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FROM THE INTERNET TO COURT: EXERCISING JURISDICTION OVER WORLD WIDE WEB COMMUNICATIONS

Gwenn M. Kalow*

INTRODUCTION

Caitlin, the owner of the "Enchanted Florist" flower shop in New York City, decides to create and maintain a World Wide Web site on the Internet to enable her customers to order flowers for delivery in New York City and its surrounding suburbs. On this World Wide Web site, she posts photographs of her more popular flower arrangements, and takes orders over the phone from regular customers with account numbers. Approximately one month later, Caitlin receives notice that Ohio and Florida flower shop owners—of shops named the "Enchanted Florist"—are suing her in those respective states. Caitlin is stunned that these "Enchanted Florist" shop owners would sue her, especially because she never conducted or tried to conduct business in Ohio or Florida. Although Caitlin knew that the World Wide Web site *could* be accessed anywhere in the world, she assumed that only her regular account-bearing customers would actually visit the site, especially because flowers cannot be ordered without a customer number.

As it turns out, the courts in these two states employed a different jurisdictional test to determine whether it was appropriate to force Caitlin to defend the suit in that state. Ironically, the Florida court exercised personal jurisdiction, but the Ohio court did not. This situation perplexed Caitlin: How could one court exercise jurisdiction and another decline, while the two claims were virtually identical? Caitlin now faces a difficult situation: She is being asked to defend a suit in Florida, a distant forum in which she has never conducted business, visited, or even intended to visit. How can a business owner like Caitlin operate a Web site and prevent states from exercising jurisdiction? What inconsistencies in Ohio's and Florida's personal jurisdiction tests led to the disparate results? These difficult questions affect many Internet users, and these users must feel confident that information they post on the Internet will not be sufficient to subject them to suit in any forum unless the Internet user has some intention of reaching that particular forum.¹

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1. For a detailed examination of a hypothetical case on personal jurisdiction and the Internet, see Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 Vill. L. Rev. 1, 19-25 (1996) (describing the nature of Web transmissions and how they relate to In-

The Internet community—which includes children, adults, corporations, government, and other organizations electronically connected using computers and modems—has recently experienced exponential growth.² The Internet serves as an electronic means of transmitting information between members of its community. Occasionally, those members engage in improper conduct on the Internet, from violating a criminal statute to publishing defamatory material, that gives rise to potential criminal or civil liability. These illicit Internet communications, void of territorial boundaries, present numerous challenges to traditional personal jurisdiction jurisprudence. Contacts initiated over the Internet are not actually conducted in a particular location, but rather in the ephemeral world of “Cyberspace.” Courts have not only been faced with the challenge of deciding whether to apply new jurisdictional rules to Internet-related disputes, but also have encountered difficulties in properly analyzing these cases within traditional personal jurisdiction decisional models.³

The challenges presented by the Internet in jurisdictional disputes can be properly addressed within the traditional personal jurisdiction framework.⁴ Courts, however, must ensure that a non-resident defendant has purposefully availed himself of the laws of the forum in which the court sits before finding that a communication over the Internet is sufficient to satisfy the requirements of due process. The nature of on-line communications mandates this analysis: In many circumstances, users who “publish” information on the Internet do not direct their communications at a particular community,⁵ and have little or no control over who accesses their information. The availability of worldwide access to information on the Internet should not suffice to subject an individual to a lawsuit in any forum. There must be a uniform jurisdictional test used by all courts to determine whether particular Internet communications are sufficient to subject non-resi-

ternet jurisdictional theories). While Professor Perritt lays out different possible scenarios and analogous cases for Web jurisdictional disputes, *see id.* at 13-25, this Note focuses on the need for a strict, uniform approach among courts when analyzing Internet contacts.

2. See Curt A. Canfield & Joseph Labbe, *Web or Windows?: Planning for Internet/Intranet Technology—Explosive Growth Experienced*, N.Y. L.J., Jan. 21, 1997, at S2. The increased use of the Internet is due in part to increased advertising and ease of obtaining access. See Christopher Wolf & Scott Shorr, *Cybercops Are Cracking Down on Internet Fraud: Federal and State Officials Have Stepped Up Efforts in the Battle Against Info-Highway Robbery*, Nat'l L.J., Jan. 13, 1997, at B12.

3. See *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1332-33 (E.D. Mo. 1996).

4. See Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 Alb. L.J. Sci. & Tech. 339, 380 (1996) (“The existing body of jurisdictional jurisprudence is equipped to deal with the unique scenarios that arise when a non-resident defendant’s contacts with a forum are isolated electronic travels.”).

5. Unlike Caitlin, who established her Web site only to sell flowers to her local customers, individuals who do not direct their communications establish Web sites without intending to reach any specific geographical community.

dent defendants to a forum's jurisdiction. This test should establish a strict standard to ensure that the non-resident defendants intended for their Internet communications to reach the forum. Accordingly, this Note proposes that courts confronting the issue of whether to exercise personal jurisdiction for Internet-related activity, specifically in the context of World Wide Web communications, should follow a purposeful availment approach as outlined in Justice O'Connor's plurality opinion in *Asahi Metal Industry v. Superior Court*.⁶ Use of this test would ensure that jurisdiction will be conferred only when Internet communications intended to, and did, reach residents of the forum state.

Part I of this Note provides a description and overview of the Internet. It first introduces some services available on the Internet and then describes the Internet's popular communication tool, the World Wide Web. Finally, part I discusses some common uses of the Internet. Part II provides an overview of current personal jurisdiction analyses and outlines cases of particular importance to this Note's proposed analysis of Internet-related personal jurisdiction issues. Part III examines the divergent case law that has grappled with the issue of whether to exercise personal jurisdiction over a defendant based on his on-line conduct. After detailing the advantages and deficiencies of alternative jurisdictional analyses, part IV proposes that courts use the "purposeful availment" approach in World Wide Web jurisdictional cases. Under this approach, courts should exercise personal jurisdiction over a non-resident defendant World Wide Web site operator only when that defendant intentionally directed the information on the World Wide Web to the forum state or a national/international market.

This Note concludes that proper application of the purposeful availment approach to Internet activity in all forums will result in fair jurisdictional results by preventing Internet users from being at the mercy of plaintiff forum shopping and by ensuring that non-resident defendants are subject to suit only in those jurisdictions with which they intend to communicate.

I. BACKGROUND

The Internet currently consists of thirteen million host computers⁷ in ninety countries linked by more than fifty thousand connected computer networks.⁸ The information and data found on the Internet are located on individual computers throughout the world, and are not

6. 480 U.S. 102 (1987); see *infra* note 83.

7. David Aubrey, *Bandwidth Blues*, Computer Shopper, Feb. 1997, at 594. An Internet host is a computer system that (1) has a unique numerical address that no other computer uses, and (2) can both originate and receive information in the format the network requires. Bryan Pfaffenberger, *World Wide Web Bible* 36 (2d ed. 1996).

8. See *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 925 (S.D.N.Y. 1996).

controlled by any single entity.⁹ Approximately thirty to sixty million individuals currently have access to the resources found on the Internet, and that number is expected exceed one hundred million by 1998.¹⁰

Numerous avenues exist through which individuals can join the Internet community. Many obtain access to the Internet through an educational institution or employer directly linked to the Internet.¹¹ Others rely on Internet service providers¹² or commercial on-line services.¹³ Regardless of the source through which an individual obtains access, once a person is on-line, he may take advantage of a variety of services. Some of these services are explained below.

A. Services on the Internet

New Internet users commonly first utilize the Internet to communicate with other members of the Internet community.¹⁴ Electronic mail, or e-mail, is one popular method employed to communicate with others who use the Internet. In fact, approximately thirty-five million

9. *Id.* at 926.

10. Jill H. Ellsworth & Matthew V. Ellsworth, *Marketing on the Internet* 5 (2d ed. 1997) (quoting Vinton Cerf, an early Internet developer, testifying to the United States House of Representatives).

11. Steve O'Keefe, *Publicity on the Internet* 29-30 (1997).

12. Internet service providers, often commercial entities charging access fees, provide modem access to computers linked directly to the Internet. *Shea*, 930 F. Supp. at 926; Robin Frost, *What Does it Cost?*, *Wall St. J.*, Dec. 9, 1996, at R10.

13. Commercial on-line services provide access to both the Internet and materials on the services' own proprietary networks. Some well-known commercial on-line services include America Online, CompuServe, and Prodigy. *See Shea*, 930 F. Supp. at 926; Pfaffenberger, *supra* note 7, at 100-05. The nation's largest commercial on-line service, America Online, has become so popular that it can accommodate only 3.5% of its subscribers at one time. David S. Hilzenrath, *At This Rate, They'll Be Swamped*, *Wash. Post*, Jan. 24, 1997, at D1, D3; *see* David M. Herszenhorn, *Connecticut Man Finds E-Mail 'Date' Isn't a Girl, Isn't 13 and Has a Badge*, *N.Y. Times*, Dec. 25, 1996, at 3 (stating that America Online is the nation's largest commercial Internet access provider). The unavailability of this service to subscribers, who paid for unlimited access, has led attorneys general of approximately 35 states to settle a dispute with America Online so that the company will issue refunds to customers, which is expected to total as much as \$25 million. David Hilzenrath & Jennifer Ordonez, *AOL to Give Refunds to Subscribers*, *Wash. Post*, Jan. 30, 1997, at A1, A12. Despite America Online's difficulties, commercial on-line services as a whole are currently the most popular way of accessing the Internet. *See Pfaffenberger*, *supra* note 7, at 100.

14. Internet users form relationships through these on-line interactions that differ from real-world communications. *See* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 *Wake Forest L. Rev.* 197, 199 (1995) ("Activity in cyberspace . . . creates new relationships among individuals that differ from their analogues in the more usual, physical existence. These new relationships strain legal principles and categories that currently direct judicial power over individual action, either civilly or criminally."). One use of the Web, unlike real-world communications, is the personal Web page, through which individuals can easily transmit photographs and messages that are accessible anywhere in the world. *See infra* notes 46-49 and accompanying text.

individuals worldwide use e-mail.¹⁵ E-mail, however, is only one of many resources available to Internet users wishing to communicate with others.

Internet users with particular interests often join listservs, which are electronic mailing lists arranged by interest group.¹⁶ Interest groups also form through Usenet Newsgroups, which are electronic bulletin boards arranged by interest group, where users freely post messages relating to the particular topic of interest.¹⁷

While e-mail, listservs, and Usenet groups are still used individually by many Internet users, the World Wide Web (the "Web") integrates all of these services with an easy-to-use graphical interface. Because the Web provides Internet users with an interface allowing them to access information based on content, regardless of the physical location from which the site operator manages the Web site, it provides a paradigmatic model for evaluating personal jurisdiction problems for Internet communications.

