

PERSONAL JURISDICTION AND THE WEB

*Joseph S. Burns**

*Richard A. Bales***

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PERSONAL JURISDICTION AND THE WEB

I. INTRODUCTION

Mr. Jones owns a small nursery business in central Ohio named "Scenix Garden Center," where he sells shrubbery, flowers, and other landscape supplies.¹ To more efficiently serve his customers, the majority of whom are Ohio residents, Mr. Jones creates a World Wide Web (Web) site on the Internet, which allows his regular customers to place orders directly through the site. He does not, however, deliver or ship his products so the vast majority of his customers are local, rather than out-of-state, residents and businesses.

A year after first devising the Web site, Mr. Jones discovers that he is being sued in both Missouri and New York by two other nursery operations, both of which are coincidentally named "Scenix Garden Center." Mr. Jones has never intentionally solicited customers from Missouri or New York.

The simple act of operating a Web site, which is accessible from any area in the world, however, may suffice to render Mr. Jones amenable to suit in Missouri or New York. From a practical perspective, this result appears unfair because Mr. Jones did not purposely direct his Web site at Missouri or New York, nor did he have control over who accessed his communications. From a legal perspective, it is unclear under what circumstances Web activity will render a person amenable to suit in a particular forum state.

Courts have struggled in determining precisely when a defendant should be subject to suit in a particular forum based on his or her Web activity. Although most jurisdictions have applied some form of the "minimum contacts" test, the test has been applied inconsistently.² A new standard is needed to resolve personal jurisdiction disputes arising out of Web activity.

This Article examines the ways in which modern courts have attempted to resolve personal jurisdiction issues based on Web activity, as well as the inconsis-

* Second year law student and staff member of the Northern Kentucky Law Review at Northern Kentucky University, Salmon P. Chase College of Law. Mr. Burns obtained his B.A. in English, Summa Cum Laude, from Northern Kentucky University, and will receive his J.D. in May 2002.

** Assistant Professor Law, Northern Kentucky University, Salmon P. Chase College of Law. Special thanks to Ed Brewer.

1. This hypothetical, with some modification, is from Gwenn M. Kalow, *From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 65 FORDHAM L. REV. 2241 (1997); for similar hypotheticals, see Tammy Trout-MacIntyre, *Personal Jurisdiction and the Internet: Does the Shoe Fit?* 21 HAMLINE L. REV. 223 (1997), RAYMOND A. KURZ, *INTERNET AND THE LAW: LEGAL FUNDAMENTALS FOR THE INTERNET USER*, xiii-xiv (1996), and Henry H. Perritt, *Jurisdiction in Cyberspace*, 41 VILL. L. REV. (1996).

2. The "minimum contacts" test, a standard used to evaluate what type of contacts are sufficient to allow a court to exercise personal jurisdiction, was first employed in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This test was further refined in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

tencies that have resulted from the inherent difficulty in conceptualizing the Web.³ Part II briefly describes various background and historical information regarding the Internet and the Web. Part III focuses on the Supreme Court decisions that have defined the reaches of personal jurisdiction in general.

Part IV describes the two primary approaches courts have taken in attempting to resolve personal jurisdiction issues arising from Web contacts. Under the "spider web" approach, the operator of a Web site is deemed to be jurisdictionally "present" at every location from which her site is accessed.⁴ This results in the Web site operator being subject to personal jurisdiction in all fifty states, even if

