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***Bensusan Restaurant Corp. v. King:*
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I. Introduction

WARNING: If you are reading this Note from an electronic database, you are deemed to have consented to resolving all legal disputes arising from the contents of this Note under New York laws and within a New York state court. If you do not agree, do NOT continue to read this Note.

This type of warning may be required to avoid becoming subject to a foreign state's jurisdiction through one's Internet activities. Failure to clearly post such a warning may mean that one has consented to the distribution of one's web site throughout the world-wide web and to any person accessing it. Since the web site can be accessed virtually anywhere, the web site creator may purposefully avail himself of the laws of every state – maybe even every nation.

The question is whether an Internet web site, even a passive one, constitutes a constitutionally sufficient basis upon which a court in a foreign forum may assert personal jurisdiction.¹ Even though a finding of personal jurisdiction once re-

1. Also known as *in personam* jurisdiction.

quired strict physical presence within a state's boundaries,² the evolution of technology has mandated a change in that traditional rule. Since 1877, both statutory and common laws have relaxed personal jurisdiction requirements by expanding the definition of physical presence.³ In 1945, the Supreme Court in *International Shoe Co. v. State of Washington*⁴ redefined the "anachronistic"⁵ *Pennoyer* rule, enabling an assertion of personal jurisdiction when "minimum contacts" are present within the forum, to the extent that such minimum contacts would not offend "traditional notions of fair play and substantial justice."⁶

Since *International Shoe*, courts have struggled to apply the evolved personal jurisdiction test to varied situations.⁷ Principles and standards have emerged resulting in the development of guideposts to assess personal jurisdiction.⁸ However, there remains the need to respond to constant changes in the ways in which businesses operate.⁹

As early as 1996, the limit of the minimum contacts analysis was again tested¹⁰ when courts questioned whether an Internet¹¹ presence constituted minimum contacts under the

2. See *Pennoyer v. Neff*, 95 U.S. 714 (1877).

3. See *infra* Parts II.A and II.B and accompanying text.

4. 326 U.S. 310 (1945).

5. JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE*, § 3.10, at 120 (2d ed. 1995).

6. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (citations omitted).

7. See, e.g., *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *infra* Part II.B and accompanying text.

8. See *infra* Part II.B and accompanying text (discussing in detail the factors courts have considered in deciding whether to assert personal jurisdiction).

9. See FRIEDENTHAL, *supra* note 5, § 3.10, at 120. Those authors suggest that the case "adopted a new, more flexible standard for the assertion of personal jurisdiction, based upon a jurisdictional theory and standards better suited to a progressively more mobile society." *Id.* See, for example, *Frummer v. Hilton Hotels Int'l*, 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41 (1967), involving a tourist who was injured at a Hilton Hotel in England. Hilton Hotels, an English corporation, established a reservation center in New York using a 1-800 telephone number. See *id.* at 537. New York's highest court agreed that the reservation center provided a minimum contact in light of the fact that the agency was doing all the business the principle could be doing if it were actually in New York. See *id.* at 538.

10. See Leif Swedlow, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. L. REV. 337 (1997).

11. For an in depth definition and explanation of the Internet and the modes of connecting and transmitting information, see *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997). The Internet has been defined

International Shoe standard.¹² Since that time, and through today, courts continue to struggle with this question.¹³ Given that the Internet is accessible world-wide, the fear has been that if a web site establishes minimum contacts, then the defendants will be subject to personal jurisdiction in all jurisdictions. On the other hand, denying that an Internet site is a method by which people knowingly conduct activities in foreign states may enable corporations to be "present" in a foreign state without being subject to its jurisdiction.¹⁴ Neither extreme seems desirable. The Supreme Court has not yet had occasion to respond, although it has suggested in the past that it is reluctant to develop firm standards in the ever-changing technological arena.¹⁵

as follows: "The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks." *Goldberger*, 1997 WL 97097, at *1 (quoting *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996)). "Reasonable estimates are that as many as 40 million people around the world can and do access the Internet; that figure is expected to grow to 200 million Internet users by 1999." *Goldberger*, 1997 WL 97097, at *1 (citing *Reno*, 929 F. Supp. at 871). "The Internet is a decentralized, global medium of communications – or 'cyber space' – that links people, institutions, corporations and governments around the world. . . . These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole." *Reno*, 929 F. Supp. at 871. "The Internet is a cooperative venture, owned by no one, but regulated by several volunteer agencies." *Goldberger*, 1997 WL 97097, at *1 (quoting *MTV Networks v. Curry*, 867 F. Supp. 202 (S.D.N.Y. 1994)); see also *EDIAS Software Int'l v. BASIS Int'l*, 947 F. Supp. 413, 419-20 (D. Ariz. 1996); *Intermatic Inc. v. Toeppen*, 947 F. Supp. 1227 (N.D. Ill. 1996); *Playboy Enterprises, Inc. v. Chuckleberry Publishing Inc.*, 939 F. Supp. 1032-37, 1039-40 (S.D.N.Y. 1996); Swedlow, *supra* note 10.

12. See *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). Compare, e.g., John Matney et al., *Brief for Respondent*, 14 J. MARSHALL J. COMPUTER & INFO. L. 627 (1996) (based on a hypothetical factual situation, arguing that Internet presence may confer personal jurisdiction), with Aaron Reber et al., *Brief for Petitioner*, 14 J. MARSHALL J. COMPUTER & INFO. L. 595 (1996) (based on a hypothetical factual situation, arguing that Internet presence does not confer personal jurisdiction).

13. It has been recognized that the Internet maintains no definable territorial boundaries. See *Digital Equipment Corp. v. Altavista Technology*, 960 F. Supp. 456, 462 (D. Mass. 1997). In that case, District Judge Gertner suggested that "[t]o paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps 'no there there,' the 'there' is everywhere where there is Internet access." *Digital Equipment*, 960 F. Supp. at 462 (no citation provided).

14. See *infra* Part II.B and accompanying text.

15. See *Denver Area Education Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (plurality decision finding it unwise to establish guidelines now, considering the changes in law and technology).

Nevertheless, the issue is ripe for resolution in light of the growing number of organizations and people transacting business over the Internet.¹⁶

Part II of this Note will discuss both the statutory and common law aspects and requirements of personal jurisdiction. Also, it will elucidate many recent decisions which have considered whether use of the Internet constitutes a valid contact for personal jurisdiction. New York has forayed into the personal jurisdiction question in light of Internet presence.¹⁷ In *Bensusan Restaurant Corporation v. King*, the court dismissed a complaint against a Missouri resident for lack of personal jurisdiction, holding that an Internet web page was not a sufficient contact.¹⁸ Part III will discuss the *Bensusan* case in depth. Part IV is an analysis of the *Bensusan* decision which argues that the court erred in holding that Internet presence is a constitutionally insufficient contact. In addition, Part IV will suggest a new way in which current personal jurisdiction law may be applied to limit the possibility of world-wide jurisdiction, and at the same time prevent parties from using the Internet as a jurisdictional shield.

II. The Law of Personal Jurisdiction

A. Long-Arm Statutes

Long-arm statutes, otherwise known as single-act statutes, outline the circumstances under which a state can exercise personal jurisdiction over a nonresident defendant.¹⁹ Once statutory compliance has been met, a court must turn to the constitutional parameters of personal jurisdiction as estab-

16. See David Thatch, *Personal Jurisdiction and the World-Wide Web: Bits (And Bytes) of Minimum Contacts*, 23 RUTGERS COMPUTER & TECH. L.J. 143, 153 (1997) (discussing new uses of the Internet) (citing *Surf's Up for New-Wave Bankers*, THE ECONOMIST, Oct. 7, 1995, at 77; Vic Sussman and Kenan Pollack, *Gold Rush in Cyberspace*, U.S. NEWS & WORLD REP., Nov. 13, 1995, at 73; *Will Your Next Computer Be a Tin Can and a Wire?*, THE ECONOMIST, Oct. 14, 1995, at 75). See also Swedlow, *supra* note 10.

17. See, e.g., *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

18. See *id.* at 295-96.

19. See Friedenthal, *supra* note 5, § 3.12, at 139; see also *Hess v. Pawloski*, 274 U.S. 352 (1927).

lished under common law.²⁰ Not all states have chosen to allow their courts to find personal jurisdiction to the extent allowed by the Constitution.²¹ For example, New York's long-arm statute restricts the exercise of personal jurisdiction to instances where specified transactions have taken place.²² In contrast, California's statute has a scope as broad as the Constitution permits, providing 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."²³

Since each state may design its own long-arm statute, this Note does not attempt to assess the impact of such statutes on cases dealing with Internet presence. Instead, this Note concentrates on the next hurdle: the constitutional considerations.

20. See *infra* Part II.B and accompanying text.

21. See *infra* note 23.

22. See N.Y. C.P.L.R. 302(a) (McKinney 1997) which authorizes personal jurisdiction when a nonresident person or corporation:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, 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 or international commerce; or
4. owns, uses or possesses any real property situated within the state.

N.Y. C.P.L.R. 302(a) (McKinney 1997).

23. CAL. CIV. PROC. CODE § 410.10 (West 1997). Rhode Island enacted a similarly broad long-arm statute, providing that:

Every [non-resident] . . . that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island, and the courts of this state shall hold such [non-residents] . . . amenable to suit in Rhode Island in every case not contrary to the provisions of the Constitution of the United States.

R.I. GEN. LAWS § 9-5-33(a) (1997).

B. *Retrospective: The Evolution of the Law of Personal Jurisdiction*

In *Pennoyer v. Neff*,²⁴ the Supreme Court established that “[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.”²⁵ The Court reasoned that a state could maintain jurisdiction of persons and property found only within its territorial boundaries.²⁶ This reasoning stemmed from the notion that each state is like an independent nation and so cannot intrude on the sovereignty of neighboring “nations.”²⁷ Over 100 years later, the physical presence test remains, in varying form, as one test for personal jurisdiction.²⁸ Today, of course, physical presence is one way a court may retain general jurisdiction over a defendant.²⁹

In 1945, however, the Supreme Court restated its position on personal jurisdiction requirements, shifting the focus away from actual physical presence as a prerequisite.³⁰ In *International Shoe*, the Court considered whether a Delaware corporation could be “present” in the state of Washington by means of its contacts with that state.³¹ The appellant shoe company did not have an office, make contracts for sale or purchase, or maintain any stock in the forum state.³² However, eleven to thirteen salespeople resided in Washington at various times and their main activities were confined to that state.³³ Each sale registered within Washington was subject to approval by the home office in Missouri.³⁴

Even though *International Shoe* was not actually physically present in the forum state, the Court permitted an asser-

24. 95 U.S. 714 (1877).

25. *Id.* at 720.

26. *See id.* at 723-24.

27. *See* Friedenthal, *supra* note 5, § 3.3, at 97.

28. Some may suggest that the traditional *Pennoyer* physical presence test was dispensed with in the Court's decision in *International Shoe*. *See* Friedenthal, *supra* note 5, § 3.10, at 121.

29. *See infra* note 82 and accompanying text (indicating the ways in which a court may retain general jurisdiction over a defendant).

30. *See International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

31. *See id.* at 311.

32. *See id.* at 313.

33. *See id.* at 313-14.