B. *The World Wide Web*

The Web is an area of the Internet that has recently exploded in popularity.¹⁸ It is a popular medium through which users locate and access information on the Internet.¹⁹ The Web combines communicative tools with a friendly graphical interface to increase the ease with which an individual can find and access information and other individuals.²⁰

Information made available on the Web is said to be "published."²¹ Publishing on the Web merely requires an Internet-connected com-

15. Online Law: The SPA's Legal Guide to Doing Business on the Internet 411 (Thomas J. Smedinghoff ed., 1996) [hereinafter Online Law].

16. See Jonathan Rosenoer, *CyberLaw: The Law of the Internet* 342 (1997).

17. See Ellsworth & Ellsworth, *supra* note 10, at 77. See generally Daniel P. Dorn, *The Internet Guide for New Users* 195-211 (1994) (describing the origins, uses, and diverse offerings of Usenet groups).

18. For more detailed information about the Web and its history, see Pfaffenberger, *supra* note 7, at 53-63; see also *About the World Wide Web* (visited Feb. 2, 1997) <<http://www.w3.org/pub/WWW/WWW>> (on file with the *Fordham Law Review*) (describing the Web's origin and history).

19. *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996); see *ACLU v. Reno*, 929 F. Supp. 824, 837 (E.D. Pa. 1996) ("The World Wide Web exists fundamentally as a platform through which people and organizations can communicate through shared information.").

20. The Web is a means of creating a "geographically distributed pool of information" so that Internet users can make information available to others regardless of the actual physical distance separating them. Pfaffenberger, *supra* note 7, at 1 (emphasis omitted).

21. *ACLU*, 929 F. Supp. at 837. "By creating a page on the [Web], a single individual can essentially publish a document—a letter, a speech, a photograph or even a movie—anywhere and everywhere across the globe." Thomas E. Weber, *How Do I Create My Own Home Page?*, Wall St. J., Dec. 9, 1996, at R25.

puter that runs the proper server software.²² Any Internet user, from an individual working on a home computer to a large corporation using sophisticated computer systems, can publish information on the Web.

Individuals who create their own Web sites, called site operators, publish information on the Web through their respective sites.²³ This information, once published on a Web site, is accessible internationally to anyone with Internet access.²⁴ Any entity with Internet access, including corporations, educational institutions, or other organizations, can function as site operators.²⁵

Because of the ease with which a Web site can be created, the quality and accuracy of the information on a particular Web site is far from guaranteed.²⁶ A federal district court recently noted that, "[t]he Web, as a universe of network accessible information, contains a variety of documents prepared with quite varying degrees of care, from the hastily typed idea, to the professionally executed corporate profile."²⁷ Despite the inconsistent quality of Web sites, the Web nevertheless remains a powerful tool for accessing information.²⁸ This power "stems from the ability of a link to point to any document, regardless of its status or physical location."²⁹

Users access information on the Web by pointing and clicking on "hyperlinks," sometimes called "links," which are underlined phrases that users click on to move "seamlessly between documents, regardless of their location."³⁰ Links may take a user from the original Web site to another site on a different Internet-connected computer.³¹

22. *ACLU*, 929 F. Supp. at 837; see Pfaffenberger, *supra* note 7, at 589-90.

23. See Louise Kehoe, *Time on Your Side*, *Fin. Times*, Nov. 13, 1996, at 14 (explaining that site operators publish information to Web users' computers).

24. See Weber, *supra* note 21, at R25.

25. See generally *id.* (describing the ease with which a home page can be constructed and operated).

26. See *The Bluebook: A Uniform System of Citation* 124 (16th ed. 1996) (noting the "transient nature" of Internet sources).

27. *ACLU v. Reno*, 929 F. Supp. 824, 837 (E.D. Pa. 1996); see Wolf & Shorr, *supra* note 2, at B12 (explaining that promoters of fraudulent schemes and deceptive advertisers have started doing business on the Internet, partly because of the inexpensive start-up costs).

28. See David J. Goldstone, *Legal Jurisdiction in Cyberspace: Locating the Seams on the Web*, Wash. Legal Found., Jan. 24, 1997, at 1 (stating that the World Wide Web "has enabled people to make contacts, obtain information, communicate with others, and conduct business all over the world, with remarkable ease").

29. *ACLU*, 929 F. Supp. at 837.

30. *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 929 (S.D.N.Y. 1996); see Pfaffenberger, *supra* note 7, at 2, 12. Hyperlinks, usually boldfaced or underlined to be distinguished from the surrounding text, function as computer-activated cross-references. *Id.* The text of each Web page screen often includes highlighted and underlined text, which, when selected, takes the user to another part of the Web site or another Web site. See O'Keefe, *supra* note 11, at 108.

31. *ACLU*, 929 F. Supp. at 836.

An Internet user traveling from site to site is exploring an on-line world with no physical boundaries.³² Indeed, "[t]he 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."³³ When exploring the Web, for example: "You might hook up to a computer in the next building, a different city, or a far-away country—all the mechanics are hidden from your view. Suddenly, the Internet's riches are at your fingertips (and you don't need a computer science degree to access them)."³⁴

C. Uses of the World Wide Web

Numerous uses of the Web exist to satisfy the diverse user base that constitutes the Internet community. These uses, and the entities taking advantage of them, are critical to personal jurisdiction analysis.

Businesses take advantage of the Internet in a variety of ways. Many commercial entities use Web sites to solicit purchases or to inform potential customers about the business' services and goods.³⁵ For example, major corporations like Pepsi and General Motors use Web sites for promotional purposes.³⁶ Internet users may visit Web sites to obtain information about particular businesses. In fact, many for-profit and not-for-profit entities provide information about their organizations on the Web.³⁷ Retailers have also used Web sites as a virtual shopping mall, allowing users to purchase their products from the user's computer. For example, consumers can currently purchase clothing,³⁸ computer software³⁹ or compact discs⁴⁰ on the Web from the comfort of their living room through their home computer.

32. David Bender, *Emerging Personal Jurisdiction Issues on the Internet*, at 7, 17 (453 PLI Pat., Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. G4-3961, 1996); Online Law, *supra* note 15, at 365.

33. *ACLU*, 929 F. Supp. at 830.

34. Pfaffenberger, *supra* note 7, at 2.

35. *ACLU*, 929 F. Supp. at 842; see Robin Frost, *Watching the Web*, Wall St. J., Dec. 9, 1996, at R30 (describing 19 Web sites).

36. See *Pepsi World* (visited Feb. 2, 1997) <<http://www.pepsi.com/>> (on file with the *Fordham Law Review*); *General Motors: People in Motion* (visited Feb. 2, 1997) <<http://www.gm.com/index.cgi>> (on file with the *Fordham Law Review*).

37. Time Warner's Web site is an excellent example; the site provides information about the corporation's many divisions. See *Time Warner Factfinder* (visited Feb. 2, 1997) <<http://pathfinder.com/Corp>> (on file with the *Fordham Law Review*).

38. See, e.g., *Welcome Eddie Bauer* (visited Feb. 2, 1997) <<http://www.ebauer.com/>> (on file with the *Fordham Law Review*) (allowing Web users to purchase clothing and learn about Eddie Bauer).

39. See, e.g., *Cyber Exchange* (visited Feb. 3, 1997) <<http://www.cyberexchange.com/>> (on file with the *Fordham Law Review*) (selling new and used computer software on the Web).

40. See, e.g., *Columbia House Online* (visited Feb. 3, 1997) <<http://www.columbiahouse.com/>> (on file with the *Fordham Law Review*) (selling, among other things, compact discs on the Web).

Educational institutions are also joining the Web bandwagon, using the Web to provide information about their schools. Universities, for example, may have Web pages providing information about their school or library catalogs.⁴¹ Additionally, many Web pages, created by either organizations or individuals, cater to particular recreational interests. There are currently Web pages dedicated to almost every conceivable hobby, including in-line skating,⁴² theater,⁴³ bridge,⁴⁴ and cooking.⁴⁵ Enthusiasts of almost any endeavor enjoy both communicating with other users and the ease of access to up-to-date information about their hobby.

Many individuals have personal Web pages containing any information that the individual site operator wishes to publish on the Internet.⁴⁶ These pages, for example, function as: a resume available to any Internet user,⁴⁷ a display of favorite photographs,⁴⁸ or hyperlinks to the individual's favorite sites.⁴⁹ Although an individual may obtain Internet access from an educational institution, employer, Internet service provider, or commercial on-line service, he still acts as a site operator if he maintains a personal Web page.

The Web provides a flexible means through which Internet users can access information.⁵⁰ Most Internet users explore the Web unaware of the geographical location of other Internet users with whom they are communicating.⁵¹ As Steven A. Zalesin, a partner at the law firm of Patterson, Belknap, Webb & Tyler LLP commented: "The

41. See, e.g., *Fordham: New York City's Jesuit University* (visited Feb. 3, 1997) <<http://www.fordham.edu/>> (on file with the *Fordham Law Review*) (Fordham University Home Page); *Penn* (visited Feb. 3, 1997) <<http://www.upenn.edu/>> (on file with the *Fordham Law Review*) (University of Pennsylvania Home Page).

42. See, e.g., *NYCISG: The New York City Inline Skating Guide* (visited Feb. 3, 1997) <<http://www.skatecity.com/NYC/cover.html>> (on file with the *Fordham Law Review*) (providing information for New York's inline skating community).

43. See, e.g., *Playbill On-Line* (visited Feb. 3, 1997) <<http://piano.symgrp.com/playbill/>> (on file with the *Fordham Law Review*) (updating theater lovers on the latest news).

44. See, e.g., *Okbridge: Bridge on the Internet* (visited Feb. 3, 1997) <<http://www.okbridge.com/>> (on file with the *Fordham Law Review*) (allowing bridge players to play bridge live on the Internet for a small fee).

45. See, e.g., *The Taste of the Web* (visited Feb. 3, 1997) <<http://www.epicurious.com/>> (on file with the *Fordham Law Review*) (distributing recipes on the Web).

46. For more information on how to create a Web site, see Pfaffenberger, *supra* note 7, at 573-87.

47. See, e.g., *The Board* (visited Feb. 4, 1997) <<http://TheBoard.com/>> (on file with the *Fordham Law Review*) (providing resume postings and home pages to Web users).

48. See, e.g., *Welcome to Ben's Rally Page* (visited Feb. 3, 1997) <<http://www.reed.edu/~bradley/>> (on file with the *Fordham Law Review*) (displaying photographs of Rally cars).

49. See, e.g., *Cosma's Home Page*, (visited Feb. 3, 1997) <<http://www.physics.wisc.edu:80/~shalizi/>> (on file with the *Fordham Law Review*) (providing numerous hyperlinks to other Web sites).

