (Mere foreseeability is not enough.).

[34] *Id.* at 112. ("The 'substantial connection' between the defendant and the forum state necessary for finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.* The placement of the product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State... But 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.") (emphasis added).

[35] Hasbro, Inc. v. Clue Computing, Inc., 994 F.Supp 34 (1997) (court found personal jurisdiction based on defendant's interactive web site and non-Internet related activities).

[36] *Id.* at 45.

company.[37] Looking at the totality of the contacts, the court held that it was proper to assert personal jurisdiction over the defendant.[38] The Massachusetts court said that a "web site is simply another piece of evidence demonstrating the defendants' purposeful availment of other states."[39]

On the other hand, some courts began to move away from looking at the availability of a web site as mere evidence of purposeful availment.[40] In *Inset Systems v. Instruction Set*, the plaintiff, a computer software corporation, brought a trademark infringement action against the defendant for the alleged use of its trademark in registering the domain name "inset.com."[41] The United States District Court for the District of Connecticut held that the minimum contacts necessary for due process were satisfied because the defendant had advertised over the Internet and had a toll free number to solicit business.[42] Since the advertisement was continuously available on the Internet, the defendant "purposefully availed itself of the privilege of doing business within Connecticut."[43] In the same year, the United States Court of Appeals for the Sixth Circuit[44] decided an Internet stream of commerce case. In *CompuServe, Inc. v.*

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[37] *Id.*

[38] *Id.* at 46.

[39] *Id.* at 40. *See also* Digital Equip. Corp. v. Altavista Tech., 960 F. Supp. 456 (D. Mass. 1997) (the court focused on non-web contacts to find personal jurisdiction over the defendant. It found that defendant had a licensing agreement with the plaintiff, a Massachusetts corporation, and had made sales to at least three Massachusetts residents); EDIAS Software Int'l v. BASIS Int'l Ltd., 947 F.Supp. 413 (D. Ariz. 1996) (the court found jurisdiction over a defendant who, other than creating a defamatory web page, regularly e-mailed, faxed and telephoned the plaintiff); and Resuscitation Tech. v. Cont'l Health Care Corp., 65 USLW 294, 1997 WL 148567 (S.D. Ind 1997) (the court found jurisdiction over defendant who telephoned, e-mailed and sent regular mail and faxes to the plaintiff, even though the contacts between the parties originated over the Internet).

[40] *See generally* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).

[41] Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996). In this case, a Connecticut corporation sued a Massachusetts corporation for trademark infringement. The court denied defendant's motion to dismiss for lack of personal jurisdiction, because it found that the defendant has availed himself to the forum state.

[42] *Id.* at 165.

[43] *Id.* at 165.

[44] CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996). In this case a computer information service company in Ohio brought an action in the Ohio District Court seeking declaratory judgment that it is not infringing on Patterson's common law trademarks. *Id.* at 1261. In reversing the district court's grant of defendant's motion to dismiss for lack of personal jurisdiction, the United States Court of Appeals held that Patterson purposefully contracted to sell his product in other states and to use plaintiff as his distributor. *Id.* at 1263.

Patterson the plaintiff and the defendant, Patterson, had an agreement whereby Patterson was to provide software to CompuServe, Inc., and it was to put the software on its web page where users could download the software for a price.[45] Plaintiff came out with its own software designed to help people navigate the Internet.[46] The defendant alleged that this software infringed his common law trademarks.[47] CompuServe, Inc. filed for a declaratory judgment, asking the court to declare that its software did not infringe on any of Patterson's common law trademarks.[48] The court held that it had personal jurisdiction over the defendant who "knowingly made an effort-- and in fact, purposefully contracted to market a product in other states, with Ohio-based CompuServe operating, in effect, as his distributor."[49]

2. The Rigid and Mechanical "Sliding Scale" Test

There was a growing need for a concrete and predictable test in the area of personal jurisdiction for activities conducted on the Internet. In *Zippo Mfg. v. Zippo Dot Com*, the District Court for the Western District of Pennsylvania realized that, although personal jurisdiction law at that time was "based on Internet use ... in its infant stages ... 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."[50] Based on this realization, the District Court developed a "sliding scale" test, which provided a differentiation between passive and interactive web sites.[51] The test set out three grounds for establishing personal jurisdiction over a defendant:

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[45] *Id.* at 1260-61.
[46] *Id.* at 1261.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 1263. The court found that Patterson subscribed to and then entered into a "Shareware Registration Agreement" before he loaded his software onto plaintiff's system. After he had done those two things he was on notice that he made contracts, which had a choice of law provision. Moreover, Patterson electronically sent his computer software to CompuServe in Ohio, and advertised his software on that system. *Id.* at 1264.
[50] Zippo Mfg. v. Zippo Dot Com, 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997) (emphasis added).
[51] *Id.* at 1124. This was a trademark dilution and infringement action. The only contacts that the defendant, a California Dot Com company, had with the Pennsylvania resident occurred over the Internet. Approximately two percent out of defendant's subscribers (3,000/140,000) were from Pennsylvania. *Id.* at 1121. The court ultimately denied defendants motion to dismiss because it found that Dot Com contacts with Pennsylvania were sufficient to establish jurisdiction under the siding scale test. *Id.* 1127.

(1) At one end of the scale is the situation where the defendant is doing business over the Internet. The court stated that when a web site is substantially commercial and where there is "knowing and repeated transmission of files," personal jurisdiction is warranted.[52]
(2) At the opposite end of a scale is the passive web site, which does little more than make information available over the Internet. The court stated that in this situation there is no ground for the exercise of personal jurisdiction.[53]

(3) Finally, the middle ground is occupied by web sites that allow exchange of information between the user and the host computer. In these cases the exercise of personal jurisdiction is based on whether the web site is interactive and commercial in nature.[54]

The District Court was able to reconcile the "sliding scale" test with the "minimum contacts" test by applying both to the given facts and reaching the same conclusion.[55]

In most cases courts have equated the interactive aspect of a web site with the commercial aspect. Thus, for a web site to be interactive, courts have held that it must derive or have the potential to derive some kind of commercial revenue from its contents.

The "sliding scale" test was subsequently adopted in *Cybersell v. Cybersell*, a trademark infringement case,[56] where the United States

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[52] *Id.* at 1124. The court stated:

"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." *Id.* at 1124. *See e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).

[53] Zippo Mfg. v. Zippo Dot Com, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). The court opined:

"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." *Id.*

[54] *Id.* at 1124. The court stated:

"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." *Id.*

[55] *Id.* at 1125-27.

[56] Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997). In this case, a Florida corporation web site contained a "Cybersell" logo, a Florida phone

Court of Appeals for the Ninth Circuit held that advertisements on a web site alone were not enough for personal jurisdiction.[57] According to the court, such a web site was passive under the "sliding scale" test.

In *GTE New Media Services v. Ameritech*, GTE filed a claim alleging Sherman Antitrust Act violations.[58] The District of Columbia District Court asserted personal jurisdiction over companies which provided "Yellow Pages" directory service over the Internet. Moreover, the defendant derived substantial revenues from advertising on the directory sites when residents of the forum accessed the sites.[59] The court found that the web site was highly interactive and the quality and nature of the site was such that personal jurisdiction could be asserted.[60]

An example of how courts have dealt with the "middle ground" is

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number and an invitation for the users to introduce themselves and to contact the owners via e-mail. *Id.* at 415-416. Plaintiff, an Arizona corporation filed a trademark infringement case against defendant in Arizona. *Id.* The Arizona court declined to assert personal jurisdiction over the defendant, who "conducted no commercial activity over the Internet in Arizona." *Id.* at 419.

