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Cyberspace and Personal Jurisdiction: The Problem of Using Internet Contacts to Establish Minimum Contacts

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CYBERSPACE AND PERSONAL JURISDICTION: THE PROBLEM OF USING INTERNET CONTACTS TO ESTABLISH MINIMUM CONTACTS

I. INTRODUCTION

Electronic communication threatens the modern conception of personal jurisdiction over nonresident defendants, as defined by the United States Supreme Court in *International Shoe Co. v. Washington*[1] and its progeny. Every day many people communicate via some form of electronic media, usually a computer, to send electronic mail (e-mail), visit Internet newsgroups, or "surf" the World Wide Web. Each of these activities could potentially become the basis for asserting personal jurisdiction in a distant forum. This Comment explores the extent to which courts should use these electronic contacts to assert personal jurisdiction over nonresident defendants.

Although cyberspace has now become part of the common vernacular, synonymous with electronic entities such as the Internet and the World Wide Web,[2] few who use the term can explain what the word precisely means.[3] Even the man who coined the term, science fiction author William Gibson, has difficulty defining it; cyberspace is "[s]omeplace that you can't see but you know is there."[4] Yet, the term has attained such exalted pop culture status that it has spawned new derivative terms: cyberchat, cyberphobia, cybersex.[5]

Cyberspace, in a nutshell, describes a world of electronic communication through the use of computer connections.[6] The recent rapid increase in the number of these transmissions and connections has afforded people greater accessibility to more efficient means of communication and information exchange than the traditional methods of telephone and mail provided in the past. The ubiquity of

1. 326 U.S. 310 (1945).
2. *See* Philip Elmer-DeWitt, *Welcome to Cyberspace: What Is It? Where Is It? And How Do We Get There?*, TIME, Mar. 22, 1995, at 4.
3. *See id.*
4. *Id.* at 6.
5. *See id.* at 8.
6. *See id.*

computer technology has forced society to depend increasingly on the electronic contacts that form the foundation of cyberspace.[7] This growth has raised novel legal issues concerning the implication of electronic contacts. One such issue involves the potential use of these contacts to assert personal jurisdiction over defendants.

Recently, two separate courts analyzed this issue and reached seemingly contradictory results. In *Bensusan Restaurant Corp. v. King*,[8] the Southern District of New York held that the court could not assert personal jurisdiction over a Missouri defendant who had created a home page on the World Wide Web.[9] Ten days later, in *Panavision International, L.P. v. Toeppen*,[10] the Central District of California found that it retained personal jurisdiction over an Illinois resident who had allegedly violated the plaintiff's trademarks by using them to register Internet domain names.[11]

This Comment examines the reasoning set forth in both *Bensusan* and *Panavision* to analyze the application of the rules of personal jurisdiction to the world of cyberspace. Part II traces the development of the various entities that constitute cyberspace, the Internet and the World Wide Web in particular, to acquaint the reader with the relevant terms and concepts. Part III briefly summarizes general principles of personal jurisdiction. Part IV and Part V review the decisions in *Bensusan* and *Panavision*. Part VI attempts to reconcile the apparent conflicts between these two decisions and offers a modified approach based on the "effects test" of *Calder v. Jones*[12] for courts confronting this issue in the future.

II. WHAT IS CYBERSPACE?

In 1984 William Gibson coined the term "cyberspace" to describe generically the "geographically nonexistent space where com-

7. People rarely fail to encounter some form of computer-based communication device on a daily basis. Pagers that transmit messages to their owners from another source can arguably become the centerpiece of a future lawsuit. People can access the World Wide Web, send e-mail, and download vast amounts of information from the convenience of their own homes. Many multinational corporations currently utilize internal e-mail systems to link their branch offices around the world. In addition, companies have begun to recognize new business opportunities available through the Internet. *See* Philip Elmer-DeWitt, *Will Gates Get the Net?*, TIME, Jan. 30, 1995, at 79.

8. 937 F. Supp. 295 (S.D.N.Y. 1996).

9. *See id.* at 300.

10. 938 F. Supp. 616 (C.D. Cal. 1996).

11. *See id.* at 622.

12. 465 U.S. 783 (1984).

puter-aided communication takes place[,]"[13] as well as the "realm and cultural dynamics of people and machines working within the confines of computer-based networks."[14]

During the 1992 presidential campaign, President Clinton and Vice President Gore helped to popularize another term that also describes cyberspace: "Information Superhighway."[15] Most people are unaware, however, that "there really is no such thing. But it sounds big and exciting and like something the government should pour lots of dollars into, so the metaphor survives."[16] Although the term cyberspace did not first appear until 1984, the interconnected network of computers that it describes existed long before anyone had an official name for it.

A. The Internet

Through the overuse of references to cyberspace by media and society,[17] the term has mistakenly become synonymous with the Internet, an entity that has its origins in the 1960s.[18] Many people use the names interchangeably without realizing that, in fact, the two words describe separate concepts.[19] The Internet more accurately describes one aspect of the larger world of cyberspace.[20] People can connect two or more computers together into a network, allowing the computers and their users to share information and communicate with one another.[21] Thousands of these networks connect to each

13. DINTY W. MOORE, THE EMPEROR'S VIRTUAL CLOTHES: THE NAKED TRUTH ABOUT INTERNET CULTURE 209 (1995); *see* WILLIAM GIBSON, NEUROMANCER 4 (1984).

14. G. BURGESS ALLISON, THE LAWYER'S GUIDE TO THE INTERNET 331 (1995).

15. *See* Elmer-DeWitt, *supra* note 2, at 4; *see also* MOORE, *supra* note 13, at 1 ("No one is even sure who first used [the term Information Superhighway,] though many people have accused Vice President Al Gore.").

16. MOORE, *supra* note 13, at 213.

17. *See, e.g.*, ALLISON, *supra* note 14, at 331 (Cyberspace has become "[a]n entirely meaningless buzzword that *might* have been related to the Gibson term, once, but has since been sucked into the reality distortion field that surrounds Hollywood, Madison Avenue, and pop culture.").

18. *See id.* at 31.

19. *Cf.* Elmer-DeWitt, *supra* note 2, at 4.

20. Cyberspace also encompasses internal electronic mail networks, which are not connected to the Internet, where users can exchange messages with one another but cannot connect to other networks. *Cf. id.* ("By 1989 [cyberspace] had been borrowed by the online community to describe not some science-fiction fantasy but today's increasingly interconnected computer systems—especially the millions of computers jacked into the Internet.").

21. *See* MOORE, *supra* note 13, at 213.

other to create one huge international "Network of Networks,"[22] the Internet.

The United States Department of Defense in 1969 created the forerunner to the Internet, ARPAnet, as an experiment to develop computer network technologies that could survive partial power outages.[23] A power outage could disable portions of a network for an unspecified amount of time. The government, therefore, wanted to build a system that could ensure the delivery of information from a source computer to its destination,[24] a concept known as "dynamic rerouting."[25] The resulting effort, ARPAnet, consisted of a system which linked each computer to multiple computers, safeguarding the uninterrupted flow of information.[26] The Internet retained this intergrated structure, which replaced the central hub model, "ensur[ing] that the network isn't vulnerable to a simple break in the chain."[27]

Currently, the Internet connects hundreds of thousands of universities, government agencies, and corporations around the world. Users can access it from their offices, classrooms, homes and from the road.[28] The Internet recently underwent an explosive growth period with the number of host computers and users doubling every year between 1983 and 1994.[29]

In order to access the Internet, a potential user has two options.[30] A person can use a computer connected directly to the Internet, such as a workplace terminal that is part of a network connected to the Internet.[31] In this case, the computer will also serve as an Internet host, with its own electronic address.[32] Alternatively, a person can use a computer that connects to an Internet service provider, such as America Online, the Microsoft Network, or Prodigy.[33] The computer

22. *Id.*
23. *See* ALLISON, *supra* note 14, at 31.
24. *See id.*
25. JOHN R. LEVINE & CAROL BAROUDI, THE INTERNET FOR DUMMIES 12 (1993).
26. *See* ALLISON, *supra* note 14, at 31.
27. *Id.*
28. *See id.* at 19.
29. *See id.*; *see also* LEVINE & BAROUDI, *supra* note 25, at 7, 8 (estimating that by 1994, approximately 1000 new networks and 100,000 users joined the Internet each month); MOORE, *supra* note 13, at xiv (predicting that by 2003, every person on the planet will have network access).
30. *See* HARLEY HAHN & RICK STOUT, THE COMPLETE INTERNET REFERENCE 34 (1994).
31. *See id.* at 35.
32. *See id.*
33. *See* LEVINE & BAROUDI, *supra* note 25, at 16-17.

