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I. INTRODUCTION

One of the most monumental events of the last half-century has been the marriage of computing power and communication technology. The product of this union has evolved into what is commonly called the "information superhighway." The newfound ability to access vast amounts of information, coupled with the ability to communicate with man and

1. Al Gore, Communications; Networking the Future; We Need a National "Superhighway" for Computer Information, WASH. POST, July 15, 1990, at B3. This term quickly became part of the vernacular to describe the revolution of online communication.

2. The indexing of the Internet via "hyperlinks" allows for "information to be accessed and organized in very flexible ways, and allow[s] people to locate and efficiently view related information even if the information is stored on numerous computers all around the world." ACLU v. Reno, 929 F. Supp. 824, 836 (E.D. Pa. 1996), aff'd, 521 U.S. 844 (1997). See also infra Part III.A.
machine across global distances is revolutionizing the way we live. No industry, profession, or enterprise has remained untouched by this phenomenon. As each segment of society is confronted by the challenges and opportunities brought on by the information revolution, it needs to adapt and reinvent itself to meet the demands and capabilities of this medium. The Internet in the legal arena is no different.

When litigation concerns online contact, personal jurisdiction will be considered a threshold issue. The Internet is a community without walls or boundaries that encourages people to indiscriminately communicate and conduct business over state and national borders. If litigation ensues from such contact, the propriety of jurisdiction over an out-of-state defendant will invariably arise. Because the conventional methods of communication have been altered, it must be determined whether the traditional tests employed by the courts to determine personal jurisdiction issues still apply in this new era of online communication.

This article will examine how the courts have dealt with personal jurisdiction in the context of online communication. First, the modern framework of personal jurisdiction as set forth by numerous United States Supreme Court decisions is examined. Second, this article will briefly describe the Internet and analyze the unique nature of the Internet as a communicative device. Finally, this article will examine how the courts have dealt with this issue and formulate some of the factors used by the courts in making personal jurisdiction determinations.

One of the most important aspects of our legal system is its ability to adapt to new and emerging areas. The elasticity of the law is what provides it with enduring strength. Therefore, to best understand the future of online personal jurisdiction, one must consider the design of existing law and determine how the courts will adapt these principles to new and emerging areas.

II. PERSONAL JURISDICTION: A MODERN FRAMEWORK

The doctrine of personal jurisdiction limits the parties upon whom a court may impose a binding and enforceable judgment. A court will always have jurisdiction over the plaintiff in an action because by filing the lawsuit in a particular forum, the plaintiff consents to the jurisdiction of that court. On the

3. See generally Gore, supra note 1.
other hand, defendants who need not consent to the jurisdiction of the court will be safeguarded by the principles of personal jurisdiction. These principles protect defendants from being unwillingly placed under the jurisdiction of a foreign court in a manner that is unjust and inequitable.\textsuperscript{7} The current state of personal jurisdiction law is a blend of statutory law and constitutional limitations. For a court\textsuperscript{8} to impose \textit{in personam}\textsuperscript{9} jurisdiction over a defendant, both the long arm statutes of the forum state and the due process requirements of the Fourteenth Amendment must be complied with.\textsuperscript{10}

A. \textit{Long Arm Statutes}

Each state has a long arm statute that dictates the instances in which nonresident defendants will be subject to the jurisdiction of its courts. Such

\begin{itemize}
    \item \textsuperscript{7} Hanson v. Denckla, 357 U.S. 235, 251 (1958) (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).
    \item \textsuperscript{8} The \textit{Federal Rules of Civil Procedure} indirectly apply a state's long arm statute to the federal courts. Under the Federal Rules:
    \begin{itemize}
        \item Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant
            \begin{itemize}
                \item who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or
                \item who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or
                \item who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or
                \item when authorized by a statue of the United States.
            \end{itemize}
        \end{itemize}
    \end{itemize}
    \textsuperscript{9} Personal jurisdiction over a defendant, who does not consent to the jurisdiction of the court, can be obtained in one of three ways. \textit{In personam} jurisdiction is jurisdiction over a defendant “where the entire object of the action is to determine the personal rights and obligations of the defendants.” Pennoyer v. Neff, 95 U.S. 714, 727 (1877). \textit{In rem} jurisdiction is jurisdiction in a “proceeding . . . taken directly against property, and has for its object the disposition of the property.” \textit{Id.} at 734. \textit{Quasi in rem} jurisdiction is jurisdiction “based on attachment or seizure of property present in the jurisdiction.” Shaffer v. Heitner, 433 U.S. 186, 196 (1977).
    \item \textsuperscript{10} Burger King Corp. v. Rudzewicz, 471 U.S. 462, 463–64 (1985). \textit{See also} Savin v. Ranier, 898 F.2d 304, 306 (2d Cir. 1990) (stating “In diversity cases, federal courts must look to the forum state's long-arm [sic] statute to determine if personal jurisdiction may be obtained over a nonresident defendant. If jurisdiction is appropriate under the relevant statute, the court must then decide whether exercise of jurisdiction comports with due process.”).
a statute cannot broaden the reach of the court beyond what is constitutionally permissible, but it can narrow the jurisdiction of a court and limit it to even less than what is constitutionally acceptable. Long arm statutes will commonly fit into one of two categories. The first type of statute is one in which the state is looking to expand its jurisdiction to the limits allowed by its constitution. Such a statute will provide a court with jurisdiction over any nonresident defendant so long as such jurisdiction is not inconsistent with the United States Constitution. The second type of long arm statute is one that limits the power of the courts beyond what the Constitution protects, thereby giving nonresident defendants greater immunity from suit. These limiting statutes may allow for jurisdiction over a nonresident defendant only in specific instances. For example, many states allow jurisdiction only when the nonresident defendant has contracted with a party in the forum state or has committed a tort in the forum state.

Because each state has its own individualized long arm statute, there is no uniformity. Nonetheless, regardless of a particular state’s long arm statute, jurisdiction must, at a minimum, be consistent with the Due Process Clause of the United States Constitution. An assertion of jurisdiction that is valid under a state’s long arm statute but in violation of the Due Process Clause will still be unconstitutional and nonbinding.

11. Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947, 950 (1st Cir. 1994) (stating “The state statutes... cannot provide for service of process on a defendant outside the respective states unless the defendant has had the contact with that state that is required by the fourteenth amendment.”).
13. An example of such a statute is California’s, which simply states that “[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” § 410.10.
15. See id.
16. See, e.g., N.C. GEN. STAT. § 1-75.4 (1997) (invoking personal jurisdiction “[i]n any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.”).
17. Lorelei Co. v. County of Guadalupe, 940 F.2d 717, 720 (1st Cir. 1991) [T]he federal court must determine whether the state’s "long arm" or "doing business" statute authorizes it to exercise personal jurisdiction over the foreign defendant. If it does, the court must then determine whether the exercise of personal jurisdiction under the circumstances is consistent with due process under the fourteenth amendment. Id.
B. Due Process

The Due Process Clause of the Fourteenth Amendment, in protecting the rights of a defendant, limits the ability of a court to impose jurisdiction over a nonresident defendant who is not served process in the forum state or who does not consent to the jurisdiction of the forum state.\(^\text{18}\) It has long been established that this protection is not absolute in that in personam jurisdiction over a nonresident defendant will be proper so long as "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"\(^\text{19}\) Over half a century ago, the United States Supreme Court introduced the minimum contacts test to determine when a relationship between the defendant and the forum state rises to a level at which jurisdiction over the defendant would be fair and just.\(^\text{20}\) In questioning whether such minimum contacts exist, the courts will measure the "quality and nature" of the defendant's contact with the forum state in the context of the goals and ideals that the Due Process clause was designed to insure.\(^\text{21}\)

In International Shoe Co. v. Washington,\(^\text{22}\) the United States Supreme Court established the minimum contacts test, the backbone of any personal jurisdiction formulation.\(^\text{23}\) In his groundbreaking opinion, Chief Justice Stone distinguished between three types of relationships that a party may have with a forum state, each with different personal jurisdiction ramifications.\(^\text{24}\) First, a party may have a connection with the forum state so substantial in nature that jurisdiction in that state will be justified in actions arising from the party's activities within the forum or from matters "entirely distinct from those activities."\(^\text{25}\) For a defendant to be subject to such jurisdiction, commonly known as "general jurisdiction,"\(^\text{26}\) there must be contact with the forum that is "continuous and systematic" in nature.\(^\text{27}\) A second type of jurisdiction will arise even when the defendant lacks the substantial contacts necessary to give rise to general jurisdiction, but the defendant nonetheless has some association with the forum state. When a limited relationship exists and "the maintenance of the suit does not offend

\(^{18}\) Pennoyer v. Neff, 95 U.S. 714, 733 (1877).
\(^{19}\) International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
\(^{20}\) Id.
\(^{21}\) Id. at 319.
\(^{22}\) 326 U.S. 310 (1945).
\(^{23}\) Id. at 316.
\(^{24}\) Id.
\(^{25}\) Id. at 317.
\(^{26}\) "General jurisdiction" is the term used to explain "[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contact with the forum." Helicopteros Nacionales De Columbia S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984).
\(^{27}\) Id. at 414–15.
'traditional notions of fair play and substantial justice,' jurisdiction over a nonresident defendant will be proper if the contact gave rise to the liability sued upon.\textsuperscript{28} Such jurisdiction is known as specific jurisdiction.\textsuperscript{29} Unlike these two relationships, which give rise to a finding of minimum contacts, the Court recognized a third category in which a defendant has "no contacts, ties, or relations" with the forum state.\textsuperscript{30} In such an instance, there are no minimum contacts, and personal jurisdiction is not constitutionally justified.\textsuperscript{31}

\textit{International Shoe}, which required the existence of minimum contacts to ensure "fair play and substantial justice,"\textsuperscript{32} was subsequently manipulated by the Court. Thirty-five years later, in \textit{World Wide Volkswagen Co. v. Woodson},\textsuperscript{33} the United States Supreme Court held that a New York automobile dealer was not subject to jurisdiction in Oklahoma when an automobile sold by the dealer in New York was driven to Oklahoma and was involved in an accident there.\textsuperscript{34} A critical element of the Court's analysis was whether the defendant "should reasonably anticipate being haled into court" in the forum state.\textsuperscript{35} The primary purpose of inquiring into the reasonableness and fairness of the forum is "to protect\[ ] the defendant against the burdens of litigating in a distant or inconvenient forum."\textsuperscript{36}

Only when foreign litigation is foreseeable to the defendant will personal jurisdiction be reasonable.\textsuperscript{37} Foreseeability requires more than merely entering a product into the stream of commerce;\textsuperscript{38} rather, it requires that the defendant "purposefully avails itself of the privilege of conducting activities within the forum State."\textsuperscript{39} Such "purposeful availment" will give notice to the defendant of its susceptibility to suit in a foreign state, thus providing the minimum assurances required by the Constitution.\textsuperscript{40}

\begin{itemize}
\item \textsuperscript{28} \textit{International Shoe}, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
\item \textsuperscript{29} "Specific jurisdiction" is the term used to explain "when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." \textit{Helicopteros}, 466 U.S. at 414 n.8 (1984).
\item \textsuperscript{30} \textit{International Shoe}, 326 U.S. at 319.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
\item \textsuperscript{33} 444 U.S. 286 (1980).
\item \textsuperscript{34} Id. at 298–99.
\item \textsuperscript{35} Id. at 297.
\item \textsuperscript{36} Id. at 292.
\item \textsuperscript{37} Kulko v. California, 436 U.S. 84, 97–98 (1978).
\item \textsuperscript{38} \textit{World Wide Volkswagen}, 444 U.S. at 297.
\item \textsuperscript{39} Hanson v. Denckla, 357 U.S. 235, 253 (1958).
\item \textsuperscript{40} Id.
\end{itemize}
The courts use an assortment of factors to determine whether it is reasonable to require a defendant to litigate in the forum state. These considerations include the comparative burden on the defendant and plaintiff in obtaining effective and convenient relief, the interest that the forum state has in adjudicating the dispute, and judicial efficiency. The reasonableness of requiring a defendant to defend himself in a foreign court is an important factor that determines whether personal jurisdiction exists. If it is unreasonable to require a defendant to litigate an action in the forum state, the court will lack jurisdiction, even if the defendant purposefully directed his activities toward that state.

Personal jurisdiction will usually be found when a "defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Once a party takes advantage of doing business or conducting other activities in the forum state, he automatically submits himself to the obligations of that state, and is subject to suit in that state. The need to maintain a predictable legal system that provides a defendant clear notice that he may be summoned to court in a foreign state is so important that the purposeful availment requirement has become a "sine qua non for in personam jurisdiction."

Purposeful availment is measured by the "quality and nature" of the contact made and is not a quantitative mechanical test. A single act in the forum state can give rise to jurisdiction if the activity is such that it shows the party's intent to avail itself of the benefit of making contact with the state. Once such contact is made, it is no longer deemed "random," "fortuitous," or "attenuated," and the defendant "should reasonably anticipate being haled into court there."