34. *See id.* at 314.

tion of personal jurisdiction.³⁵ In doing so, the Court established a new test of personal jurisdiction: the minimum contacts and reasonableness test.³⁶ The Court reasoned that since a corporation is a fiction, presence should be determined considering due process requirements.³⁷ The Court concluded that the relevant due process considerations include an "estimate of the inconveniences" which the defendant would face as a result of a trial away from its home state.³⁸ The Court broke new ground when it ruled that:

due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."³⁹

Since *International Shoe*, the Court has attempted to explain the limitations of the minimum contacts doctrine, and provide a clearer understanding of "traditional notions of fair play and substantial justice."⁴⁰ In *World-Wide Volkswagen Corp. v. Woodson*,⁴¹ for example, the Court drew a clearer distinction between the concepts of "minimum contacts" and "traditional notions of fair play and substantial justice" (the test for reasonableness).⁴² In that case, the Court considered whether an Oklahoma court could assert personal jurisdiction over a New York corporation as a result of an automobile accident in Oklahoma.⁴³ Harry and Kay Robinson, on their way from New York to their new home in Arizona, were involved in a serious accident with their new Audi, purchased from one of the defendants in New York.⁴⁴ The Robinsons brought suit al-

35. See *International Shoe*, 326 U.S. at 320.

36. See *id.*

37. See *id.* at 317; see also U.S. CONST. amends. V and XIV.

38. *International Shoe*, 326 U.S. at 317 (quoting *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930)); see also Friedenthal, *supra* note 5, § 3.10, at 122.

39. *International Shoe*, 326 U.S. at 316 (citing *Miliken v. Meyer*, 311 U.S. 457 (1940)).

40. See FRIEDENTHAL, *supra* note 5, § 3.10, at 121.

41. 444 U.S. 286 (1980).

42. See *id.* at 291-92; see also FRIEDENTHAL, *supra* note 5, § 3.10, at 122.

43. See *World-Wide Volkswagen*, 444 U.S. at 287-89.

44. See *id.*

leging faulty design because the gas tank exploded in the collision.⁴⁵

Holding that the defendant car dealership was not "present" in Oklahoma, the *World-Wide Volkswagen* Court elaborated on the traditional notions of fair play and substantial justice test, suggesting that the defendant's ties to the forum state must be such that it would be "reasonable" to hale the defendant into court there.⁴⁶ The Court defined "reasonable" as a multi-part consideration of: the "burden on the defendant"⁴⁷ in light of the "forum State's interest in adjudicating the dispute;"⁴⁸ the "plaintiff's interest in obtaining convenient and effective relief;"⁴⁹ the interstate judicial system's interest in obtaining an efficient resolution;⁵⁰ and the "shared interests of the several States in furthering fundamental substantive social policies."⁵¹ The Court intimated, however, that the reasonableness test remains as a secondary consideration to the minimum contacts analysis.⁵²

In light of the fact that technological developments have "accelerated" the ways in which people conduct business, the Court observed that the concept of minimum contacts had progressed since *International Shoe*.⁵³ However, the Court also remarked that it would be a "mistake to assume that this trend heralds the eventual demise of all restrictions on the personal

45. *See id.*

46. *Id.* at 292 (citation omitted).

47. *Id.* at 292.

48. *World-Wide Volkswagen*, 444 U.S. at 292 (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

49. *World-Wide Volkswagen*, 444 U.S. at 292 (citing *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978)).

50. *See World-Wide Volkswagen*, 444 U.S. at 292.

51. *Id.*

52. *See id.* The Court indicated that even if the minimum contacts analysis was satisfied, "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.* at 294.

53. *See id.* at 293-95. "As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome." *See World-Wide Volkswagen*, 444 U.S. at 294 (quoting *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958)).

jurisdiction of state courts.”⁵⁴ The Court concluded that Oklahoma could not retain personal jurisdiction over the defendant since the only contact in the forum state was through a unilateral act by the plaintiff.⁵⁵ Even though it may have been foreseeable to defendants that an automobile would be used for long distance travel, “‘foreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.”⁵⁶ Moreover, the Court did not accept the plaintiff’s argument that the defendant should have foreseen the Audi being driven into a foreign state.⁵⁷ Instead of mere foreseeability, the Court insisted that the standard is one which requires that the defendant’s conduct be directed at the forum state, and that he purposefully avail himself of the advantages of the laws of that state.⁵⁸ If the requisite purposeful availment exists, then foreseeability would be said to exist and the minimum contacts test satisfied.⁵⁹ This standard would provide the defendant with “clear notice” that he may be subject to suit in the forum state.⁶⁰

Evidence of purposeful availment may exist if the defendant, through his channels of distribution, “delivers [his] products into the stream of commerce”⁶¹ of the forum state. Therefore, introduction of one’s goods into the stream of commerce provides the necessary foreseeability under the Due Process Clause.

In a later case, *Burger King Corp. v. Rudzewicz*,⁶² the Court again drew a distinction between the minimum contacts analysis and the fair play and substantial justice test.⁶³ There, the Court decided that a Florida court could retain personal jurisdiction over a Michigan company.⁶⁴ The defendant was a Michi-

54. *World-Wide Volkswagen*, 444 U.S. at 294 (quoting *Hanson*, 357 U.S. at 250-51).

55. See *World-Wide Volkswagen*, 444 U.S. at 297.

56. See *id.* at 295. The Court disagreed that a seller’s chattel could automatically be appointed as agent for service of process. See *id.*

57. See *id.* at 296 n.11 (citations omitted).

58. See *id.* at 297.

59. See *World-Wide Volkswagen*, 444 U.S. at 297.

60. *Id.*

61. *Id.* at 298.

62. 471 U.S. 462 (1985).

63. See *id.* at 476.

64. See *id.* at 478.

gan businessperson who entered into a franchise agreement with the plaintiff, Burger King, headquartered in Miami, Florida.⁶⁵ Franchise payments were made to the Florida office and when the defendant allegedly breached the agreement, correspondence from Burger King originated from its Florida headquarters.⁶⁶ The Court reaffirmed the "stream of commerce" test when it noted that a defendant is warned of a suit in a forum state when it has "purposefully directed" activities at residents of the forum state.⁶⁷ This holding prevents the use of the Due Process Clause as a "territorial shield" to avoid voluntarily assumed responsibilities.⁶⁸

The Court further noted that once a court has determined that the requisite minimum contacts exist, personal jurisdiction is presumptively reasonable.⁶⁹ If notions of fair play and substantial justice cut against a finding of personal jurisdiction, this presumption may be defeated.⁷⁰ In balancing between these semi-independent tests, the *Burger King* Court suggested that a non-resident defendant should be able to "reasonably anticipate being haled into court" in the foreign jurisdiction.⁷¹ Where a defendant has purposefully "directed his activities at forum residents [and] seeks to defeat jurisdiction,"⁷² the burden shifts to the defendant to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."⁷³ Conversely, the reasonableness test may bol-

65. *See id.* at 464-67.

66. *See id.* at 468.

67. *Burger King*, 471 U.S. at 472 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). The Court suggested that the purposeful availment consideration "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*, 471 U.S. at 475 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980)).

68. *See Burger King*, 471 U.S. at 474.

69. *See id.* at 476; *see also* Friedenthal, *supra* note 5, § 3.13, at 146.

70. *See Burger King*, 471 U.S. at 477-78; *see also* Friedenthal, *supra* note 5, § 3.13, at 146.

71. *See Burger King*, 471 U.S. at 474. "The focus of the inquiry is on the relationship 'among the defendant, the forum, and the litigation.'" *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356, 1360 (quoting *Shaffer v. Heitner*, 433 U.S. 186 (1977)).

72. *Burger King*, 471 U.S. at 477.

73. *Id.* "Once the defendant properly disputes the existence of personal jurisdiction, the plaintiff bears the burden to establish, by a preponderance of the evidence, sufficient facts demonstrating the court's jurisdiction." *Weber v. Jolly*

ster a less than adequate finding of minimum contacts such that the test “sometimes serve[s] to establish jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”⁷⁴ Therefore, a plaintiff may be able to persuade a court to exercise personal jurisdiction despite weaker evidence of minimum contacts, with greater showings of additional factors going to fair play and substantial justice requirements.⁷⁵

In other cases, the Court continued to contribute to the understanding of the due process requirements for personal jurisdiction.⁷⁶ For instance, as long as a “substantial connection” with the forum state is established, one act within the forum state may support a finding of personal jurisdiction.⁷⁷ However, if the contacts with the forum are sporadic or limited, jurisdiction may only be predicated upon acts arising out of the contact(s).⁷⁸

From these and other refinements, four “guideposts”⁷⁹ have emerged to determine the appropriateness of personal jurisdiction in light of the test for minimum contacts.⁸⁰ The first guidepost is when “[a] defendant’s activity in the forum is continuous and systematic”⁸¹ general jurisdiction may be asserted.⁸² Since a defendant’s presence in the forum state is ongoing, the assertion of jurisdiction neither offends the due process requirements of the Fourteenth Amendment, nor traditional notions of fair play and substantial justice, regardless of whether the cause of action arises out of the contacts.⁸³ In the second situation, when a defendant engages in systematic and continuous activi-

Hotels, 977 F. Supp. 327, 331 (D. N.J. 1997) (citing *Carteret Savings Bank FA v. Shushan*, 954 F.2d 141, 146 (3d Cir. 1992), *cert. denied*, 506 U.S. 817 (1992)).

74. *Burger King*, 471 U.S. at 477 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957)).

75. See *Burger King*, 471 U.S. at 477.

76. See, e.g., *infra* note 88.

77. See *McGee*, 355 U.S. at 223.

78. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

79. FRIEDENTHAL, *supra* note 5, § 3.10, at 121.

80. See *id.* (citations omitted).

81. *Id.* at 122.

82. “A court of ‘general jurisdiction’ is one which takes cognizance of all cases. . . .” BLACK’S LAW DICTIONARY 471 (abridged 6th ed. 1991). See FRIEDENTHAL, *supra* note 5, § 3.10, at 123-24.

83. See *Burger King*, 471 U.S. at 477.

ties in the forum state, but the cause of action does not arise out of them, the question of personal jurisdiction is left open to state laws.⁸⁴ Third, when the cause of action arises out of a defendant's single or isolated contact with the state, the defendant may be subject to the forum's jurisdiction since the defendant will have created a substantial enough connection with the forum state.⁸⁵ In this case, specific jurisdiction may be found.⁸⁶ Lastly, when a defendant's activities in the forum state are sporadic and irregular, and the action complained of does not arise out of those minimal contacts, personal jurisdiction will not be found.⁸⁷

In *Asahi Metal Industry Co. v. Superior Court*,⁸⁸ the personal jurisdiction issue was revisited by the Court when it considered whether a California court could assert personal jurisdiction over a Japanese corporation.⁸⁹ While driving his motorcycle, Gary Zurcher lost control and crashed into a tractor.⁹⁰ Zurcher claimed that the crash was caused by an exploded faulty tire valve.⁹¹ Cheng Shin, a named defendant, was the Taiwanese manufacturer of that tire's tube.⁹² Asahi was Cheng Shin's Japanese supplier.⁹³ Cheng Shin sued Asahi in

84. See *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952).

85. See Friedenthal, *supra* note 5, § 3.10, at 123; see also *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) (only contact with forum state was insurance policy issued to resident plaintiff). See generally *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citation omitted).

86. "'Specific' jurisdiction contrasts with 'general' jurisdiction," in that under the latter, "a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, n.9 (1984). See Friedenthal, *supra* note 5, § 3.10, at 123. "The terms 'general' and 'special,' applied to jurisdiction, indicate the difference between a legal authority extending to the whole of a particular subject and one limited to a part; and, when applied to the terms of court, the occasion upon which these powers can be respectively exercised." BLACK'S LAW DICTIONARY 471 (abridged 6th ed. 1991).

87. See *Hanson v. Denckla*, 357 U.S. 235 (1958) ("The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State. . . . Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida."). *Id.* at 251; see also Friedenthal, *supra* note 5, § 3.10, at 123.

88. 480 U.S. 102 (1987).