50. Pfaffenberger, *supra* note 7, at 2.

51. Bender, *supra* note 32, at 17.

possibility of being dragged into court in states where no business is conducted is 'a little scary from the standpoint of an Internet Web site operator and advertiser They certainly are not willingly subjecting themselves to the laws in every state in the U.S.' ⁵² Given the inconsistent approaches followed under the traditional personal jurisdiction framework, applying this framework to the various means and methods of exploring and publishing on the Web to prevent the unjust assertion of jurisdiction over Web site operators is a formidable task. The conflicting traditional methods of analyzing personal jurisdiction must be examined before integrating the appropriate doctrine to Web communications.

II. PERSONAL JURISDICTION

Personal jurisdiction is the geographical restriction on where a plaintiff may elect to sue a defendant for a particular claim.⁵³ The restriction is intended to prevent a plaintiff from suing a defendant in a jurisdiction foreign to the defendant, unless that defendant has established some relationship with that forum that would lead him to reasonably anticipate being sued there.⁵⁴

General jurisdiction and specific jurisdiction are two distinct methods by which a court can assert personal jurisdiction over a non-resident defendant. A court exercises general jurisdiction when it holds jurisdiction over a non-resident defendant who is present in the forum.⁵⁵ To assert general jurisdiction, the defendant must participate in substantial forum-related activity.⁵⁶ When a non-resident defendant's actions in a forum state give rise to long-arm jurisdiction over the defendant,⁵⁷ a court may assert specific jurisdiction over the non-resident.

Unlike specific jurisdiction, general jurisdiction requires the defendant to have substantial threshold contacts with the forum state.⁵⁸ Ex-

52. Dominic Bencivenga, *Cyberspace in Court: Arguments Are Part Tradition, Part Imagination*, N.Y. L.J., Nov. 21, 1996, at 5 (quoting Steven A. Zalesin of Patterson, Belknap, Webb & Tyler LLP).

53. See *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957).

54. See *Kulko*, 436 U.S. at 100-01; *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977).

55. A court exercises general jurisdiction when there are sufficient contacts between the defendant and the state or when there is "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).

56. Jack H. Friedenthal et al., *Civil Procedure* § 3.10, at 124 (2d ed. 1993); 4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1067, at 296 (2d ed. 1987).

57. See *infra* notes 65-67 and accompanying text.

58. Friedenthal et al., *supra* note 56, § 3.10, at 124; see, e.g., *Helicopteros*, 466 U.S. at 415-16 (holding that defendant's contacts with Texas were insufficient to assert general jurisdiction because the contacts did not constitute continuous and systematic activity).

exercising general jurisdiction is constitutionally permissible as long as the defendant is commonly present in the forum, regardless of whether the defendant's contacts with the forum are directly related to the cause of action.⁵⁹ The inquiry for specific jurisdiction, unlike that for general jurisdiction, involves a fact-specific determination of whether asserting personal jurisdiction over the non-resident defendant comports with due process, given the specific facts of the case.⁶⁰

Thus far, at least one court has refused to apply principles of general jurisdiction to contacts over the Internet.⁶¹ The court refused to assert general jurisdiction based on Internet activity because electronic communications on the Internet are not considered sufficient to justify a finding of general jurisdiction.⁶² Courts have addressed the Internet jurisdictional issue in the context of asserting specific jurisdiction pursuant to a state's long-arm statute instead of through general jurisdiction.⁶³

A. *Specific Jurisdiction—Long-Arm Statutes*

The Due Process Clause of the Fourteenth Amendment⁶⁴ sets the outermost limits of a state's power to exercise personal jurisdiction.⁶⁵ The legislature of each state, however, has the power to impose further limitations beyond the Due Process Clause by granting its courts the power to exercise personal jurisdiction over non-residents through long-arm statutes.⁶⁶

59. *Helicopteros*, 466 U.S. at 414.

60. *See Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (explaining that "the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present" (quoting *Hanson v. Denckla*, 357 U.S. 235, 246 (1958))).

61. *See, e.g., McDonough v. Fallon McElligott, Inc.*, 40 U.S.P.Q.2d (BNA) 1826, 1828 (S.D. Cal. 1996) ("Because the Web enables easy world-wide access, allowing computer interaction via the Web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists Thus, [having] a Web site used by Californians cannot establish jurisdiction by itself.").

62. *See id.*

63. Robert A. Bourque & Kerry L. Konrad, *Avoiding Remote Jurisdiction Based on Internet Web Sites*, N.Y. L.J., Dec. 10, 1996, at 1, 4.

64. U.S. Const. amend. XIV.

65. *See Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 108 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984); Friedenthal et al., *supra* note 56, § 3.1, at 94.

66. Friedenthal et al., *supra* note 56, § 3.1, at 94. Long-arm statutes are [v]arious state legislative acts which provide for personal jurisdiction, via substituted service of process, over persons or corporations which are non-residents of the state and which voluntarily go into the state, directly or by agent, or communicate with persons in the state, for limited purposes, in actions which concern claims relating to the performance or execution of those purposes

Black's Law Dictionary 942 (6th ed. 1990); *see Gregory P. McMahon, Comment, Personal Jurisdiction in a Dissolution of Marriage Action: Garrett v. Garrett*, 21 Nova L. Rev. 491, 504 (1996).

Some states enumerate in their long-arm statutes the types of contacts with the forum state necessary to authorize courts to exercise jurisdiction over a non-resident defendant.⁶⁷ Types of contacts enumerated in New York, for example, include transacting business within the forum, committing a tortious act within the forum, or being a defendant in a matrimonial or family action who previously resided in the forum.⁶⁸

Other state legislatures have granted their state courts the authority to confer jurisdiction to the full extent permissible under the Due Process Clause.⁶⁹ In these states, the personal jurisdiction analyses collapse into one: If a court has constitutional jurisdictional power, it also has statutory power to assert jurisdiction. After determining that a particular lawsuit falls within the state's long-arm statute, a court next employs an independent analysis to ensure that the nature of the contacts satisfies the due process analysis.

B. *Due Process Analysis for Specific Jurisdiction*

The two-part due process test for specific jurisdiction is fact-specific, requiring that courts first analyze the defendant's pre-litigation connections with the forum, and then determine whether exercising jurisdiction over the defendant is fair and reasonable.⁷⁰ The Court first set forth this standard in *International Shoe Co. v. Washington*,⁷¹ when it was forced to determine whether subjecting a non-resident defendant to personal jurisdiction passed due process muster.⁷²

1. Minimum Contacts

The first prong of the due process analysis inquires into the defendant's contacts with the forum prior to litigation. The *International Shoe* test mandates that, in order to be subject to personal jurisdiction if not present in the forum, a non-resident defendant must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial

67. See, e.g., N.Y. Civ. Prac. L. & R. 302(a) (McKinney 1990) (stating that conduct within the long-arm statute includes committing a tortious act within the forum state or transacting business within the forum); 42 Pa. Cons. Stat. Ann. § 5322(a) (Purdon 1981) (providing that a court may exercise personal jurisdiction over a non-resident defendant when the non-resident, among other things, transacts business, supplies services, contracts to insure, or causes tortious injury in Pennsylvania).

68. See N.Y. Civ. Prac. L. & R. 302(a) (McKinney 1990).

69. See, e.g., Cal. Civ. Proc. Code § 410.10 (West 1973) (stating 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."); R.I. Gen. Laws § 9-5-33 (1985) ("[T]he courts of this state shall hold [non-resident defendants] amenable to suit in Rhode Island in every case not contrary to the provisions of the constitution or laws of the United States.").

70. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-78 (1985).

71. 326 U.S. 310 (1945).

72. *Id.* at 316.

justice.' ”⁷³ The minimum contacts test recognizes that due process limitations require that non-resident defendants have minimum contacts with the forum state such that they would reasonably anticipate being haled into court there.⁷⁴

The *International Shoe* minimum contacts test is somewhat vague because it leaves room for courts to interpret and apply the individual facts of each case to determine what contacts are sufficient. This vagueness, however, has its virtues: It allows courts to make individual judgments about what is reasonable and fair in ways that bright line tests do not.⁷⁵ The test's tension “between notions of territoriality and fairness continues to create incoherent and uncertain case law.”⁷⁶

2. Reasonableness

The second prong of the due process analysis examines the reasonableness of exercising jurisdiction over the non-resident defendant. Simply put, defendants must be able to reasonably anticipate the possibility of being haled into court in a given jurisdiction so that exercising jurisdiction “does not offend ‘traditional notions of fair play and substantial justice.’ ”⁷⁷ The Court has established the following five factors to consider in the reasonableness analysis: (1) “the burden on the defendant” of defending a lawsuit in the forum,⁷⁸ (2) “the forum State’s interest in adjudicating the dispute,”⁷⁹ (3) “the plaintiff’s interest in obtaining convenient and effective relief,”⁸⁰ (4) the “interstate judicial system’s interest in obtaining the most efficient resolution of controversies,”⁸¹ and (5) the “shared interest of the several states in furthering fundamental substantive social policies.”⁸²

The due process analysis for personal jurisdiction is meant to protect individuals from being subject to suit in any forum selected by a plaintiff. By carefully considering the interests of both the forum and the defendant, it allows courts to properly balance factual factors to

73. *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); see also Rex R. Perschbacher, *Foreword: Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction*, 28 U.C. Davis L. Rev. 513, 515-18 (1995) (explaining the minimum contacts test established in *International Shoe*).

74. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

75. Perschbacher, *supra* note 73, at 529 (summarizing views on the impact of *International Shoe* on current jurisdictional issues).

76. *Id.* at 528. Indeed, Perschbacher argues that the test “has never completely fulfilled its promise to provide an adequate general theory of state-court jurisdiction.” *Id.* at 514 (footnote omitted). But see Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 288 (stating that the minimum contacts principle provides an adequate theory of state-court jurisdiction).

77. *World-Wide Volkswagen*, 444 U.S. at 292 (quoting *International Shoe*, 326 U.S. at 316).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

ensure the fair and just exercise of jurisdiction over a non-resident defendant. Advances in technology, however, mandate that courts take into account the implications of our rapidly modernizing world. Looking at the effects of modernization would ensure that personal jurisdiction will be exercised only when the non-resident defendant both utilized advanced tools and actually intended to conduct business or communicate with individuals in certain forums; mere awareness that citizens of numerous other forums *could* intercept communications cannot be sufficient.

B. *Personal Jurisdiction Analyses Relevant to Cybercommunications*

Courts currently use jurisdictional analysis models established by the Supreme Court to analyze Web jurisdictional issues. A number of Supreme Court personal jurisdiction decisions are particularly relevant to examining courts' attempts to establish a framework for analyzing the propriety of asserting jurisdiction over non-resident defendants based on Web communications. The particular personal jurisdiction analysis courts apply when deciding whether to assert personal jurisdiction over a non-resident Web site operator will have great consequences on all Web site operators in all jurisdictions. If Web site operators are subject to jurisdiction in a foreign forum simply because they published on the Web, then the fear of litigation not only may cause individual site operators to remove their Web sites, but may also lead to a sharp decrease in Web usage.