The minimum contacts test was not designed as a rigid and indiscriminate factual examination. Every facet of the contact, and its effect on a finding of jurisdiction, must be analyzed to determine whether asserting jurisdiction is constitutionally justified. At the very least, a court

42. *Burger King*, 471 U.S. at 477–78.
43. *Hanson*, 357 U.S. at 253.
47. *International Shoe*, 326 U.S. at 319.
can impose its authority over a nonresident defendant when *minimum contacts* are found such that requiring a party to defend a suit in the forum state is reasonable.\(^\text{50}\) If the defendant's contacts with the forum state are inconsequential, then regardless of how reasonable such a suit may be, jurisdiction will be improper.\(^\text{51}\) Likewise, even if substantial contacts exist, if it is unreasonable for the defendant to litigate the matter in the forum state, jurisdiction will not be imposed.\(^\text{52}\)

The courts have not totally disregarded the extent to which technology factors into the personal jurisdiction equation. In 1957, Justice Black recognized a trend that was "expanding the permissible scope of state jurisdiction" over foreign defendants because of the increased nationalization of our economy and the ease of "modern transportation and communication."\(^\text{53}\) In the past four decades the technological advances in computing, communication, and transportation have increasingly diluted the significance of our state borders and nationalized our economy. As Justice Black recognized, an expansion of personal jurisdiction has followed.\(^\text{54}\) Nonetheless, the Court has repeatedly warned that it is a mistake to think "state lines are irrelevant,"\(^\text{55}\) or that the nationalization of our economy "heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."\(^\text{56}\)

As the increased use of online communication suspends the reality of our geographic limitations, the personal jurisdiction barrier will only become a finer line. The technological advances that Justice Black envisioned have increased exponentially, and discerning what *minimum contacts* and reasonableness are in the realm of the online world is the next challenge before the courts.

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\(^{50}\) Id. at 472-73.

\(^{51}\) *International Shoe*, 326 U.S. at 319.

\(^{52}\) Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1271 (9th Cir. 1981) (finding a sliding scale with regard to these elements, in that "[the smaller the element of purposeful interjection, the less is jurisdiction to be anticipated and the less reasonable is its exercise.").


\(^{54}\) *See McGee*, 355 U.S. at 223.


\(^{56}\) Id. at 294 (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)). The Court in 1987 made it clear that constitutional personal jurisdiction requirements are still a valid concern. *Asahi Metal Indus. Co. v. California*, 480 U.S. 102, 114-16 (1987). In *Asahi*, the Court found that a California court did not have jurisdiction over a Japanese manufacturer of tire tube valve stems, because of the severe burden on the defendant to defend itself in a foreign legal system. *Id.*
III. THE INTERNET AS A WHOLE NEW PARADIGM

The Internet is the intangible grouping of many individual computers and small computer networks into a decentralized "network of networks." Just as people can communicate over long distances, computers have the ability to communicate with each other in their own unique language. This long-distance communication is done by randomly relaying messages from computer to computer, through an infinite number of intermediaries, until the desired recipient is reached. Unlike the schoolyard game of "telephone," computers communicate in a digital format that guarantees a rapid and flawless transmission.

The average person may not appreciate the intricate, technological marvels of online communication, but everyone can appreciate the uniqueness of this medium and recognize why it will have a strong impact on our lives. Among the distinguishing characteristics of the Internet are its vast cadre of ever increasing information, its use of multimedia, its global insensitivity, and its low-cost and high-speed access. The Internet is not merely an improvement of existing technology or an enhancement of our communication capabilities—it is a whole new phenomenon. To understand the impact that the Internet has had and will increasingly have on our society, one must acknowledge a paradigm shift from our established models of communication and realize the uniqueness of Internet communication. By seeing how atypical the Internet is, we can recognize its power and attraction.

A. Information Glut

The Internet is not a typical database that can store vast amounts of information. Unlike a database, which will always have some limit on capacity, the Internet is truly infinite. By networking many computer databases together, the Internet allows one to retrieve information from many varied data sources. Since its inception in 1969 as a joint project of government and academia, the number of computers linked to the Internet

58. Id. at 831–32.
60. The term "online communication" encompasses all electronic communication of which the Internet is merely one form. This author has chosen not to distinguish between the different forms of online communication and to use the terms interchangeably.
has grown exponentially. In 1981, there were 300 computers linked to the Internet; in 1989, there were 90,000, and by 1996, there were nearly ten million host computers.

Just as with any "real world" medium, the uses for the Internet run the gamut of our social culture. With the click of a button, one can "surf" material as diverse as the latest political developments in Slovakia, the trajectory of Halley's Comet in 2061, or the best methods of contraception. It is the ease of access and varied nature of the material that make the Internet so alluring.

On the Internet, information is accessed via a novel method of indexing called hyperlinking. Hyperlinking allows an Internet user to click, with a mouse, on a word, picture, or image and to immediately be linked to a different document. Unlike existing methods of indexing, hyperlinking does not limit the relationship of information to a predetermined linear format. One's imagination is his or her limitation, not the alphabet, chronology, or any other indexing system. For example, one viewing the Declaration of Independence on the Internet can click upon the words "John Hancock" and be immediately transferred to a biography of our founding father or an article about signatures. Another click on the name of the article's author will transfer the viewer to the New York Times bestseller list on which that author is found. This method of indexing allows for a fast paced flow of information and unlimited opportunity.

B. Multimedia

In the quest for access to information and communication, society has used many media, each one with its distinct benefits and drawbacks. Newspapers, magazines, and other printed materials are strictly one-dimensional media because they communicate solely through print, a single sensory and tangible medium. The written word has effectively allowed us to communicate for centuries, yet it has significant limitations. The high costs of printing and distribution are barriers to a continuous information feed. Radio, though still one-dimensional, breaks the cost and distribution barriers and allows for a continuous and contemporaneous flow of information. Television is a multidimensional medium that allows for a continuous information flow but is limited by expensive production costs.

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62. Id.
64. See supra text accompanying note 2.
The Internet takes the best qualities of each of our communicative media. It is essentially a low-cost print, audio, and visual information device. One can read and print the latest stock reports, listen to the closing bell, and watch the frenzied activity on the floor of the New York Stock Exchange, all without changing communication devices. Additionally, the communication can be tailored to one’s particular interests. In the fifteenth century, movable type changed the way we communicate; in the 1900s, radio changed the way we communicate; in the 1950s, television changed the way we communicate; and in the twenty-first century, the Internet will change the way in which we communicate.

C. Global Insensitivity

The Internet is global in two senses: first, it has no governing body or partisan allegiance, and second, it is unrestricted by terrestrial borders or physical limitations. An uninformed person may ask: Where is the headquarters of the Internet? While this question may be valid in any other sphere, in regard to the Internet, it is unanswerable. The New York Times has its headquarters in midtown Manhattan and CNN in Atlanta, but the Internet is strictly intangible. "There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet."[65] There is no central location, there is no governing body, and there are no limitations. Information can be posted on the Internet by any person, on any continent, in any language, and in any format; that information can be accessed in a like manner.