connects, via modem and telephone lines, with the service provider's network computer, essentially providing an "on-ramp" onto the Superhighway.[34]

The most interesting aspect of the Internet, aside from the vast amounts of information available to users, concerns the fact that no single person or entity assumes responsibility for overseeing and operating it;[35] in effect, "no one is in charge."[36] Although the National Science Foundation, an agency of the United States Government, operates and funds a substantial portion of the Internet's "backbone,"[37] the Internet's fundamental lack of structure causes its inherent disorganization.[38]

B. The World Wide Web

A researcher in Geneva, Switzerland created the World Wide Web (the Web), the "multimedia branch of the Internet," in 1990.[39] The Web "radically differ[s] [from other components of the Internet] because it uses hypertext and graphics together to display information, allowing users to cross the globe with a single click of the mouse."[40]

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34. *See id.*

35. In *The Lawyer's Guide to the Internet*, G. Burgess Allison compares the operation of the Internet to faxing. No one stands in charge of faxing; nor does anyone own it. Yet people still fax effectively in the absence of supervision over this mode of communication. In order to fax, people purchase their own equipment and pay for the telephone charges they incur. People must also rely on suppliers of basic services, such as the telephone companies. *See* ALLISON, *supra* note 14, at 30.

36. *Id.* at 19.

37. *See id.* at 32.

38. *See id.* at 20.

39. KATIE HAFNER & MATTHEW LYON, WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET 257 (1996).

40. DAVID M. CHANDLER ET AL., RUNNING A PERFECT WEB SITE 9 (1995). "*Hypertext* is data that contains *links* to other data." HAHN & STOUT, *supra* note 30, 496. In an encyclopedia, hypertext's closest non-technical analogy, an article on "Trees" might end with, "For related information, see Plants." This cross-reference represents a link. *Id.*

In a hypertext article about trees on the Web, the creator can create additional links each time the author mentions a new tree. *See id.* The creator of the Web page often highlights or underlines the links so that they stand out to readers. *See id.* By clicking the mouse on a link to a specific tree, the reader can jump to an article about that particular type of tree. *See id.*

As one court noted, "a user can move seamlessly between documents, regardless of their location; when a user viewing the document located on one server selects a link to a document located elsewhere, the [computer] will automatically contact the second server and display the document." Shea v. Reno,

The Swiss creators originally developed the Web to enable physicists from around the world to share their research and information.[41] Businesses, however, have rapidly commercialized the Web, exploiting it as a means to market and sell their products and services.[42]

Because a person can access a vast variety of information from numerous sites, the Web requires a system that catalogues the information for easy retrieval.[43] Uniform Resource Locators (URLs),[44]

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930 F. Supp. 916, 929 (S.D.N.Y. 1996).

Links can also connect to full articles on related topics, such as "wood" or "paper" or to portions of articles defining technical terms, such as "coniferous." *See id.* Furthermore, links no longer refer simply to text. Web site creators increasingly utilize the multimedia facet of the Web to incorporate links to photographs, graphics, video, and sound. *See id.*

41. *See* HAHN & STOUT, *supra* note 30, at 497.

42. *See* BILLY BARRON ET AL., THE INTERNET UNLEASHED 35 (2d ed. 1995); *see also infra* note 53 and accompanying text.

43. *See* PAUL GILSTER, FINDING IT ON THE INTERNET 143 (1994).

44. The URL describes the type of resource involved as well as the address of that resource. *See id.* at 144. All URLs consist of multiple parts, separated by periods, with each part resembling a word. *See id.* (providing a listing of URLs which show a variety of Internet files). For example, Loyola Law School maintains a home page on the Web at "http://www.law.lmu.edu." *See* Anton Mack, *Loyola Leads the Way on the World Wide Web*, LOY. LAW., Spring-Summer 1997, at 8. This site contains an index of links to available information, including career services and admissions. *See id.*

The vast majority of addresses on the Web begin with "http://www." The "http" (HyperText Transfer Protocol) designation signifies a hypertext document while "www" indicates a location on the Web. *See* GILSTER, *supra* note 43, at 144.

The actual address of the document or site, in this case "law," which is a server on the larger "lmu" server, follows "www." *See* CHANDLER ET AL., *supra* note 40, at 244. The last part of the address, which can consist of two or three letters, "edu" above, signifies the zone. *See* LEVINE & BAROUDI, supra note 25, at 59. In the United States, most World Wide Web sites rest in three-letter zones, as defined by the entity creating the site. *See id.* The most commonly used zones include "edu" for educational institutions, "com" for commercial organizations, "gov" for government bodies and departments and "org" for organizations which do not fall under any of the other categories, such as professional societies like the American Bar Association. *See id.*

This complicated scheme can create problems and confusion. For an example of the importance of precision when identifying a URL, see Cornelia Grumman, *Dole Error Hurts Web Site Plug; Deleted 'Dot' Sends Some into Cyberether*, CHI. TRIB., Oct. 8, 1996, at 19. During the 1996 campaign, Republican presidential nominee Bob Dole bungled an attempt to advertise his Web home page, www.dolekemp96.org, when he left out the last "dot," stating the address as www.dolekemp96org. *See id.* Those who followed Dole's directions received a "try again" message. *See id.* Others who tinkered with the address by adding a dot or a hyphen, could have landed on the Clinton-Gore campaign Web site. *See id.* An imposter Dole Web site, http://www.dole-kemp.org, sent unknowing us-

serve as "addresses" that specify the exact location of information not only on the Web, but also on the entire Internet.[45]

In order to place hypertext documents on the Internet, an individual must first create a Web home page.[46] After completing the page in a hypertext format on a home computer, the author uploads the information onto leased space on an existing network server.[47] As long as the server remains online, anyone with access to the Internet can contact the home page.

Most importantly, the creator must select an appropriate name for the address to ensure that people can easily remember the URL and readily find the page.[48] The federal government funds Network Solutions Inc., whose InterNIC division, holds responsibility for assigning, registering and regulating domain names.[49] By the end of July 1996, InterNIC had registered nearly 500,000 domain names, nearly a ten-fold increase from the 52,500 existing in March 1995.[50]

C. Distinctive Cyberspace Culture

The Internet can attribute its rapid growth and popularity to the "enormous sense of community and cooperation that characterizes"[51] its "grass roots structure."[52] The Internet remains open and demo-

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ers to http://www.cg96.org, the President's campaign Web site. *See id.*

45. *See* GILSTER, *supra* note 43, at 144.

46. *See* CHANDLER ET AL., *supra* note 40, at 40. A network server is a computer dedicated to providing information to any of the computers that connect to it. *See* ALLISON, *supra* note 14, at 330.

47. *See* CHANDLER ET AL., *supra* note 40, at 40, 164.

48. *See id.* at 183.

49. *See* Kara Swisher, *More Protection Due for Addresses on the Internet; Official Registry Seeks to Avoid Involvement in Trademark Fights*, WASH. POST, July 27, 1995, at B9.

50. *See* Evan Ramstad, *Cyberspace's Hated Cop*, BUFF. NEWS, Sept. 9, 1996, at A9. Until recently, InterNIC did not adhere to traditional trademark principles when registering new domain names. As a result, the first to register a domain name was the "first in right." *See* James A. Powers, *Web Names May Lead to Legal Trouble*, INTERACTIVE MKTG. NEWS, Feb. 2, 1996, *available in* 1996 WL 7819865. This practice, of course, constituted "competitive poaching," an abuse of the system whereby an entity purposely registered a name to exploit that name's association with a company or brand name. *See id.* For example, Pepsi would engage in competitive poaching if it were to register "coke.com." *See id.*; *see also* discussion *infra* Part IV. Individuals who engage in competitive poaching purely for personal profit also become commonly known as "cyber squatters." *See* Intermatic Inc. v. Toeppen, 947 F. Supp. 1227, 1233 (N.D. Ill. 1996) (citing Greg Miller, *Cyber Squatters Give Carl's Jr., Others Net Loss*, L.A. TIMES, July 12, 1996, (Orange County ed.) at A1).

51. *See* ALLISON, *supra* note 14, at 35.