89. See *id.*

90. See *id.* at 105.

91. See *id.* at 106.

92. See *id.*

93. See *Asahi*, 480 U.S. at 106.

California for indemnification.⁹⁴ After Zurcher's claim was settled and dismissed against Cheng Shin and the other defendants, Cheng Shin's indemnification action against Asahi was the only remaining claim.⁹⁵

On the issue of reasonableness, the *Asahi* Court unanimously concluded that personal jurisdiction was unreasonable and that a contrary conclusion "would offend traditional notions of fair play and substantial justice."⁹⁶ The Court stated that California had no manifest interest in providing a forum for an indemnification suit for a Taiwanese corporation, especially because the plaintiff had another forum in which to litigate.⁹⁷ Moreover, the Court recognized that traveling to California to defend the suit was an extreme burden on the defendant.⁹⁸

On the issue of minimum contacts, however, the Court's decision was a plurality.⁹⁹ Three distinct opinions were rendered by the Court, two of which are discussed here.¹⁰⁰ By interpreting and applying *World-Wide Volkswagen*, Justice O'Connor, joined by Chief Justice Rehnquist, Justice Powell, and Justice Scalia, found that the mere "placement of a product into the stream of commerce" will not support a finding of minimum contacts.¹⁰¹ Justice O'Connor wrote that the foreseeability requirement outlined in *World-Wide Volkswagen*¹⁰² may be satisfied when there is evidence of a defendant's intent to direct his activities to the forum state.¹⁰³ She further stated that a defend-

94. *See id.*

95. *See id.*

96. *Id.* at 105.

97. *See id.* at 114 (citing *International Shoe Co. v. Washington*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

98. *See Asahi*, 480 U.S. at 114.

99. *See id.* at 102-05.

100. The third opinion, authored by Justice Stevens and joined by Justices White and Blackmun, argued that the Court need not always look at the minimum contacts criteria in determining the constitutionality of a state's assertion of personal jurisdiction. *See id.* at 121. Instead, Stevens suggested that traditional notions of fair play and substantial justice may serve to defeat any assertion of personal jurisdiction and thus concluded the inquiry. *See id.* However, if the Court had considered minimum contacts, Stevens would have found the issues of "volume, [] value, and [the] hazardous character" of the products to be controlling. *Id.*

101. *See Asahi*, 480 U.S. at 112; *see also* FRIEDENTHAL, *supra* note 5, § 3.11, at 137.

102. *See supra* note 59 and accompanying text.

103. *See Asahi*, 480 U.S. at 112.

ant's intent may be shown by "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."¹⁰⁴ However, "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."¹⁰⁵

Justice Brennan, joined by Justices White, Marshall, and Blackmun, applied the stream of commerce theory established in *World-Wide Volkswagen* differently.¹⁰⁶ Under their interpretation, foreseeability and intent are established through the placement of products into the stream of commerce.¹⁰⁷ Brennan reasoned that "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale."¹⁰⁸ Knowledge of the stream of commerce, therefore, provides adequate notice to a defendant that he may be haled into a foreign forum to settle disputes.¹⁰⁹

C. *Prospective: Internet Contacts and the Question of Personal Jurisdiction*

In addition to the *Bensusan* decision discussed below,¹¹⁰ many other courts throughout this country have considered whether an Internet web site or transmissions through the Internet render a defendant constitutionally present in a foreign jurisdiction.¹¹¹ While the answers have not been consistent, three generalizations may be made in order to better compre-

104. *Id.*

105. *Id.*

106. *See id.* at 116; *see also* Friedenthal, *supra* note 5, § 3.11, at 137.

107. *See Asahi*, 480 U.S. at 117 (citation omitted).

108. *Id.* at 117. Justice Brennan also concluded that his interpretation of "stream of commerce" had been adopted by "most courts and commentators." *Id.* (citations omitted).

109. *See id.*

110. *See infra* Part III.

111. Lawyers in other countries have also begun to consider this issue. *See* Monique Conrod, *Website Advertising Raises Troubling Jurisdictional Issues*, THE LAWYERS WEEKLY (CANADA), October 31, 1997, at 15.

hend some emerging trends: (1) because the potential is world-wide jurisdiction, a web site, especially a passive one,¹¹² should not be an adequate premise on which to find minimum contacts in a foreign forum;¹¹³ (2) while the potential may be world-wide jurisdiction, it is sometimes the case that a defendant expected or desired his web site to be accessed in a foreign forum or to be used on the Internet to his benefit, and so a finding of minimum contacts is not *de facto* unconstitutional;¹¹⁴ and, (3) although there is the potential for world-wide jurisdiction, a defendant who establishes a web site has knowledge of the nature of the Internet and thus cannot claim to be surprised that he must answer a claim in a foreign forum.¹¹⁵ The basis for drawing these generalizations is elucidated below, using case examples.

1. *Because the potential is world-wide jurisdiction, a web site, especially a passive one, should not be an adequate premise on which to find minimum contacts in a foreign forum*

In *Hearst Corporation v. Goldberger*,¹¹⁶ an Internet web site was rejected as a basis for finding personal jurisdiction in New York against a New Jersey domiciliary.¹¹⁷ Hearst, the publisher of *Esquire Magazine*, filed suit alleging that Goldberger's request to register and his subsequent registration of the domain name "ESQWIRE.COM" constituted trademark infringement.¹¹⁸ At the time the suit was filed, the web site was under

112. A passive web site is one that does little more than make information available, as opposed to an interactive web site, which provides for the exchange of information. See *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

113. See *infra* Part II.B.1 and accompanying text.

114. See *infra* Part II.B.2 and accompanying text.

115. See *infra* Part II.B.3 and accompanying text.

116. No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

117. See *id.* at *1.

118. See *id.* Note that Goldberger's Internet provider was a Pennsylvania company. See *id.* at *3. "Domain name" is part of the Internet's addressing system and means that

[the] host computer providing Internet services ("site") has a unique Internet address. Users seeking to exchange digital information (electronic mail ("e-mail"), computer programs, images, music) with a particular Internet host require the host's address in order to establish a connection. Hosts actually possess two fungible addresses: a numeric "IP" address such as 123.456.123.12, and an alphanumeric "domain name" such as

construction and provided only information about an upcoming business venture of Goldberger's.¹¹⁹

The parties disputed personal jurisdiction. After jurisdictional discovery, the court concluded that "[u]nless and until Congress or the New York legislature enacts Internet specific jurisdictional legislation, the Court must employ New York's existing jurisdictional statutes," and merely "analogize to presently existing, traditional, non-Internet personal jurisdiction case law."¹²⁰ The court found the web site similar to an advertisement in a national magazine and, on the basis that New York's long-arm statute is restrictive, concluded that the statute did not permit a finding of personal jurisdiction.¹²¹ In response to the suggestion that the Internet could act as a constitutionally sufficient contact, the court expressed concerns about offending traditional notions of fair play and substantial justice in light of the fact that a web site would lead to nationwide jurisdiction.¹²²

In *Weber v. Jolly Hotels*,¹²³ New Jersey's District Court considered whether a finding of general jurisdiction could be made against an Italian hotel operator with its principal place of busi-

microsoft.com, with greater mnemonic potential Internet domain names are similar to telephone number mnemonics, but they are of greater importance, since there is no satisfactory Internet equivalent to a telephone company white pages or directory assistance, and domain names can often be guessed. A domain name mirroring a corporate name may be a valuable corporate asset, as it facilitates communication with a customer base. The uniqueness of Internet addresses is ensured by the registration services of the Internet Network Information Center ("InterNIC")

See *id.* at *2 (quoting *MTV Networks v. Curry*, 867 F. Supp. 202, 204, n.2. (S.D.N.Y. 1994)).

119. See *Goldberger*, 1997 WL 97097, at *4. Goldberger had undertaken to develop a site which would "offer law office infrastructure network services for attorneys." *Id.* at *3.

120. *Id.* at *7.

121. See *id.* at *10; see also *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654 (S.D.N.Y. 1997) (finding, among other things, that an Internet advertisement alone is not enough to open the defendant to personal jurisdiction in New York). Under N.Y. C.P.L.R. § 302(a)(1), an advertisement is not a sufficient basis under which to find personal jurisdiction. See *Goldberger*, 1997 WL 97097, at *10. The court noted that there was ample case law supporting its contention that "[e]leven advertisements targeted at the New York market have been found to be insufficient for C.P.L.R. § 302(a)(1) transaction of business jurisdiction." *Id.* at *11 (citations omitted).

122. See *id.* at *15.

123. 977 F. Supp. 327 (D. N.J. 1997).

ness in Italy.¹²⁴ The plaintiff planned and booked a vacation to Italy through a Massachusetts travel agency.¹²⁵ The plaintiff's suit stemmed from injuries sustained from a fall at the Jolly Diodoro Hotel in Italy.¹²⁶ The defendant maintained an Internet site providing telephone numbers and descriptions of hotel properties and rooms.¹²⁷ The plaintiff argued that general jurisdiction was proper in New Jersey because the "defendant's use of the Internet is equivalent to advertising in New Jersey."¹²⁸

The court ruled against the plaintiff holding that an Internet page with an advertisement was not a sufficient basis for general jurisdiction.¹²⁹ In so finding, the court established a sliding-scale of categories to be used in determining whether jurisdiction exists based on cyberspace contacts.¹³⁰ In the first category, defendant "actively" engages in business on the Internet,¹³¹ and therefore personal jurisdiction is proper because the defendant engages in repeated and knowing transmissions of materials via the Internet to a domiciliary of the forum state.¹³² The second category deals with situations in which a defendant engages in information exchanges with a computer within the forum state.¹³³ Here, jurisdiction depends on the nature and extent of the exchanges.¹³⁴ In the third category the web site is passive and provides only advertisements and information and therefore a finding of jurisdiction is prohibited¹³⁵

124. *See id.* at 329. New Jersey's long-arm statute is similar to that of California's, running to the limits of the constitution. *See id.* at 330.

125. *See id.* at 329.

126. *See id.* at 329-30.

127. *See Jolly Hotels*, 977 F. Supp. at 329.

128. *Id.* at 331. Plaintiff also alleged specific jurisdiction, asserting that the contract with the Massachusetts travel agency resulted in defendant "stand[ing] in the shoes" of the travel agency, which was an independent contractor. *Id.*

129. *See id.* at 333-34.

130. *See id.* at 333.

131. *See Jolly Hotels*, 977 F. Supp. at 333 (citing *Compuserve v. Patterson*, 89 F.3d 1257 (6th Cir. 1996)).

132. *See Jolly Hotels*, 977 F. Supp. at 333 (citation omitted).

133. *See id.*

134. *See id.* at 333 (citing *Zippo Manufacturing Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Penn. 1997) (additional citation omitted)).

135. *See Jolly Hotels*, 977 F. Supp. at 334 (citing *Hearst Corporation v. Goldberger*, No. 96 Civ. 3620, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997)).

The court reasoned that the defendant's activities fell into the third category and thus refused to exercise jurisdiction.¹³⁶

In *Smith v. Hobby Lobby Stores, Inc.*,¹³⁷ the District Court considered whether a third-party's web site, carrying advertisements from Boto and Everstar Manufacturing, was a sufficient basis upon which to exercise personal jurisdiction.¹³⁸ In this wrongful death action, Smith, as administrator, sued Hobby Lobby Stores in Arkansas.¹³⁹ Hobby Lobby stores sold the decedent an artificial Christmas tree that may have been the cause of a deadly fire.¹⁴⁰ The defendant purchased the tree through Boto and Everstar Manufacturing, and sued those parties for indemnification in Arkansas.¹⁴¹ Boto was a foreign corporation doing business in Hong Kong and did not have any customers with a principal place of business in Arkansas.¹⁴² All sales made to American companies were shipped from Hong Kong, free on board, to a port of the customer's choosing.¹⁴³ However, Boto's managing director testified that it "was foreseeable that

136. *See Jolly Hotels*, 977 F. Supp. at 333. The court transferred the case to the Southern District of New York, under 28 U.S.C. § 1406(a), since defendant's subsidiary owns a hotel in New York. *See id.* at 334.