[57] *See generally* Mink v. AAAA Dev., LLC, 190 F.3d 333 (5th Cir. 1999) ("While the website provides users with a printable mail-in order form, AAAA's toll-free telephone number, a mailing address and an electronic mail ('e-mail') address, orders are not taken through AAAA's website. This does not classify the website as anything more than passive advertisement which is not grounds for the exercise of personal jurisdiction."); Smith v. Hobby Lobby Stores, 968 F.Supp. 1356 (W.D. Ark. 1997) (holding that there was no personal jurisdiction over a Hong Kong defendant who advertised over the Internet without any sales of goods or services within the forum state.); Bensusan Rest. Corp. v. King, 937 F. Supp. 295, *aff'd*, 126 F.3d 25 (2d Cir. 1997) (holding that a web site that permits access to information without more is not purposefully directed toward the forum and, therefore, does not warrant the exercise of personal jurisdiction); Hearst Corp. v. Goldberger, 1997 WL 97097 (S.D.N.Y.) (holding that there is no personal jurisdiction over a defendant who has not contracted to sell or actually sold any goods or services in New York); *Contra* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1332-34 (E.D. Mo. 1996) (holding that a web site that could be accessed by any user, and which encouraged the users to add their address to a mailing list does meet the requisite contacts required for the assertion of personal jurisdiction).

[58] GTE New Media Services, Inc. v. Ameritech, 21 F. Supp.2d 27 (D.D.C. 1998).

[59] *Id.* at 38-39.

[60] *Id.* ("[T]he continuous contact the defendants' interactive Website have with the [forum] demonstrate the defendants purposefully established minimum contacts by invoking the benefits and privileges of conducting activities in the forum."); *See generally* Blumenthal v. Drudge, 992 F. Supp. 44, 56 (D.D.C. 1998) (holding that assertion of jurisdiction over a web site that directs activity at forum state is proper).

illustrated by *Bath & Body Works, Inc. v. Wal-Mart Stores, Inc.*[61] In that case the plaintiff filed an action against defendant under the Lanham Act,[62] common law trade dress infringement and common law unfair competition and misappropriation.[63] The defendant maintained a web site which advertised a toll-free order number, provided information for making wholesale purchases, allowed customers to join an e-mail list, and displayed a link for ordering online.[64] The Ohio court held that personal jurisdiction was appropriate because plaintiff's cause of action arose out of defendant's contacts with Ohio.[65]

3. The Limited "Effects Test"

Many courts, however, have adopted the "effects test" laid out in the libel case of *Calder v. Jones*.[66] Under that test, the court asserted personal jurisdiction if (1) defendant committed an intentional tort, which was (2) expressly aimed at the forum state, and (3) caused harm that was felt in the forum state.[67] As the following two cases demonstrate, the applicability of the test has been limited to doctrines of intellectual property and intentional tort claims.[68]

In *Panavision International v. Toeppen*,[69] the United States District Court for the Central District of California asserted personal jurisdiction under the "effects test" in a trademark infringement case.[70] Panavision International was a Delaware company with a primary place of

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[61] Bath & Body Works, Inc. v. Wal-Mart Stores, Inc., 2000 WL 1810478 (S.D. Ohio Sept. 12, 2000).
[62] 15 U.S.C. Section 43(a) (1997).
[63] Bath & Body Works, 2000 WL 1810478, 1.
[64] *Id.* at 8.
[65] *Id.* at 9; *Contra* JB Oxford Holding, Inc. v. Net Trade, Inc., 76 F.Supp.2d 1363 (S.D. Fla. 1999) (holding that personal jurisdiction could not be exercised over a defendant who maintained three interactive web sites accessible to the residents of the forum, a national toll free number and a pending application to do business in the forum).
[66] Calder v. Jones, 465 U.S. 783 (1983). In this libel case the court established the "effects test" and in finding that the "effects test" was satisfied, the United States Supreme Court held that there is personal jurisdiction because defendant could reasonably anticipate being haled into court in the forum state. *Id.* at 790.
[67] *Id.* at 789-90. *See* Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1087 (9th Cir. 2000) (articulates the three part "effects test.").
[68] Jason Green, *Is Zippo's Sliding Scale a Slippery Slope of Uncertainty? A Case for Abolishing Web Site Interactivity as a Conclusive Factor in Assessing Minimum Contacts in Cyberspace*, 34 J. MARSHALL L. REV. 1051, 1062 (Summer 2001) (citing Am. Bar Ass'n, Global Cyberspace Jurisdiction Project 3, 49 (2000)).
[69] Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616 (Cal. Dist. Ct. 1996).
[70] *Id.* at 621.

business in California.[71] The defendant, an Illinois resident, was a "cybersquatter."[72] When Panavision tried to register its own domain name[73] it found[74] that Toeppen had already registered that name.[75] Toeppen refused to stop using the domain name, and Panavision refused to buy the domain name from Toeppen.[76] The court found that Toeppen registered the trademarks as a domain name knowingly and thus "intended to interfere with Panavision's business."[77] Since the defendant intended his actions to cause injurious effects within the forum state, personal jurisdiction was proper.[78]

In *Barrett v. Catacombs Press*,[79] the District Court for the Eastern District of Pennsylvania held that personal jurisdiction was not proper over a defendant who posted defamatory statements on two informational web sites. The court held that the defendant did not intend to direct the defamatory statements into the forum.[80] Even though the forum state

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[71] *Id.* at 618.

[72] *Id.* at 618-619; "Cybersquatting" is the act of registering a well-known domain name with the intent of selling it to its true owner. Cybersquatting, *at* http://www.webopedia.com/TERM/c/cybersquatting.html (last visited April 14, 2003); World Intellectual Property Organization (WIPO) has set out anti-cybersquatting tactics, which have been by the ICANN; *See generally* http://arbiter.wipo.int; http://www.icann.org.

[73] A "domain name" is an "an addressing construct used for identifying and locating computers on the Internet. Domain names provide a system of easy-to-remember Internet addresses, which can be translated by the Domain Name System (DNS) into the numeric addresses (Internet Protocol numbers) used by the network. A domain name is hierarchical and often conveys information about the type of entity using the domain name. A domain name is simply a label that represents a domain, which is a subset of the total domain name space," *at* http://www.domainmart.com/DomainNames/information/Glossary_Terms.htm#d (last visited April 14, 2003) (text copy on file with author).

[74] A way to find out who has registered a particular domain name and the information about that person or entity is to use the Internet "whois" search engines.; *See e.g.* http://www.internic.net/whois.html; http://www.netsol.com/cgi-bin/whois/whois; http://www.whois.us (covers only .us domain names); http://www.afilias.info/cgi-bin/whois.cgi (covers only .info domain names); http://www.whois.biz (covers only .biz domain names); http://netnames.com (allows a user to search for domain names registered in the UK, Europe and North America).

[75] *Panavision Int'l*, 938 F.Supp at 619.

[76] *See Id.*

[77] *Id.* at 621.

[78] *Id.* at 621-622.

[79] Barrett v. Catacombs Press, 44 F.Supp.2d 717 (E.D. Pa. 1999).