D. Advertising

In the past decade, the Internet has become an increasingly popular mode of communication. This increased popularity and exponential growth can be directly attributed to the commercialization of the Internet. Corporate America has recently discovered what academics have known for nearly thirty years—namely, that the Internet is an efficient and economic communicative device. Internet advertising is powerful because it is inexpensive, global, and asynchronous. A business advertising on the Internet can set up a website with information about its product or service at a fraction of the cost of television, radio, or print advertising. Additionally, the website, unlike other media, allows Internet users to access that "Internet ad" from anywhere in the world and at any time of the day.

The global nature of the Internet does have some drawbacks in regard to its inability to target certain individuals or geographic locations. That is, one cannot limit website access strictly to viewers in New York or Lebanon, nor can the website be limited to viewers over the age of eighteen or under the age of sixty-five. A business wishing to advertise over traditional media can limit its geographic scope and target audience. For instance, advertising in a local newspaper will reach the local market but avoid the national market. Even a national print or television campaign will not reach an international audience. Likewise, a spot on a late-night talk show only reaches certain viewer demographics. On the other hand, the Internet will allow all users from any location to access your "Internet ad." While global exposure has its benefits, the legal consequences of such exposure must be realized. For example, in the realm of personal jurisdiction, a small business owner in Florida who advertises on the Internet may not realize that he may be subject to personal jurisdiction and may need to litigate a lawsuit anywhere in the country because of that ad. It is in this context that many personal jurisdiction issues have arisen.

IV. INTERNET JURISDICTION

When it comes to determining Internet-related personal jurisdiction issues, a business owner about to foray into the cyberworld will ask whether his website might expose him to the jurisdiction of a foreign court. The answer to this question is yes, no, and maybe. Certainly, personal jurisdiction can be evoked based exclusively on online contact, such as a website, but personal jurisdiction cannot be imposed if the tests employed in the "real world" are not met. Unfortunately, there is no perfunctory test to determine whether personal jurisdiction exists; rather, such a determination is dependent on the nature of the website and the online contact.

The court's opinion in Zippo Manufacturing Co. v. Zippo Dot Com, Inc. sets forth an elucidating framework for analyzing online personal jurisdiction issues. Other courts have cited this framework with increased frequency. A premise of this structured analysis is that not all online
contact is of the same "nature and quality." Online, there are active contacts with a foreign state, which will give rise to personal jurisdiction, and there are passive contacts, which will not give rise to personal jurisdiction. Active contact is online communication that fosters an ongoing business relationship, whereas passive contact is online communication that does "little more than make information available to those who are interested in it."72

There is no brightline test to distinguish between online contact that is active and passive. The courts look to all aspects of the contact to determine whether such contact should be considered active, giving rise to personal jurisdiction. In making such a determination, the level of "interactivity and [the] commercial nature" of the contact is of paramount importance.73 As discussed infra, the greater the level of interactivity on a website, the greater the chance that the website will be considered active and give rise to personal jurisdiction.74 Likewise, a website with little or no interaction between the user and the website will be considered passive and will not give rise to personal jurisdiction.75 In summary, when a court is presented with an online personal jurisdiction issue, it must look to the specific facts of the case and determine whether the online contact is active or passive. Upon a finding of active contact, personal jurisdiction is proper. If the contact is deemed passive, no personal jurisdiction shall be found.

What conduct is considered active and what conduct is considered passive can best be understood by examining the factual polarity of CompuServe, Inc. v. Patterson76 and Bensusan Restaurant Co. v. King.77 CompuServe, a Sixth Circuit decision, depicts the quintessential active contact and typifies the instance in which personal jurisdiction is proper.78 On the other hand, Bensusan, from the Second Circuit Court of Appeals, provides an example of what the courts consider to be a passive website that will not give rise to personal jurisdiction.79 With these cases as reference

72. Id.
73. Id.
74. Id.
76. 89 F.3d 1257 (6th Cir. 1996).
77. 126 F.3d 25 (2d Cir. 1997).
78. CompuServe, 89 F.3d at 1257.
79. Bensusan, 126 F.3d at 25. To date only three United States circuit courts of appeals have decided this issue. The Sixth Circuit in CompuServe, 89 F.3d at 1257, the Second Circuit in

Published by NSUWorks, 1999
points, an examination of the spectrum between them will provide an understanding of the factors to which the courts look in determining online personal jurisdiction issues.

A. Active Contact: CompuServe, Inc. v. Patterson

The first opinion by a circuit court on the issue of online personal jurisdiction was *CompuServe*, in which it held that an Ohio court had jurisdiction over a Texas defendant based strictly on the defendant's online contacts with the State of Ohio. The defendant, Mr. Patterson, was a subscriber and shareware provider to CompuServe, Inc., an Ohio corporation. As a shareware provider, Mr. Patterson had signed an online contract, known as the Shareware Registration Agreement, which provided that any litigation regarding the agreement would be construed and governed in accordance with Ohio law. The relationship between Patterson and CompuServe existed for three years, during which time Patterson uploaded thirty-two software programs to CompuServe's computers in Ohio. Once uploaded, Patterson's shareware programs could be downloaded and purchased by any CompuServe subscriber. In effect, Patterson used CompuServe's computer network as "a distribution center to market his software" programs. Patterson advertised these programs on the CompuServe network, payment for the programs were made to CompuServe, and the programs were available exclusively on the CompuServe network.

For over three years, Patterson sold programs to only twelve residents in Ohio and received less than $650 in fees. In December of 1993, Patterson claimed that CompuServe had incorporated some of his trademarked terms into its own software product. Patterson contacted CompuServe via e-mail about its alleged trademark infringement and eventually demanded $100,000 to settle the claim. CompuServe filed a complaint seeking a declaratory judgment that it did not infringe upon Patterson's trademark. The district court, Bensusan, 126 F.3d at 25, and the Ninth Circuit in *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) and *Panavision Int'l, L.P. v Toeppen*, 141 F.3d 1316 (9th Cir. 1998).


81. Shareware is software that an Internet user downloads for a trial period, paying the author a fee only if he or she decides to continue using the software. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 n.6 (W.D. Pa. 1997).

82. *CompuServe*, 89 F.3d at 1260. CompuServe is the second largest provider of Internet computing and information services. *Id.*

83. *Id.* at 1260–61. Mr. Patterson's program was a software program that was designed to help people navigate the Internet. *Id.* at 1261.