137. 968 F. Supp. 1356 (W.D. Ark. 1997).

138. *See id.* at 1361. The Arkansas long-arm statute is similar to that of California's, extending to the reaches of the Due Process Clause of the Constitution. *See id.* at 1359.

139. *See id.* at 1358.

140. *See id.*

141. *See id.* at 1357-59. Note that Hobby Lobby Stores originally filed a third-party complaint that was dismissed for lack of personal jurisdiction. *See Hobby Lobby*, 968 F. Supp. at 1358. The court subsequently allowed Hobby Lobby Stores to amend its third-party complaint and required the parties to undertake "expedited" jurisdictional discovery. *See id.* "Thus the sole question [was] whether the exercise of personal jurisdiction is consistent with the Due Process Clause." *Id.* at 1359.

142. *See id.* at 1358.

143. *See id.* The court noted Boto's sales to American companies as follows: (in Hong Kong dollars) approximately \$187 million for the year ending March 31, 1993; \$171 million for the year ending March 31, 1994; \$241 million for the year ending March 31, 1995; \$328 million for the year ending March 31, 1996; and \$415 million for the year ending March 31, 1997. *See Hobby Lobby*, 968 F. Supp. at 1361. Hobby Lobby Stores' business with Boto included: \$2.3 million in purchases in 1995, with 101,100 trees bought; and \$3.0 million in purchases in 1996. *See id.* Boto utilized a distribution system in the United States, but did not direct the location of its products in the States. *See id.* at 1363- 64.

Boto's products could end up in any state in the United States."¹⁴⁴

Boto advertised in *Hong Kong Enterprise*, a monthly trade publication, that was available in print and on the Internet.¹⁴⁵ Boto's advertisement in the publication also appeared on the publication's web page.¹⁴⁶ Plaintiff contended that while Boto may have had little other ties to Arkansas, the Internet site constituted a "significant connection[]" with the forum state.¹⁴⁷ Boto disagreed, asserting that the Internet site was only an advertisement and "surely does not mean that a company is subject to personal jurisdiction at each and every location on the planet where someone is capable of logging on the Internet."¹⁴⁸ The court ruled against plaintiff.¹⁴⁹ It concluded that "Boto did not contract to sell any goods or services to any citizens of Arkansas over the Internet site."¹⁵⁰ Thus, the Internet site was held to be an insufficient minimum contact.¹⁵¹

As early as 1994, Florida began struggling with the extent to which computer transfers of information would result in personal jurisdiction.¹⁵² In *Pres-Kap v. System One, Direct Access*, the court determined that a New York travel agency (Pres-Kap) should not be subject to Florida's jurisdiction based on its access to a travel information database located in Miami.¹⁵³ The court was not persuaded that such a "contact" could convert what it determined to be a New York transaction into a Florida one.¹⁵⁴ One judge dissenting, however, found that the defendant could have reasonably anticipated being haled into Florida to answer suit.¹⁵⁵

144. *Id.*

145. *See id.* at 1361.

146. *See Hobby Lobby*, 968 F. Supp. at 1361.

147. *Id.* at 1363.

148. *Id.* at 1364.

149. *See id.* at 1365-66.

150. *Id.* at 1365.

151. *See Hobby Lobby*, 968 F. Supp. at 1365.

152. *See Pres-Kap v. System One, Direct Access*, 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994), *rehearing denied*, 645 So. 2d 455 (Fla. 1994).

153. *See id.* at 1352-54.

154. *See id.* at 1353.

155. *See id.* at 1354 (Barkdull, J., dissenting).

2. *While the potential may be world-wide jurisdiction, it is sometimes the case that a defendant expected or desired his web site be accessed in a foreign forum, or used on the Internet to his benefit, and so a finding of minimum contacts is not de facto unconstitutional*

In *People v. Lipsitz*,¹⁵⁶ a case of nationwide first impression, the New York State Attorney General sought enforcement of consumer fraud and false advertising laws against the defendant for his practices targeting an Internet audience with the use of e-mail.¹⁵⁷ The charges stemmed from the defendant's business of selling magazine subscriptions but failing to deliver the orders promptly and for the duration paid.¹⁵⁸ The State alleged that the defendant was pocketing the subscription money.¹⁵⁹ In concluding that it had jurisdiction,¹⁶⁰ the court rejected a contention that "traditional jurisdictional standards" are insufficient to deal with the Internet problem.¹⁶¹ Instead, the court remarked that traditional standards are able to resolve even novel jurisdictional issues.¹⁶²

In *Playboy Enterprises v. Chuckleberry Publishing*,¹⁶³ while enforcing an injunction against a trademark infringing Italian company, a District Court in New York, although not in connection with a personal jurisdiction motion, commented that "[c]yberspace is not a 'safe haven'" from which to avoid civil liability.¹⁶⁴ The court also discovered that customers were not responsible for "pulling" the information from the Internet, rather the information was distributed by the web page creator.¹⁶⁵

156. 663 N.Y.S.2d 468 (Sup. Ct. 1997).

157. *See id.* at 470.

158. *See id.*

159. *See id.*

160. The court so concluded since the respondents reside in New York state. *See id.* at 473. In *dicta*, however, the court discussed the concept of personal jurisdiction for civil matters arising when defendants do not reside in the forum state. *See Lipsitz*, 663 N.Y.S.2d at 473.

161. *See id.*

162. *See id.* (citing Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALBANY L.J. SCIENCE & TECH. 339 (1996)).

163. 939 F. Supp. 1032 (S.D.N.Y. 1996).

164. *Id.* at 1040.

165. *See id.* at 1039.

Therefore, the defendant's actions were not confined to Italy where it had established and maintained the web site.¹⁶⁶

In *Cody v. Ward*,¹⁶⁷ Connecticut's District Court concluded that alleged misrepresentations made through e-mails constituted sufficient minimum contacts to subject a California resident to suit in Connecticut.¹⁶⁸ The court considered a Connecticut resident's claim that he was duped into buying about \$200,000 worth of stock in a company that later went bankrupt.¹⁶⁹ The plaintiff originally learned of the opportunity over the Internet from the defendant's 225 posted messages, on general access electronic bulletin boards and was further informed by the defendant's telephone calls and e-mails.¹⁷⁰ Turning to the due process arguments, the court determined that the sheer quantity of messages between the plaintiff and the defendant, and the amount of money involved, should have reasonably indicated to the defendant that he would be subject to suit in Connecticut.¹⁷¹ Based on the rationale that technological advances provide conveniences, answering suit in Connecticut would not be unfair.¹⁷²

In *State v. Granite Gate Resorts, Inc.*,¹⁷³ a Minnesota court determined that an Internet site may constitute a sufficient basis upon which to assert personal jurisdiction.¹⁷⁴ There, the defendant Rogers, a Nevada resident, advertised on his web site

166. *See id.* at 1044.

167. 954 F. Supp. 43 (D. Conn. 1997).

168. *See id.* at 45.

169. *See id.* at 44-5.

170. *See id.* at 45.

171. *See id.* at 47. The court found that Connecticut's long-arm statute applied. *See Cody*, 954 F. Supp. at 45-6.

172. *See id.* at 47. The court noted that:

[t]he widespread use of facsimile equipment and overnight mail and the courts' increasing use of telephone conferences in lieu of live conferences reduces the burden on nonresidents of litigating in a distant state. Even depositions can be done by telephone. If telephone depositions are objectionable for some reason, a plaintiff can be required to pay or at least share travel costs associated with depositions in appropriate cases. . . . If a plaintiff's case has sufficient merit to survive a motion for summary judgment, requiring the defendant to bear the burden of traveling to the plaintiff's state for trial makes at least as much sense as requiring the plaintiff to do the traveling.

Id. at 47 n.9.

173. 568 N.W.2d 715 (Minn. Ct. App. 1997).

174. *See id.* at 721.

that an Internet gambling service web page would be coming soon.¹⁷⁵ Rogers designed and operated the page, but the gambling company was based in Belize.¹⁷⁶ While the gambling program was not yet available, the web site offered those accessing it the opportunity to subscribe for additional information, and provided a 1-800 number to call a person in Belize, or a Nevada number to reach the defendant Rogers.¹⁷⁷ On the web page, the defendant claimed that gambling on-line was legal.¹⁷⁸ Minnesota's Attorney General filed a complaint alleging the statement amounted to an act of consumer fraud.¹⁷⁹

In affirming the lower court's finding that Minnesota could retain personal jurisdiction,¹⁸⁰ the court analyzed the circumstances in light of the Due Process Clause of the Federal Constitution.¹⁸¹ The court relied on both the quantity and quality of contacts with the forum.¹⁸² For example, during a two-week period in 1996, at least 248 Minnesota computers accessed the site, and at least one Minnesota resident's name was added to the mailing list.¹⁸³ As to the quality of the contacts, the court noted that "users are essential to the success of its service. Clearly, [the defendant] has obtained the web site for the purpose of, and in anticipation that, internet users, searching the internet for web sites, will access [the defendant's] web site and eventually sign up on [the defendant's] mailing list."¹⁸⁴ Accordingly, the defendant may not "hide behind the structuring of its

175. See *id.* at 716.

176. See *id.*

177. See *id.* Subscribers were added to a mailing list. See *Granite Gate Resorts*, 568 N.W.2d at 718-20. The Minnesota Attorney General's office, as part of its investigation, added itself to the mailing list under an employee's name. See *id.* at 721.

178. See *id.* at 720.

179. See *id.*

180. See *id.* at 721. The lower court's ruling may be found at *State by Humphrey v. Granite Gate Resorts, Inc.*, No. C6-95-7227, 1997 WL 767431 (Minn. Dist. Ct. Dec. 11, 1996).

181. See *Granite Gate Resorts*, 568 N.W.2d at 718. The court noted that Minnesota's long-arm statute runs to the limits of the Due Process Clause of the federal Constitution. See *id.*

182. See *id.*

183. See *id.* at 718-19.

184. See *id.* at 719. The court's analysis is reminiscent of the comment by the *Playboy* court which also noted the commercial intent behind the establishment of Internet sites. See *Playboy Enterprises v. Chuckleberry Publishing*, 939 F. Supp. 1032, 1040-41 (S.D.N.Y. 1996).

distribution system" when evidence exists that the defendant intended to enter into the forum state.¹⁸⁵

In a case of first impression in Missouri, the District Court in *Maritz v. Cybergold*,¹⁸⁶ determined that a web site soliciting names for a mailing list was a sufficient contact with the state to subject the defendant to suit in Missouri.¹⁸⁷ The defendant established a web site in California allegedly using a trademarked name.¹⁸⁸ After dispensing with the long-arm statute component of the jurisdiction test,¹⁸⁹ the court concluded that the due process standard would not be offended by asserting personal jurisdiction against the defendant because he knowingly transmitted information across several state lines with the hope of gaining a comprehensive mailing list.¹⁹⁰ Despite the fact that the web page was only an advertisement, the court found that "traditional notions of fair play and substantial justice" would not be offended with an assertion of personal jurisdiction.¹⁹¹

In *Digital Equipment Corp. v. Alta Vista Technology*,¹⁹² the Massachusetts District Court concluded that an Internet presence is a sufficient basis for personal jurisdiction.¹⁹³ In December 1995, Digital Equipment ("Digital"), a Massachusetts company, established an Internet search engine under the name "AltaVista."¹⁹⁴ Digital acquired the rights to use that name by contract with ATI in March of 1996.¹⁹⁵ ATI was a California corporation and one of the defendants in this action.¹⁹⁶ The licensing agreement between Digital and ATI required that any dispute arising out of it must be resolved under Massachusetts law.¹⁹⁷ The agreement also provided that ATI was to re-

185. See *Granite Gate Resorts*, 568 N.W.2d at 720 (quoting *Rostad v. On-Deck, Inc.*, 372 N.W.2d 717, 722 (Minn. 1985)).