In *Asahi Metal Industry v. Superior Court*,⁸³ the Court was faced with the question of whether exercising personal jurisdiction over a foreign defendant corporation based on its mere awareness that components it manufactured, sold, and delivered outside of the United States would reach the forum state through the stream of commerce,⁸⁴ comports with due process.⁸⁵ A plurality of the Court endorsed a two-prong analysis, first looking at whether the non-resident defendant de-

83. 480 U.S. 102 (1987). The *Asahi* Court's Justices, unable to articulate a majority holding, failed to state a clear constitutional standard against which long-arm jurisdiction over non-resident defendants should be measured. Douglas Ulene, *Recent Development, Jurisdiction: Personal Jurisdiction over Alien Corporations—Asahi Metal Industry Co. v. Superior Court of California*, 29 Harv. Int'l L.J. 207, 213 (1988); see also Yvonne Luketich Blauvelt, Case Comment, *Personal Jurisdiction After Asahi Metal Industry Co. v. Superior Court of California*, 49 Ohio St. L.J. 853, 868 (1988) ("The Supreme Court in *Asahi* ignored the opportunity to provide a federal standard to decide issues of personal jurisdiction in the international context."). The plurality's purposeful availment analysis has been adopted, at least in theory, by many jurisdictions. The problem, however, is that exactly what purposeful availment entails is still unresolved.

84. See *infra* note 88 for a definition of the stream of commerce test.

85. In other words: Did this awareness satisfy the minimum contacts test so that exercising jurisdiction would be reasonable? *Asahi*, 480 U.S. at 105.

liberately availed himself of the laws of the forum state,⁸⁶ and next deciding whether exercising jurisdiction over that defendant would be fair and reasonable.⁸⁷ This approach ensures that non-resident defendants will not be subject to jurisdiction for merely placing goods in the "stream of commerce."⁸⁸

The deliberate availment prong prevents courts from asserting jurisdiction merely because a non-resident defendant has some awareness of a possible connection with the forum. Justice O'Connor's plurality opinion stated:

The "substantial connection[]" between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.⁸⁹

Conduct that fulfills the deliberate availment requirement includes advertising or marketing in the forum state.⁹⁰ The plurality explained that there must be clear evidence that the defendant sought to serve the particular market.⁹¹

In general, once courts find that the minimum contacts prong of the due process analysis is satisfied, they must still evaluate the reasonableness of exercising jurisdiction over the defendant. The *Asahi* court found that, when evaluating the reasonableness of asserting jurisdiction, courts must weigh and consider the burden on the defendant to litigate in the forum, the forum state's interests in the matter, the interest of the plaintiff in obtaining relief, efficiency in resolving the conflict in the forum, and the interests of several states in furthering certain fundamental social policies.⁹² Eight of the nine *Asahi* justices agreed that, regardless of whether there are sufficient minimum con-

86. *Id.* at 112. This Note argues that purposeful availment requires more than awareness that the World Wide Web site could easily be accessed in a particular forum; rather, purposeful availment entails actually directing the site to particular jurisdictions. See *infra* part IV.B (discussing how purposeful availment should be applied to World Wide Web jurisdictional cases).

87. *Asahi*, 480 U.S. at 113-16.

88. Stream of commerce is the "[t]erm used to describe goods which remain in interstate commerce though held within a state for a short period of time. . . . In Commerce Clause analysis, local activities which are part of the current or stream of interstate commerce are considered part of the interstate movement." Black's Law Dictionary 1421 (6th ed. 1990).

89. *Asahi*, 480 U.S. at 112 (citations omitted).

90. *Id.* For example, a corporation's Web site that offers special products and prices for New York residents who mention a special "Web offer" when ordering would be marketing or advertising over the Web to New York residents; the corporation thereby would be taking advantage of New York residents for financial gain. This conduct would constitute deliberate availment for any lawsuit initiated by a New York resident arising from the special offer.

91. *Id.*

92. *Id.* at 113.

tacts, exercising jurisdiction over the defendant in this case would be unreasonable.⁹³

In his concurrence in *Asahi*, Justice Brennan argued that merely sending a product into the stream of commerce is sufficient to satisfy the purposeful availment requirement in any state.⁹⁴ Justice Brennan explained that a "defendant who has placed goods in the stream of commerce . . . benefits from the State's laws that regulate and facilitate commercial activity."⁹⁵ Therefore, Justice Brennan's approach endorses asserting jurisdiction whenever a product is accessible in a forum, regardless of the defendant's intent to place the product in that particular forum.⁹⁶

In *Keeton v. Hustler Magazine, Inc.*,⁹⁷ another case with potential ramifications in the Web jurisdictional context, Hustler's regular circulation of magazines in the forum state was held to be sufficient to support asserting jurisdiction in a libel action based on the magazine's content.⁹⁸ The Court found that the combination of New Hampshire's interest in redressing injuries that occur within the State, and its interest in cooperating with other States in the application of the "single publication rule," illustrates the propriety of requiring the defendant to answer to a multi-state libel action in New Hampshire.⁹⁹ The Court concluded:

Where, as in this case, respondent Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine. And, since respondent can be charged with knowledge of the "single publication rule," it must anticipate that such a suit will seek nationwide damages. Respondent produces a national publication aimed at a nationwide audience. There is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed.¹⁰⁰

93. *Id.* at 105, 113-16.

94. *Id.* at 117. Justice Brennan concurred with Justices White, Marshall, and Blackmun. *Id.* at 116. The divergence of opinions in *Asahi* has led to confusion about exactly what constitutes "minimum contacts": "The sharp fragmentation of the Court in *Asahi* has obscured the content of the minimum contacts doctrine. . . . [L]ower courts are seemingly free to experiment with the constitutional standard on a case-by-case basis." Ulene, *supra* note 83, at 213.

95. *Asahi*, 480 U.S. at 117.

96. *See id.* (Brennan, J., concurring) (stating that there is no need for additional conduct beyond the placement of a product into the stream of commerce).

97. 465 U.S. 770 (1984).

98. *Id.* at 773-74. In *Keeton*, a New York plaintiff brought a libel suit in New Hampshire against Hustler, an Ohio corporation. Hustler's only connection with New Hampshire was monthly sales of approximately 10,000 to 15,000 copies of its nationally published magazine. *Id.* at 772. The plaintiff chose New Hampshire because of its longer statute of limitations. *Id.* at 773-75.

99. *Id.* at 777-78.

100. *Id.* at 781 (citation omitted).

Therefore, because it sold magazines nationwide, Hustler was at the mercy of the plaintiff's forum selection.¹⁰¹ Applying *Keeton* to Internet personal jurisdiction cases could lead to this kind of dangerous forum selection based on the worldwide accessibility of Web sites.¹⁰²

III. ON-LINE LAWSUITS

In the past two years, numerous decisions have emerged that either directly or closely confront the issue of whether on-line contacts are sufficient to subject a non-resident defendant to personal jurisdiction. These decisions have followed traditional personal jurisdiction analyses, complying with the controlling constitutional analysis of the particular court's circuit or other superior court. As this Note reveals, these analyses are inconsistent from state to state. Unless states apply the same personal jurisdiction analysis to these cases—in particular an analysis requiring purposeful availment towards the forum state—Web site operators, like Caitlin, will never be able to predict what conduct will be sufficient to force them to defend lawsuits in a foreign jurisdiction.¹⁰³

A. Cases Establishing Personal Jurisdiction

Some decisions suggest that a court may obtain personal jurisdiction over a non-resident defendant whose sole contact with the forum state arose through the Internet. This section discusses these decisions: *CompuServe, Inc. v. Patterson*,¹⁰⁴ *Zippo Manufacturing v. Zippo Dot Com, Inc.*,¹⁰⁵ *Inset Systems, Inc. v. Instruction Set, Inc.*,¹⁰⁶ *Panavision International, L.P. v. Toeppen*,¹⁰⁷ *Maritz, Inc. v. Cybergold*,¹⁰⁸ and *Edias Software International, L.L.C v. Basis International Ltd.*¹⁰⁹

In *CompuServe, Inc. v. Patterson*,¹¹⁰ Patterson, a CompuServe subscriber, entered into a Shareware Registration Agreement ("SRA") with CompuServe by which CompuServe stored and distributed Patterson's software over the Internet in exchange for fifteen percent of Patterson's sales.¹¹¹ Patterson and CompuServe entered into the SRA

101. The plaintiff's only connection with New Hampshire was Hustler's circulation of the magazine that she helped produce. *Id.* at 772.

102. David A. Price, *Lawsuits over Web Sites Plague Companies from Afar*, Investor's Bus. Daily, Oct. 15, 1996, at A4. A situation like that in *Keeton*, where the plaintiff chose the forum based on its longer statute of limitations, illustrates the temptation and danger of forum shopping.

103. See *supra* Introduction (describing hypothetical situation).

104. 89 F.3d 1257 (6th Cir. 1996).

105. No. Civ.A.96-397 Erie, 1997 WL 37657 (W.D. Pa. Jan. 16, 1997).

106. 937 F. Supp. 161 (D. Conn. 1996).

107. 938 F. Supp. 616 (C.D. Cal. 1996).

108. 947 F. Supp. 1328 (E.D. Mo. 1996).

109. 947 F. Supp. 413 (D. Ariz. 1996).

110. 89 F.3d 1257 (6th Cir. 1996).

111. *Id.* at 1260-61. Under the SRA, CompuServe agreed to provide its subscribers with access to Patterson's software products. The standardized SRA, and other

electronically from Patterson's computer in Texas to CompuServe's computer system in Ohio.¹¹² When CompuServe began marketing a product similar to one of Patterson's, Patterson notified CompuServe via e-mail that some terms CompuServe used in its similar product were Patterson's common law trademarks.¹¹³ CompuServe commenced a declaratory judgment action seeking, among other things, a declaration that it had not infringed on Patterson's common law trademarks.¹¹⁴ The United States District Court for the Southern District of Ohio dismissed the claim for lack of personal jurisdiction.¹¹⁵

The Sixth Circuit reversed the district court's dismissal, holding that (1) Patterson purposefully availed himself of the privilege of doing business in Ohio by knowingly reaching out to CompuServe in Ohio and benefiting from CompuServe's handling of the software and the resulting fees;¹¹⁶ (2) the cause of action arose from Patterson's activities in Ohio;¹¹⁷ and (3) Patterson, by employing a computer network service like CompuServe to market his software, could reasonably expect disputes with CompuServe to yield lawsuits in CompuServe's home state of Ohio.¹¹⁸

In determining whether to assert specific jurisdiction over Patterson, the Sixth Circuit employed the three part test it uses for all personal jurisdiction issues, considering: (1) purposeful availment; (2) whether the action arose out of defendant's activities in the forum state; and (3) the reasonableness of exercising jurisdiction over the defendant.¹¹⁹ Note the similarities between this test and Justice O'Connor's *Asahi* approach—both tests look for intentional availment and reasonableness.¹²⁰ The Sixth Circuit's additional factor, that the action arise out of forum activity, is applied to prevent the adjudication of claims totally unrelated to the state.

agreements that were incorporated into the SRA, provided that it was entered into in Ohio and governed by Ohio law. *Id.*

112. *Id.*

113. *Id.* at 1261.