52. *See* Elmer-DeWitt, *supra* note 2, at 4, 9.

cratic; no single entity owns or controls it.[53] Two basic principles which guide the Internet include freedom of speech and self-determination.[54]

1. Freedom of speech

Freedom of speech offers protection to participants to discuss and express their opinions candidly, as they would in public.[55] Internet users generally treat anything one places on the Internet or Web as public domain; if users can obtain an electronic copy of an item, they will likely redistribute that image or information over the Internet without regard to copyright or intellectual property rights.[56] Fair use on the Internet "goes a long, long way."[57]

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53. *See id.* However, new commercial forces seeking a foothold in the Internet threaten this democracy. *See, e.g.*, Elmer-DeWitt, *supra* note 7, at 79 (detailing Microsoft Chairman Bill Gates's attempt to control the Internet); Brent Schlender, *Whose Internet Is It, Anyway?*, FORTUNE, Dec. 11, 1995, at 120 (describing the efforts of large technology companies like IBM, AT&T, Microsoft and Hewlett-Packard to take advantage of the Internet's rise).

Companies use the Internet, and in particular the multimedia capabilities of the World Wide Web, to transact business. Companies, in their print advertising, commonly suggest readers to visit their Web pages for additional information about their products. *See Advertisement for Honda*, SPORTS ILL., Sept. 29, 1997, at 58; *Advertisement for Sony*, GQ, Oct. 1997, at 303; *In-Site*, GQ, Oct. 1997, at 117 (providing a directory of corporate Internet addresses). People who actually visit the sites experience color photos, sound and perhaps even a short video clip, all featuring various products. *See, e.g.*, Daniel Fisher, *After Net Profits; Companies Are Dropping Catalogs and Using the Internet to Solicit Business, but They Still Must Rely on Some Traditional Methods,* ORANGE COUNTY REG., Sept. 9, 1996, at Business 19 (describing how small companies utilize the Internet as a retail channel to compete with larger companies); Jo Mancuso, *Mining the Net for Gold,* S.F. EXAMINER, Sept. 8, 1996, (Magazine) at 10 (comparing people seeking to exploit the Internet for profit to the gold prospectors who invaded California in the 1840s and 1850s).

In addition, banking companies are rapidly perfecting the use of "cybercash," a method of banking based on the popular European debit card system and recently introduced in the United States. Although many regard the commercialization of the Internet as inevitable, purists still hope to reverse this trend. *See* Daniel Akst, *In Cyberspace Nobody Can Hear You Write a Check*, L.A. TIMES, Feb. 4, 1996, (Magazine) at 20. *See generally* Louise McElvogue, *Subtracting Ads; Web User Develops Program to Delete Unwanted Commercials,* L.A. TIMES, June 10, 1996, at D2 (chronicling the work of four college students to create software that would allow its users to block advertisements on the Web).

54. *See* ALLISON, *supra* note 14, at 36-42.

55. *See id.* at 37.

56. *See id.*

57. *Id.* Users' placement of information and images on the Internet raises obvious intellectual property issues that recent courts have struggled to reconcile.

Of course, drawbacks also accompany this freedom. Since responsibility for editing the content or format of sites rests on no one individual, the Internet contains material that many would regard as foolish, tasteless, and inappropriate.[58]

2. Self-determination

The freedom of speech recognized on the Internet does not prove absolute; the principle of self-determination—the right of individuals to choose what they want to see and experience—tempers its influence.[59] Inappropriate comments, postings and messages violate another's right to self-determination.[60]

When freedom of speech and self-determination clash, the Internet culture favors a person's right to choose. While Internet denizens exercise control over what they will and will not see,[61] no established system enforces this ethical code of conduct.[62]

III. GENERAL PRINCIPLES OF PERSONAL JURISDICTION

A court must have jurisdiction over the persons or entities involved in the action to hear a case properly.[63] The Constitution defines the outermost limits of a court's jurisdiction over nonresidents of the state in which the court sits.[64] The state may further limit that scope statutorily.[65] A court cannot exercise jurisdiction over a

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58. *See* Elmer-DeWitt, *supra* note 2, at 4, 10.

59. *See* ALLISON, *supra* note 14, at 39-42.

60. *See id.* at 39-40.

61. *See id.* at 41.

62. *See id.* at 41-42. The notorious "Green Card" incident exemplifies the inability of enforcing these rules. Two Arizona lawyers, a husband and wife, posted an advertisement for their immigration-related legal services—helping people obtain green cards—in *several thousand* newsgroups through an Internet service called Usenet.

The couple violated unofficial "netiquette" by interrupting legitimate online discussions with an off-topic posting. No Internet user subscribing to that newsgroup could avoid the posting of this commercial advertisement, exacerbating this breach of protocol. In fact, many people encountered the same posting several times.

Despite their breach of netiquette, the couple had no remorse. They repeated this technique on more than one occasion and even offered to teach others the same. *See id.* at 40-41.

63. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.1, at 94 (2d ed. 1993).

64. *See id.*

65. *See id.* A court cannot assert personal jurisdiction over a nonresident defendant without a state long-arm statute authorizing the courts of that state to assert personal jurisdiction. *See* FRIEDENTHAL ET AL., *supra* note 63, § 3.12, at

party unless it possesses authorization under both the Constitution and applicable state statutes.[66]

Initially, courts based personal jurisdiction on the presence of the person or thing involved in the lawsuit within the territorial boundaries of the forum or the consent of the parties.[67] Modern decisions, beginning with the Supreme Court's opinion in *International Shoe v. Washington*,[68] have created exceptions to this restrictive concept of jurisdiction to permit courts to assert jurisdiction over nonresident individuals and entities after reviewing the relationship among the place where the underlying transaction occurred, the parties, and the state of the court hearing the lawsuit.[69]

A. The Basic Rule of International Shoe

In 1945, the Supreme Court, faced with an emerging postwar society, adopted a more flexible standard for the assertion of personal jurisdiction to address the practices of an increasingly mobile postwar society.[70]

The Supreme Court upheld the Washington state court's assertion of personal jurisdiction over International Shoe, a company incorporated in Delaware and with its principal place of business in Missouri.[71] The Court's opinion established what still remains the basic standard for determining whether a state may constitutionally subject a nonresident to the jurisdiction of its courts:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[72]

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141. A court can assert personal jurisdiction over a nonresident defendant under a long-arm statute only after the plaintiff demonstrates the following: 1) the statute's language applies to the cause of action alleged; 2) the court's exercise of jurisdiction will satisfy the judicially developed standards that have emerged under the statute; and 3) the court's exercise of jurisdiction complies with federal, and any applicable state, constitutional standards. *See id.*

66. *See* FRIEDENTHAL, *supra* note 63, § 3.1, at 94.

67. *See id.*; *see also* Pennoyer v. Neff, 95 U.S. (5 Otto) 714 (1877) (approving the assertion of personal jurisdiction based on the territorial concept, the predecessor to physical presence in the forum).

68. 326 U.S. 310 (1945).

69. *See* FRIEDENTHAL ET AL., *supra* note 63, § 3.1, at 95.

70. *See id.* § 3.10, at 120.

71. *See International Shoe*, 326 U.S. at 316.

72. *See id.* at 316.

This test focuses on whether "subjecting a particular defendant to jurisdiction in a particular case meets the demands of due process."[73] The requirements for determining whether a defendant shares minimum contacts with a forum to permit the assertion of personal jurisdiction depend upon "the quality and nature of the activity in relation to the fair and orderly administration of the laws."[74]

B. Refinements to the Basic Rule of International Shoe

After *International Shoe* the Supreme Court refined the "fair play and substantial justice" formulation that courts should apply to measure minimum contacts.[75] In *Worldwide Volkswagen Corp. v. Woodson*,[76] however, the Supreme Court explicitly divided the "fair play and substantial justice" standard into a two-pronged test.[77] The threshold question still centers on whether the defendant has established minimum contacts with the forum state. Only after a court finds minimum contacts "among the parties and the forum do fair play and substantial justice become relevant considerations."[78]

1. Minimum contacts analysis

An analysis of whether a defendant has established minimum contacts with a forum begins with two questions: (1) Whether the defendant's activities in the forum were continuous and systematic or only sporadic and casual, and (2) whether or not the cause of action arises from the defendant's activities in the forum.[79]

a. general jurisdiction versus specific jurisdiction

The Supreme Court explicitly recognized the distinction between "general jurisdiction" and "specific jurisdiction" in *Helicopteros Nacionales de Columbia, S.A. v. Hall*.[80] A court will inquire into the nature of the activity and the relation of the cause of action to that activity to determine whether general or specific jurisdiction applies.