[80] *Id.* at 731. Note that prior to examining this case under the "effects test," the court classified the web site as being passive under the definition of the *Zippo* "sliding scale" test and denied jurisdiction. *Id.* at 727; Medinah Mining, Inc. v. Amunategui, 237 F. Supp.2d 1132 (Nev. 2002) (holding that personal jurisdiction

received the defamatory statements, the residents of the forum "are but a fraction of other worldwide Internet users who have received or viewed such statements."[81]

III. THE ILLOGICAL APPLICATION OF THE "SLIDING SCALE" TEST AND THE "EFFECTS TEST" TO NEW TECHNOLOGIES ON THE INTERNET

The existing "sliding scale" and "effects" tests, which were formed during the infancy of the Internet, work in very narrow circumstances, namely commercial transactions or intentional tortious claims. However, given the current highly interactive nature of the Internet, these tests are not longer appropriate and do not account for cyberspace technological advances,[82] such as the ability to download free software. These tests, just like *Pennoyer*, establish jurisdictional categories which were only useful during the emerging era of cyberspace. By applying these tests to the newly developed Internet technologies, what the courts have essentially done is revert to an era similar to the pre-*International Shoe* era, where the courts attempted to adopt the old language of presence and consent (used during stationary society) to the then newly mobile society.[83] This was the misconception eventually resolved by *International Shoe*.

A. New Technological Advances in Cyberspace

"Internet" is "a term used to reference a group of networked[84]

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does not exist over the defendant because he did not purposefully avail himself by posting messages about a Nevada corporation of a "passive" web site. Moreover, the "effects test" is not satisfied because there is no evidence that defendant aimed his defamatory statements at residents of Nevada).

[81] *Barrett*, 44 F. Supp.2d 717 (forum state must be targeted by the non-resident defendant to satisfy the due process requirement).

[82] *See generally* Tricia Leigh Gray, *Minimum Contacts in Cyberspace: The Classic Jurisdiction Analysis in a New Setting*, 1 J. HIGH TECH. L. 85 (2002) (an analysis of how traditional methods for evaluating jurisdiction, found in case law and in reports of the American Bar Association, are working in cyberspace).

[83] *See* Kurkland *supra* note 11 at 586 ("The attempts to adapt old language to the new problems proved unhappy in their result.").

[84] A "network" is "a system consisting of a computer (or computers) and the connected terminals and related devices, such as modems and input/output devises." WEBSTER'S NEW WORLD COMPACT: DICTIONARY OF COMPUTER TERMS 258 (1983); A network is a "group of two or more computer systems linked together" in a way which allows all the computers on the Internet to communicate with one another. Webopedia, Network, *at* http://www.pcwebopaedia.com/TERM/n/network.html (last visited April 14, 2003); *See also* LARRY L. PETERSON & BRUCE S. DAVIE, COMPUTER NETWORKS: A SYSTEMS APPROACH 2-3 (2d ed., Morgan Kaufmann 2000)

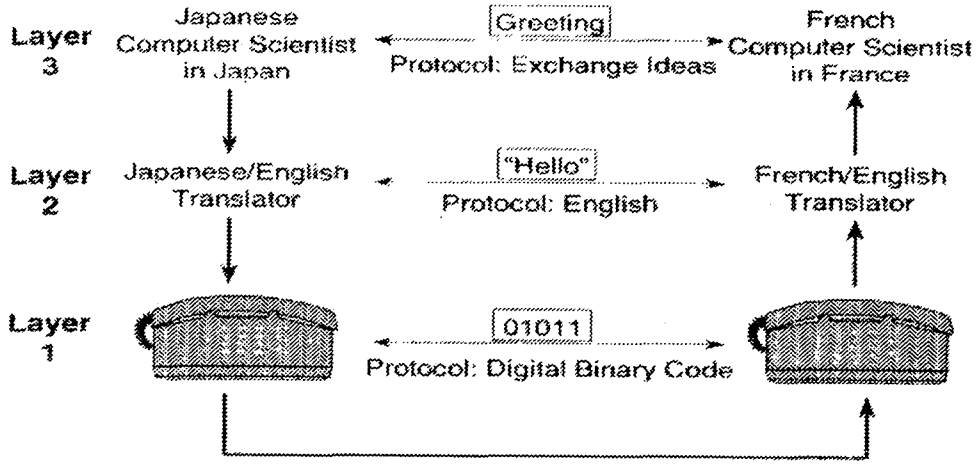
computers that are interconnected with other networked computers."[85] Each computer has an Internet Protocol (IP) address, which is a unique 32-bit long number "written as four decimal integers separated by dots," that identifies the specific connection to the Internet.[86] Information between two computers is transferred using two methods: File Transfer Protocol (FTP) and Hypertext Transfer Protocol (HTTP). Although there are some differences between the two, they essentially do the same thing. They use a Transmission Control Protocol/Internet Protocol (TCP/IP)[87] to transfer files between the host (server) computer,[88] which is

[85] Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565, 567-68 (Winter 1999).

[86] LARRY L. PETERSON & BRUCE S. DAVIE, COMPUTER NETWORKS: A SYSTEMS APPROACH 264 (2d ed., Morgan Kaufmann 2000); *See generally* ANDREW S. TANENBAUM, COMPUTER NETWORKS 416-17 (3d ed., Prentice Hall 1996); An example of an IP address is 165.225.225.0.

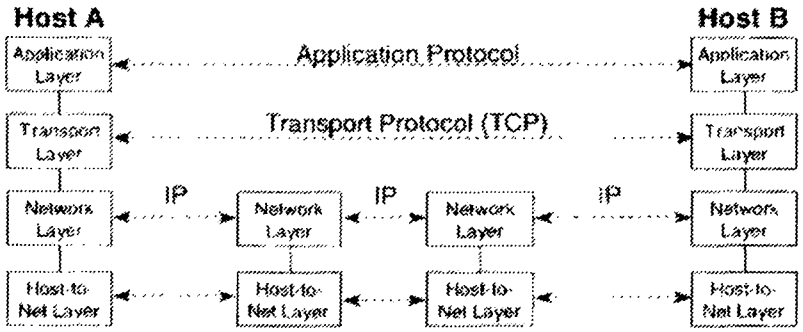
[87] "These two protocols were developed by the U.S. military to allow computers to talk to each other over long distances." CNET: Glossary, TCP/IP, *at* http://www.cnet.com/Resources/Info/Glossary/Terms/tcpip.html (last visited April 14, 2003); This protocol breaks down information into smaller, individual packets of information that are split up and independently sent to a unique address located on the network. Scot Finnie, 20 Questions: How the Net Works, *at* http://www.scotfinnie.com/20quests/hownet.htm (last visited April 14, 2003).

TCP/IP is a four layer protocol. Each layer has its function in transporting data from one computer to another.



Picture A

managed by the system administrator, and the user (client) computer. [89]



Picture B

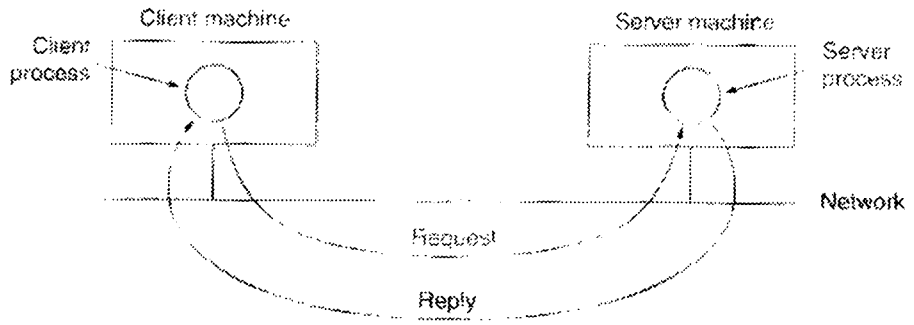
Picture A is an illustration how a layer protocol works. For example, if a Japanese Computer Scientist in Japan wants to talk to a French Computer Scientist in France, he will tell what he wants to be communicated to his Translator, who will then relate that information to the French Translator via phone, who will then translate the information to the French Computer Scientist in France.