114. *CompuServe Inc. v. Patterson*, No. C2-94-91, 1994 U.S. Dist. LEXIS 20352, at *3-4 (S.D. Ohio 1994).

115. *Id.* at *21-22.

116. *CompuServe*, 89 F.3d at 1263-67.

117. *Id.* at 1267.

118. *Id.* at 1268.

119. *Id.* at 1263.

120. Another jurisdictional case that involved non-Internet electronic communications has employed this test as well. *Plus System, Inc. v. New England Network, Inc.*, 804 F. Supp. 111 (D. Colo. 1992), involved a contract dispute between a Colorado-based national Automatic Teller Machine ("ATM") network and a regional New England ATM network based in Connecticut. *Id.* at 114. The United States District Court for the District of Colorado applied Colorado's three-part test for analyzing personal jurisdiction, which is identical to the test employed by the *CompuServe* court. *Id.* at 118. The court assumed jurisdiction over the Connecticut defendants because, among other things, the defendants knowingly signed an agreement with a Colorado company, their agreement contained a Colorado choice of law clause, and the defendants were aware of digital contacts with computers located in Colorado. *Id.* at 118-19.

Zippo Manufacturing v. Zippo Dot Com, Inc.,¹²¹ like *CompuServe*, involved a non-resident defendant who conducted business over the Internet.¹²² In *Zippo*, defendant Dot Com operated a Web site using plaintiff's trademark "Zippo" as part of its domain name.¹²³ This site had approximately 140,000 subscribers worldwide to its Internet news service; each subscriber submitted their address over the Web and paid for the service by credit card.¹²⁴ The site included an application for its Internet news service.¹²⁵ After paying for the service, subscribers would enter a password to access the site.¹²⁶ Zippo sued Dot Com in Pennsylvania alleging, among other claims, trademark infringement and dilution.¹²⁷ The court exercised jurisdiction, holding that "Dot Com's conducting of electronic commerce with Pennsylvania residents constitute[d] the purposeful availment of doing business in Pennsylvania."¹²⁸

The court's due process analysis examined: (1) whether there were sufficient minimum contacts; (2) whether the claim arose out of those contacts; and (3) whether exercising jurisdiction would be reasonable.¹²⁹ When analyzing the first prong, minimum contacts, the court examined whether Dot Com " 'purposefully established' " contacts with Pennsylvania, and could reasonably foresee being haled into a Pennsylvania court.¹³⁰ This test looked at whether conducting electronic commerce over the Internet constituted purposeful availment of doing business in Pennsylvania.¹³¹ This analysis is similar to Justice O'Connor's *Asahi* approach, but apparently also considers the foreseeability of litigation with purposeful availment.

The court noted that Dot Com freely chose to conduct business with Pennsylvania residents by selling its services to them.¹³² Further, Dot Com could have chosen not to sell its services to Pennsylvania resi-

121. No. Civ.A.96-397 Erie, 1997 WL 37657 (W.D. Pa. Jan. 16, 1997).

122. *Id.* at *1.

123. *Id.* at *1-2. Domain names, or addresses, are similar to street addresses in that through a domain name or address an Internet user can find another Internet user. If a company uses a domain address that is identical to the name or trademark of another company, an Internet user could inadvertently access the unintended company. *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996). The domain names at issue in *Zippo* were titled: "zippo.com," "zippo.net," and "zipponews.com." *Zippo*, 1997 WL 37657, at *1.

124. *Id.* The credit card payments were made over the Internet or by telephone. *Id.* Note that, by asking for and receiving addresses, Dot Com was aware of the geographical location of its subscribers. Additionally, by receiving credit card payments, Dot Com conducted business beyond the scope of the Internet communications.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at *6.

129. *Id.* at *3.

130. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

131. *Id.* at *6. The court declined to determine "whether Dot Com's Web site alone constitutes the purposeful availment of doing business in Pennsylvania." *Id.*

132. *Id.* at *7.

dents, and knew that giving Pennsylvania subscribers a password would result in the transmission of electronic messages into Pennsylvania.¹³³ The fact that Dot Com knew their subscribers' addresses and credit card numbers substantially strengthened the availment argument because Dot Com had the opportunity to reject applications of residents of a given state.

In *Inset Systems, Inc. v. Instruction Set, Inc.*,¹³⁴ Instruction Set, Inc. ("ISI"), a Massachusetts corporation, advertised its computer technology goods and services over the Internet using the domain name "Inset.Com."¹³⁵ Inset did not authorize ISI's use of its "Inset" trademark in any capacity.¹³⁶ Nevertheless, ISI used Inset's trademark in both its domain name and toll-free telephone number.¹³⁷ The United States District Court for the District of Connecticut held that advertising on the Internet is solicitation of a sufficient repetitive nature to satisfy the Connecticut long-arm statute, thereby conferring Connecticut's long-arm jurisdiction upon ISI.¹³⁸ In this case, the court examined contacts arising from Internet advertising, rather than Internet business as in *CompuServe* and *Zippo*.¹³⁹

The court's due process analysis considered whether (1) the defendant could reasonably anticipate being haled into court in the forum state, and (2) notions of fair play and substantial justice were offended.¹⁴⁰ Interestingly, this analysis differs from Justice O'Connor's *Asahi* approach because its first prong focuses on whether the defendant could anticipate being haled into court rather than whether the defendant purposefully availed himself of the forum state's jurisdiction.¹⁴¹

The court explained that ISI had sufficient minimum contacts because it purposely availed itself of the privilege of conducting business in Connecticut, noting that ISI's advertisements were continuously available to any Internet user, which included as many as 10,000 in

133. *Id.* Because Dot Com subscribers disclosed their address and credit card numbers to the corporation, Dot Com could have chosen not to conduct business with residents of any given forum.

134. 937 F. Supp. 161 (D. Conn. 1996).

135. *Id.* at 162-63; *see supra* note 123 (discussing domain names).

136. *Inset*, 937 F. Supp. at 163.

137. *Id.*

138. *Id.* at 164.

139. *See supra* notes 116-18, 121-22 and accompanying text.

140. *Inset*, 937 F. Supp. at 164-65 (citations omitted).

141. Another court has employed this analysis in deciding whether to exercise jurisdiction based on electronic communications, although in a non-Internet context. In *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994), the District Court of Appeal of Florida, Third District, held that the fact that a New York defendant contracted for information on a computer database located in Florida is not sufficient to impose Florida jurisdiction. *Id.* at 1352-53. The minimum contacts test, like the test in *Inset*, focused on whether the defendant could reasonably anticipate being haled into court in the forum. *Id.* at 1352.

Connecticut alone.¹⁴² Therefore, the advertisements satisfied the constitutional precepts concerning due process.

In *Panavision International, L.P. v. Toeppen*,¹⁴³ Toeppen registered a Web site using "Panavision.com" as its domain name, preventing Panavision from registering and using its own trademark as its Internet domain.¹⁴⁴ After Panavision brought claims against Toeppen under, among other things, federal and state dilution of trademark and unfair competition law, Toeppen moved to dismiss for lack of personal jurisdiction.¹⁴⁵

The court utilized the Ninth Circuit's three-part test for specific jurisdiction considering: (1) purposeful availment; (2) whether the claim arose out of the defendant's forum-related activities; and (3) the reasonableness of exercising jurisdiction over the defendant.¹⁴⁶ This is the same jurisdictional test used by the Sixth Circuit in *CompuServe* and is quite similar to Justice O'Connor's *Asahi* approach.

The United States District Court for the Central District of California held that it had specific jurisdiction over the Illinois defendant Toeppen because the defendant's conduct both intended to, and did, result in harmful effects in California.¹⁴⁷ The court noted, however, that it was not holding that Toeppen was conducting business in California over the Internet; rather, Toeppen was "running a scam directed at California."¹⁴⁸ The court commented further that "[i]n this era of fax machines and discount air travel," requiring Toeppen to litigate in California is not constitutionally unreasonable."¹⁴⁹

In *Maritz, Inc. v. Cybergold, Inc.*,¹⁵⁰ the plaintiff claimed that the defendant, Cybergold, committed trademark infringement and unfair competition through its Web site and service.¹⁵¹ Cybergold moved to dismiss claiming that the court lacked personal jurisdiction.¹⁵² Cybergold's Web site, based in California, can be accessed by any Internet user in the world.¹⁵³ The site provides information about Cybergold's upcoming service which will provide Internet users with electronic mailings of advertisements in each user's particular areas of interest.¹⁵⁴ Plaintiff claimed that the site functioned as an advertisement for Cybergold's upcoming service and invited both users and ad-

142. *Inset*, 937 F. Supp. at 165.

143. 938 F. Supp. 616 (C.D. Cal. 1996).

144. *Id.* at 619. For a similar set of facts, see *supra* note 135 and accompanying text.

145. *Panavision*, 938 F. Supp. at 619.

146. *Id.* at 620 (citation omitted).

147. *Id.* at 622.

148. *Id.*

149. *Id.* (quoting *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990)).

150. 947 F. Supp. 1328 (E.D. Mo. 1996).

151. *Id.* at 1329. To view the Web site, see *Cybergold: Get Ready* (visited Feb. 5, 1997) <<http://www.cybergold.com/>> (on file with the *Fordham Law Review*).

152. *Maritz*, 947 F. Supp. at 1329.

153. *Id.* at 1330.