84. *Cybersell*, 130 F.3d at 417.

https://nsuworks.nova.edu/nlr/vol23/iss2/8
court dismissed CompuServe's complaint for lack of personal jurisdiction over Patterson, but the Sixth Circuit reversed.85 Judge Brown, writing for the court, rejected Patterson's position that "contacts with Ohio, which have been almost entirely electronic in nature" are insufficient to support personal jurisdiction over a nonresident defendant.86 The court recognized that online communication "represents perhaps the latest and greatest manifestation of these historical, globe-shrinking trends;" however, the court refused to allow the nature of the medium to alter the due process examination used in conventional personal jurisdiction analysis.87 If anything, "there is less perceived need today for the federal constitution to protect defendants from 'inconvenient litigation' because all but the most remote forums are easily accessible for the pursuit of both business and litigation."88 Physical presence, the court emphasized, is not necessary "'[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State.'"89 In finding that Patterson had "purposefully availed himself of the privilege of doing business in Ohio,"90 the court characterized Patterson as a "third party provider of software who used CompuServe... to market his wares."91 This depiction of Patterson's relationship with CompuServe was "crucial" to finding that minimum contacts existed.92 Having a contract or even injecting a product into the "stream of commerce, without more, would be at best a dubious ground for [personal] jurisdiction."93 Only by finding a deliberate, repeated, and ongoing commercial relationship was the court able to find that a substantial connection between Patterson and Ohio existed, despite a "'minimal course of dealing'" and a paucity of tangible and physical evidence of Patterson's relationship with Ohio.94

The CompuServe decision is based primarily on the fact "that Patterson purposefully availed himself of the privilege of doing business in Ohio."95 The court emphasized Patterson's purposeful link with Ohio but made little

86. Id. at 1262, 1268–69.
87. Id. at 1262–63. See also Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (stating "Different results should not be reached simply because business is conducted over the Internet").
88. CompuServe, 89 F.3d at 1262 (citing World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980)).
89. Id. at 1264 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).
90. Id. at 1266.
91. Id. at 1264.
92. Id.
93. CompuServe, 89 F.3d at 1265.
94. Id. at 1264–65.
95. Id. at 1266.
inquiry into whether it was reasonable to require Patterson to defend himself in Ohio. The CompuServe court chose to ignore the Worldwide Volkswagen reasonableness inquiry; however, it is important to recognize that other courts have found the issue of reasonableness to be determinative. Additionally, the CompuServe court, in trying to limit the scope of its opinion, specifically stated that it did not decide whether a shareware provider would be subject to suit in the state of the shareware purchaser, or whether a subscriber to an online service can be sued by the service provider in its home state. What is clear from the CompuServe decision is that an active commercial venture that has "knowing and repeated" online contacts with a foreign state will be subject to the jurisdiction of that state even if the sole basis for such jurisdiction is the online contacts.

B. Passive Contact: Bensusan Restaurant Co. v. King

At the other end of the spectrum is the "passive" website, which merely makes information available for those who wish to access it. Such were the facts in Bensusan, a case decided and upheld primarily on the basis of the New York long arm statute, but which is nonetheless instructive.

In Bensusan, a New York-based chain of jazz clubs known as the "The Blue Note" brought an assortment of trademark related claims against a Missouri club also known as "The Blue Note." The claims, filed in federal court in New York, asserted personal jurisdiction based upon the fact that the defendant had set up a website on the Internet's World Wide Web. The website, in addition to providing general club information and a schedule of events, also furnished the telephone number of the club box office for charging and reserving tickets by phone. While tickets could be ordered and purchased by phone, the actual tickets had to be picked up at the box office on the night of the show.

The district court, in granting the defendant's motion to dismiss for lack of personal jurisdiction, held that the mere fact that the defendant's website

96. Id. at 1267–68. The extent of the court's inquiry is a conclusory statement that when purposeful availment exists, it can be inferred that the suit is reasonable. Id.


98. CompuServe, 89 F.3d. at 1268.


102. Id. at 26.

could be accessed from the forum state does not give rise to jurisdiction, even if the consequences of such access are foreseeable. 104 The simple creation of a general access website, like entering a product into the stream of commerce, may have nationwide impact, but without additional contact “is not an act purposefully directed toward the forum state.” 105 To find otherwise would subject the operator of a website to national if not worldwide jurisdiction, which “is not consistent with traditional personal jurisdiction case law nor acceptable . . . as a matter of policy.” 106

The beauty of Bensusan is its simple fact pattern. There were no other facts, aside from the defendant's website, upon which the court could base personal jurisdiction. The Blue Note club in Missouri had no other contacts with the State of New York. 107 Unlike the defendants in many other cases the Missouri club in Bensusan, received no revenue from New York, did not advertise in New York, and had no 800 number that was accessible in New York. Its sole contact with New York was the website upon which it advertised. This, the court held, did not give rise to personal jurisdiction in a New York court. 108

C. The Middle Spectrum

Bensusan and CompuServe are important because they provide some measure of clarity in the otherwise murky realm of online personal jurisdiction law. These two cases may be viewed as reference points on a hypothetical personal jurisdiction spectrum. At one end of the spectrum is CompuServe, which holds that knowing and repeated electronic contacts with a foreign state will give rise to personal jurisdiction. At the other end is Bensusan, which holds that a strictly passive website will not give rise to personal jurisdiction over a nonresident defendant. These reference points will decide cases in which the fact pattern can be clearly characterized as an active or passive online contact.

Unfortunately, not all cases have Bensusan’s uncomplicated facts or CompuServe’s extensive contacts. Many online contacts will be somewhere in the middle of the personal jurisdiction spectrum. In this middle spectrum, the courts must determine whether online contact, coupled with other factors

104. Id. at 300. The Bensusan decision in both the district and appellate courts was determined on the basis of New York’s long arm statute.
105. Id. at 301.
108. Id.
such as toll-free numbers,\textsuperscript{109} print or direct mail advertising,\textsuperscript{110} or even the filing of a lawsuit\textsuperscript{111} will be considered sufficient contact with the foreign state to give rise to personal jurisdiction.

The courts are still exploring the chasm between Bensusan and CompuServe. What follows is a look at the factors that some courts have found to be significant in deciding whether an online contact should be considered active or passive. A single factor will rarely be dispositive of the issue, but we can glean from court opinions what factors are important in finding that the required \textit{minimum contacts} exist with the forum state.