3. See, e.g., Steven Betensky, *Jurisdiction and the Internet*, 19 PACE L. REV. 1 (1998); J. Christopher Gooch, *The Internet, Personal Jurisdiction, and the Federal Long-Arm Statute: Rethinking the Concept of Jurisdiction*, 15 ARIZ. J. INT'L & COMP. L. 635 (1998); Robert M. Harkins, Jr., *The Legal World Wide Web: Electronic Personal Jurisdiction in Commercial Litigation, or How to Expose Yourself to Liability Anywhere in the World with the Press of a Button*, 25 PEPP. L. REV. 451 (1997); Gwenn M. Kalow, *From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 65 FORDHAM L. REV. 2241 (1997); Mark S. Kende, *Lost in Cyberspace: The Judiciary's Distracted Application of Free Speech and Personal Jurisdiction Doctrines to the Internet*, 77 OR. L. REV. 1125 (1998); Donnie L. Kidd, Jr., *Casting the Net: Another Confusing Analysis of Personal Jurisdiction and Internet Contacts in Telco Communications v. An Apple A Day*, 32 U. RICH. L. REV. 505 (1998); Christian M. Rieder & Stacy P. Pappas, *Personal Jurisdiction for Copyright Infringement on the Internet*, 38 SANTA CLARA L. REV. 367 (1998); Richard Philip Rollo, *The Morass of Internet Personal Jurisdiction: It is Time for a Paradigm Shift*, 51 FLA. L. REV. 667 (1999); David Wille, *Personal Jurisdiction and the Internet-Proposed Limits on State Jurisdiction Over Data Communications in Tort Cases*, 87 KY. L.J. 95 (1999); Corey B. Ackerman, Note, *World-Wide Volkswagen, Meet the World Wide Web: An Examination of Personal Jurisdiction Applied to a New World*, 71 ST. JOHN'S L. REV. 403 (1997); Michael E. Allen, Note, *Analyzing Minimum Contacts Through the Internet: Should the World Wide Web Mean World Wide Jurisdiction?*, 31 IND. L. REV. 385 (1998); Sean M. Flower, Note, *Maritz, Inc., v. CyberGold, Inc.: When Does Internet Activity Establish the Minimum Contact Necessary to Confer Personal Jurisdiction?*, 62 MO. L. REV. 845 (1997); James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095 (1999); Todd D. Leitstein, Comment, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565 (1999); John A. Lowther, IV, Comment, *Personal Jurisdiction and the Internet Quagmire: Amputating Judicially Created Long-Arms*, 35 SAN DIEGO L. REV. 619 (1998); Christine E. Mayewski, Note, *The Presence of a Web Site as a Constitutionally Permissible Basis for Personal Jurisdiction*, 73 IND. L.J. 297 (1997); Darren L. McCarty, Note, *Internet Contacts and Forum Notice: A Formula for Personal Jurisdiction*, 39 WM. & MARY L. REV. 557 (1998); Christopher W. Meyer, Note, *World Wide Web Advertising: Personal Jurisdiction Around the Whole Wide World?*, 54 WASH. & LEE L. REV. 1269 (1997); Matthew Oetker, Note, *Personal Jurisdiction and the Internet*, 47 DRAKE L. REV. 613 (1999); Shane A. Orians, Note, *Exercising Personal Jurisdiction on the Internet: The Misapplication of the Asahi Metal Decision to "Cyberspace,"* 24 OHIO N.U. L. REV. 843 (1998); Sam Puathasnanon, Comment, *Cyberspace and Personal Jurisdiction: The Problem of Using Internet Contacts to Establish Minimum Contacts*, 31 LOY. L.A. L. REV. 691 (1998); Michael L. Russell, Note, *Back to the Basics: Resisting Novel and Extreme Approaches to the Law of Personal Jurisdiction and the Internet*, 30 U. MEM. L. REV. 157 (1999); Motty Shulman, Note, <http://www.personal-jurisdiction.com>, 23 NOVA L. REV. 781 (1999); Leif Swedlow, Note, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337 (1997); Tammy S. Trout-McIntyre, Comment, *Personal Jurisdiction and the Internet: Does the Shoe Fit?*, 21 HAMLINE L. REV. 223 (1997); Lori Irish Bauman, *Personal Jurisdiction and Internet Advertising*, COMPUTER LAW, Jan. 1997, at 1; Beth Boland, *The Internet and Personal Jurisdiction Under the Constitution: In What State, Exactly, Is the Internet Located*, BOSTON B.J., Jan.-Feb. 2000, at 16; Eric Schneiderman & Ronald Kornreich, *Personal Jurisdiction and Internet Commerce*, N.Y.L.J., June 4, 1997, at 1.

4. See Boland, *supra* note 3, at 16; Rollo, *supra* note 3; Swedlow, *supra* note 3.

her business is local and her products never leave her home state. Under the "highway" approach, the operator of a Web site is jurisdictionally present in a foreign state only if the operator has somehow "reached out" to a person or entity in the foreign state, such as by soliciting information from or selling a product over the Web to a person or entity in the foreign state.⁵

In Part V, we take the highway approach a step further by creating a hierarchy of contacts to govern whether, and under what circumstances, the contacts between a Web site operator and a person or entity in a foreign state suffice to create personal jurisdiction over the Web site operator in that foreign state. We argue that "passive browsing only" Web sites that are not interactive and that do not sell products or information should not suffice to create personal jurisdiction in a foreign state from which the site is accessed. When products or information are purchased over the Web site, however, that is much stronger evidence that the Web site operator has reached out to the foreign state, and should create a rebuttable presumption of personal jurisdiction. Certain financial transactions, such as securities purchases, necessarily involve a high degree of reaching out to the foreign state, and therefore should always create personal jurisdiction. We believe that this three-level hierarchy of Web contacts provides courts with a consistent framework with which to analyze the cases.