154. *Id.* This service was not operational as of the date of this court's opinion. *Id.*

vertisers¹⁵⁵ from Missouri to receive or send information through its mailing service.¹⁵⁶

The United States District Court for the Eastern District of Missouri's minimum contacts test required (1) that the defendant reasonably anticipate being haled into court in the forum state¹⁵⁷ and (2) that maintenance of the suit not offend traditional notions of fair play and substantial justice (i.e., it is not unreasonable).¹⁵⁸ Both prongs must be satisfied for sufficient contacts to exist.¹⁵⁹ This test has an emphasis similar to the plurality's test in *Asahi*. The court measured the actual contacts to determine if the contacts satisfy the three prong test by considering:

- (1) the nature and quality of the contacts with the forum state; (2) the quantity of those contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; [and] (5) the convenience of the parties.¹⁶⁰

The court held that Missouri's long-arm statute reached the defendants because their activity may have produced an effect in Missouri by allegedly causing Maritz economic injury.¹⁶¹ The court relied on the "commission of a tortious act" provision of the Missouri long arm statute, finding that violating the Lanham Act is tortious in nature.¹⁶² The court also held that asserting jurisdiction over the defendant did not violate the defendant's due process rights.¹⁶³

The court first noted that Cybergold intended its Web site to reach all Internet users, regardless of their geographic location.¹⁶⁴ This helped the court decide that Cybergold's contacts favored exercising personal jurisdiction over the defendant.¹⁶⁵ The court then held that by transmitting information about its service into Missouri over one hundred times, Cybergold purposely availed itself of the privilege of conducting activities in Missouri.¹⁶⁶ The court also found that Cybergold could not only anticipate litigation in a Missouri court,¹⁶⁷

155. Advertisers would pay Cybergold to promote their products through the mailing list. *Id.*

156. *Id.*

157. *Id.* at 1332 (citation omitted). There must be some purposeful availment of the privilege of conducting activities in the forum to satisfy this prong.

158. *Id.* (citation omitted).

159. *Id.*

160. *Id.*

161. *Id.* at 1331.

162. *Id.*

163. *See id.* at 1332-34.

164. *Id.* at 1333. The court noted that "Cybergold automatically and indiscriminately responds to each and every internet user who accesses its website [and] has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally." *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1334.

but that it was reasonable to exercise jurisdiction over Cybergold because requiring Cybergold to defend this suit in Missouri did not offend traditional notions of fair play and substantial justice.¹⁶⁸

In light of the aforementioned factors, as well as the quality and nature of the contacts, the number of contacts (131), and Missouri's and Maritz's interest in resolving this case in Missouri, the court held that exercising personal jurisdiction over Cybergold did not violate due process.¹⁶⁹

In *Edias Software International, L.L.C. v. Basis International Ltd.*,¹⁷⁰ Basis posted a press release stating that its reason for terminating a contractual agreement with Edias was Edias's failure to sign an agreement to ensure that it would provide Edias customers with Basis's products at a fair price and with complete technical support and product information.¹⁷¹ Using the Ninth Circuit's three-part specific jurisdiction test, articulated in *Panavision*,¹⁷² the court held that an allegedly defamatory statement published on the Internet can establish personal jurisdiction over the party that published the statement.¹⁷³ The court explained that Basis "should not be permitted to take advantage of modern technology through an Internet Web page and forum and simultaneously escape traditional notions of jurisdiction."¹⁷⁴

Although all five courts arrived at the same result—exercising personal jurisdiction over a non-resident defendant based on Internet contacts—each court reached this result using a different standard for personal jurisdiction. The main difference between the approaches is that the *CompuServe*, *Zippo*, *Panavision*, *Edias*, and *Maritz* courts followed a deliberate availment approach similar to the *Asahi* plurality; however, the District of Connecticut in *Inset* analyzed the contacts based on anticipation of being haled into court rather than on whether the defendant purposefully availed himself of the forum's laws.¹⁷⁵ The inconsistency of these approaches makes it difficult for a Web site operator to know precisely what conduct will be sufficient to hale him into a foreign jurisdiction's court. Curiously, these courts did not take into account the nature of Internet communications when deciding how to analyze the personal jurisdiction issue. All courts must take into account the recent radical communicatory changes brought on by

168. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)).

169. *Id.*

170. 947 F. Supp. 413 (D. Ariz. 1996).

171. *Id.* at 415.

172. *See id.* at 417 (citing *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995)); *supra* note 146 and accompanying text.

173. *Id.* at 422.

174. *Id.* at 420.

175. *See supra* note 140 and accompanying text.

the Internet to protect site operators, like Caitlin, from inconsistently and unjustly being subject to jurisdiction in a foreign forum.¹⁷⁶

B. Cases Not Asserting Jurisdiction

Two recent decisions suggest that contact with the forum state via the Internet is not sufficient to confer personal jurisdiction. In *McDonough v. Fallon McElligott Inc.*,¹⁷⁷ the United States District Court for the Southern District of California declined to exercise jurisdiction based on the existence of a Web site alone.¹⁷⁸ McDonough alleged that Fallon McElligott, a Minnesota advertising agency, reproduced his photographs for national publication without permission, thereby constituting copyright infringement and unfair competition.¹⁷⁹ Plaintiff claimed that the existence of defendant's Web site suggested that Fallon McElligott conducted business throughout the United States, making the court's assertion of general jurisdiction appropriate. The court, however, rejected this assertion, concluding:

Because the Web enables easy world-wide access, allowing computer interaction via the Web to supply sufficient contacts . . . would eviscerate the personal jurisdiction requirement as it currently exists; the Court is not willing to take this step. Thus, the fact that Fallon has a Web site used by Californians cannot establish jurisdiction by itself.¹⁸⁰

The court did not engage in a specific jurisdiction analysis based on the existence of the Web site.

In *Bensusan Restaurant Corp. v. King*,¹⁸¹ King, the operator of a small Missouri jazz club called "The Blue Note," posted a site on the Web to promote his club.¹⁸² Bensusan, a New York corporation and the creator of "The Blue Note" jazz club in New York City, sued King for trademark infringement, trademark dilution, and unfair competition.¹⁸³

The minimum contacts portion of the court's due process analysis looked at (1) purposeful availment; (2) reasonableness; and (3) whether the defendant conducted a systematic and continuous part of his general business within the forum state.¹⁸⁴ This approach is similar to the plurality's approach in *Asahi*, except that *Bensusan* adds a third factor, the examination of whether the non-resident defendant conducted a systematic and continuous part of his business within the fo-

176. See *supra* Introduction (describing hypothetical situation).

177. 40 U.S.P.Q.2d (BNA) 1826 (S.D. Cal. 1996).

178. *Id.* at 1828.

179. *Id.* at 1827.

180. *Id.* at 1828.

181. 937 F. Supp. 295 (S.D.N.Y. 1996).

182. *Id.* at 297.

183. *Id.* at 297-98.

184. *Id.* at 300-01.

rum state. Yet, unlike the *CompuServe*, *Zippo*, *Panavision*, *Edias*, and *Maritz* courts, which also applied an *Asahi* analysis, the *Bensusan* court reached a different result.

The United States District Court for the Southern District of New York granted King's motion to dismiss for lack of personal jurisdiction, holding that the existence of a site on the Web, without anything more, is not sufficient to vest the court with personal jurisdiction over a defendant pursuant to New York's long-arm statute and the Due Process Clause.¹⁸⁵ The court noted that it would take several affirmative steps by a New York resident to access King's Web site, and "[t]he 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."¹⁸⁶ The court also held that asserting jurisdiction over King would violate the Due Process Clause:

King, like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state.¹⁸⁷

The court distinguished this case from *CompuServe*,¹⁸⁸ in that there were no allegations that King directed any contact to, or had any contact with, New York or intended to purposely avail himself of any benefits of New York.¹⁸⁹ In *CompuServe*, on the other hand, the defendant specifically targeted Ohio by subscribing to CompuServe and entering into the SRA with CompuServe.¹⁹⁰

The court in *Bensusan*, like the courts that asserted jurisdiction over non-resident defendants based on Internet conduct, chose its minimum contacts test without regard to the unique circumstances it was confronting.¹⁹¹ Because the court used a purposeful availment ap-

185. *Id.*

186. *Id.* at 299.

187. *Id.* at 301.

188. 89 F.3d 1257 (6th Cir. 1996); see *supra* notes 110-19 and accompanying text.

189. *Bensusan*, 937 F. Supp. at 301.

190. *CompuServe*, 89 F.3d at 1264-65; *Bensusan*, 937 F. Supp. at 301.

191. Other courts have asserted jurisdiction without directly analyzing the issue. For example, in *United States v. Thomas*, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996), the Sixth Circuit held that images transferred through an electronic bulletin board service from California to Tennessee did not preclude prosecution for interstate transportation of obscene materials. See *id.* at 706-07. The court explained that the "manner in which the images moved does not affect their ability to be viewed on a computer screen in Tennessee or their ability to be printed out in hard copy in that distant location." *Id.* at 707. The court also explained that the defendants advertised and promised obscene pictures to the bulletin board's members, and clearly intended to conduct business in Tennessee. See *id.*

In *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996), Playboy sought to have Chuckleberry found in contempt of a previously awarded injunction which prevented Chuckleberry from, among other things,

proach similar to that articulated by the *Asahi* plurality, the court declined to exercise jurisdiction based solely on King's posting of an Internet Web site. The purposeful availment approach prevented the exercise of jurisdiction where King had no intention of serving the New York community.

While the *Bensusan* court did not assert personal jurisdiction, the *Inset* court reached the opposite conclusion based on a similar Web site.¹⁹² In both cases, the defendant used its Web site for advertisement.¹⁹³ In fact, the differing results can be explained by the difference in the jurisdictional tests: The *Bensusan* court followed a purposeful availment analysis, while the *Inset* court followed a reasonable anticipation analysis.

Two main patterns of analysis have emerged from these Internet jurisdictional cases. Some jurisdictions look at both purposeful availment and reasonableness, as does the *Asahi* plurality.¹⁹⁴ In contrast, other jurisdictions dispense with the availment requirement and, instead, look at whether the defendant could anticipate being haled into court in that jurisdiction.¹⁹⁵

The inconsistency of jurisdictional analyses from forum to forum presents serious problems for Web site operators: A potential plaintiff may take advantage of this inconsistency by commencing a lawsuit in a forum with a more favorable jurisdictional policy.¹⁹⁶ Internet communications are accessible worldwide to all users and Web site operators cannot control from where an individual accesses their sites. The

"distributing or selling in the United States . . . an English language male sophisticate magazine which uses the word 'PLAYMEN' or any word confusingly similar therewith." *Id.* at 1034. Chuckleberry had created a Web site making available images of its Italian "PLAYMEN" magazine. *Id.* The United States District Court for the Southern District of New York held that the prohibition of the distribution or sale of a magazine in the United States extends to distribution or sale over the Internet. *Id.* at 1038.

Both the *Thomas* and *Playboy* courts reached their decisions without using specific jurisdictional tests, and accordingly differ from the cases that analyzed the defendants' contacts. In *Thomas*, the contacts extended beyond the electronic contacts: The defendants collected money from Tennessee. *See Thomas*, 74 F.3d at 705. In *Playboy*, Chuckleberry violated an injunction by establishing a Web site available in the United States. *Playboy*, 939 F. Supp. at 1040.

192. *See Zippo Mfg. v. Zippo Dot Com, Inc.*, No. Civ.A.96-397 Erie, 1997 WL 37657, at *5 (W.D. Pa. Jan. 16, 1997).