\section{Contracts}

The United States Supreme Court held that the mere existence of a contract between the defendant and a resident of the forum state would not automatically give rise to personal jurisdiction.\textsuperscript{112} Though a contract in itself may not give rise to personal jurisdiction, the existence of a contract is an indication of the expectations of the parties, which consequently may give rise to personal jurisdiction.\textsuperscript{113} The factors surrounding the formation of and compliance with the contract will often be more important than the contract itself. "[P]rior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" are determinative, not the fact that a contract exists.\textsuperscript{114}

An example of the role that a contract plays in finding jurisdiction in a non-online setting is \textit{Burger King Corp. v. Rudzewicz}.\textsuperscript{115} The defendant, a Michigan resident, was sued in a Florida court for breaching a franchise agreement with the Burger King Corporation. The Court found that the defendant was subject to the jurisdiction of a Florida court despite the fact that "the defendant did not \textit{physically} enter the forum State."\textsuperscript{116} The existence of a franchise contract was indicative of a "substantial and

\begin{itemize}
  \item \textsuperscript{109} Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (exercising jurisdiction based on an Internet website that included a toll-free 800 number).
  \item \textsuperscript{110} Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 5 (D.D.C. 1996) (finding jurisdiction based upon the defendant's Internet website and the defendant's newspaper advertisement).
  \item \textsuperscript{111} \textit{Hearst}, 1997 WL 97097, at *12 (discussing whether litigation related e-mail will give rise to jurisdiction). \textit{See also} CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1266 (6th Cir. 1996) (considering the fact that the defendant sent e-mail messages about his claim as an indication that the defendant "originated and maintained" contact with the forum state).
  \item \textsuperscript{112} Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1995).
  \item \textsuperscript{114} \textit{Burger King}, 471 U.S. at 479.
  \item \textsuperscript{115} \textit{Id.} at 462.
  \item \textsuperscript{116} \textit{Id.} at 476.
\end{itemize}
continuing relationship” between the parties. By seeking out the inherent benefits of such a relationship, the defendant had reached out to the forum state in a manner that “can in no sense be viewed as ‘random,’ ‘fortuitous,’ or ‘attenuated.’”

In adapting the Burger King holding to online situations, the court in CompuServe found that sufficient contact with the forum state existed when the defendant had an online service and shareware provider contract with CompuServe located in Ohio. Likewise, in Thompson v. Handa-Lopez, Inc., the court looked toward the existence of a contract as grounds for finding personal jurisdiction. In that case, the defendant was a California company that operated an arcade website called “Funscape’s Casino Royale,” on which one could play such games as blackjack, poker, keno, slots, craps, easy lotto, and roulette. To play the games, one would have to agree to an online contract and use a credit card to purchase tokens, known as “Funbucks.” The contract included a provision stating that all disputes would be governed by the laws of California. If a player won a game, he or she would be paid with “Funbucks,” which could be redeemed for cash or prizes. When the plaintiff, a Texas resident, attempted to claim $193,728.40 in winnings, the defendant refused to pay, and, after suit was filed, moved to dismiss for lack of personal jurisdiction. The district court found that jurisdiction in Texas was proper because the defendant “entered into contracts with the residents of various states knowing that it would receive commercial gain.” The fact that the enrollment contract provided for California law to apply was inconsequential to the court in light of the interests that the State of Texas had in protecting its citizens.

Though evidence of a contract, online or otherwise, will not be conclusive of the personal jurisdiction issue, it will be a significant factor in determining whether sufficient contacts exist to give rise to personal jurisdiction.

117. Id. at 485–87.
118. Id. at 480 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
119. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996) (comparing the contracts with CompuServe to the franchisee’s contract with Burger King).
121. Id. at 744.
122. Id. at 741. As of February 5, 1999, the Defendant’s website could be found at <http://www.funscape.com>.
123. Id.
124. Id. at 744.
125. Thompson, 998 F. Supp. at 745 (the court avoided finding jurisdiction based solely on the contract by identifying the contract as providing a “choice of law,” rather than a “forum selection.”).
2. Interactivity

A second factor considered by the courts is the defendant's commercial interaction with the forum state. In *Zippo Manufacturing*, the court stated that "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." While the exact level of interactivity necessary is unclear, a website must be more than strictly passive.

A case from the Eastern District of Texas provides a good example of how an interactive website can give rise to personal jurisdiction, even when the contact is unrelated to the cause of action. In *Mieczkowski v. Masco Corp.*, a products liability suit was filed in Texas against the defendant, Rose Furniture Company, a North Carolina entity. The plaintiff had purchased a bunk bed in North Carolina and a year later moved to Texas. Subsequently, the plaintiff's son was asphyxiated when he got caught between the bed railings. The defendant had no offices, employees, agents, or property in Texas, nor did the defendant advertise in Texas. The defendant had, during a six-year period, sold over five million dollars worth of merchandise to Texas residents, but this alone, the court determined, would not give rise to personal jurisdiction. What gave rise to jurisdiction was the defendant's maintenance of an interactive website that was accessible by Texans.

The court relied on the fact that the defendant's website was quite extensive. The website's "Shop Online" section provided the user with an extensive list of furniture selections from which individual pieces of furniture could be chosen. Once a specific piece of furniture was selected, the viewer would see a picture of the furniture, informational material regarding the construction of the furniture, and the price of the selected furniture. To order, one had the choice of either printing an order form or

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128. Id.
129. When a court finds personal jurisdiction over a defendant based on contact unrelated to the dispute it is commonly referred to as *general* jurisdiction. *See supra* text accompanying note 25.
131. Id. at 783–85.
132. Id. at 787–88.
133. As of February 5, 1999, the defendant's website could be found at <http://www.rosefurniture.com>. Id. at 786 n.4.
134. Id. at 787.
communicating with an online sales representative in the “Internet Sales Division.” Additionally, one could check the status of a purchase online.  

In finding jurisdiction, the court stated that such a website was clearly “designed to solicit business in a manner that exceeds traditional notions of advertising.” When a party solicits rather than merely advertises, he may be subjecting himself to personal jurisdiction in that forum. This distinction was crucial in *Maritz v. Cybergold, Inc.* a trademark infringement case from the Eastern District of Missouri. In that case, the defendant, a California company, operated an Internet website that provided information about a forthcoming mailing list. Upon registering with the website, a user was provided with a personal mailbox to which advertisements, tailored to the specific interests of each user, would be forwarded. From the time the website was set up to the time that the lawsuit was filed, the website was accessed by Missouri users 131 times.  

The court found Cybergold’s relationship with the State of Missouri significant enough to supply the required *minimum contacts.* The court rejected the characterization of the defendant’s website as a “passive site” and found that the defendant was soliciting names and addresses for the use of its mailing list. The court found that by interacting with the website visitors, “Cybergold automatically and indiscriminately respond[ed] to each and every Internet user who accesses its website.” It was this automatic interaction between the website and the foreign state that caused the online communication to cross the line between passive and active contact, thereby giving rise to personal jurisdiction.  