186. 947 F. Supp. 1328 (E.D. Mo. 1996).

187. See *id.* at 1330.

188. See *id.* at 1329-30.

189. See *id.* at 1329; see also MO. REV. STAT. § 506.500 (West 1997).

190. See *Maritz*, 947 F. Supp. at 1330-31.

191. *Id.* at 1334.

192. 960 F. Supp. 456 (D. Mass. 1997).

193. See *id.* at 465-66.

194. See *id.* at 459.

195. See *id.*

196. See *id.*

197. See *Digital Equipment*, 960 F. Supp. at 464.

frain from using "AltaVista" as "the name of a product or service offering."¹⁹⁸ ATI continued to maintain a web site with the name "AltaVista" visible to the viewer.¹⁹⁹ Below the name banner, ATI offered software for sale.²⁰⁰ ATI did not mention its own corporate name on the web site.²⁰¹ There was a hyperlink on the web page that connected the viewer to Digital's Alta Vista search engine.²⁰² A portion of Digital's claim was that ATI's web site "look[s], feel[s], and function[s]" much like Digital's Alta Vista site.²⁰³ Accordingly, Digital alleged that ATI's web site constituted trademark infringement and unfair competition.²⁰⁴

ATI filed a motion to dismiss for lack of personal jurisdiction, but the court rejected it.²⁰⁵ While the court was concerned with the nature of the Internet and its impact on the expectations of corporations doing business in a free economy, ATI's web activities brought them "over the line."²⁰⁶ Accordingly, the court dismissed the defendant's motion, holding that personal jurisdiction in Massachusetts was foreseeable to the defendant.²⁰⁷

3. *Although there is the potential for world-wide jurisdiction, a defendant who establishes a web site has knowledge of the nature of the Internet and thus cannot claim to be surprised that he must answer a claim in a foreign forum*

In *American Network, Inc. v. Access America*,²⁰⁸ a New York case, the District Court retained personal jurisdiction over a Georgia corporation that conducted its business over the In-

198. *Id.* at 474 (quoting the licensing agreement).

199. *See id.* at 460.

200. *See id.*

201. *See id.*

202. *See Digital Equipment*, 960 F. Supp. at 461.

203. *Id.* at 461.

204. *See id.*

205. *See id.* at 464.

206. *Id.* at 463.

207. *See Digital Equipment*, 960 F. Supp. at 463. The court expressly rejected that it was ruling on the general topic of the Internet and personal jurisdiction, but instead narrowed its holding to the facts at bar. *See id.* at 463.

208. 975 F. Supp. 494 (S.D.N.Y. 1997).

ternet, even though the corporation maintained only 0.08% of its business in New York.²⁰⁹ The defendant was an Internet access provider allegedly infringing on the plaintiff's domain name.²¹⁰ Other than total revenues of \$150 per month from New York subscribers (less than 10% of its subscriptions business), the defendant maintained no other ties with the state except an Internet web site available to anyone accessing the Internet.²¹¹ However, the web site advertised that the defendant could grant anyone across America access to the Internet.²¹²

The court ruled that New York's long-arm statute requirements were satisfied.²¹³ Since the defendant dealt with some New York subscribers and had prior knowledge of plaintiff's trademark, it was reasonably foreseeable that the defendant's alleged infringement would have an effect in New York.²¹⁴ In turning to the due process arguments, the court considered that a defendant who merely publishes a web site should not be subject to jurisdiction in the forum state, unless the defendant maintained additional contacts in New York.²¹⁵ In addition to the monthly subscription fees from the state, the defendant mailed software into New York in response to requests from New York subscribers.²¹⁶ Therefore, the defendant could have avoided suit in New York by refusing to do business with New York residents.²¹⁷ Further supporting the court's conclusion

209. *See id.* at 496.

210. *See id.* at 495-96. Plaintiff's domain name was "American.Net" while defendant's was "America.Net". *See id.* at 496.

211. *See id.*

212. *See Access America*, 975 F. Supp. at 496.

213. *See id.* at 498 (finding that the defendant's act without the state had consequences within the state and that defendant could have foreseen such consequences within New York); *see also* N.Y. C.P.L.R. 302(a)(3)(ii) (McKinney 1997); *supra* note 22.

214. *See Access America*, 975 F. Supp. at 498. The court determined that N.Y. C.P.L.R. 302(a)(3)(ii) applied in that the defendant committed a tortious act without the state, causing injury within the state, and that the defendant could reasonably have anticipated consequences in New York. *See id.* at 497.

215. *See id.* at 497-98.

216. *See id.* at 499.

217. *See id.* The court observed that since world-wide publication cannot be avoided once a site is placed on the Internet, other means to reject availment of a forum state's citizens is required. Accordingly, had the defendant refused to enter into contracts with New York state residents, the court would likely have received that assertion as positive evidence of the defendant's unwillingness to open itself to jurisdiction in New York. *See Access America*, 975 F. Supp. at 499.

was the defendant's advertisement that he was willing to assist anyone across the United States.²¹⁸ Finally, the court determined that it would be fair to litigate in New York.²¹⁹ The second prong of the due process analysis did not prevent a finding of personal jurisdiction considering the state's manifest interest in providing residents with a convenient forum in which to litigate the matter.²²⁰

In *Inset Systems, Inc. v. Instruction Set Inc.*,²²¹ the Connecticut District Court determined that the repetitive nature of Internet advertising constituted a "solicitation of business" under that state's long-arm statute.²²² The defendant was a Massachusetts corporation, and its only contacts with Connecticut were over the Internet.²²³ The plaintiff, owner of the trademark "INSET," filed suit against the defendant because it registered "INSET.COM" as a domain name.²²⁴

Turning to the constitutional issues, the court recognized that while a posting on the Internet could result in country-wide jurisdiction, it nonetheless was a "purposeful availment" of the laws of the forum state.²²⁵ Moreover, because an Internet posting is continuously available around the clock, it provides ample constitutional basis to find that the defendant should reasonably have anticipated being haled into a foreign jurisdiction.²²⁶

In *Hall v. LaRonde*,²²⁷ the use of the Internet and telephone created a sufficient basis for the court to assert personal juris-

218. See *id.* at 495-96.

219. See *id.* at 499.

220. See *id.*

221. 937 F. Supp. 161 (D. Conn. 1996).

222. See *id.* at 164. The Connecticut long-arm statute provides, in part, that personal jurisdiction shall be maintained on any cause of action arising out of "any business solicited in this state . . . if the corporation has repeatedly so solicited business" *Id.* at 164 (quoting CONN. GEN. STAT. § 33-411(c)(2) (West 1997)).

223. See *Inset Systems*, 937 F. Supp. at 162.

224. See *id.* at 163. The defendant also registered a toll-free telephone number which, if spelled alphanumerically, reads "1-800-US-INSET." *Id.*

225. See *id.* at 165.

226. See *id.* The court quickly disposed of the second prong of the personal jurisdiction issue, fair play and substantial justice, noting that Massachusetts and Connecticut were close to one another and that the forum state has an interest in providing a forum for its residents. See *Inset Systems*, 937 F. Supp. at 165.

227. 66 Cal. Rptr. 2d 399 (Ct. App. 1997).

diction over a New York corporation.²²⁸ Hall, his principal place of business in California, entered into a contract with LaRonde, whose principal place of business was in New York.²²⁹ Their contract authorized LaRonde to sell software licenses owned by Hall.²³⁰ One year into the contract, LaRonde continued to sell licenses, but allegedly failed to submit the contractually required payments to Hall.²³¹ In his affidavit of opposition to LaRonde's motion to dismiss for lack of personal jurisdiction, Hall indicated that his first contact with LaRonde was via e-mail.²³² While Hall's first e-mail was an inquiry, LaRonde's response via e-mail was "with the idea of integrating Hall's module into LaRonde's software package."²³³ After the planned integration was completed, Hall continued to modify it, making each adjustment from his office in California.²³⁴ Hall also stated that all contacts with LaRonde were via e-mail and telephone.²³⁵ Hall agreed that absent jurisdictional discovery, his only claim was to assert specific jurisdiction.²³⁶

The court considered technological advancements, such as e-mail, and reasoned that the methods of transacting business have changed substantially, especially in light of advancements in electronic communications.²³⁷ Since "[t]he speed and ease of such communications has increased the number of transactions that are consummated without either party leaving the office . . . [t]here is no reason why the requisite minimum contacts cannot be electronic."²³⁸ Since LaRonde reached out to a resident of California and continued to work with him in developing and modifying the software package, the court concluded that "LaRonde created a 'continuing obligation' between himself and a resident of California" and that his contacts with the forum

228. *See id.* at 400.

229. *See id.*

230. *See id.*

231. *See id.*

232. *See Hall*, 66 Cal. Rptr. 2d at 401.

233. *Id.*

234. *See id.*

235. *See id.*

236. *See id.*

237. *See Hall*, 66 Cal. Rptr. 2d at 402.

238. *Id.*

state "were more than 'random,' 'fortuitous,' or 'attenuated.'"²³⁹ Accordingly, minimum contacts had been established with California.²⁴⁰ Since "minimum contacts" had been established, the burden shifted to the defendant to present a "compelling case" against a finding of personal jurisdiction.²⁴¹ The court concluded that it was neither unreasonable, nor too burdensome, for the defendant to present himself in a California court.²⁴²

Although in *Hall* a California court authorized personal jurisdiction against a foreign defendant based solely on an Internet presence, California recognized a constitutional limitation.²⁴³ In *Expert Pages v. Buckalew*,²⁴⁴ the court found it unfair to require the nonresident young adult defendant to defend a suit in California.²⁴⁵ This copyright infringement suit stemmed from the plaintiff's allegation that its web page was copied and used by the defendant in his attempt to develop an on-line information service.²⁴⁶ The court determined that minimum contacts existed since the defendant purposefully directed his activities to the plaintiff's web site that was based in California.²⁴⁷ However, given the limited contacts the defendant maintained with California, and that the plaintiff corporation was better able to prosecute its claim in a foreign state, the court's exercise of personal jurisdiction would have deprived the defendant of his right to defend himself.²⁴⁸

In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,²⁴⁹ it was concluded that an Internet provider who conducted "electronic commerce" with 3000 residents of the forum state had purposefully availed himself of the forum's laws and was therefore "doing business" within the state.²⁵⁰ Zippo Manufacturing

239. *Id.* (quoting *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 475-76 (1985)).

240. *See Hall*, 66 Cal. Rptr. 2d at 402.

241. *Id.* (citing *Burger King*, 471 U.S. at 477).

242. *See Hall*, 66 Cal. Rptr. 2d at 403. The court also indicated that LaRonde's claim of excessive burden was "late." *See id.* at 402.

243. *See id.* at 402.

244. No. C-97-2109-VRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997).

245. *See id.* at *4-5.

246. *See id.* at *1.

247. *See id.* at *3.

248. *See id.* at *4-5.

249. 952 F. Supp. 1119 (W.D. Pa. 1997).

250. *See id.* at 1125-26.

sued under several trademark infringement theories, stemming from Zippo Dot Com's use of the domain names "zippo.com" and other similar names.²⁵¹ Zippo Dot Com, a California Internet provider, maintained no affiliations with Pennsylvania, other than through its subscribers, who had been made aware of the provider solely by advertisements on the Internet.²⁵² The defendant did not otherwise solicit business from the forum state.²⁵³

The court recognized that business, as a result of the Internet, could now be conducted from a person's desktop.²⁵⁴ The court stated that :

[t]raditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper. [citation omitted]. Different results should not be reached simply because business is conducted over the Internet.²⁵⁵

Due to the fact that the defendant continued to accept business from forum domicilaries, the court rejected the defendant's argument that its contacts with the forum state were "fortuitous."²⁵⁶

In *Telco Communications v. An Apple A Day*,²⁵⁷ the Virginia District Court concluded that a web site was a sufficient basis upon which to assert personal jurisdiction against a Missouri corporation.²⁵⁸ The defendant posted allegedly defamatory press releases on its Missouri-based web site, allegedly result-

251. *See id.* at 1121.