The layers in the TCP/IP protocol communicate with one another in a similar matter. The Application Layer of one computer, which implements communication between two applications of the same type. The Application Layer codes its information and passes it to the Transport Layer, which provides a reliable end-to-end connection between two computers and whose functions include end-to-end connection setup, flow control and error control. The Transport Layer further encodes this information and passes it to the Network Layer, at which point all the information is put into IP packets and are ready to be sent to another computer. The Network Layer then passes the information to the Host-to-Net Layer. This layer relays the bits of information to the Host-to-Net Layer of the destination computer, which then sends the information to its Network Layer, which decodes the packet and sends it to the Transport Layer, whose primary function is to check for errors of delivery. Finally, the Transport Layer sends the information to the Application Layer, which puts all the information into an application that a user can understand. Internet Technology Lecture by Professor Brett Vickers at Rutgers University (Fall 1999) (lecture notes and copies of overhead slides are on file with author).

[88] A "host computer," as used in this Note, is a server that serves the pages for one or more web sites. What's?com, Host, *at* http://whatis.techtarget.com/definition/0,,sid9_gic212254,00.html (last visited April 14, 2003).

[89] This type of communication is what is known as a "client-server model."

A web site presents downloadable files in the form of hyperlinks.[90] When a client accesses the web site and "clicks"[91] on the desired hyperlink, a "get method"[92] is sent to the server. The information that is sent in the "get method" is a packet[93] created according to TCP/IP



Communication in this model "takes the form of a request message from client to the server asking for some work to be done. The server then does the work and sends back the reply." ANDREW S. TANENBAUM, COMPUTER NETWORKS 3-4 (3d ed., Prentice Hall 1996).

[90] Another word for a hyperlink is a hypertext link. "A hypertext link allows a user to move directly from one web location to another by using the mouse to click twice on the colored link." Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 n2 (9th Cir. 1997).

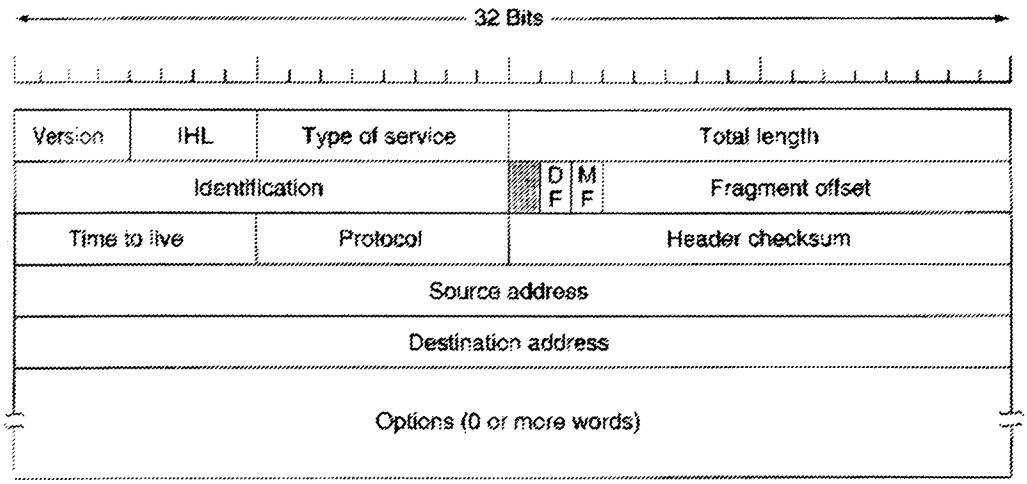
[91] Left clicking on a computer mouse will activate the "get method." It should be noted that some computers are made to accommodate left handed persons. In these situations, a right click of the mouse is required. Some computers, such as Apple Computers, only have one button on its mouse.

[92] *See generally* How the Web Works: HTTP and CGI Explained, *at* http://www.garshol.priv.no/download/text/http-tut.html (last visited April 14, 2003); The Jakarta Project, *at* http://jakarta.apache.org/commons/httpclient/methods/get.html (last visited April 14, 2003) (Get method is mostly used to download a document from a web site).

[93] A TCP/IP packet is a 32 bit packet that contains multiple fields of identifying data and one big field of information.

protocol. Each IP packet, originated by the client, contains the destination address, which is the server's IP address, and the source address, which is the client's IP address. Therefore, when the server receives and parses[94] the packet, it sees the client's IP address. This is important because that address is needed to deliver the requested file. Once the packet is parsed, the TCP/IP creates another packet to be sent to the client. This IP packet, which is originated by the server, includes the requested data. The destination address is now the client's IP address and the source address is the sender's (server's) IP address.[95] Many packets must be exchanged in this order to download any particular file.

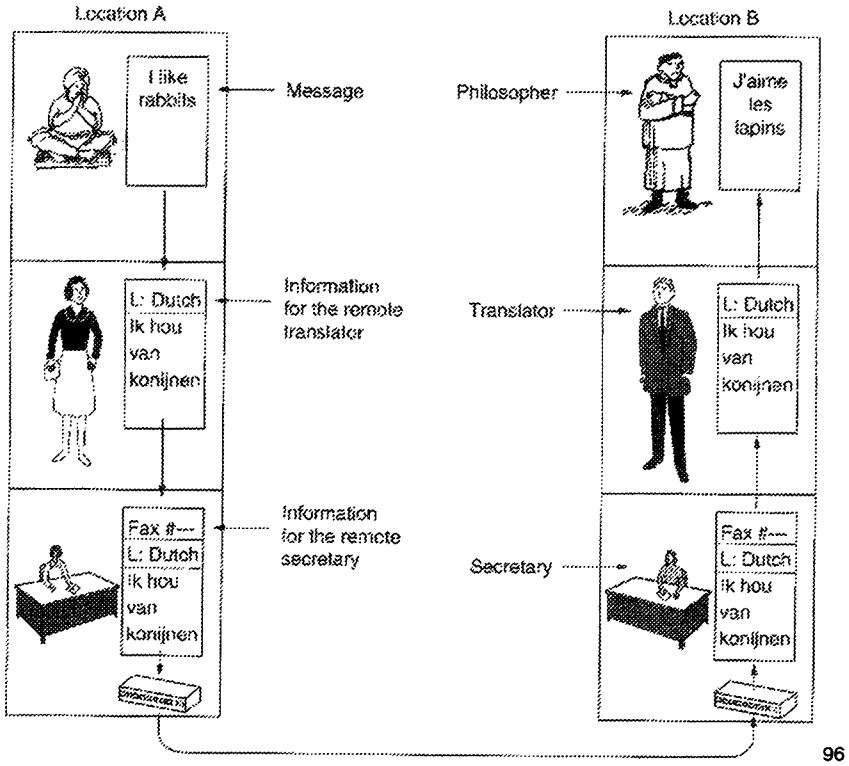
The interaction described above could be analogized to a "philosopher-translator-secretary" example.



The three main fields in the above IP header that this Note focuses on is the Source Address, Destination Address and the Data field. The Source Address is the IP address of the sender of the packet and the Destination Address is the IP address of the receiver of the packet. Finally, the Data field contains the information that is being sent to another computer. ANDREW S. TANENBAUM, COMPUTER NETWORKS 413-16 (3d ed., Prentice Hall 1996); *See also* What is?com:searchWebServices.com, IP address, *at* http://searchwebservices.techtarget.com/sDefinition/0,,sid26_gci212381,00.html (last visited April 14, 2003).