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136. Id.
138. Id.
139. As of February 5, 1999, the Defendant’s website could be found at <http://www.cybergold.com>. *Id.* at 1330.
140. Id.
141. *Id.* Though the site was actually accessed 311 times, the court discounted the 180 contacts made by the plaintiff. *Maritz,* 947 F. Supp. at 1330.
142. Id. at 1334.
143. Id. at 1333.
144. Id. at 1335.
145. *Id.* at 1333 (comparing an interactive website to the receiving of a inquiry letter and the mailing a response via traditional mail).
146. *Maritz* went one step beyond *Mieczkowski* and found an active contact even though the interactivity was not with a live representative. See *Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 721 (Minn. Ct. App. 1997) (finding a website advertising a forthcoming online gambling service to be interactive).
3. Quantity of Contact

It has long been recognized that we must look to the "quality and nature" of the contact with the forum state rather than to a "mechanical or quantitative" measure of such contact. A single contact with the forum state that is substantial in nature may supply the required minimum contacts, whereas repeated contacts which are only minimal in nature may not. Nonetheless, the number of contacts that are made with the forum state will be indicative of whether the defendant purposefully availed itself of the privilege of conducting business in the forum state. This is especially true online, where the number of hits a website receives is the primary method of measuring the popularity and effectiveness of a website.

In looking at the quantity of contacts, the Maritz court found that a defendant’s website which received 131 hits from Missouri residents was subject to jurisdiction in Missouri, in part because the number of hits suggested that the defendant purposefully availed itself of the privilege of doing business in Missouri. Likewise, the 248 hits from Minnesota that were received by an Internet site advertising a future online gambling service were important in finding that the State of Minnesota had jurisdiction over the nonresident corporate defendant which operated the website. In playing the numbers game, the Minnesota Court of Appeals found that if 131 hits were enough for Missouri to find purposeful availment, then 248 hits would a fortiori show such an intent.

In using the quantity of contacts such as hits as a factor in determining whether jurisdiction is proper, there are a number of problems. First, as with any statistic, such numbers are malleable. Do you look at the number of hits received by a site individually, or do you look at the hits as a percentage of Internet users in that state? Alternately, do you look at the number of hits in relation to how popular other websites are, or do you look at what percentage of the hits at a specific website come from the forum state? Second, the amount of hits a website receives is not indicative of the amount of people with whom the website communicates. Often, one will reach a website by mistake and just “surf” on, yet such a contact is still considered a

150. Humphrey, 568 N.W.2d at 718–19.
151. Id.
152. See, e.g., id. at 718 (using the fact that computers in Minnesota were among the 500 computers that most often accessed the defendant’s website, as a factor in finding jurisdiction over the defendant).
Finally, parties to an action can easily inflate the number of hits a site receives by contacting the site themselves. Indeed, in Maritz, there was evidence that over half the recorded hits were caused by the plaintiff, and the court therefore discounted the inflated number of hits from 311 actual hits to 131. Using the number of hits a website receives as a method of determining jurisdiction is a poor way to measure a defendant's contact with the forum state and has fortunately not been used by many courts.

4. Financial Success

Some courts, in making a determination of whether minimum contacts exist, have looked toward the success of the Internet site. In Expert Pages v. Buckalew, the court denied jurisdiction over a defendant who had infringed the copyright of Expert Pages, a website which provides information regarding expert witness and litigation consulting. The court found that the defendant's "business does not appear to have been terribly successful," for he never had more than twelve paying customers. The court found that to require such an unsuccessful endeavor to defend itself in a foreign state would be an undue burden upon the defendant and would violate due process principles. On the other hand, in CompuServe, the court rejected the argument that such a "de minimis amount of software sales" should not give rise to personal jurisdiction. The court specifically stated that it is "not their number or status [of the contacts] that determines whether they amount to purposeful availment." While the financial success of a party, by itself, may not be an important factor, the financial success of the defendant may indirectly play a role in determining whether it is reasonable to require the defendant to litigate the matter in a foreign state. Obviously, a financially successful defendant will find the cost of foreign litigation less burdensome than a cash-strapped, upstart enterprise. In Digital Equipment Corp. v. Altavista Technology, Inc., a complicated trademark infringement case, the court dealt with this issue by stating that the costs involved in litigating a suit in a

154. Maritz, 947 F. Supp. at 1330; see supra text accompanying note 137.
156. Id. at *5.
157. Id. at *4.
158. Id.
159. CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1265 (6th Cir. 1996). The defendant had made only $650 worth of sales to 12 residents of the forum state. Id. at 1261.
160. Id. at 1265 (citations omitted).
foreign state "may well be the price of its agreeing to do business involving
the Internet." While such a viewpoint may be realistic, it is especially
harsh when the defendants are small companies or individuals who are not
"experienced and sophisticated businessmen."

5. Electronic Mail

One of the most common forms of online communication is the use of
electronic mail, or e-mail, as it is commonly called. Where the defendant
has been in contact with parties in the foreign state via e-mail, the courts
have been willing to find personal jurisdiction over the defendant. The
reason for this is twofold. First, e-mail does not exist in a vacuum. It is
usually only one method of communication that supplements other
telephone, written, or in-person contact. Even if e-mail alone does not
provide sufficient contact with the forum state, the totality of the relationship
with the forum state will. Second, e-mail, unlike a website, is targeted
toward a specific person or group of people. When one sends an e-mail
message to a specific person or group, it will be easier for a court to find
purposeful activity directed toward the forum state than it would with an
open-ended Internet website.

Electronic mail, even if sent regarding pending or future litigation, may
give rise to personal jurisdiction. In CompuServe, the court, in finding
jurisdiction, took into account the e-mail messages that the defendant sent to
CompuServe about his claim. Likewise, in Hearst Corp. v. Goldberger, the
court closely examined the defendant's litigation-related e-mails before
finding a lack of jurisdiction.

6. Passive Plus

The instances in which websites gave rise to personal jurisdiction
usually present other factors upon which courts can rely to support a finding
of personal jurisdiction. Such was the case in Inset Systems, Inc., v.