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73. FRIEDENTHAL ET AL., *supra* note 63, § 3.10, at 121.
74. *International Shoe*, 326 U.S. at 316.
75. *See* FRIEDENTHAL ET AL., *supra* note 63, § 3.10, at 122 n.9.
76. 444 U.S. 286 (1980).
77. *See id.* at 291-92; *see also* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984).
78. *See* FRIEDENTHAL ET AL., *supra* note 63, § 3.10, at 122 n.9.
79. *See id.* at 122.
80. 466 U.S. 408, 414-15 (1984).

General jurisdiction exists when the defendant has maintained substantial forum-related activity.[81] If the nature of the defendant's activities reaches a continuous and systematic level, a court can properly hear any cause of action, even one not arising out of the defendant's forum-related activities.[82]

If a defendant's contacts with a forum constitute sporadic or casual activities, a court must assert specific jurisdiction over causes of action arising out of those contacts.[83] Specific jurisdiction can exist even if defendant's contacts only prove minimal, such as an insurance contract.[84]

b. purposeful availment

Although the application of minimum contacts can result in nearly unlimited jurisdictional scope, the Supreme Court still recognizes the relevancy of territorial limits on state court power:

> [I]t is a mistake to assume that [the International Shoe] trend heralds the eventual demise of all restrictions on the

81. *See* FRIEDENTHAL ET AL., *supra* note 63, §3.10, at 125. In *Helicopteros*, plaintiffs brought a wrongful death suit in Texas against a Colombian corporation and other defendants after one of the corporation's helicopters crashed in Peru. *See Helicopteros*, 466 U.S. at 410. The plaintiffs argued that the court had general jurisdiction over the defendants at trial. *See id.* at 415. Because the Supreme Court may only address the issues raised at trial, the Court had to treat this case as one requiring general jurisdiction. *See id.* at 416. After characterizing a trip by the chief executive officer to Texas as sporadic, *see id.* at 415, and the corporation's acceptance of checks drawn on a Texas bank as "negligible," *see id.* at 416, the Court turned its attention to the corporation's regular purchase of helicopters from Bell Helicopters in Texas and the training of the corporation's pilots and management personnel by Bell in Texas. *See id.* at 418. The Court held that the purchases alone did not warrant the assertion of personal jurisdiction over the nonresident corporation for a cause of action which does not arise from the purchases themselves. *See id.* Furthermore, the Court also characterized the training sessions in Texas as part of "the package of goods and services purchased" and not a significant contact on which to base jurisdiction. *See id.* The failure of the *Helicopteros* Court to consider the contacts in the aggregate rather than separately "suggests very strongly that the threshold contacts required for general jurisdiction are very substantial, indeed." *See* FRIEDENTHAL ET AL., *supra* note 63, § 3.10, at 125.

82. *See* FRIEDENTHAL ET AL., *supra* note 63, §3.10, at 122-23. In *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), the Court upheld the assertion of a Ohio court's jurisdiction over a nonresident defendant when the cause of action did not arise from the defendant's forum activities.

83. *See* FRIEDENTHAL ET AL., *supra* note 63, § 3.10, at 124.

84. *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (upholding jurisdiction in a breach of contact action over a nonresident defendant whose only contacts with California involved its issuance of an insurance policy to a California resident and its receipt of premium payments from the insured).

> personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are the consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has "minimum contacts" with that State that are the prerequisite to its exercise of power over him.[85]

Thirteen years after *International Shoe*, the Court in *Hanson v. Denckla*[86] held that "it is essential in each case that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[87] The Court upheld the argument that "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."[88] Requiring purposeful conduct by the defendant

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85. Hanson v. Denckla, 357 U.S. 235, 251 (1958) (citations omitted); *see supra* note 67 and accompanying text.

86. 357 U.S. 235 (1958). In this case, Dora Donner, a Pennsylvania domiciliary executed a trust instrument in Delaware in 1935, granting her the power of appointment as to the remainder in the trust and naming a Delaware bank as the trustee. *See id.* at 238. Nine years later, Donner moved to Florida, where she died in 1952. *See id.* at 239. Before her death, Donner purportedly exercised her power of appointment to appoint a substantial portion of her trust to two other trusts she had previously established with another Delaware trustee for two of her grandchildren. *See id.* After Donner's death, the residual legatees filed an action in Florida challenging Donner's exercise of the power of appointment and claiming that the $400,000 amount in question had passed to them along with the residue of Donner's estate. *See id.* at 238. The Florida Supreme Court exercised jurisdiction over the Delaware trustee, upheld the lower court's determination that Donner ineffectively exercised her power of appointment under Florida law, and awarded the money to the legatees. *See id.* at 242. However, before the Florida trial court issued its judgment, the executrix of Donner's estate instituted a declaratory judgment action in Delaware to determine who could claim the trust assets. *See id.* The Delaware court held the trust and the exercise of the power of appointment valid, refusing to give full faith and credit to the Florida judgment after determining the Florida court had no jurisdiction over the trustee. *See id.* at 243. The Supreme Court held that the Delaware trustee had not established minimum contacts with Florida. *See id.* at 251. The trustee did not have an office in Florida, did not solicit or transact business there, and did not hold or administer any of the trust's assets there. *See id.* The Court also held that the cause of action in the Florida suit did not "arise[] out of an act done or transaction consummated in the forum State." *Id.*

87. *Id.* at 253 (emphasis added).

88. *Id.*; *see also* Kulko v. Superior Court, 436 U.S. 86, 97 (1978) (holding that a father's mere act of sending his daughter to live with her mother did not manifest the intent to obtain nor the expectation to receive a corresponding benefit in the mother's state.)

protects the defendant's liberty interests and simultaneously requires states to recognize the "coequal sovereignty of its sister states."[89]

2. Reasonableness

Even if the defendant has established minimum contacts with the forum state, a court must determine whether it may reasonably the assert jurisdiction over the nonresident.[90] The Court must balance several factors including "the interests of the forum State, and the plaintiff's interest in obtaining relief" against the "burden on the defendant."[91] The Court suggested, however, that this analysis weighs more heavily in a lawsuit involving international defendants such as *Asahi* as opposed to suits involving nonresident, domestic defendants.[92]

IV. *BENSUSAN RESTAURANT CORPORATION V. KING*[93]

A. The Facts

The plaintiff, Bensusan Restaurant Corporation ("Bensusan"), a New York corporation, founded the world-famous New York City jazz club, The Blue Note.[94] Bensusan owns all rights, title and interest in and to the federally registered trademark "The Blue Note."[95] Defendant King, an individual, owns and operates a small music club in Columbia, Missouri, called "The Blue Note."[96]

In April 1996, King created a World Wide Web site to promote his club.[97] This site, located on a computer server in Missouri, allegedly contained a distinctive logo substantially similar to Bensusan's.[98] The Web site provided unrestricted access to any Internet user and did not require any type of authentication or password for entry.[99] At this Web site, visitors could obtain general and ticket information about the Missouri club, such as names and addresses of local Columbia ticket outlets and a telephone number for charge-by-phone

89. *See* FRIEDENTHAL ET AL., *supra* note 63, § 3.11, at 133.
90. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987).
91. *See id.*
92. *See id.* at 116.
93. 937 F. Supp. 295 (S.D.N.Y. 1996).
94. *See id.* at 297.
95. *See id.*
96. *See id.*
97. *See id.*
98. *See id.*
99. *See id.*

ticket orders.[100]

At the time of the lawsuit, the first page of the Web site included a disclaimer: "The Blue Note's Cyberspot should not be confused with one of the world's finest jazz club[s] [the] Blue Note, located in the heart of New York's Greenwich Village. If you should find yourself in the big apple, give them a visit."[101] In addition, the disclaimer also contained a hyperlink allowing users to connect directly with the Bensusan Web site simply by clicking on the link.[102] After Bensusan objected to King's Web site, King eliminated both the final sentence of the disclaimer and the hyperlink.[103]

Bensusan brought this lawsuit in federal district court, asserting claims for trademark infringement, trademark dilution and unfair competition.[104] King moved to dismiss the complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2).[105]