[94] To "parse" a statement or a packet is to separate "a programming statement into the basic units that can be translated into machine instructions." WEBSTER'S NEW WORLD COMPACT: DICTIONARY OF COMPUTER TERMS 281 (1983); *See also* What's?com, Parse 1 http://whatis.techtarget.com/definition/0,,sid9_gci214503,00.html (last visited April 14, 2003).

[95] This is what this Note refers to as an interaction between computers.



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Assume that Dutch is the universal language that can be understood at both locations A and B. This is similar to the ones and zeros, or binary code, which is a common language between computers. If philosopher A (analogous to a client computer) wants to send a message to philosopher B, he gives the information to translator A (same as a computer activating the "get method."). After the information is given to translator A, that data gets translated into the universal language of Dutch and packaged into a document ready to be sent to philosopher B. Finally, the packet containing the information is given to secretary A, who faxes it page-by-page to secretary B. This is analogous to a packet being transmitted from one computer to another computer. When secretary B receives the message, she gives it to translator B. Translator B then decodes the message from Dutch into a language understood by philosopher B. This is synonymous to the way packets are decoded by computers and presented to the users. After the message is translated, it is given to philosopher B (analogous to the host computer). Once philosopher B has a response, he sends it back to philosopher A via the same channels through which the original message was delivered.[97]

[96] ANDREW S. TANENBAUM, COMPUTER NETWORKS 19 (3d ed., Prentice Hall 1996).
[97] *Id.* at 18-19.

B. Hypothetical Problems Resulting From These New Technological Advances[98]

Hypothetical 1:

Suppose that QIC, a developing company incorporated in New Jersey with its principle place of business in Pennsylvania, developed a new program (software) that will upgrade any database[99] and increase its speed by two. QIC wanted to offer the free (promotional) software to various users. The developer delivered the software to a systems administrator working for C&T (C&T), a North Carolina company. The C&T administrator, which operates the host computer and is comparable to philosopher B in the above diagram, placed the software on its server to provide Internet users with the ability to download it.

Brian Keller, comparable to a user or philosopher A in the above diagram, is a database administrator for N & P Inc., a New York corporation. One day, when Brian was surfing[100] the Internet, an Internet window appeared that said "For Free Software which Increases the Speed of Your Database, Click Here."[101] Brian, very excited about the possibility of increasing his work speed by two, "clicked" on the hyperlink window and began to download the free software.

Unbeknownst to Brian (and QIC) the software had a couple of "bugs,"[102] which crashed[103] his database. Since his computer was

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[98] All these hypotheticals are fictional events with fictional characters and corporations.

[99] "A database is a collection of data that is organized so that its contents can easily be accessed, managed, and updated." Search Database.com: Definitions, database, *at* http://searchdatabase.techtarget.com/sDefinition/0,,sid13_gci211895,00.html (last visited April 14, 2003); Webopedia, Database, *at* http://www.pcwebopaedia.com/TERM/d/database.html (last visited April 14, 2003) ("A collection of information organized in such a way that a computer program can quickly select desired pieces of data.").

[100] To "surf" is to explore web sites in a random way or to simply use the Internet to "look for something in a questing way." Whatis?com, Surf, *at* http://whatis.techtarget.com/definition/0,,sid9_gci213075,00.html (last visited April 14, 2003).

[101] *See, e.g.*, http://tvguide.com; http://morpheus-download-morpheus.com; http://www.aol.com (text copy of the computer screens with the pop up windows on file with author as of April 14, 2003).

[102] A "bug" is "an error or mistake in a program." WEBSTER'S NEW WORLD COMPACT: DICTIONARY OF COMPUTER TERMS 46 (1983); *See also* Whatis?com, Bug, *at* http://whatis.techtarget.com/definition/0,,sid9_gci211714,00.html (last visited April 14, 2003) (a "bug is a coding error in a computer program.").

connected to a network, the "bug" also crashed all other computers on the network. As a result, N & P Inc. was set back in its production by a year and had to replace all the computers and recover some of the lost information that was in the database. Brian brought a suit under the theories of products liability and negligence against QIC and C&T in a New York court. Both defendants entered a special appearance[104] to challenge personal jurisdiction of the court. Does a New York court have jurisdiction over the defendants?

Hypothetical 2:

It would be a harder problem if instead of downloading from a window that appeared on his computer, Brian Keller heard about the software from a friend, performed a search,[105] found a web site that offered the free software download,[106] and "clicked" on the hyperlink to download the software. If all other facts remain the same as in hypothetical 1, can Brian bring a suit for products liability and negligence against QIC and C&T in a New York court?

Hypothetical 3:

Suppose that Kool Downloads,[107] comparable to philosopher B in the above diagram, is a California administrative company that operates a

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[103] A "crash" is "an instance of becoming inoperable because of a malfunction in equipment or an error in the program." WEBSTER'S NEW WORLD COMPACT: DICTIONARY OF COMPUTER TERMS 94 (1983). It is when a "computer itself stops working or that a program aborts unexpectedly. A crash signifies either a hardware malfunction or a very serious software bug." Webopedia, Crash, *at* http://www.pcwebopaedia.com/TERM/c/crash.html (last visited April 14, 2003). In the hypothetical presented, the "crash" is due to a serious software "bug."

[104] Special appearance is an appearance entered by the defendant "for the sole purpose of objecting to the jurisdiction of the court over the defendant, because of want of legal service of process... The authorities all seem agreed that such appearance is a special appearance only, and does not waive the want of service of process." Kluver v. Middlewest Grain Co., 173 N.W. 468, 474 (N.D. 1919).

[105] There are many search engines on the Internet. *See e.g.*, http://www.yahoo.com; http://www.google.com; http://www.hotbot.com; http://www.dogpile.com.

[106] *See, e.g.*, http://download.com; http://www.freedownloadscenter.com; http://www.kx.com/download/download.htm.

[107] Assume that Kool Downloads allows a user to perform various searches for items, such as music, movies or files that he wants to download. At the same time, Kool Downloads uploads (retrieves and puts it on its server) any such files that are available on the user's computer. Thereby, when a user wants to download a particular file, he downloads it directly from the server and not the user who is the owner of the file.

new peer-to-peer download system,[108] similar to that of Napster.[109] Kathleen Brier, a user analogous to philosopher A in the above diagram, is a New York college student who loves to download music. She went onto Kool Downloads and conducted a search for her favorite song. When she found it, she began to download by double clicking the mouse on the name of the song. When the download was completed, she began to play the song. To her disappointment, the music file was corrupted[110] and crashed her computer. Kathleen brought a suit in a New York court against Kool Downloads to recover the cost of her computer. Does a New York court have jurisdiction over the defendant?

C. Current Tests Do Not Provide an Adequate Solution to the Problems Resulting from Free Downloads

1. Applying the "Sliding Scale" Test

The mechanical "sliding scale" test, which worked well at the time it was put into effect, does not provide an adequate analysis for the new technologies described in the hypotheticals above.[111] Applying the "sliding scale" test to the first hypothetical,[112] a court is likely to

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[108] A peer-to-peer architecture is a network where each computer has equivalent capabilities and responsibilities. Webopedia, Peer-to-Peer Architecture, *at* http://www.webopedia.com/TERM/p/peer_to_peer_architecture.html (last visited April 14, 2003); *See, e.g.*, http://www.kazaa.com; http://morpheus-download-morpheus.com.