252. *See id.*

253. *See id.*

254. *See Zippo*, 952 F. Supp. at 1123.

255. *Id.* at 1124 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

256. *Zippo*, 952 F. Supp. at 1123, 1126 (quoting *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)). The court's observation may suggest that defendant could have avoided a finding of personal jurisdiction in Pennsylvania had he expressly refused to conduct business with Pennsylvania residents. The court seems to suggest that a web site for advertising alone may not be sufficient grounds for asserting personal jurisdiction.

257. 977 F. Supp. 404 (E.D. Va. 1997).

258. *See id.* at 408. The court noted that Virginia's long-arm statute runs nearly to the limits of the Due Process Clause of the Constitution. *See id.* at 406-07. Personal jurisdiction is limited slightly in that it provides that a defendant acting outside the state must solicit, or regularly solicit, business within the state. *See id.* at 407 (citations omitted).

ing in depressed stock prices for the plaintiff.²⁵⁹ The court ruled that two or three press releases placed on the Internet, for the purposes of advertising, rises to the level of "regularly doing or soliciting business."²⁶⁰ The court reasoned that "but for" the Internet transmissions, the alleged tort would not have occurred in the forum state.²⁶¹ The court rejected any contention that the defendant would be unfairly prejudiced by having to defend a suit in Virginia.²⁶² The court reasoned that defendant should have known that the information would disseminate into Virginia, particularly because the plaintiff was headquartered in that state.²⁶³

In *Edias Software International v. Basis International*,²⁶⁴ the Arizona District Court found that an Internet web page constituted a constitutionally sufficient contact in the context of a libel and defamation action.²⁶⁵ The defendant was alleged to have posted a message on its web page indicating that the plaintiff, Edias Software, performed inadequately under a distribution contract.²⁶⁶ In reviewing a motion to dismiss for lack of personal jurisdiction, the court considered whether posting the message on the web page was a constitutional contact.²⁶⁷ Since Arizona was Edias' principal place of business, the court reasoned that the defendant "could foresee that the result of the statements might be to deter potential Edias customers [and] that the injury might be felt in Arizona."²⁶⁸ In ruling that the exercise of personal jurisdiction was proper, the court stated that the defendant could not simultaneously rely on modern technology to disseminate information while escaping "traditional notions of jurisdiction."²⁶⁹

259. *See id.* at 404.

260. *Telco Communications*, 977 F. Supp. at 406. In *dicta*, the court also accepted the Internet as a valid contact for purposes of personal jurisdiction under its long-arm statute requiring tortious act or injury within the state. *See id.* at 409.

261. *See id.* at 408.

262. *See id.*

263. *See id.*

264. 947 F. Supp. 413 (D. Ariz. 1996).

265. *See id.* at 420.

266. *See id.* at 415.

267. *See id.* at 419.

268. *Id.* at 420.

269. *Edias Software*, 947 F. Supp. at 420.

In *Compuserve Inc. v. Patterson*,²⁷⁰ the Sixth Circuit entertained an action brought by Compuserve seeking a declaratory judgment that it had not violated any trademark infringement laws against Patterson.²⁷¹ Compuserve was an Ohio corporation engaged in the business of computer networking for Internet access.²⁷² It entered into a contract with Patterson to provide access to the Internet for Patterson's shareware software.²⁷³ Patterson also advertised his shareware over the Internet.²⁷⁴

In 1993, Patterson demanded approximately \$100,000 from Compuserve to settle his potential trademark infringement claims stemming from his belief that software developed by Compuserve was similar to his own.²⁷⁵ To stave off a suit, Compuserve filed this action for declaratory judgment in Ohio federal court, seeking an equitable determination that its software was not an infringement.²⁷⁶ Patterson made a motion to dismiss for lack of personal jurisdiction.²⁷⁷

The court recognized the decreasing role of the Federal Constitution in preventing inconvenient litigation since "all but the most remote forums are easily accessible for the pursuit of both business and litigation."²⁷⁸ Accordingly, the court ruled that specific personal jurisdiction was proper under the circumstances.²⁷⁹ It determined that Patterson had purposefully

270. 89 F.3d 1257 (6th Cir. 1996).

271. *See id.* at 1259.

272. *See id.* at 1260.

273. *See id.* "Shareware," as this court described, makes money only through the voluntary compliance of an 'end user,' that is, another CompuServe subscriber who may or may not pay the creator's suggested licensing fee if she uses the software beyond a specified trial period. The 'end user' pays that fee directly to CompuServe in Ohio, and CompuServe takes a 15% fee for its trouble before remitting the balance to the shareware's creator.

Id. The defendant Patterson had developed software which he provided to consumers, as shareware, via Compuserve. *See Patterson*, 89 F.3d at 1260.

274. *See id.* at 1261.

275. *See id.*

276. *See id.*

277. *See id.* The motion to dismiss for lack of personal jurisdiction was granted by the district court. *See Patterson*, 89 F.3d at 1261. Compuserve appealed. *See id.*

278. *Id.* at 1262 (citations omitted).

279. *See id.* at 1267-68. Ohio's long-arm statute allows the exercise of personal jurisdiction over nonresidents on claims arising out of the nonresident's

availed himself of the laws of Ohio when he chose to create a connection with Ohio²⁸⁰ through repeatedly sending his software through electronic channels to Compuserve in Ohio,²⁸¹ and advertising his shareware over Compuserve's system.²⁸² The court found purposeful availment despite the fact that between 1991 and 1994 Patterson sold through Compuserve less than \$650.00 worth of his software to twelve Ohio residents.²⁸³ The court also recognized Ohio's interest in providing Compuserve with a forum for litigation.²⁸⁴

III. The *Bensusan* Decision²⁸⁵

In 1996, the plaintiff corporation, Bensusan, brought a trademark infringement, trademark dilution, and unfair competition action against the defendant, King.²⁸⁶ Bensusan alleged that his trademark and logo – “The Blue Note” – were

transaction of business in Ohio. *See id.* at 1262 (citing OHIO REV. CODE ANN. § 2307.382(A)). “Transacting business” has been construed to run to the limits of the Due Process Clause of the Federal Constitution. *See Patterson*, 89 F.3d at 1262. (citations omitted).

280. The court found that Patterson's choice to transmit files to Compuserve in Ohio was the most “salient” fact for finding personal jurisdiction. *See id.* at 1264.

281. The court also found the repeated nature of the transmissions into Ohio to be of significance, suggesting that the district court, in granting Patterson's motion to dismiss for lack of personal jurisdiction, disregarded the fact that Patterson's involvement with Ohio was not a “one-shot affair.” *See id.* at 1261 (citation omitted).

282. *See id.* at 1264.

283. *See id.* at 1261

284. *See Patterson*, 89 F.3d. at 1268. The court also devoted a small portion of its decision to indicating what it was not deciding in the case. *See id.* at 1268. Among other things, the court was not holding that Patterson could be subject to suit in any state where his shareware was made available through Compuserve's computers, or whether Compuserve could sue in Ohio a subscriber from Alaska who had never done more than access Compuserve's regular Internet services. *See id.*

285. *See Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

286. *See Bensusan*, 937 F. Supp. at 298. This Note focuses on the lower court's decision since it, in *dicta*, considered New York's position as to whether an Internet presence is a sufficient minimum contact. *See id.* at 300-01. Although it affirmed, the Second Circuit did so without reaching the constitutional question. *See Bensusan*, 126 F.3d at 26-27. However, the Second Circuit indicated that “we believe that well-established doctrines of personal jurisdiction law support the result reached by the district court.” *Id.*

improperly used on King's Internet web page.²⁸⁷ Bensusan is a New York corporation and the creator of a New York city jazz club named "The Blue Note."²⁸⁸ Bensusan is the rightful owner of the federally registered mark of the same name.²⁸⁹ King is an individual who owns and operates a night club in Columbia, Missouri, named "The Blue Note."²⁹⁰

King's web site was a general access site, meaning that it required no passwords and had no other access-restricting devices.²⁹¹ In addition to general club information and calendar dates, the site provided ticket information for the club which included names and numbers of local ticket agents and a telephone number for phone ticket orders.²⁹² The site also mentioned The Blue Note of New York in a disclaimer.²⁹³ King also included a hyperlink permitting users to connect directly to Bensusan's web page.²⁹⁴

Bensusan brought the action in the Southern District of New York.²⁹⁵ King moved to dismiss the action for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure ("FRCP").²⁹⁶ Initially, the court considered the long-arm statute requirements, specifically whether "the creation of a Web site, which exists either in Missouri or in

287. *Bensusan*, 937 F. Supp. at 297. According to the trial court, [i]n April of 1996, King posted a "site" on the World-Wide Web of the Internet to promote his club. This Web site, which is located on a computer server in Missouri, allegedly contains "a fanciful logo which is substantially similar to the logo utilized by [Bensusan]."

Id.

288. *See id.*

289. *See id.*

290. *See id.*

291. *See Bensusan*, 937 F. Supp. at 297.

292. *See id.*

293. *See id.* The disclaimer indicated that "The Blue Note's Cyberspot should not be confused with one of the world's finest jazz club[s] [the] Blue Note, located in the heart of New York's Greenwich Village. If you should find yourself in the big apple give them a visit." *Id.* at 297-98. "After Bensusan objected to the Web site, King dropped the sentence 'If you should find yourself in the big apple give them a visit' from the disclaimer and removed the hyperlink." *Id.* "Hyperlink" is a tool in which "highlighted text or images that, when selected by the user, permit him to view another, related Web document." *Bensusan*, 937 F. Supp. at 298 n.2 (quoting *Shaw v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996)).

294. *See Bensusan*, 937 F. Supp. at 298.

295. *See id.* at 297.

296. *See id.*; *see also* Fed.R.Civ.P. 12(b)(2) (McKinney 1997).

cyberspace—i.e., anywhere the Internet exists—with a telephone number to order the allegedly infringing product, is an offer to sell the product in New York.”²⁹⁷ The court sustained the defendant’s motion on statutory grounds.²⁹⁸ The court reasoned that the New York resident would have to take “several affirmative steps” to access the site and would then have to telephone the club in Missouri to reserve tickets, and travel to Missouri to see a show.²⁹⁹ Moreover, the alleged infringement was deemed to have occurred in Missouri, not New York.³⁰⁰ “The mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling, or otherwise making an effort to target its product in New York.”³⁰¹ According to the court, no tortious act was committed within New York and consequently C.P.L.R. 302(a)(2) did not apply.³⁰²

The court also found that C.P.L.R. 302(a)(3)(ii) did not provide a basis for personal jurisdiction.³⁰³ King submitted an affidavit stating that ninety-nine percent of his business is derived from local residents.³⁰⁴ Subsequently, the court determined that the statutory requirement that substantial revenues be derived from interstate commerce was not satisfied.³⁰⁵ The court also rejected Bensusan’s claim that it was foreseeable that domiciliaries of New York would access the site.³⁰⁶

In *dicta*, the court considered the personal jurisdiction question under due process requirements.³⁰⁷ The court’s opin-

297. *Bensusan*, 937 F. Supp. at 299.

298. *See id.*

299. *Id.*

300. *See id.*

301. *Id.* at 299.

302. *See Bensusan*, 937 F. Supp. at 299.