B. The Analysis

In considering King's motion to dismiss, the court framed the issue as follows: "[W]hether the existence of a 'site' on the World Wide Web of the Internet, without anything more, is sufficient to vest this Court with personal jurisdiction over defendant pursuant to New York's long-arm statute and the Due Process Clause of the United States Constitution."[106] The court specifically applied subdivisions (a)(2) and (a)(3)(ii)[107] of New York's long-arm statute to determine proper jurisdiction under the state statute.[108]

1. New York Civil Practice Law and Rules 302 (a)(2)

New York Civil Practice Law and Rules (N.Y. C.P.L.R.) 302(a)(2) permits a court to exercise personal jurisdiction over any non-domiciliary who "commits a tortious act within the state" as long as the cause of action arises from the tortious act.[109] The court relied on the Second Circuit's requirement that a trademark infringement

100. *See id.*
101. *Id.* at 297-98 (quoting Complaint ¶ 9) (alterations in original).
102. *See id.* at 298.
103. *See id.*
104. *See id.*
105. *See id.*
106. *Bensusan*, 937 F. Supp. at 297.
107. N.Y. C.P.L.R. 302(a)(2), (a)(3)(iii) (Consol. 1994).
108. *See Bensusan*, 937 F. Supp. at 299-300.
109. N.Y. C.P.L.R. 302(a)(2).

occur at the location "where the passing off occurs, *i.e.*, where the deceived customer buys the defendant's product in the belief that he is buying the plaintiff's."[110] Under this standard, the sole act of offering a single infringing copy of the trademarked product for sale in New York, would vest a court with jurisdiction over the accused, even if the accused failed to complete the transaction.[111] Therefore, an additional issue under this subdivision of the statute involves whether "the creation of a Web site, which exists either in Missouri or in cyberspace—*i.e.*, anywhere the Internet exists—with a telephone number to order the allegedly infringing [tickets], is an offer to sell the product in New York."[112]

The court conceded that a New York resident could gain access to the Web site and view the information concerning The Blue Note Club in Missouri, either with knowledge of King's Web site address or with a search engine capable of locating the site.[113] Nonetheless, the court concluded that, even viewed in the light most favorable to the plaintiff, the allegations could not support the assertion of personal jurisdiction because a New York resident would have to take several affirmative steps to access the Web site and use the information there.[114] In other words, the infringement in such a situation occurs in Missouri, not New York.[115]

Under the reasoning of the court, users must initially access the Web site using their own computer.[116] The court next reasoned that if users wanted to attend a show at the defendant's club, they would have to telephone the box office in Missouri and reserve tickets.[117] Lastly, users would need to pick up their tickets in Missouri because King does not mail or otherwise transmit tickets to buyers.[118]

> Even assuming that the user was confused about the relationship of the Missouri club to the one in New York, such an act of infringement would have occurred in Missouri, not New York. The mere fact that a person can gain information on the allegedly infringing product is not the equivalent

110. *Bensusan*, 937 F. Supp. at 299 (quoting Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 639 (2d Cir. 1956)).
111. *See id.*
112. *Id.*
113. *See id.*
114. *See id.*
115. *See id.*
116. *See id.*
117. *See id.*
118. *See id.*

> of a person advertising, promoting, selling or otherwise making an effort to target its product in New York.[119]

Therefore, the court concluded that it could not exercise jurisdiction over King under N.Y. C.P.L.R. 302(a)(2).[120]

2. New York Civil Practice Law and Rules 302(a)(3)(ii)

N.Y. C.P.L.R. 302(a)(3)(ii) grants a court personal jurisdiction over any non-domiciliary who commits tortious acts committed outside the state that cause injury in the state if the non-domiciliary "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."[121]

Bensusan did not allege that King derived substantial revenue from interstate or international commerce.[122] Instead, it alleged that King *participated* in interstate commerce by hiring and showcasing bands of national stature.[123] Section 302 (a)(3)(ii), however, explicitly requires "substantial revenue" from interstate or international commerce.[124] As such, the court rejected Bensusan's assertion because local Columbia residents accounted for ninety-nine percent of King's revenues.[125]

The plaintiff also offered the following argument for personal jurisdiction under 302(a)(3)(ii). An Internet subscriber can access King's Web site from New York, as well as from anywhere else in the world. The defendant should therefore have foreseen that a person in New York could view his site. King should thus have taken precautionary steps to restrict access to his Web site to users within a specified geographic area, presumably Missouri, if he did not want to risk exposure to out-of-state litigation.[126] Under 302(a)(3)(ii), a defendant must make "'a discernible effort . . . to serve, directly or indirectly, a market in the forum state.'"[127] "[M]ere foreseeability of an in-state consequence and a failure to avert that consequence is not

119. *Id.*
120. *See id.*
121. N.Y. C.P.L.R. § 302(a)(3)(ii).
122. *See Bensusan*, 937 F. Supp. at 300.
123. *See id.*
124. N.Y. C.P.L.R. § 302(a)(3)(ii).
125. *See Bensusan*, 937 F. Supp. at 300.
126. *See id.*
127. *Id.* (quoting Darienzo v. Wise Shoe Stores, Inc., 427 N.Y.S.2d 831, 834 (App. Div. 1980)).

sufficient to establish personal jurisdiction."[128] The court, premising its holding on the standard above, found in favor of the defendant.[129]

3. Due process analysis

The court properly recognized that constitutional due process requires "the nonresident defendant [to have] purposefully established 'minimum contact' with the forum state such that the 'maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'"[130] This standard incorporates the following factors:

> (1) whether the defendant purposefully availed himself of the benefits of the forum state; (2) whether the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there; and (3) whether the defendant carries on a continuous and systematic part of its general business within the forum state.[131]

The court focused on the first factor in its analysis and concluded that King did not purposefully avail himself of the benefits of New York because "King, like numerous others, simply created a Web site and permitted anyone who could find it to access it."[132] The court analogized the creation of a Web site to placing a product into the stream of commerce.[133] Although King's creation of the home page allows him to reach Internet users "nationwide . . . without more, it is not an act purposefully directed toward the forum state."[134]

Bensusan did not allege that King encouraged New Yorkers to access the site or that King conducted any business in New York.[135] Moreover, Bensusan did not allege that King had sustained any presence in New York other than the Web site.[136] Therefore, the court suggests that, even if King had satisfied the first prong, purposeful

128. *Id.*
129. *See id.*
130. *Id.* (quoting Darby v. Compagnie Nacionale Air France, 769 F. Supp. 1255, 1262 (S.D.N.Y. 1991) (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))).
131. *Id.* at 300-01 (quoting Independent Nat'l Distribs., Inc. v. Black Rain Communications, Inc., No. 94 Civ. 8464, 1995 WL 571449, at *5-6 (S.D.N.Y. Sept. 28, 1995)).
132. *Id.* at 301.
133. *See id.*
134. *Id.*
135. *See id.*
136. *See id.*

availment, he probably did not satisfy either of the remaining two prongs.[137] King did not maintain a sufficient connection to the forum state to foster reasonable expectations of defending a lawsuit in New York court, and he did not conduct continuous and systematic business in New York.[138]

Finally, the court distinguished this case from *CompuServe, Inc. v. Patterson*,[139] where the Sixth Circuit held personal jurisdiction over defendants proper. In *CompuServe*, an Internet user domiciled in Texas specifically targeted Ohio by subscribing to CompuServe, an Ohio-based Internet service provider, and by entering into a separate agreement with the company to sell his software over the Internet.[140] Furthermore, the user advertised his product over the Internet and repeatedly shipped the software to CompuServe in Ohio.[141] The Sixth Circuit concluded that Patterson had "reached out" from Texas to Ohio and "originated and maintained" contacts with Ohio.[142] However, the court explicitly refrained from addressing the issue of whether the user "would be subject to suit in any state where his software was purchased or used."[143]

In contrast, the *Bensusan* court held that, unlike the user in *CompuServe*, King had not directed any contact toward or shared any contact with New York.[144] As a result, the court granted King's motion to dismiss under Federal Rule of Civil Procedure 12(b)(2).[145]

V. *PANAVISION INTERNATIONAL, L.P. V. TOEPPEN*[146]

On September 19, 1996, ten days after the *Bensusan* decision, a federal court in the Central District of California applied the California long-arm statute to assert personal jurisdiction over an Illinois resident and a District of Columbia corporation.[147]

A. The Facts

Panavision International, L.P., a Delaware limited partnership with its principal place of business in Los Angeles, owns several