[109] *See generally* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (9th Circuit found that record companies and music publishers have established a prima facie case for copyright infringement against Napster, an Internet service that facilitated the downloads of free digital audio files by its users).

[110] The computer term "corrupted" refers to "data that has been damaged in some way." Webopedia, Corrupted, *at* http://www.webopedia.com/TERM/c/corrupted.html (last visited April 14, 2003).

[111] *See* Richard A. Bales and Suzanne Van Wert, *Internet Web Site Jurisdiction*, 20 J. MARSHALL J. COMPUTER & INFO. L. 21 (Fall 2001). Although *Zippo* test worked in 1996, technological advance have rendered it obsolete. The author proposes a new three part test: (1) see if the parties have a valid agreement selecting the forum, (2) apply a modified "effects test" and (3) see whether the defendant has of should have the knowledge of the targeting IP address. Although this Note makes a valid point about the *Zippo* "sliding scale" test being out of date, I do not agree with the solution, because all that it does is replace an existing non-flexible mechanical test by another.

[112] Prior to doing the constitutional analysis for jurisdictional due process, it must be determined if the defendant could be reached under the long arm of the particular state; *See, e.g.*, N.Y. CPLR §302 (McKinney 2001); VA.Code Ann § 8.01-328.1.

characterize C&T's web site in terms of the "middle ground" category.[113] Administrator C&T is not conducting business on the Internet because it is offering the software as a free download. Furthermore, the web site cannot be characterized as "passive" because it does more than just make information available to users; it allows users to download the software, which is an interaction between multiple computers (as described above). Thus, the court would have to analyze whether personal jurisdiction is proper for this "middle ground" web site. To be subject to personal jurisdiction, a web site has to be "interactive and commercial."[114] The courts have interpreted interactivity of a site to encompass a business nature which essentially collapsed the interactive and commercial requirements of the *Zippo* test.[115] However, a web site could be considered interactive in the sense that computers exchange information via the "get method," which is activated when a download is requested. Regardless of how the term interactive is defined, there can be no personal jurisdiction over C&T because its activity on the web site is not commercial.[116] Although C&T was paid by QIC developer to make the software available to the public, that commercial transaction is collateral to the relationship between C&T and Brian Keller. Even though C&T advertised the software in the forum,[117] it was not directed towards commercial gain from the user Brian. Therefore, since the software was free and since C&T did not derive any revenue from New York, a New York court is not likely to assert jurisdiction over C&T.

It should be noted that the "sliding scale" test does not take into account the unilateral activities of an injured party.[118] Therefore, the second hypothetical, where Brian unilaterally went to C&T web site to

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[113] Maritz, Inc. v. Cybergold, 947 F.Supp. at 1335 (held that the anticipation of further sales fits into the "middle ground" of the "sliding scale" test). Thus, although there is no commercial gain from the current C&T web site, it fits into the middle category of the *Zippo* test, because, by providing promotional software, it is designed with the intent of future commercial gain.

[114] Zippo Mfg. v. Zippo Dot Com, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997) (emphasis added).

[115] Winfield Collection, Ltd. v. McCauley, 105 F.Supp.2d 746, 750-51 (E.D. Mich. 2000) (In order for a web site to be interactive, defendant has to be conducting business through that site. "In short, the court is not prepared to broadly hold, as Plaintiff implies, that the mere act of maintaining a website that includes interactive features *ipso facto* establishes personal jurisdiction over the sponsor of that website anywhere in the United States.").

[116] Barrett v. Catacombs Press, 44 F.Supp.2d 717 (E.D. Pa. 1999) (court found that it lacked personal jurisdiction over a defendant who put defamatory information on the Internet without the intention of targeting Pennsylvania residents for its audience).

[117] C&T sent its commercial window to the IP address of Brian Keller, thereby knowing the state where it was advertising.

[118] *See* Hanson v. Denckla, 357 U.S. 235 (1958).

download the software, will have the same analysis as the first hypothetical.

The question of whether a New York court will assert personal jurisdiction over QIC is an easier question. QIC developer is not the system operator of the server, therefore it does not maintain the web site which had the contact with New York.[119] Absent any other contacts with New York, a New York court will hardly be inclined to find personal jurisdiction over QIC. Moreover, the *Zippo* test has a commercial requirement, which is not satisfied in this hypothetical. Thus, applying the *Zippo* test, a New York court would not assert personal jurisdiction over QIC developer.

The third hypothetical would have a similar analysis to that of C&T in the first two hypotheticals. Here, the administrator, Kool Downloads, operates a "middle ground" web site. It is not passive, because it does more than make information available to the users, and it is not purely commercial because it offers free downloads to its users. Although interactive in the sense that at least two computers may communicate with one another, it is not commercial in nature. Therefore, under the "sliding scale" test, personal jurisdiction over Kool Downloads in a New York court would not be proper.

As the above analysis demonstrates, the "sliding scale" test, which was intended to be flexible, is not able to adequately accommodate these hypotheticals. In fact, the application of the "sliding scale" test is too mechanical rather than qualitative. The courts will pigeonhole any web site into one of the three categories without giving consideration to the underlying policies of the "quality and nature" of defendant's activities, the defendant's minimum contacts with the forum and the fairness of being hauled into the court of a particular forum.

2. Applying the "Effects Test"

The limited "effects test," which worked well for the intentional tort claims, will not provide adequate solutions to the hypotheticals. Under the first element of the test, there has to be an intentional tort, and depending on how the court will define that, there will or will not be personal jurisdiction. With regard to administrator C&T in the first hypothetical, if the court characterizes C&T's activities as intentional failure to inspect the software before introducing it to a New York resident via a commercial window, the court may find jurisdiction under the "effects test". On the other hand, if C&T negligently failed to adequately inspect

[119] This separate analysis would not be necessary if the developer and the system analyst is one in the same.

the software, which is the more probable alternative, it would not be subject to personal jurisdiction, even though it knew the destination IP address for the software.

It should be further noted that the "effects test," like the *Zippo* test, does not take into consideration the unilateral activity of an injured party, but looks to where the effects of the tortious activity were felt.[120] Therefore, the analysis for personal jurisdiction over C&T in the second hypothetical would be the same as the analysis under the first hypothetical.

With regard to asserting personal jurisdiction under the "effects test" over QIC developer, negligent development of the software is not an intentional tort, such as a development of a virus, but a negligent oversight. Furthermore, the doctrine of "stream of commerce plus"[121] would not be satisfied,[122] because QIC developer did not know the destination of its software. It is questionable whether QIC intended to provide the software to New York residents, since, unlike C&T, it does not know the IP addresses of users who download the software. Accordingly, it is unlikely that the court will assert jurisdiction in this case.

Finally, the analysis of personal jurisdiction over Kool Downloads will be similar to the analysis for C&T in the first and second hypotheticals. The administrator Kool Downloads might have known that it was sending a music file to New York (from Kathleen Brier's IP address), but it is not likely that it has done anything intentionally tortious, since it might not have known that the file was corrupted. Therefore, the New York court is not likely to assert personal jurisdiction in this case. Accordingly, since the "effects test" is aimed at specific areas of the law, namely intellectual property and intentional torts, it is too limited to provide adequate solutions for negligent causes of action, such as the ones demonstrated by the three hypotheticals.

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[120] Ligue Contre la Racisme et l'Antisemitisme v. Yahoo! Inc. (May 22, 2002), *available at* http://www.lapres.net/yahen.html (last visited April 14, 2003) (held that the foreseeability of being hauled into a French court is not necessary as long as the harm was felt in France.) (text copy on file with author).

[121] Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102 (1986).