303. *See id.* 302(a)(3)(ii) provides that acts committed by nondomiciliaries which the nondomiciliary “expects or should reasonably expect [] have consequences in the state and [from which the nondomiciliary] derives substantial revenue from interstate or international commerce” generate a basis for personal jurisdiction. N.Y. C.P.L.R. 302(a)(3)(ii) (McKinney 1997).

304. *See Bensusan*, 937 F. Supp. at 300.

305. *See id.*; *see also* N.Y. C.P.L.R. 302(a)(3)(ii) (McKinney 1997).

306. *See Bensusan*, 937 F. Supp. at 300. The court emphasized that “[t]hat prong of the statute requires that a defendant make a ‘discernable effort . . . to serve, directly or indirectly, a market in the forum state.’” *Id.* (quoting *Darlenzo v. Wise Shoe Stores*, 427 N.Y.S.2d 831, 834 (App. Div. 1980)).

307. *See Bensusan*, 937 F. Supp. at 300.

ion was that King “had done nothing to purposefully avail himself of the benefits of New York,”³⁰⁸ reasoning that an Internet site could not be “directed” to anyone in New York, but was spread worldwide.³⁰⁹ Thus this activity was “insufficient to satisfy due process.”³¹⁰ As to Bensusan’s argument that King should have foreseen people in New York reading the site and becoming confused about the rightful ownership of the trademark, the court concluded it was an insufficient argument upon which to rest a finding of personal jurisdiction.³¹¹

Bensusan appealed, but the Second Circuit affirmed the dismissal.³¹² The Second Circuit, however, did not reach the due process issue.³¹³ Instead, that court relied on an analysis similar to the lower court’s in finding the long-arm statute in New York inapplicable.³¹⁴

IV. Analysis

A. *Advertising on the World-Wide Web Constitutes a Valid Contact: The Error of Bensusan*

Why advertise on the Internet but to solicit clients and inform people (and the world) of your presence? King, wishing to advertise to locals, might have opted for another form of advertising such as newsprint, radio or local television. A world-wide audience does not seem necessary to attract local patrons. In this way, it seems that King “intentionally became part of an interstate economic network”³¹⁵ for economic gain. King had knowledge of the plaintiff’s club, The Blue Note, as evidenced by King’s use of a similar logo, as well as his web site’s disclaimer that the Missouri club was not affiliated with The Blue Note in New York.³¹⁶ These facts tend to show both King’s desire for

308. *Id.*

309. *Id.* at 301.

310. *See id.*

311. *See Bensusan*, 937 F. Supp. at 300.

312. *See Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997).

313. *See id.* at 27.

314. *See id.* at 27-8.

315. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 315 (1980) (Marshall, J., dissenting). *See Playboy Enterprises v. Chuckleberry Publishing*, 939 F. Supp. 1032, 1044 (S.D.N.Y. 1996) (advertisement on the Internet constitutes “distribution” within the forum state).

316. *See Bensusan*, 937 F. Supp. 297-98.

commercial gain and his recognition that his club's name might cause confusion with the one in New York.³¹⁷ Those same facts may evidence King's knowledge that his web site would be read by people in New York, and most likely by people planning to visit a jazz club in New York City. Thus, King could foresee an impact in New York.

The *Bensusan* court improperly applied Justice O'Connor's *Asahi* plurality opinion. The court relied on Justice O'Connor's "stream of commerce plus something more approach" to defeat Bensusan's claim of jurisdiction based on King's Internet activities.³¹⁸ Even under the O'Connor construction, however, it seems that King introduced his product into the stream of commerce and directed it towards the forum. It is hard to draw any other conclusion other than that the defendant's web site was placed on the web for the purpose of soliciting business.³¹⁹ King knew, or should have known, the nature of the distribution system known as the world-wide web.³²⁰ King also knew that some confusion with the plaintiff's club, The Blue Note, may result from the web site, and therefore King tried to limit that confusion.³²¹ Consequently, it seems King did more than just place something into the stream of commerce; King created a link between himself and The Blue Note in New York.³²²

The district court in *Bensusan*, in *dicta*, refused to find personal jurisdiction partly on the basis that King's Internet page did not represent any intent to solicit business in, or otherwise make any connection with, New York.³²³ However, the defendant is likely to have been aware that some New Yorkers would

317. See *supra* Part III and accompanying text.

318. See *supra* Part III and accompanying text.

319. See *supra* Part III and accompanying text.

320. See *supra* Part II.C and accompanying text.

321. See *supra* Part III and accompanying text.

322. See Gwenn M. Kalow, *From the Internet to Court: Exercising Jurisdiction Over World-Wide Web Communications*, 65 *FORDHAM L. REV.* 2241 (1997). Kalow argues that Justice O'Connor's approach in *Asahi* should be the test of choice in Internet cases. See *id.* at 2270. She argues that the mere placement of a web site on the Internet would never satisfy due process requirements, especially because it would be unreasonable to do so. See *id.* at 2272. Kalow's argument, however, fails to consider the intention of a web site creator in placing his advertisement on the Internet.

323. See *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 300-01 (S.D.N.Y. 1996).

visit the site to learn more about and possibly purchase tickets from the jazz club in Missouri. Consider *EDIAS Software Int'l v. BASIS Int'l*,³²⁴ in which the court concluded that because the web page referred to a person in the forum state (who was allegedly defamed by the statement about him), the defendant must have foreseen the consequences within the forum state.³²⁵ As in *EDIAS*, therefore, it seems King's inclusion of a disclaimer, and information about the New York jazz club, suggested that he was able to foresee some consequences in New York.

If the *Bensusan* court's application of Justice O'Connor's opinion was correct, the defendants will have found a means of reaching potential clients and improperly utilizing trademarked names, without concern of being haled into a foreign forum.³²⁶ As this result is undesirable, a more prudent application under Justice O'Connor's analysis would be to consider the placement of a web site on the Internet similar to placing a product into the stream of commerce with purposeful availment. Without question, a web site offers "advertising in the forum State," as well as "channels for providing regular advice" two factors which Justice O'Connor's approach requires in order to demonstrate purposeful availment.³²⁷ Even though the result may be to assert jurisdiction over more territory,³²⁸ the result seems logically necessary under Justice O'Connor's approach and it is not inconsistent with personal jurisdiction jurisprudence.³²⁹

Under Justice Brennan's more relaxed *Asahi* approach,³³⁰ the *Bensusan* court's decision was also erroneous. King likely knew, or should have known, that the "currents or eddies"³³¹ of Internet information distribution would carry his message into

324. 947 F. Supp. 413 (D. Ariz. 1996). See *supra* note 263 and accompanying text.

325. See *supra* note 263 and accompanying text.

326. This notion seems to run contrary to an implied purpose of the doctrine of personal jurisdiction, namely to force defendants to act responsibly in a forum so that the forum's residents may be protected from harm. Failing to act in such manner, defendants face the threat of having to litigate in an inconvenient forum.

327. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

328. The fears attendant to this conclusion, however, may be calmed when the analysis turns to the reasonableness test. See *infra* Part IV.C.1 and accompanying text.

329. See *infra* Part IV.C.1 and accompanying text.

330. See *Asahi*, 480 U.S. at 116-21 (1987).

331. See *id.*

New York.³³² Moreover, knowing that The Blue Note club operated in New York with a similar logo, it should not have surprised King that he may have to defend a lawsuit there. Lastly, King's use of the plaintiff's trade name and logo provided him with the potential of economic gain, through name recognition. Therefore, King may be said to benefit indirectly from New York's law facilitating plaintiff's business there.

The *Bensusan* court's decision also disregarded the spirit of *International Shoe* and its progeny, dictating that personal jurisdiction ought not be grounded in territorial boundaries.³³³ While the Due Process Clause provides certainty and a degree of predictability for potential defendants, it must not do so at the expense of states' rights.³³⁴ Unlike a car that may or may not be driven into a foreign state,³³⁵ the predominant characteristic of the Internet is world-wide circulation.³³⁶ Arguably, the Internet provides a degree of predictability that a person's message will be circulated to every person accessing it around the world. Such vast distribution is likely the appeal in initiating an Internet presence. Knowledge of the distribution system makes a defendant's web site anything but a "random," "fortuitous," or "attenuated" contact with a forum.³³⁷ The fact that the contact is electronic should not convert an otherwise valid contact into an invalid one.³³⁸

332. See *supra* Part II.C and accompanying text.

333. See *supra* Part II.B and accompanying text.

334. See *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

335. See *World-Wide Volkswagen*, 444 U.S. at 286.

336. See *supra* note 11.

337. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citing *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770, 774 (1984)); *World-Wide Volkswagen Corp.*, 444 U.S. at 299.

338. See, e.g., *Hall v. LaRonde*, 66 Cal. Rptr .2d 399 (Ct. App. 1997).

B. *Recognizing Internet Contacts as Constitutionally Valid Ones: What it Means for the Personal Jurisdiction Question*

The fact that both a large company³³⁹ and a young adult at home³⁴⁰ using the Internet may be considered "present" anywhere in the nation presents unique strains on the minimum contacts analysis. The potential for inequalities are abundant since the young adult on an opposite coast may not be given an opportunity to defend himself adequately. The fear of litigation in a foreign forum may shape the way small companies do business. This could be the impact on a free economy that the court warned of in *Digital Equipment*.³⁴¹ This world-wide reach of jurisdiction runs counter to established principles in personal jurisdiction jurisprudence.³⁴² This fear was expressed well by the *Goldberger* court when it wrote that personal jurisdiction based on an Internet web site "would be tantamount to a declaration that this Court, and every other court throughout the world, may assert [personal] jurisdiction over all information providers on the global world-wide web. Such a holding would have a devastating impact on those who use this global service."³⁴³

The fear of being haled into every distant court, however, may be unfounded. The due process analysis established in *International Shoe* and developed in subsequent cases³⁴⁴ is capable of preventing unfair assertions of personal jurisdiction, even after an electronic contact is deemed constitutionally satisfactory.³⁴⁵ An outright disallowance of electronic contacts as constitutionally valid ones, however, may allow a company to exercise a freedom to transact interstate business (to the extent that a web page brings the business advertised to the awareness of foreign residents) without personal jurisdiction conse-

339. See *supra* Part II.C and accompanying text (discussing *Digital Equipment Corp. v. Alta Vista Technology*, 960 F. Supp. 456 (D. Mass.1997)).

340. See *supra* Part II.C and accompanying text (discussing *Expert Pages v. Buckalew*, No. C-97-2109-VRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997)).

341. See *Digital Equipment*, 960 F. Supp. at 463.

342. See *supra* Part II.B and accompanying text.

343. *Hearst Corporation v. Goldberger*, No. 96 Civ. 3620, 1997 WL 97097, at *20 (S.D.N.Y. Feb. 26, 1997) (quoting *Playboy Enterprises v. Chuckleberry Publishing*, 939 F. Supp. 1032, 1039-40 (S.D.N.Y. 1996)).

344. See *supra* Part II.B and accompanying text.

345. See *supra* Part III.C.1 and accompanying text.

quences never before permitted in personal jurisdiction jurisprudence.³⁴⁶

In the evolution of cases from *Pennoyer*, through *International Shoe*, *Burger King*, *World-Wide Volkswagen*, and *Asahi*, the Court has continually emphasized that the law must be flexible to accommodate changes in technology.³⁴⁷ Following *Pennoyer*, the Court's interpretation of physical presence has evolved into an abstract notion that a defendant's products, placed into the stream of commerce and used in a foreign state,³⁴⁸ may create constitutionally sufficient "physical" presence. This expansion of the personal jurisdiction doctrine should not stop short of the Internet medium.