137. *See id.*
138. *See id.*
139. 89 F.3d 1257 (6th Cir. 1996).
140. *See id.* at 1264.
141. *See id.* at 1264-65.
142. *See id.* at 1266.
143. *Id.* at 1268 (emphasis omitted).
144. *See Bensusan*, 937 F. Supp. at 301.
145. *See id.*
146. 938 F. Supp. 616 (C.D. Cal. 1996).
147. *See id.* at 618.

federally-registered trademarks, including "Panavision" and "Panaflex," for its motion picture and television camera and photographic equipment business.[148] Panavision filed a suit against Dennis Toeppen, an individual residing in Illinois and operating several Web sites, including the two at issue in the case, "panavision.com" and "panaflex.com."[149] In addition, Panavision also named Network Solutions, Inc. ("NSI"), a District of Columbia corporation maintaining its principal place of business in Herndon, Virginia.[150] Panavision alleged various federal and state causes of action against both defendants in this case.[151]

Anyone who wishes to create a Web site must apply for use of a domain name through NSI, the only entity in the world responsible for accurately registering all Internet URLs.[152] NSI does not separately inquire into an applicant's right to enlist a particular domain name.[153] Since at least November 1995, NSI has required applicants to offer the following representations and warranties,

> (1) that the applicant's statements in the application are true and the applicant has the right to use the requested domain name; (2) that the use or registration of the domain name does not interfere with or infringe the rights of any third party with respect to trademark, service mark, trade name, company name or any other intellectual property right; and (3) that the applicant is not seeking to use the domain name for any unlawful purpose, . . . or for the purpose of confusing or misleading a person, whether natural or incorporated.[154]

Although Toeppen never obtained authorization to use the Panavision trademarks, NSI registered the panavision.com domain name to him.[155] Toeppen's Web site displayed aerial photos of Pana, Illinois. At no time did Toeppen use the site to sell any goods or

148. *See id.*
149. *See id.*
150. *See id.*
151. The claims included: "1) federal dilution of trademark; 2) state dilution of trademark; 3) federal trademark infringement; 4) federal unfair competition; 5) unfair competition; 6) intentional interference with prospective economic advantage; 7) negligent interference with prospective economic advantage; and 8) breach of contract. *Id.* at 619.
152. *See supra* notes 49-50 and accompanying text.
153. *See Panavision*, 938 F. Supp. at 619.
154. *Id.*
155. *See id.*

services over the Internet.[156]

Subsequently, Panavision attempted to establish a Web site under its own name to transact business.[157] Panavision, however, learned it could not register its URL under its trademark after discovering that Toeppen had already established that domain name.[158] When Panavision notified Toeppen of its intent to use panavision.com, Toeppen demanded $13,000 in return for discontinuing use of the Web site address.[159] Toeppen thereafter registered panaflex.com as another domain name.[160]

Panavision also asserted that Toeppen registered additional domain names similar to other trademarked names, such as "aircanada.com," "anaheimstadium.com," "camdenyards.com," "deltaairlines.com," "eddiebauer.com," "neimanmarcus.com," and "northwestairlines.com."[161] At the time of this suit, American Standard, Inc. and Intermatic, Inc. had already instituted trademark infringement actions against Toeppen for registering "americanstandard.com" and "intermatic.com" as Web site addresses and subsequently demanding money for relinquishing control of the names.[162] Panavision claimed that Toeppen registered its trademarks solely to extort money from Panavision.[163]

Toeppen filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2), for lack of personal jurisdiction, arguing that he lived in Illinois and that the allegations concerned his actions in that state.[164]

B. The Analysis

California's long-arm statute permits its courts to assert jurisdiction over a nonresident defendant "on any basis not inconsistent with the Constitution of [California] or of the United States."[165] Therefore, a court must determine only whether personal jurisdiction in this case comports with due process.[166] In conducting its analysis, the

156. *See id.*
157. *See id.*
158. *See id.*
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.*
163. *See id.*
164. *See id.*
165. CAL. CIV. PROC. CODE § 410.10 (West 1991).
166. *See* Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1484 (9th Cir. 1993) (quoting Brainerd v. Governors of the Univ. of Alberta, 873 F.2d 1257,

Panavision court focused primarily on specific jurisdiction,[167] which arises when a defendant's contacts with the forum state, though insufficient to establish general jurisdiction, form the basis of the lawsuit.[168] Specific jurisdiction may apply even if the defendant has never physically entered in the forum state.[169]

The Ninth Circuit has developed a three-part test to determine whether specific jurisdiction exists:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he *purposefully avails* himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws[;] (2) [t]he claim must be one which *arises out of or results from* the defendant's forum-related activities[; and](3) [e]xercise of jurisdiction must be *reasonable*.[170]

1. Purposeful availment

The purposeful availment requirement protects nonresidents from having to appear before a court to defend against actions based on "'random, fortuitous or attenuated' contacts over which [they] have no control."[171] This prong of the test necessitates that "it must

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1258 (9th Cir. 1989)). The California long-arm statute reaches the entire scope of due process as it recognizes jurisdiction over nonresident to the extent permitted under the United States Constitution. In contrast, the New York long-arm statute invoked in *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), discussed *supra* Part III, places greater limitations on courts' ability seeking to assert jurisdiction over nonresidents. All states, except California and Rhode Island, have enacted this type of "tailored" long-arm statute. *See* JACK H. FRIEDENTHAL ET AL., *supra* note 63, § 3.12, at 140.

167. Initially, the court did analyze whether it could assert general jurisdiction over Toeppen. General jurisdiction exists when the defendant resides in the forum state or when the defendant conducts "substantial" or "continuous and systematic" activities there. *Panavision*, 938 F. Supp. at 620 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16 (1984)). Successfully invoking general jurisdiction permits a plaintiff to pursue a cause of action unrelated to the defendant's continuous and systematic activities in the state. *See id.* The court concluded that it lacked general jurisdiction as Toeppen lived in Illinois and did not maintain systematic, continuous, or substantial contact with California—he had only visited the state twice in 1996. *See id.*

168. *See id.*

169. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

170. Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir. 1995) (quoting Data Disc, Inc. v. Systems Tech. Assocs., 557 F.2d 1280, 1287 (9th Cir. 1977)) (alteration in original) (emphasis added).

171. *See Panavision*, 938 F. Supp. at 620 (quoting *Burger King*, 471 U.S. at 475).

be foreseeable that the defendant's conduct and connection with the forum state are such that the defendant should reasonably anticipate being haled into court there."[172] However, the nature of this first threshold will differ depending on whether the underlying cause of action involves contract or tort principles.[173]

The *Panavision* court, after concluding that "tort analysis provid[ed] the proper analytical framework," adopted the "effects test"[174] of *Calder v. Jones*[175] to determine whether Toeppen purposefully availed himself of the privilege of transacting business in California.[176] This test contains three elements: 1) the act must be intentional; 2) the act must be expressly aimed at the forum state; and 3) the act must cause harm, "'the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state.'"[177]

Since Toeppen allegedly registered his domain names with both the knowledge that they belonged to Panavision and the intent to interfere with its business, the court found that Toeppen did aim his conduct at California.[178] Also, Toeppen knew that harm would likely

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172. *Id.*

173. *See id.* For example, in a contract dispute, merely entering into an agreement with a resident of the forum state does not suffice to establish specific jurisdiction. *See id.* at 620-21. With tort actions, specific jurisdiction may be proper under the "effects test." *See id.* at 621; *infra* notes 176-177 and accompanying text.

174. *See id.*

175. 465 U.S. 783 (1984). In *Calder*, the Court found that California could exercise proper jurisdiction over a reporter and an editor, both residing in Florida, for an allegedly defamatory article they had written and published in a national magazine. *See id.* at 784-85. The Court reasoned that "the focal point both of the story and of the harm suffered" occurred in California. *Id.* at 789. The plaintiffs fell victim to "intentional, and allegedly tortious, actions . . . expressly aimed at California," not from untargeted negligence. *Id.* at 789-90. As a result, the Court held that plaintiffs "injured in California need not go to Florida to seek redress from [defendants who] knowingly cause . . . injury in California." *Id.* at 790.