[122] It should be noted that the *Zippo* "sliding scale" test does not take into the account the "stream of commerce plus" test. *See* Jason Green, *Is Zippo's Sliding Scale a Slippery Slope of Uncertainty? A Case for Abolishing Web Site Interactivity as a Conclusive Factor in Assessing Minimum Contacts in Cyberspace*, 34 J. MARSHALL L. REV. 1051, 1077 (Summer 2001) (*Zippo* "sliding scale" test does not take into account the "something more" requirement set out by O'Connor in *Asahi*).

IV. MINIMUM CONTACTS AND FAIRNESS APPLIED TO DEFENDANTS PROVIDING TORTIOUS DOWNLOADS

Since the mechanical framework of the "sliding scale" test and the limited "effects test" are not flexible to accommodate the emerging technological advances on the Internet, some courts have attempted to move away from applying those tests, but have not gone far enough.[123] By applying these tests, the courts have reverted themselves to a pre-*International Shoe* era,[124] where a newly mobile or interactive society was pigeonholed into tests developed at infancy of either territorial or Internet medium. New technological issues cannot be resolved "by applying a mechanical formula or a rule of thumb but by ascertaining what is fair and reasonable under the circumstances."[125] Accordingly, new technologies, such as free downloads, warrant a case by case analysis for personal jurisdiction in the light of the "quality and nature" of defendant's activities, minimum contacts and traditional notions of "fair play and substantial justice."[126]

A. Personal Jurisdiction Analysis Over QIC Developer Using Minimum Contacts and Fairness.

To establish personal jurisdiction over a particular defendant, the court has to look to the "quality and nature" of the defendant's activity to find minimum contacts between the defendant and the forum and that the assertion of such jurisdiction will not be of "substantial inconvenience" to

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[123] *See e.g.,* Millennium Enters., Inc. v. Millennium Music, L.P., 33 F.Supp.2d 907 (D. Or. 1999) (holding that the middle category in the *Zippo* test must include "deliberate action," and since the defendant's actions were not deliberate, personal jurisdiction could not be asserted - used both cases); Tech Heads, Inc. v. Desktop Serv. Ctr., Inc., 105 F.Supp.2d 1142 (Dist. Ct. Or. 2000) (court decided that it might be best to move away from the existing tests for personal jurisdiction and upheld jurisdiction where there were least possible contacts with the forum); Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446 (3d Cir. 2003) (maintaining an interactive site, without purposefully availing yourself to the forum state, is not enough to warrant the exercise of personal jurisdiction.").

[124] *See* Kurkland *supra* note 11, at 584 ("The courts ... came round to using either the consent thesis or the presence thesis, depending largely upon which would support jurisdiction over the nonresident corporation.").

[125] Gray v. American Radiator, 176 N.E.2d 761, 765 (1961).

[126] Rachael T. Krueger, *Traditional Notions of Fair Play and Substantial Justice Lost in Cyberspace: Personal Jurisdiction and On-line Defamatory Statements*, 51 CATH. U. L. REV. 301 (Fall 2001) (argues that on-line defamation should be analyzed in terms of traditional notions of fairness). Although the Note advocates for keeping jurisdictional tests used during the pre-Internet era, it focuses on defamation cases and not on cases dealing with new technologies that the courts have yet to consider.

the defendant.[127]

The analysis for personal jurisdiction over QIC will be the same for the first and the second hypotheticals, since QIC's actions remained the same. QIC is similar to Titan Valve Manufacturing Company, a defendant in the early long arm case *Gray v. American Radiator*.[128] Titan was a foreign corporation that constructed safety valves.[129] It sold such a valve to American Radiator, an out of state company, which incorporated it into a water heater.[130] The water heater was shipped to Illinois where it exploded, injuring the plaintiff.[131] Since Gray established personal jurisdiction over a negligent defendant, the case presents a broader "effects test" than Calder. The parties in Gray are analogous to the parties in the first two hypotheticals. QIC developer manufactured software and gave it to C&T (analogous to American Radiator), an out of state corporation, which incorporated that software onto its server. Upon a download request, C&T sent the software to New York, causing injury to Brian Keller. As in Gray, "the only contact with [the forum] is found in the fact that a product [the software] manufactured in [Pennsylvania] and was incorporated in [North Carolina onto a server,]"[132] from which a New York resident was able to download the software. It should be noted that the Supreme Court of Illinois assumed that there were other transactions, other than the one giving rise to the cause of action, between Titan Valve and the forum.[133] Accordingly, for the purposes of this hypothetical, assume that other New York users have downloaded QIC's software.

Gray found minimum contacts using the "stream of commerce" doctrine: the water heater made its way to the forum state in the "course of commerce."[134] Although there was no monetary exchange for the software in the hypothetical, the software did make its way into the forum through the stream of commerce. The stream in this case is not a

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[127] Burger King Corp. v. Rudzewicz, 471 U.S. at 477-478 (holding that, if a defendant shows that assertion of personal jurisdiction over him will be a grave and "substantial inconvenience" to him, and if that inconvenience cannot be ameliorated, such jurisdiction is not proper, even if there are requisite minimum contacts).

[128] Gray v. American Radiator, 176 N.E.2d 761 (1961).

[129] *Id.* at 762.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 764 ("[O]nly contact with this State is found in the fact that a product manufactured in Ohio was incorporated in Pennsylvania, into a hot water heater which in the course of commerce was sold to an Illinois consumer.").

[133] *Id.* at 766 ("[W]hile the record does not disclose the volume of Titan's business or the territory in which appliances incorporating its valves are marketed, it is a reasonable inference that its commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State.").

[134] *Id.*

traditional idea of a stream where freight carts take a product from State A to State B, but an organized chain of distribution of a particular product, here the software, with the goal of making money in the future. The free software involved in this case is promotional software, which QIC might want to market in the future. Moreover, it was foreseeable[135] to QIC that it could be hauled into court in New York if it sent its product, from which it intended to derive future revenue, into the state, thereby invoking the protections of its laws.[136] Accordingly, the constitutional requirement for minimum contacts is satisfied. By taking into consideration the "quality and nature" of QIC's activities, the personal jurisdiction test is more qualitative than the mechanical "sliding scale" test and broader than the Calder "effects test," and is able to adjust to this type of a hypothetical.

Furthermore, assertion of personal jurisdiction over QIC comports with traditional notions of "fair play and substantial justice." QIC developer will not be burdened by litigating in New York, because "modern transportation and communication have made it much less burdensome for a party sued to defend [itself] in a State where [it] engages in economic activity,"[137] or activity from which it anticipates to receive future business. QIC might assert that it will be substantially inconvenienced if personal jurisdiction is to be asserted over it. However, it is hard to imagine QIC having anything higher than a huge inconvenience, which is not strong enough to negate its minimum contacts. QIC may argue that such an assertion of jurisdiction will open the door for litigation over similar contacts. However, such an argument may be trumped by QIC requesting that the systems administrator put a disclaimer or a warning[138] on their web site that the software might have "bugs" and that downloads are performed at the user's own risk. Accordingly, since there are minimum contacts between QIC developer and New York and since there is no "substantial inconvenience" to QIC,

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[135] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980).

[136] Gray v. American Radiator, 176 N.E.2d 761, 766 (1961) ("To the extent that its business may be directly affected by the transactions occurring here it enjoys benefits from the laws of this State, and it has undoubtedly benefited ... from the protection which [the law of the forum] has given [it].").

[137] *Id.* at 765.