162. Id. at 471.
the defendant's telephone calls and e-mail messages to the plaintiff); see also Hall v. LaRonde,
66 Cal. Rptr. 2d 399, 400 (Cal. Ct. App. 1997) (finding jurisdiction based on e-mail contact).
165. CompuServe, 89 F.3d at 1266.
168. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997). In any case
where jurisdiction is found "there has been 'something more' to indicate that the defendant
Instruction Set, Inc.,\textsuperscript{169} which reached "the outer limits of the exercise of personal jurisdiction."\textsuperscript{170} Inset and Instruction were two software developers located in Connecticut and Massachusetts, respectively. When a trademark infringement issue arose over Instruction's use of "inset.com," as a domain name, Inset filed suit in a Connecticut court. The court found personal jurisdiction based on the defendant's strictly passive Internet site and the toll-free number posted thereon.\textsuperscript{171} In recognizing the uniqueness of the Internet, the court stated that "unlike television and radio advertising, the [Internet] advertisement is available continuously to any Internet user."\textsuperscript{172} The fact that Internet advertising is a continuous medium which, at that time, had the ability to reach 10,000 Connecticut users, coupled with the defendant's toll-free number, was in the court's eyes indicative of the defendant's intent to solicit business and "purposefully avail[ ] itself of the privilege of doing business within Connecticut."\textsuperscript{173}

Similarly, in Heroes, Inc. \textit{v.} Heroes Foundation,\textsuperscript{174} the court found that the Heroes Foundation, a New York charity that helps fight cystic fibrosis, was subject to the jurisdiction of a District of Columbia court based in part because of its Internet website.\textsuperscript{175} Heroes Foundation was sued for trademark infringement by Heroes, Inc., a Washington, D.C.-based charity that assists families of firefighters and police officers killed in the line of duty.\textsuperscript{176} The court found that the defendant purposefully availed itself of the privilege of doing business in the forum state by expressly soliciting donations and providing a toll-free number on its Internet website.\textsuperscript{177} The text of the website was:

\begin{quote}
    How Can I Help?

    You can help by donating to the Heroes Foundation. For information on how to make a donation, call (800) 789-HERO(4376). No donation is too small, and every donation counts. With your help, we can find a cure to this deadly disease.\textsuperscript{178}
\end{quote}

\begin{flushright}
    purposefully (albeit electronically) directed his activity in a substantial way to the forum state."
\end{flushright}

\textit{Id.}

\textsuperscript{171} \textit{Inset Sys.}, 937 F. Supp. at 165.
\textsuperscript{172} \textit{Id.} at 165.
\textsuperscript{173} \textit{Id.}
\textsuperscript{175} \textit{Id.} at 5.
\textsuperscript{176} \textit{Id.} at 2.
\textsuperscript{177} \textit{Id.} at 5.
\textsuperscript{178} \textit{Id.} at 4.
Such a website, the court found, would satisfy the minimum contacts test and give rise to personal jurisdiction. However, not all courts will find jurisdiction in such instances. In Shapiro v. Santa Fe Gaming Corp., an attorney claiming to be the "critical impetus" in discovering a short swing violation of section 16(b) of the Securities and Exchange Act of 1934 sued for his attorney's fees in an Illinois court. The court found no jurisdiction over a Nevada corporate plaintiff even though the company maintained a website and a toll-free number. The court held that having a website and toll-free number, even one that is solicitous in nature, is not a lethal combination that automatically submits a defendant to personal jurisdiction. Likewise, in Graphic Controls Corp. v. Utah Medical Products, Inc., the court found that the defendant's Internet site and toll-free number "do not demonstrate [the defendant's] purposeful availment of the benefits and protections provided in each or any of such fora." This matter is clearly still in conflict among the district courts.

The most recent circuit court opinion on this issue is Cybersell, Inc. v. Cybersell, Inc., a Ninth Circuit decision. In Cybersell, the court refrained from finding specific jurisdiction based solely upon the maintenance of an Internet website. The court found that an essentially passive website "does not qualify as purposeful activity invoking the benefits and protections" of the forum state. In this case, an Arizona Internet marketing service sued a Florida Internet consulting service for trademark infringement and related actions in an Arizona court. The defendant, Cybersell of Florida, maintained a website on the Internet that contained the allegedly infringing materials. The website allowed the browser to enter his or her name, address, and an indication of whether he or she was interested in Cybersell's services. One could not sign up over the Internet, nor was there a toll-free number on the website. No one in Arizona, aside

179. Heroes, 958 F. Supp. at 5. What is especially intriguing is that the court seems to hold that such activity will even give rise to general jurisdiction. Id. at 4–5.
181. Id.
182. Id. at *2.
183. Id.
185. Id. at *3.
186. 130 F.3d 414 (9th Cir. 1997).
187. Id. at 415.
188. Id. at 420.
189. Id. at 415. The defendant's website address could be found at <http://www.cybsell.com>. Id. As of February 20, 1999, this website is unavailable.
from the plaintiffs, ever accessed the website. The court found Cybersell’s website to be essentially passive in that the defendant never encouraged people to access the site and therefore never “invok[ed] the benefits and protections of Arizona law.”

_Cybersell_ remains true to the holding of _Bensusan_ that a strictly passive website will not give rise to personal jurisdiction in a foreign state. _Cybersell_ also goes a step beyond _Bensusan_ in deeming the website strictly passive despite the fact that the browser’s name and address could be entered on the website as an indication of interest in the services provided. This case should not be read to require online activity similar to the facts in _CompuServe_ before personal jurisdiction can be established. What it does indicate is the court’s distaste for finding personal jurisdiction based solely on an essentially passive website that includes a toll-free number.

V. CONCLUSION

In trying to fit new technology into existing law, the courts have extended the principles of _International Shoe_ to the outer limits. The courts that do find purposeful availment based on minimal online contact fail to take the geographic insensitivity of the Internet into account. The Internet does not yet allow for targeted postings, which would permit access to a website only in certain geographic areas, and one cannot purposefully avail oneself of something that is not optional. By finding personal jurisdiction based on such minimal contacts, the courts will in effect limit Internet advertising only to those enterprises that can afford to litigate matters in foreign and distant jurisdictions.

When Chief Justice Stone wrote his opinion in _International Shoe_, it is doubtful that he envisioned his principles being applied to a medium such as the Internet. What he did recognize was that any personal jurisdiction doctrine would need to be flexible and adaptable to changing circumstances. Even if the minimum contacts of the cyber era are found to be different than the minimum contacts of fifty years ago, the guiding principles and doctrines of _International Shoe_ and its progeny will certainly endure.

In the next decade, the issues surrounding online personal jurisdiction must be watched from both a legal and technological perspective. As the issue of personal jurisdiction makes its way through the appellate courts, a more organized structure and formulation will be developed, which will allow for a clearer application of the law. Personal jurisdiction is a threshold issue that the United States Supreme Court has continuously addressed;

190. _Id._ at 419.
191. _See Meyer supra note 66, at 1301–02._
hopefully, in the near future, it will feel compelled to address its application to the world of online communication.

Online personal jurisdiction must also be monitored from a technological vantagepoint. The Internet, despite its massive size, is still in its infancy. Anyone who has followed the computer and communication industry will recognize that what is new and novel today may be obsolete and antiquated tomorrow. In this era of rapidly changing technology, new devices and programs may be developed that will resolve many of the personal jurisdiction issues that we have today. Until such time, we must apply existing law to this new area and remain truthful to the time-honored principles of personal jurisdiction.

Motty Shulman