176. *Panavision*, 938 F. Supp. at 621. The court viewed Panavision's allegation that Toeppen interfered with its prospective economic advantage as the underlying claim, rendering Toeppen's action "more akin to a tort claim than a contract claim." *Id.* (quoting Ziegler v. Indian River County, 64 F.3d 470, 474 (9th Cir. 1995)). The court determined that Toeppen had not intended to compete with Panavision. Instead Toeppen had hoped to act as a "spoiler," preventing Panavision and similar corporations from conducting business over the Internet using their own trademarks as their Web site addresses without paying him to discontinue his exploitation of the same for his URLs. *See id.*

177. *See id.* (citing Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1486 (9th Cir. 1993)).

178. *See id.*

occur there because Panavision's principal place of business, as well as the heart of the motion picture and television camera equipment industry rests in California.[179] Consequently, the court concluded that Toeppen could not characterize his actions as random, fortuitous, or attenuated; Toeppen purposefully availed himself of the benefits and protections of California.[180]

The court carefully distinguished its holding from the results in both *Bensusan Restaurant Corp. v. King*[181] and *CompuServe, Inc. v. Patterson.*[182] According to the *Panavision* court, "the issue in those cases was whether contacts with the forum state via the Internet . . . were sufficient to confer specific jurisdiction."[183] While the *Panavision* court admitted that the case before it appeared similar to those cases,[184] the court refused to hold that Toeppen had transacted business in California via the Internet.[185] Whereas the parties in both *Bensusan* and *CompuServe* "had legitimate businesses and legitimate legal disputes," Toeppen had only conducted "a scam directed at California."[186]

2. Arises out of or results from

The *Panavision* court, employing the Ninth Circuit's "but for" analysis established in *Shute v. Carnival Cruise Lines*,[187] quickly disposed of the "arises out of or results from" requirement.[188] Under this standard, "if the plaintiff would not have suffered [a] loss 'but for' the defendant's forum-related activities, courts [will] hold that the claim arises out of the defendant's forum-related activities."[189] In this case, the court determined that "but for" Toeppen's prior registration, Panavision would have created its Web site using its trademark as the domain name, thus avoiding harm.[190]

179. *See id.* at 621-22.
180. *See id.*
181. *See* discussion *infra* Part III.
182. *See infra* notes 139-43 and accompanying text.
183. *Panavision*, 938 F. Supp. at 622.
184. *See id.*
185. *See id.*
186. *Id.*
187. 897 F.2d 377, 385 (9th Cir. 1990).
188. *See id.*
189. *Panavision*, 938 F. Supp. at 622 (citing Ziegler v. Indian River County, 64 F.3d 470, 474 (9th Cir. 1995)).
190. *See id.*

3. Reasonableness

The final prong of the jurisdiction analysis ensures that a court's "exercise of jurisdiction comport[s] with [traditional notions of] 'fair play and substantial justice.'"[191] This determination requires a court to balance the following factors:

> (1) [T]he extent of defendant's "purposeful" interjection; (2) the burden on defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.[192]

The court must weigh each of the seven factors; "no one factor is dispositive"[193] of reasonableness.

The *Panavision* court, however, did not conduct a balancing test. Instead it relied on the holding in *Core-Vent Corp. v. Nobel Industries*[194] and pronounced that, in a tort action, when "a nonresident, acting outside the state, intentionally causes injuries within the state, local jurisdiction is *presumptively not unreasonable.*"[195] The court effectively shifted the burden of proof to the defendant to present a compelling case demonstrating jurisdiction unreasonable under the circumstances.[196]

According to the court in *Panavision*, Toeppen did not establish such a case.[197] The court acknowledged the findings of other Ninth Circuit courts stating that "'[i]n this era of fax machines and discount air travel,' requiring Toeppen to litigate in California is not constitutionally unreasonable."[198] The court concluded, without balancing the seven *Burger King* factors that jurisdiction over Toeppen did not

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191. *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985)).

192. *Id.* (citing *Burger King*, 471 U.S. at 476-77).

193. *Id.*

194. 11 F.3d 1482, 1486 (9th Cir. 1993)

195. *See Panavision*, 938 F. Supp at 622 (citing Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d. 1482, 1487 (1993)).

196. *See Core-Vent*, 11 F.3d at 1487.

197. *See Panavision*, 938 F. Supp. at 622.

198. *Id.* (quoting Sher v. Johnson, 911 F.2d 1357, 1365 (9th Cir. 1990)); *see also* California Software Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1364 (C.D. Cal. 1986) ("Modern means of communication and transportation have tended to diminish the burden of defense of a lawsuit in a distant forum," quoting Insurance Co. of North America v. Cruz, 649 F.2d 1266, 1271 (9th Cir. 1981)).

offend "fair play and substantial justice."[199] Panavision could therefore litigate its claims in California.

VI. ANALYSIS

The Internet's potential to establish electronic contacts nationwide may unintentionally confer jurisdiction over Web site creators upon courts in all fifty states. Permitting courts to assert personal jurisdiction over a nonresident defendant on the basis of these contacts alone will encourage plaintiffs to seek the forum which has enacted the most favorable laws.[200]

A court must examine whether its state's long-arm statute authorizes the exercise of jurisdiction over a nonresident and also whether the defendant's conduct satisfies the "minimum contacts" requirement under the Due Process Clause before determining if jurisdiction properly exists.[201] This second question further subdivides into three parts. First, the defendant must have purposefully availed itself of the privilege of doing business in the state.[202] Second, if asserting specific jurisdiction, the cause of action must arise from the defendant's activities in the forum state.[203] Finally, the court's exercise of personal jurisdiction must comport with "traditional notions of fair play and substantial justice."[204] In assessing reasonableness, the court usually weighs the defendant's burden of litigating in another state, the interest of the forum state in applying its laws, the plaintiff's interest in obtaining relief, and the interest of other states in securing the most efficient resolution.[205]

This traditional test for jurisdiction, however, has lost some of its relevance in a world increasingly reliant on electronic modes of communication. Courts facing these changing circumstances must adapt and contemporize their former analytic approaches to

199. *See Panavision*, 938 F. Supp. at 622.

200. Forum shopping can offend notions of "fair play and substantial justice" producing inequitable administration of the law. The plaintiff's choice of forum may inconvenience the defendant to such a magnitude as to violate federal due process. *See Burger King v. Rudzewicz*, 471 U.S. 462, 478 (1985) ("[J]urisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparision to his opponent.")

201. *See* FRIEDENTHAL ET AL., *supra* note 63, § 3.12, at 141.

202. *See Burger King*, 471 U.S. at 475.

203. *See* International Shoe Corp. v. Washington, 326 U.S. 310, 316 (1945).

204. *Id.*

205. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (O'Connor, J., plurality).

accommodate modern society, much in the same way the *International Shoe* court confronted the evolving commercial realities of postwar America.

One possible solution involves modifying the *Calder v. Jones*[206] effects test to include not only intentional torts but also non-intentional acts which the defendant should have known would cause an effect in the forum state. Expanding the scope of the effects test beyond merely intentional torts will not only protect the rights of plaintiffs but also discourage forum shopping as well. The updated effects test would allow increasing numbers of plaintiffs, not only those asserting tort claims, to file suit in their home states without appreciably circumscribing the rights of defendants. This modified approach eliminates the role of fortune inherent in the analysis of the *Panavision* court and represents an improvement over the reasoning in both earlier cases.

A. Purposeful Availment Under the Modified Effects Test

The threshold question asks whether a user "contacts" the home page in the creator's state or whether the home page makes "contact" with the user in the user's state. In *Bensusan*, the court inappropriately inferred that the user contacts the home page when it concluded that King did not purposefully avail himself of the benefits of conducting business in New York.[207]

The *Bensusan* court suggested that because a New York resident needed to "take[] several affirmative steps" to access the defendant's Missouri home page, King did not satisfy the purposeful availment prong of New York.[208] The court heavily emphasized that King earned ninety-nine percent of his revenue in Missouri in reaching its decision.[209] The absence of actual sales to New York residents influenced the court to conclude that King did not purposefully avail himself of the benefits and protections of the laws of New York.[210]

Several shortcomings plague the court's reasoning. Since a link can connect a user to any number of other hypertext documents—whose locations the user does not know—requiring users to learn their exact location on the Internet at any given time constitutes an

206. 465 U.S. 783 (1984).
207. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 298-99 (S.D.N.Y. 1996).
208. *See id.* at 299.
209. *See id.* at 300.
210. *See id.* at 301.

unfair burden.