[138] *See generally* http://www.freesoftwarefreedownloads.com/terms.php (last visited April 14, 2003) ("You understand and agree that any material downloaded or otherwise obtained through the use of this website is done at your own discretion and risk and that you will be solely responsible for any damages to your computer system or loss of data that results in the download of such material."); http://www.lavasoft.de/terms.jsp (last visited April 14, 2003) (warrantees and limitation of liability); *See* Ligue Contre la Racisme et l'Antisemitisme v. Yahoo! Inc. (May 22, 2002), *available at* http://www.lapres.net/html/yahen.html (last visited April 14, 2003) (required that Yahoo!, Inc. at least have a warning on their web site to avoid being subject to personal jurisdiction in France).

which may trump the minimum contacts, a New York court is likely to find personal jurisdiction over QIC.

B. Personal Jurisdiction Analysis Over C&T Administrator Using Minimum Contacts and Fairness.

1. Is There Personal Jurisdiction Over C&T Administrator in the First Hypothetical?

When looking to find minimum contacts between C&T administrator and New York, a court will examine whether C&T purposefully availed itself of the benefits and protections of the laws of the forum. By sending a commercial window to the IP address of Brian Keller's computer located in New York, C&T solicited the download from a resident of the forum. Since C&T interacted with the New York resident by sending TCP/IP packets back and forth, it was on notice that it could be haled into court in New York.

Moreover, C&T would not be able to meet its burden in asserting "substantial inconvenience" for adjudicating in New York for the same reasons as listed above. Also, like with QIC, C&T can put warnings on its web site to avoid a flood of litigation. Accordingly, personal jurisdiction over C&T will likely be proper in a New York court.[139]

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[139] It is worth noting that although the constitutional test for personal jurisdiction is met in this hypothetical (like in others), there might be a problem with satisfying the New York Long Arm Statute. N.Y. CPLR §302 (McKinney 2001). The New York Long Arm does not reach the limits of Due Process and deserves a separate consideration.
§302 states:

> (a) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary ... who in person ...
>
> (3) commits a tortious act without the state causing injury to a person or property within the state ... if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate ... commerce.

The problem with asserting personal jurisdiction over C&T is that might not have committed any tortious activity other then putting faulty software on its server. Moreover, C&T does not solicit any business in New York or derive any revenue from the state. Therefore, although there might be personal jurisdiction over C&T under the constitutional standards, a New York court might not exercise personal jurisdiction over C&T because its contacts will not be satisfactory under the Long Arm Statute.

2. Is There Personal Jurisdiction Over C&T Administrator in the Second Hypothetical?

The question of personal jurisdiction over C&T in the second hypothetical is harder than in the first, because C&T did not solicit interaction from Brian Keller. Brian unilaterally went onto C&T's web site and voluntarily downloaded the software. A District Court of Louisiana found personal jurisdiction over a defendant on similar facts. In *Bellino v. Simon*,[140] Bellino, a California resident, sued Simon, a New York resident, for defamatory remarks made to a Louisiana resident which caused Bellino to lose his business reputation in Louisiana.[141] Bellino was selling baseball cards; a Louisiana resident who wanted to learn more about the cards located Simon's web site and initiated a contact with Simon by filling out a form on the web site.[142] This initiated further communications between the Louisiana resident and Simon, during which the defamatory statement occurred.[143] The court said that for the purposeful availment to be satisfied the defendant had to initiate the communications or the defendant had to have solicited such communications.[144] The court held that there was purposeful availment in this case because, although the Louisiana resident initiated the contact, that contact was solicited by the form on Simon's web site and resulted in several e-mail communications and telephone calls.[145]

Similarly, in the hypothetical, Brian Keller initiated the initial contact by locating C&T's web site and clicking on the download hyperlink, which resulted in a "get method" being sent to the server. This initial contact was solicited by C&T, because similar to Simon's site that had a form for the users to fill out, C&T's site had a hyperlink which users could "click" on. Furthermore, this initial contact resulted in further communication between C&T and Brian because, to download a file, more than one TCP/IP packet has to be sent between the server and the user. Thus, C&T purposefully availed itself to New York by sending multiple TCP/IP packets to Brian's computer, in New York.[146]

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[140] Bellino v. Simon, No. CIV.A.99-2208, 1999 WL 1059753 (E.D. La.).
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Contra* Med-Tec Iowa, Inc. v. Computerized Imaging Reference Sys., Inc., 223 F.Supp.2d 1034, 1038 (S.D. Iowa 2002) (holding that there is no personal jurisdiction over the defendant, because defendant's web site contained "descriptions of its products, technical and other product information, and instructions for customers wishing to place orders for its products. The website also allows prospective purchasers to download a catalog containing the IMRT phantoms and other [defendant] products... The CIRS website does not permit

The fairness analysis would be similar to the analysis for C&T under the first hypothetical. Accordingly, since C&T purposefully availed itself to New York and would not be able to meet its burden to show that it would be "substantially [inconvenient]" for it to adjudicate the suit in New York, personal jurisdiction would be proper.[147] Consequently, unlike the "sliding scale" test and the "effects test," this analysis looks to the underlying nature of C&T connection to New York and its purposeful availment of New York without resulting to mechanical labeling or a limited intent test.

C. Personal Jurisdiction Analysis Over Kool Downloads Administrator Using Minimum Contacts and Fairness.

A "stream of commerce" argument in the third hypothetical will be weakened by the fact that, unlike QIC, Kool Downloads had no intention of profiting from future sales of its files. Therefore the inquiry as to whether there will be personal jurisdiction over Kool Downloads in New York is similar to the analysis for personal jurisdiction over C&T under the second hypothetical. Kathleen Brier went to the Kool Downloads' site and downloaded a corrupted music file. Upon initiating the download, her computer and the Kool Downloads' server began to exchange TCP/IP packets. Kool Downloads knew that it was sending those packets into New York because it was aware of Kathleen's IP address. Moreover, Kool Downloads solicited this communication by providing a hyperlink for such downloads on its web site. This would be an even stronger argument if Kool Downloads sent downloads to other New York residents, because Kool Downloads would have had an even greater notice of being hauled into court in New York. Accordingly, a New York court is likely to find that Kool Downloads purposefully availed itself to New York. Moreover, if Kool Downloads is not able to establish "substantial inconvenience," personal jurisdiction over it would be proper in a New York court.

V. CONCLUSION

The ability to provide instantaneous information from Point A to Point B on the Internet creates new problems for courts trying to assert jurisdiction over out-of-state defendants. The problem becomes even greater when the sole contact between the negligent defendant and the forum state is a free download made available to one of the state's residents.

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online placement of orders or any other 'exchange of information', and the ability of prospective customers nationwide to access the information it contains does not confer jurisdiction on this Court.").

[147] In this hypothetical, just like in the first hypothetical, there is a problem with satisfying the New York Long Arm. *See supra* note 139.

This article has shown that the existing tests ("sliding scale" test and the "effects test") used by the courts to determine whether they have personal jurisdiction over defendant's activities on the Internet are either too mechanical or too limited. Their application to Cyberspace technologies will undermine what International Shoe had done, namely create a flexible test that can accommodate a perpetually changing society. Accordingly, the courts, especially in dealing with non-intentional free transfer of tortuous data, should examine personal jurisdiction by looking at the "quality and nature" of the defendant's tortuous conduct using traditional minimum contacts (purposeful availment and "stream of commerce") and "fair play and substantial justice."

Under this analysis, Joshua Kinney would be able to bring a suit in a New York court for damages to his laptop. The court is likely to assert personal jurisdiction over the manufacturer of the faulty program and the server, which made the software available on the Internet.