193. *See id.* at *6.

194. *See CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996); *Zippo*, 1997 WL 37657; *Edias Software Int'l, L.L.C. v. Basis Int'l Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996); *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

195. *See Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164-65 (D. Conn. 1996); *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351, 1352 (Fla. Dist. Ct. App. 1994).

196. This would most likely mean suing in a jurisdiction that either (1) conducts a stream of commerce analysis, or (2) looks at whether a defendant could anticipate being subject to lawsuit in the forum rather than whether a defendant intentionally made his Web page available to the forum.

nature of these communications mandates that courts apply a consistent approach: the more stringent purposeful availment analysis.

IV. JURISDICTION FOR WEB SITES

Given the contrasting personal jurisdiction analyses from forum to forum, Web site operators, who inevitably and unavoidably make contact with every forum, may encounter difficulties arranging their sites to avoid being haled into court by each forum's jurisdictional test. As a result, site operators would be less likely to establish or maintain active Web sites if they cannot determine how to design their Web sites to avoid being subject to a foreign forum's jurisdiction. Therefore, a uniform jurisdictional test that all forums would apply consistently is necessary to provide site operators with a clear standard with which their sites must comply. This part determines that a deliberate availment approach will ensure the fairest results for site operators throughout the nation.

A. Keeton and Justice Brennan's *Asahi* Approach Are Inappropriate

Approaches that do not consider a plaintiff's purposeful availment of a particular forum are inappropriate for Internet jurisdictional cases because they under-analyze the nature of Internet communications. The approaches of *Keeton v. Hustler Magazine, Inc.*¹⁹⁷ and Justice Brennan in *Asahi Metal Industry v. Superior Court*¹⁹⁸—under which mere placement of a product in the stream of commerce would satisfy the minimum contacts test¹⁹⁹—are inappropriate for Web jurisdictional cases.

If courts followed Justice Brennan's approach, every Web site could be subject to jurisdiction in every state because any active site could be considered in the stream of commerce. To defeat jurisdiction, non-resident defendants could argue only that haling them into court is unreasonable. If applied to Internet jurisdictional cases, Justice Brennan's analysis would be troublesome because the reasonableness assessment is less predictable than deliberate availment and is not fully within the control of the non-resident defendant.

197. 465 U.S. 770 (1984).

198. 480 U.S. 102 (1987).

199. See *supra* notes 94-102 and accompanying text. After *Asahi*, many courts have applied the stream of commerce test. See, e.g., *Vermeulen v. Renault, U.S.A., Inc.*, 965 F.2d 1014, 1025 n.18. (11th Cir. 1992) (citing several district court cases that applied the stream of commerce approach); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 943, 946-47 (7th Cir. 1992) (asserting personal jurisdiction in products liability action using "the more permissive stream of commerce theory" and stating that "[t]his Circuit has repeatedly endorsed the 'stream of commerce theory' and has resolved cases on the basis of it"); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385-86 (5th Cir. 1989) (adopting stream of commerce approach as "embraced" by the Fifth Circuit).

Using Justice Brennan's approach would eliminate the crucial step of looking at the non-resident defendant's intent when he published information on a Web site. Even a defendant like King in *Bensusan*, who had no intention of entertaining New York jazz enthusiasts, could be forced to defend a New York lawsuit merely because his Web page was available to all Internet users nationwide and thus released into the stream of commerce. Similarly, a defendant like Caitlin, who had no intention of selling flowers to individuals outside of a local area, could be haled into court in a distant jurisdiction.²⁰⁰ This result could reduce growth of the Internet because merely establishing a Web site that is, like all Web sites, nationally accessible, could render the defendant site operator susceptible to jurisdiction. The site operator could only argue that exercising jurisdiction would be unreasonable, thereby leaving the question for the trial judge to determine on a case-by-case basis.

The outcomes of Internet jurisdictional cases may hinge on how federal courts, and perhaps the Supreme Court, interpret *Keeton*.²⁰¹ It would be inappropriate, however, to apply the principles of *Keeton* to Web jurisdictional cases because the *Keeton* approach endorses the stream of commerce approach.²⁰² One commentator has stated: "If the courts see the dissemination of information through Web sites as akin to the distribution of magazines, they would likely rely on the *Hustler* case to give plaintiffs free reign in picking where to sue Web site operators."²⁰³

Internet-related jurisdictional cases are not analogous to *Keeton*, however, which involved a nationally-distributed magazine. While magazine publishers can affirmatively decide not to sell or distribute their magazines in certain forums, this option is not possible for Web site providers—even password access does not discriminate based on the jurisdiction from which the user is calling. This is because the user who possesses a password can access a password-protected Web site by dialing into the Internet from anywhere in the world—the Internet does not distinguish users by the location from where the call originates.

Applying either *Keeton* or Justice Brennan's *Asahi* approach to these cases would result in devastating effects. First, forum shopping²⁰⁴ would be rampant: A plaintiff could choose virtually any jurisdiction in the United States²⁰⁵ because Web sites are accessible across

200. See *supra* Introduction (describing hypothetical situation).

201. Price, *supra* note 102, at A4.

202. See *Keeton*, 465 U.S. at 781.

203. *Id.*

204. The Supreme Court has discouraged forum shopping. See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

205. There would generally have to be some connection between the forum and the cause of action, but because Web sites are accessible in every jurisdiction, this would probably not be too difficult to establish.

the country.²⁰⁶ As a result, plaintiffs would select jurisdictions, among otherwise available forums, that have plaintiff-friendly policies²⁰⁷—due process limitations on personal jurisdiction would be no discouragement to choosing these advantageous jurisdictions. Second, it would be unfair to subject defendants to a court's unpredictable determination of whether exercising jurisdiction would be reasonable.²⁰⁸ Finally, uncertainty would diminish incentives of site operators to expand their Web sites, and may lead eventually to decreased Web usage.²⁰⁹ If site operators are subject to even a few minority forums with unfavorable personal jurisdiction analyses, they would be less likely to establish or continue to operate their Web sites.

Further, if *Keeton's* principles were applied, fewer jurisdictions would adjudicate these disputes. Plaintiffs would choose jurisdictions with more advantageous jurisdictional analyses—like the stream of commerce approach—and would always be able to because defendants would, in effect, be everywhere. Thus, defendants may consistently have a more difficult jurisdictional battle than in the plaintiffs' or defendants' home forum. Moreover, applying *Keeton's* analysis would be burdensome for defendants, forcing them to defend lawsuits in jurisdictions where no contacts exist other than plaintiffs' access to the Internet site. There would not only be more difficulties in defending such a suit, but Web site operators would suffer the inconvenient consequence of traveling to a forum with no real connection to the alleged dispute between the parties.²¹⁰

206. See *Playboy Enters., Inc. v. Chuckleberry Publishing, Inc.*, 939 F. Supp. 1032, 1035 (S.D.N.Y. 1996) (describing the capacity of Web users in the United States to browse Web sites).

207. In a libel action, for example, plaintiffs could use the "single publication rule" to recover damages from the alleged libel throughout the United States. Cf. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-75 (explaining a situation where the plaintiff chose a forum because of its longer statute of limitations).

208. In addition to forcing non-resident site operators to travel to remote jurisdictions, the stream of commerce approach would decrease site operators' ability to predict when they could be haled into court in a foreign forum—any Web conduct would satisfy the stream of commerce approach—so these site operators would be left with a foreign forum's subjective determination of reasonableness.

209. There are numerous advantages to increased Web usage. See Giorgio Bovenzi, *Liabilities of System Operators on the Internet*, 11 *Berkeley Tech. L.J.* 93, 95-96 (1996) (explaining that interests in encouraging Internet growth should be taken into account in Internet tort cases); Clive Whitfield-Jones & Susan Post, *Netscape 2.0: What's in It for Law Firms?*, *Marketing for Law.*, June, 1996, at 1, 7 (describing the advantageous global reach to Internet marketing for lawyers).

210. While forum non-conveniens, which permits dismissals of cases on the grounds of inconvenient venue, may provide some check on personal jurisdiction, it is not commonly applied in federal courts. See *Perritt*, *supra* note 1, at 27-28. Furthermore, courts would not find exercising jurisdiction unreasonable because the non-resident defendant would be forced travel as far as across the country. See *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990) ("In this era of fax machines and discount air travel, [requiring the non-resident defendant] to [travel from Florida and] defend itself in California under the circumstances as it alleges them would not be so unreasonable as to violate due process."); *Williams Elec. Co. v. Honeywell, Inc.*, 854 F.2d 389, 393

B. *The Nature of Web Communications Mandates Using a Purposeful Availment Analysis*

Site operators establish their Web sites for a variety of reasons and purposes.²¹¹ Operators target different individuals and markets with their Web sites. To protect these site operators, a deliberate availment approach must be employed when analyzing whether to assert personal jurisdiction over Internet activity. This approach, however, must differentiate between intentional decisions to conduct business with members of given (or all) forums and awareness that the site is available throughout the world. If a site operator does not make a business decision—through advertising or selling products on the Internet, for example—then the contacts must be carefully analyzed for intentional and purposeful availment. Mere foreseeability of the possibility of being haled into a forum, alone, should not suffice to assert jurisdiction.

1. Courts Should Follow Justice O'Connor's *Asahi* Approach

Courts determining whether to exercise jurisdiction over a Web site operator should apply a uniform analysis. All courts should apply Justice O'Connor's deliberate availment approach, as articulated in *Asahi*, when deciding whether publishing on a Web site is sufficient to exercise jurisdiction under the Due Process Clause.²¹² This focus will allow courts to consider the more difficult issue facing them, namely, how properly to evaluate conduct on the Web for jurisdictional purposes.

The Due Process Clause provides potential defendants with predictability so that they can structure their conduct with at least some certainty as to where that conduct will and will not subject them to suit.²¹³ Web site operators function in an environment with little awareness of the jurisdictional reach of their communications, and, more specifically, with little appreciation of the likelihood of being subject to a lawsuit in any particular forum. These communications

(11th Cir. 1988) ("Although the defendants would be compelled to travel to Florida [from Texas] to defend this lawsuit, modern improvements in transportation and communication significantly lessen this hardship (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292-93 (1980))). Courts have held that, in this modern age, it is not unduly burdensome to require defendants to travel to other parts of the country to defend a lawsuit; in reality, however, the inconvenience and added expense of travel, especially for an individual with a personal Web site rather than a large corporation, can be enormous.

211. See *supra* part I.C.

212. The analysis in this section focuses on instances where jurisdiction is appropriate under the state's long-arm statute when that statute imposes further limitations beyond the Due Process Clause. See *supra* notes 65-67 and accompanying text. This analysis applies to actions in state and federal jurisdictions, both of which must ensure that exercising jurisdiction comports with due process. See *Hanson v. Denckla*, 357 U.S. 235, 249-50 (1958).

213. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

are often sent out to the entire Web community, and not directed at any particular city, state, or even country. A site operator like Caitlin, who aspires to use her Web site to sell flowers to her local customers, often does not contemplate that others would access or be interested in her site.²¹⁴ This is why the "nature and quality of contacts" provided by maintaining an Internet Web site are "clearly of a different nature and quality" than other types of contact with a forum state.²¹⁵

The nature of communications on the Web, and the fact that Web sites may not be created for a particular community, mandates that courts be particularly careful not to blindly force Web site operators to defend lawsuits in foreign jurisdictions solely because the site operators were aware that their communications *could* reach a particular forum. Courts must determine whether Web publishing occurring outside of the forum state is intentionally directed toward that state so that it does not offend due process.²¹⁶ This determination is best effectuated by the test set forth in the *Asahi* plurality opinion written by Justice O'Connor.²¹⁷ To subject a non-resident site operator to jurisdiction, Justice O'Connor's approach would require both that the defendant operator deliberately direct the communication over the Web to the forum state, and that exercising jurisdiction, given the circumstances of the case, would be reasonable.²¹⁸

Using *Asahi*'s stringent requirements to carefully analyze the contacts to or from a Web site would ensure that Web site operators are not subject to jurisdiction in any forum simply because they published information on the Web. Web site operators need some assurance that simply publishing on the Web will not be sufficient to subject them to suit without some intention to reach a particular forum.

The current Internet jurisdictional case law, which is certainly in its infancy,²¹⁹ has generally followed this reasoning. When deciding whether conduct over the Internet is sufficient to confer jurisdiction, however, courts are following the precedent used for all jurisdictional

214. See *supra* Introduction (describing hypothetical situation).

215. *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996).

216. Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 Alb. L. Rev. 1083, 1126 (1996).

217. The *Asahi* plurality concluded that the mere placement of products into the stream of commerce by a non-resident defendant is not an act purposefully directed at the forum state and that there must be additional conduct directed at that state. *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 112 (1987). Justice O'Connor articulated a test that, ten years after its creation, is well-suited to Web sites where all published information, by existing on the Web, is arguably in the stream of commerce. See *id.* The deliberate availment approach ensures that mere placement of a site on the Web will not alone be sufficient for a forum to exercise jurisdiction over a non-resident. See *supra* notes 86-91 and accompanying text.

218. See *Asahi*, 480 U.S. at 112-16.

219. See *Zippo Mfg. v. Zippo Dot Com, Inc.*, No. Civ.A.96-397 Erie, 1997 WL 37657, at *4 (W.D. Pa. Jan. 16, 1997).

cases in that particular forum and, thus, using their forum's minimum contacts test. While most of the scant number of courts considering Internet jurisdictional issues have required both availment and reasonableness like *Asahi*, others have focused on the defendant's expectation of being sued in a particular forum.²²⁰ Because a plurality of the Court enumerated the purposeful availment test in *Asahi*, courts are not bound to follow it, and can structure their jurisdictional test without it. Such departures from *Asahi*'s purposeful availment test, however, are ill-suited to Internet cases, and will result in great uncertainty and threaten the development of a growing section of the national/global economy.

All courts should follow the *Asahi* plurality approach to ensure uniformity in the jurisdictional analysis for the same publishing on the Web. Use of this test would ensure that one action—making information available on a Web page, which inevitably and automatically places the site operator in potential or actual contact with every forum in the world—would be similarly evaluated when different jurisdictions decided questions of personal jurisdiction.

2. Advantages of the *Asahi* Purposeful Availment/Reasonableness Approach

Both prongs of the *Asahi* plurality test should be used to decide jurisdictional questions for communications over the Web. This approach, which first determines purposeful availment and next examines the reasonableness of exercising jurisdiction, would appropriately balance the interests of potential plaintiff Web users and defendant Web site operators.

a. *Purposeful Availment*

Purposeful availment, as understood by the *Asahi* plurality, requires a Web site operator to have more than mere awareness of the international scope of the Internet before it will allow a court to exercise jurisdiction over that operator.²²¹ As the court in *Bensusan* stated, "mere foreseeability of an in-state consequence and a failure to avert that consequence is not sufficient to establish personal jurisdiction."²²²

Simply operating a Web site is not sufficient to subject an operator to jurisdiction. The *Bensusan* court established that floor: "Creating a site, like placing a product into the stream of commerce, may be felt

220. See *supra* notes 194-95 and accompanying text.

221. See *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (holding that only when a company creates a Web site with the intention of reaching all Internet users, and reaches individuals in a forum, can personal jurisdiction be exercised over a defendant without regard to his physical location).

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

nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state.”²²³

Certain on-line conduct is more likely to lead the site operator to defend suits in certain forums. If a corporation advertises²²⁴ on the Web, for example, courts will likely exercise jurisdiction.²²⁵ Jurisdiction is proper when a corporation’s (or individual’s) advertisement intends to reach a certain audience. If the advertiser limits the audience to whom it is communicating, the probability of the advertiser being subject to suit in any forum should decrease. Once an advertiser conducts business with an individual in a particular forum based on a Web advertisement, however, that advertiser would easily pass the purposeful availment test.²²⁶

Another circumstance where the purposeful availment prong is easily satisfied is when out-of-state conduct intends to, and does, cause harmful effects in the forum state.²²⁷ Courts will exercise jurisdiction for tortious conduct on the Web directed at a particular person or place because courts will confer jurisdiction for this sort of conduct conducted in any medium.²²⁸ Additionally, courts will probably exercise jurisdiction when a Web site operator advertises to a nationwide audience and benefits nationally from that advertisement; in this case, it can be assumed that the advertisement directed at the national market qualifies as purposeful availment.

The purposeful availment prong will not be satisfied when a Web site does not target a forum and the site operator does not benefit from the site’s availability in a particular market.²²⁹ Thus, use of the purposeful availment prong in all jurisdictions would enable site operators to create Web sites without constant fear of litigation in a foreign forum.

223. *Id.* at 301 (citing the plurality opinion from *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 112 (1987)).

224. For this analysis, advertising means promoting or selling a product on the Internet.

225. *See, e.g., Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (holding that once an advertisement is placed on the Internet, the continuous availability of that advertisement, as well as the fact that it is directed to all states, supports a finding that the defendant purposefully availed itself of the laws of Connecticut); *Maritz*, 947 F. Supp. at 1333 (holding that consciously deciding to advertise to all Internet users, with knowledge that the information will be globally transmitted, favors exercising jurisdiction over the non-resident defendant).

226. *See Zippo Mfg. v. Zippo Dot Com, Inc.*, No. Civ.A.96-397 Erie, 1997 WL 37657, at *6-7 (W.D. Pa. Jan. 16, 1997); *supra* notes 121-33 and accompanying text (discussing *Zippo*).

227. *See, e.g., Edias Software Int’l, L.L.C. v. Basis Int’l Ltd.*, 947 F. Supp. 413, 420 (D. Ariz. 1996) (explaining that posting allegedly defamatory statements on the Web indicates purposeful availment of the forum state); *Panavision Int’l, L.P. v. Toeppen*, 938 F. Supp. 616, 622 (C.D. Cal. 1996) (asserting jurisdiction when the defendant’s conduct “intended to, and did, result in harmful effects in California”).

228. *See Edias*, 947 F. Supp. at 420; *Panavision*, 938 F. Supp. at 622.

229. *See Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 300 (S.D.N.Y. 1996); *supra* note 222 and accompanying text.

b. *Reasonableness*

Establishing jurisdiction over a Web site for its existence alone would be unreasonable, and would not comport with the notion of "fair play and substantial justice."²³⁰ Although most, if not all, Web site operators are aware of the national scope of their Web sites, this knowledge does not necessarily make it reasonable for a court to exercise jurisdiction. A Web site operator cannot limit access to his site.²³¹ Because awareness alone is not sufficient for a court to exercise jurisdiction over a Web site operator,²³² it would be unreasonable to exercise jurisdiction over operators who may not have intended residents of given states to use or benefit from their sites.²³³

Although a site operator can use sophisticated password programs to allow only authorized users to explore the Web site,²³⁴ these password programs only allow certain *users* to access the Web site, and cannot distinguish among the locations of particular Web users.²³⁵ Without the uncommon use of password programs, an Internet user can access an operator's Web site from any jurisdiction in the world.²³⁶ Additionally, the international scope of Web pages should not be used

230. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

231. *See Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1330 (E.D. Mo. 1996) ("Any internet user can access any website, of which there are presumably hundreds of thousands, by entering into the computer the internet address they are seeking."); *see also Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 937 (S.D.N.Y. 1996) (explaining that an Internet provider "has no way of identifying the receiving community").

232. *See Bensusan*, 937 F. Supp. at 301.

233. Site operators may be unaware of the jurisdictions from which people are accessing their sites. *See Perritt, supra* note 1, at 23 ("In the Web often the information is transmitted indirectly, . . . sometimes without the knowledge of the person making the information object available.").

234. This option is used primarily for premium sites, similar to premium channels for cable subscribers, where site operators require passwords to access the Web site and distribute passwords to paying customers. Most Web sites are accessible to users with or without a password, and requiring Web users to type in a password before entering a Web site does not help promote the site because Web users normally expect the free-flow of information.

235. As long as an individual has an Internet account, that user can dial into the account from anywhere there is a phone jack. The account functions identically regardless of the location from where the user is calling. Thus, an individual with a password to a Web site can access that site from anywhere in the world where there is access to a telephone line.

236. An Internet user can prevent access to particular Web sites—normally obscene Web pages—by using a variety of commercial software programs that block access to certain sites. Each Internet user, however, must decide to buy and install these software packages. Thus, affirmative steps are required by the user to block access to certain sites; this is similar to when an individual decides to subscribe to a magazine. Furthermore, many of these software packages will block out only "obscene" materials rather than any materials a Web user may want to avoid. *See Steve Wildstrom & Toddi Gutner, Cybersmut: How to Lock Out the Kids*, *Bus. Wk.*, Feb. 12, 1996, at 98-99 (describing Internet screening software); Steve Lohr, *Practicing Safety on the Internet*, *N.Y. Times*, Sept. 21, 1995, at C1 (same).

to justify unreasonably dragging Internet site operators to defend lawsuits in any jurisdiction.

CONCLUSION

Cyberspace presents new and exciting legal challenges. Courts must carefully apply the appropriate existing legal doctrines when deciding personal jurisdiction issues based on Web activity. While, of course, each case should be analyzed individually, purposeful availment and expectation should be emphasized instead of mere knowledge that the information will be accessible in the forum state. Use of this analysis would prevent Internet activity on the Web from being considered sufficient for personal jurisdiction. If any Web activity were considered sufficient, Internet users would inevitably always be at the mercy of plaintiffs' forum selections.