For example, a Californian may visit a jazz home page created in Chicago containing links to biographies on different musicians. The user could click on a link to a biography, created in New Orleans, of a specific artist listing future show dates, including one at "The Blue Note" in Missouri. The user then selects that performance and arrives at the home page operated by the defendant in *Bensusan*. Assuming this user joins the one percent of non-Missouri residents who purchase tickets, a California court employing the *Bensusan* court's reasoning would not take jurisdiction over King because he did not purposefully avail himself of the forum state. If the purchaser resorts to litigation to resolve a dispute with King over the tickets, the purchaser must do so in Missouri.

In contrast, the *Panavision* court found purposeful availment where the defendant maintained only electronic contacts with the forum state.[211] Characterizing the defendant's actions as tortious in nature, the court implemented the traditional "effects test" of *Calder v. Jones*,[212] to determine purposeful availment.[213]

The assertion of personal jurisdiction should not hinge on the ability of plaintiffs to allege a tort claim. Although the Supreme Court restricted the holding of *Calder v. Jones* to intentional torts,[214] a trademark infringement action should qualify as well because the underlying activities could substantially impact the forum state, either through confusion, interference with prospective business, or the mere fact that "[t]he registration of . . . trademarks as domain names is valuable . . . because it allows Internet users who are familiar with the trademarks to easily search the Internet."[215] Potential defendants whose acts create these possible "effects" can in many cases foresee the harmful effects of their acts in a distant forum.

Revisiting the *Bensusan* facts, King knew that using "Blue Note" and a logo susbstantially similar to Bensusan's as his Web site address could potentially confuse Web browsers. Recognizing this, King placed a disclaimer, "The Blue Note's Cyberspot should not be

211. *See* Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 620-22 (C.D. Cal. 1996).

212. 465 U.S. 783 (1984).

213. *See Panavision*, 938 F. Supp. at 621. In addition, a plaintiff who successfully invokes this line of analysis avoids the issue of whether the defendant "plac[ed] a product into the stream of commerce," as discussed in Justice O'Connor's plurality opinion in *Asahi*. *See Asahi*, 480 U.S. at 110.

214. *See Calder*, 465 U.S. at 789-91.

215. *See Panavision*, 938 F. Supp. at 621.

confused with one of the world's finest jazz club[s] [the] Blue Note, located in the heart of New York's Greenwich Village,"[216] at the foot of his home page. In addition, King created a hyperlink to the New York Blue Note Web site, in an attempt to diminish any confusion about the relationship between the two Web sites.[217]

An application of a modified effects test would have likely permitted the *Bensusan* court to assert personal jurisdiction over King, even in the absence of traditional contacts with New York, due to the foreseeable nature of the possible effects resulting from the defendant's act of creating the home page. By including the disclaimer, the defendant clearly contemplated that users could confuse the Missouri site with the New York site, potentially harming the plaintiff.

B. Reasonableness[218]

The final obstacle to the assertion of personal jurisdiction, reasonableness, consists of primarily four relevant factors.[219] The court must balance each of these factors to ensure that the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice."[220] Neither the *Bensusan* nor *Panavision* court conducted a fairness analysis on the record.

1. Burden on the defendant

Even under the proposed modified effects test applicable in nonintentional tort settings, a court would require evidence suggesting that defendants could have foreseen the harmful effects of their acts to counter the impact of the potential burden on the defendant of litigating in a distant forum. A demonstration of foreseeability ensures that "the defendant's *conduct and connection* with the forum state are such that he should reasonably anticipate being haled into court there."[221] An earlier satisfaction of the purposeful availment prong, which already takes the defendant's burden into account,

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216. *Bensusan*, 937 F. Supp. 295, 297-98 (S.D.N.Y. 1996) (alterations in original).

217. *See id.* at 298.

218. I will only discuss the first and third prongs of the minimum contacts analysis because courts generally do not have difficulty applying the second prong, which analyzes the relationship of the cause of action to the defendant's contacts.

219. *See* FRIEDENTHAL ET AL., *supra* note 63, § 3.10, at 125-27.

220. *Id.* at 125.

221. *See Bensusan*, 937 F. Supp. at 300-01 (quoting Independent Nat'l Distrib., Inc. v. Black Rain Communications, Inc., No. 94 Civ. 8464, 1995 WL 571449, at *5-6 (S.D.N.Y. Sept. 28, 1995)) (emphasis added).

diminishes the weight of this factor.

2. Interest of the forum state

Courts have recognized the interest of the forum state in adjudicating a dispute between a state resident and a company doing business in the state as another compelling factor in the reasonableness analysis.[222] The forum state also maintains an interest in regulating business activities involved in the suit and providing a convenient forum for its residents.[223] This factor plays a significant role when a nonresident defendant creates harmful effects in the forum state.[224]

3. Interest of the plaintiff

Before reaching the reasonableness analysis, a court has already determined that the defendant has sufficient contacts with the forum. The plaintiff, because it has chosen to file suit, maintains a strong interest in adjudicating this claim. By selecting their own state of residency, plaintiffs reinforce the state's interest in adjudicating the claim and protecting the rights of its citizens, undermining a defendant's argument toward unreasonableness.

Courts must examine a nonresident plaintiff's motives, however, with a more skeptical eye to ensure that the plaintiff has not engaged in forum shopping. If a plaintiff will undertake the burden, however great or insignificant, of filing in a foreign state, the burden on the defendant to litigate there increases proportionally because a defendant may not reasonably expect to defend claims in a forum where the plaintiff does not reside, especially if defendant did not foresee the effects of the act in this forum.[225] This interest would weigh more favorably to the defendant if, for example, Panavision chose to file in Texas, rather than California. Although Toeppen could have foreseen the effects in California, he could not reasonably expect to be haled into the Texas courts. Moreover, if the plaintiff pursues litigation

222. *See* FRIEDENTHAL ET AL., *supra* note 63, § 3.10, at 126.

223. *See id.*

224. Although the federal venue statute, 28 U.S.C. § 1391, restricts the ability of plaintiffs to choose an unrelated, unconnected forum, proper venue may still exist in the judicial district "in which a substantial part of the events or omissions giving rise to the claim occurred . . . ." 28 U.S.C. § 1391(b) (1994).

The issue that then presents itself concerns the determination of whether the claim arose in all 50 states simultaneously when the user posted the document, and the definition of "substantial." This Comment will not address this question because it focuses on personal jurisdiction, not venue.

225. Obviously, this would not be true if the plaintiff selects the defendant's home state.

out-of-state, the defendant's state may arguably represent the most equitable forum. The interest of the defendant's home state in securing an efficient resolution of the dispute likely outweighs the interest of any other state, except perhaps the plaintiff's state of residency, in resolving the controversy.

4. The interest of other states in securing the most efficient resolution of the controversies

Essentially, the parties' states of residence hold the greatest interests in resolving the dispute.[226] Any other state in which the plaintiff could file would likely prove too removed from the litigation to render jurisdiction improper on fairness alone. Any state, other than the parties' states of residency, will likely have a substantial interest in refusing to hear the case because the lawsuit bears little relation to that state. The courts in these other states should preserve their limited time and judicial resources.

VII. CONCLUSION

Electronic communication, the Internet (and its World Wide Web service), and cyberspace in general present novel issues in the area of personal jurisdiction. In the next few years, courts will define the parameters of basing personal jurisdiction only on electronic contacts. Recent decisions at the trial court level suggest that one coherent approach will not likely win widespread approval until the appellate courts render opinions.

Nonetheless, the approach of the court in *Bensusan Restaurant Corp. v. King* unnecessarily restricts the possible forums available to plaintiffs to file suit for claims involving electronic contacts. While the *Panavision* analysis grants wider latitude in forum selection, it restricts this privilege to a particular class of cases.

An expansion of the effects test to include non-intentional acts which have foreseeable effects in the forum state best solves this problem. This model permits courts to confront the issue of electronic contacts without a massive overhaul of the existing jurisdictional framework. In a majority of cases, adapting the effects test in this manner will in practice grant plaintiffs the choice between in-state courts or those in the defendant's home state. In most instances, the modified test will preclude all other forums as unreasonableness. Easing the personal jurisdiction hurdles for plaintiffs filing

226. *See supra* Part VI.B.2.

Internet-related lawsuits should not open the door to arbitrary forum shopping in efforts to obtain a favorable result. Applying the effects test to non-intentional tort, Internet-related lawsuits will achieve all of these goals.

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