C. *A New Personal Jurisdiction Model for Internet Cases: Shifting the Analysis to the Reasonableness Test*

1. *Existing Laws are Capable of Dealing with the Internet Issue*

The current constitutional due process standard is adequate to resolve these new issues. To accommodate the worldwide web's impact on business, it has been suggested that "[b]ecause the internet is an entirely new means of information exchange, analogies to cases involving the use of mail and telephone are less than satisfactory in determining whether [a] defendant has 'purposefully availed' itself to this forum."³⁴⁹ However, from *Pennoyer* through *International Shoe*, the Court has relied on its own understanding of the evolution of business transactions rather than relying on legislative opinions.³⁵⁰ Viewing the Internet as a new business tool, subject to present laws, enables the Court to modify existing laws, rather than rely on governmental action in developing tailored and untested new laws.

346. See *supra* Part II.C and accompanying text.

347. See *supra* Part II.B and accompanying text.

348. The exact understanding of "stream of commerce" is left at issue in light of the plurality in *Asahi*. However, it seems that the Court has advanced to an understanding that the "stream of commerce" test, in one form or another, is a standard to be used in personal jurisdiction cases. See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

349. *Maritz v. Cybergold*, 947 F. Supp. 1328, 1332 (E.D. Mo. 1996).

350. See *supra* Part II.B and accompanying text.

There is very little evidence to support the theory that current personal jurisdiction law cannot account for the Internet. Since the Internet should be considered as a constitutionally sufficient contact, courts facing the issue ought to place greater emphasis on the second prong of the *International Shoe* test.³⁵¹ This shift would prevent any unfair assertions of personal jurisdiction. Under the traditional test, finding minimum contacts results in a strong presumption that the assertion of personal jurisdiction is constitutional.³⁵² However, this need not be the case with Internet questions. Specifically, when an Internet site is proffered as a contact for jurisdictional purposes, especially in the context of a more passive site and absent additional conduct directed at the forum, courts should analyze the reasonableness factors³⁵³ by drawing most inferences in favor of the defendant.³⁵⁴ A slight shift in application of the personal jurisdiction test will avoid inequitable and unfair applications of the *International Shoe* minimum contacts test. Moreover, it will not require that an entirely new and untested body of personal jurisdiction laws be developed.

2. Preserving Defendants' Due Process Rights

Currently, the reasonableness test is secondary to the minimum contacts.³⁵⁵ This has never been interpreted to mean that the reasonableness test is irrelevant once minimum contacts have been established. Accordingly, the Court intimated that the reasonableness test acts to ensure that despite a finding of

351. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *supra* Part II.B and accompanying text.

352. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *supra* Part II.B and accompanying text.

353. The reasonableness factors include the "forum State's interest in adjudicating the dispute," *World-Wide Volkswagen*, 444 U.S. at 292 (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)); "plaintiff's interest in obtaining convenient and effective relief," *World-Wide Volkswagen*, 444 U.S. at 292 (citing *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1957)); "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen*, 444 U.S. at 292.

354. See *Expert Pages v. Buckalew*, No. C-97-2109-VRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997); *supra* Part II.C.3 and accompanying text.

355. See *World-Wide Volkswagen*, 444 U.S. at 292 (suggesting that a court, in an "appropriate case," may consider other factors). No case since *World-Wide Volkswagen* has suggested otherwise.

minimum contacts, state sovereignty will nonetheless remain honored.³⁵⁶

Greater focus on the reasonableness test and acceptance of an Internet contact as constitutionally valid, will satisfy several issues. First, it will allay fears that world-wide jurisdiction will necessarily result. Secondly, it will enable plaintiffs, harmed by activities conducted through the Internet, access to a convenient forum. Access to a convenient forum is a consideration which must not be overlooked.³⁵⁷ It is especially critical in Internet cases. A defendant who utilizes the Internet to his benefit should not avoid suit in a foreign forum, especially when defending a suit in another forum would be a hardship to the plaintiff.³⁵⁸ This is especially true when the express or implied purpose of the defendant's web site is to attract attention over the Internet.

Contrast, for example, the two California decisions, *Hall*³⁵⁹ and *Expert Pages*.³⁶⁰ In both, the courts agreed that Internet presence is constitutionally sufficient.³⁶¹ However, only in the *Hall* case did the court conclude that an assertion of personal jurisdiction would be appropriate.³⁶² This is due to the fact that the *Expert Pages* court adopted, in substance, the approach proposed in this Note.³⁶³ Since the defendant in *Expert Pages* was a young adult, unable to finance a suit in the distant forum of California, the court refused to assert personal jurisdiction over

356. See *World-Wide Volkswagen*, 444 U.S. at 293 (writing that to "remain faithful to the principles of interstate federalism embodied in the Constitution," the reasonableness test may prevent asserting personal jurisdiction even after finding sufficient minimum contacts). The Court also recapitulated the Framers' intent when they designed the Commerce Clause of the Federal Constitution, noting that a balance must be struck between free trade between states ("in which the States are debarred from acting as separable economic entities") and state sovereignty ("sovereign power to try cases in their courts"). *Id.*

357. See *id.* at 292. The Court indicated that "[i]mplicit in this emphasis on reasonableness . . . [is] the plaintiff's interest in obtaining convenient and effective relief." *Id.*

358. See *id.*

359. See *Hall v. LaRonde*, 66 Cal. Rptr. 2d 399 (Ct. App. 1997); *supra* Part II.C.3 and accompanying text.

360. See *Expert Pages v. Buckalew*, No. C-97-2109-VRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997); *supra* Part II.C.3 and accompanying text.

361. See *supra* Part II.C.3 and accompanying text.

362. See *Hall*, 66 Cal. Rptr. 2d at 400.

363. See *Expert Pages*, 1997 WL 488011, at *3-5.

him because such an assertion would have been unreasonable.³⁶⁴

The approach adopted in *Expert Pages* should be applied to Internet cases in order to prevent defendants from being deprived of their due process rights when the assertion of personal jurisdiction would be unreasonable. This approach should have been applied in *Bensusan*. The *Bensusan* court should have recognized the presence of minimum contacts, consistent with current personal jurisdiction law.³⁶⁵ Next, the court should have turned to the issue of reasonableness and asserted personal jurisdiction, only if doing so would have been reasonable.

In considering Internet jurisdiction, the *Jolly Hotels*³⁶⁶ court established a scale to determine whether Internet activities would qualify as a basis for personal jurisdiction.³⁶⁷ Although the scale applies to the minimum contacts analysis,³⁶⁸ it is a model by which courts could assess the reasonableness factors. In the first category, the defendant engages in Internet activities which are purposefully directed to the forum state.³⁶⁹ Traditional analyses apply to assert personal jurisdiction, barring an extreme burden on the defendant.³⁷⁰

In the second category, the defendant engages in information exchanges with the host computer located in the forum.³⁷¹ Under the minimum contacts analysis, the court in *Jolly Hotels* mandates an assessment of the nature and extent of communications to determine if minimum contacts exist.³⁷² However, with the understanding that an Internet contact is a sufficient one, the minimum contacts test is already satisfied. However,

364. *See id.*

365. *See supra* Part II.B and accompanying text.

366. *See Weber v. Jolly Hotels*, 977 F. Supp. 327 (D. N.J. 1997); *supra* Part II.C.1 and accompanying text.

367. *See Jolly Hotels*, 977 F. Supp. at 333.

368. While the model suggested that passive sites were insufficient contacts, *see id.*, the concept of a scale is recommended here.

369. *See id.* (citation omitted).

370. *See Hall v. LaRonde*, 66 Cal. Rptr. 2d 399, 402 (noting that electronic contacts ought to be included as part of the quantum of contacts with the forum state); *see also Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 105 (1987) (demonstrating a situation in which the burden on the defendant and minimal interest for the forum state, far outweighs the nature and quantity of contacts with the forum state).

371. *See Jolly Hotels*, 977 F. Supp. at 333 (citation omitted).

372. *See id.*

under the reasonableness test approach, the court would consider the nature and quality of the communications with the host computer in light of such factors as the burden on the defendant and the interest of the forum state.³⁷³ Since the quality and quantity of contacts may vary, an inverse relationship would emerge such that the more tenuous the contacts, the more "reasonable" the assertion must be.

The third category, where the defendant's web site is passive and entails only advertising or information, poses the most difficult scenario since the ties to the forum state arguably are most tenuous. For the reasons elucidated above,³⁷⁴ however, minimum contacts may be found in this situation. Since it involves the least participation of the defendant, however, the plaintiff would be required to make a strong showing of factors under the reasonableness test. Under this formulation, a court will be able to prevent asserting jurisdiction when a defendant is, for instance, a young adult who uses the Internet as an inexpensive advertising tool for a small business with little income. The same formulation, however, could be used to assert personal jurisdiction against a company attempting to hide behind technology and avoid foreign suits.

3. *Not Just Semantics*

Shifting to a greater emphasis on the reasonableness test in Internet cases may result in defeating personal jurisdiction when appropriate. Surely, proponents of the argument that the Internet does not provide an adequate basis for personal jurisdiction may feel vindicated that, in the end, a passive Internet site is probably not a valid source upon which to assert personal jurisdiction. Consequently, is the analysis in this Note just a question of semantics? Indeed, it is not.

Understanding that a passive Internet site constitutes a valid contact under the minimum contacts analysis materially changes the way in which modern personal jurisdiction cases will be viewed. Certainly in some cases, the result (of refusing to assert personal jurisdiction) may be the same as it would be if a web site was not a constitutionally sufficient contact. But, in

373. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *supra* Part II.B and accompanying text.

374. See Parts IV.A, IV.B and accompanying text.

cases such as *Bensusan* and *Pres-Kap*, and others which will be presented to courts in the future, where the defendant would not be challenged with an unreasonable order to defend in a foreign forum, an understanding that the Internet constitutes a valid contact is essential. Foreclosing any possible assertion of personal jurisdiction predicated on Internet contacts will enable defendants to rely on the doctrine as both a sword and shield in conducting foreign business.

V. Conclusion

Internet presence is a constitutionally valid contact for the purposes of asserting personal jurisdiction.³⁷⁵ A defendant undertaking to be present on the world-wide web has knowledge that his publication will be visible anywhere the Internet may be accessed. After all, inexpensive and expansive publication seems to be a key purpose of Internet presence. In this way, therefore, a defendant is free to use the Internet as a tool to reach into a foreign forum and influence its citizens. This sword, however, may not also be used as a shield against defending a suit in a foreign forum.

There will be instances, however, when suit in a foreign forum will be manifestly unfair, especially in light of the quantity and quality of the defendant's Internet presence. Therefore, to prevent unfair assertions of personal jurisdiction, shifting to the second prong of the International Shoe test³⁷⁶ is in order. Viewed on a scale, as a defendant's Internet presence becomes greater, the defendant will be required to make a greater showing of unreasonableness.

375. For arguments against the use of the Internet as a constitutional contact, see, for example, Corey B. Ackerman, *World-Wide Volkswagen, Meet the World-Wide Web: An Examination of Personal Jurisdiction Applied to a New World*, 71 ST. JOHN'S L. REV. 403 (1997) (arguing that reliance on the Internet as "presence" in a forum state dilutes traditional due process requirements); Gwenn M. Kalow, *From the Internet to Court: Exercising Jurisdiction Over World-Wide Web Communications*, 65 FORDHAM L. REV. 2241 (1997) (arguing for the application of Justice O'Connor's *Asahi* approach, which leads to the conclusion that an Internet advertising site, will never constitute a minimum contact in the forum state).

376. See *supra* Part II.B and accompanying text (discussing the "reasonableness test" from *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945)).

The finding in *Bensusan*, however, was improper. To deny that electronic contacts can ever be constitutionally satisfactory enables defendants to utilize a system of distribution without being held accountable. It is logically inconsistent to suggest that established Internet contacts are distinguishable from other types of contacts previously recognized by courts nationwide. The doctrine of personal jurisdiction has evolved from strict physical presence to a more abstract concept of "presence." Following the evolution of this doctrine, Internet contacts should be considered constitutionally sufficient and the necessary protections for defendants should be considered.

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