II. INTERNET BACKGROUND

The Internet is neither physical nor tangible; it is a "giant network which interconnects innumerable smaller groups of linked computer networks."⁶ As the Internet has no centralized point of control, no entity or group of entities can control or limit the ability of others to access its content.⁷

Two common methods typically are used to access the Internet. First, one can use a computer terminal that is permanently connected to a network "that is itself directly or indirectly connected to the Internet."⁸ Second, a personal computer equipped with a modem can be used to connect via a telephone line to a computer network that is itself connected to the Internet.⁹

Individuals can communicate over the Internet in six ways: "(1) one-to-one messaging (such as 'e-mail'), (2) one-to-many messaging (such as 'listserv'), (3) distributed message databases (such as 'USENET' newsgroups), (4) real time communication (such as 'Internet Relay Chat'); (5) real time remote computer utilization (such as 'telnet'), and (6) remote information retrieval (such as '...the World Wide Web')." ¹⁰

The Web, which will be the primary focus of the jurisdictional issues that follow, contains documents that are stored on servers around the world.¹¹ To access the content available on the Web, one must have a Web browser, which displays documents formatted in the standard Web formatting language, hypertext

5. See Boland, *supra* note 3; Rollo, *supra* note 3; Swedlow, *supra* note 3.

6. See *ACLU v. Reno*, 929 F. Supp. 824, 830-31 (E.D. Pa. 1996).

7. See *Shea v. Reno*, 930 F. Supp. 916, 926 (S.D.N.Y. 1996).

8. *ACLU v. Reno*, 929 F. Supp. at 832.

9. See *id.*

10. *Id.* at 834.

11. See *Shea v. Reno*, 930 F. Supp. at 929.

markup language (HTML).¹² Also, most documents contain "hyperlinks," which allow a user to immediately locate and view related information even though such information may be stored on other computers around the world.¹³ Furthermore, since all Web servers are linked to the Internet through a common communications protocol (HTTP), individuals can move immediately from document to document regardless of the document's location.¹⁴

The Internet has become one of the fastest growing means of communication within the past several years. Fewer than 300 computers were linked to the Internet in 1981.¹⁵ In 1993, there were over 1,000,000 computers linked to the Internet, and by 1996 that number was estimated to have been 9,400,000.¹⁶ In 1999, it was estimated that there were 92.2 million Internet users in the United States and Canada over the age of sixteen.¹⁷ In 2000, the figure for the worldwide Internet population was estimated to be 349 million users, and is expected to increase to 490 million by 2002.¹⁸

Considering the extraordinary explosion in the number of Web users during the past several years, as well as the seemingly boundless nature of the Web, it is not surprising that the Web has become a frequent source of litigation. Although lawsuits arising from copyright infringement, trademark infringement, advertising scams, and contract disputes have been prevalent in Web litigation, courts have yet to consistently unravel the ambiguities arising from personal jurisdiction predicated on Web contacts.

III. PERSONAL JURISDICTION BACKGROUND

Personal jurisdiction concerns the power of a court over a defendant.¹⁹ Personal jurisdiction is a constitutional requirement, emanating from the Fourteenth Amendment, that limits the states' powers over nonresident defendants.²⁰ The Supreme Court cases which follow examine the evolution of personal jurisdiction in order to provide an understanding of the standards that modern courts have applied to personal jurisdiction issues predicated on Web activity.

12. *See id.*

13. *See* ACLU v. Reno, 929 F. Supp. at 836.

14. *Shea v. Reno*, 930 F. Supp. at 928.

15. *See* ACLU v. Reno, 929 F. Supp. at 831.

16. *See id.*

17. *See* Survey from CommerceNet, <http://www.commerce.net>.

18. *See id.*

19. *See* *Pennoy v. Neff*, 95 U.S. 714 (1877); BLACK'S LAW DICTIONARY 857 (7th ed. 1999) ("Personal jurisdiction. A court's power to bring a person into its adjudicative process; jurisdiction over a defendant's rights, rather than merely over a defendant's property interests."); Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 387 (1998) ("Personal jurisdiction is a court's power to make a binding adjudication of a person's rights and obligations.").

20. *See* U.S. Const. amend. XIV, § 1 (the Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty or property, without the due process of law"); *Pennoy v. Neff*, 95 U.S. 714 (1877). *See generally*, Philip Kurtland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts from Pennoy to Denckla: A Review*, 25 U. CHI. L. REV. 569, 570-73 (1958); Sheehan, *supra* note 19, at 391; Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 (1995).

A. Early Years: Physical Presence Required

In *Pennoyer v. Neff*,²¹ the Supreme Court held that for a court to adjudicate a personal claim against an individual, that individual must either (1) be physically present in the forum, or (2) appear voluntarily.²² *Pennoyer* allegedly held title to a certain tract of land in Oregon, but he resided in another state.²³ The plaintiff brought an action in Oregon against *Pennoyer* to recover possession of the land.²⁴ However, because *Pennoyer* did not physically reside in Oregon or voluntarily consent to jurisdiction, the Court refused to affirm the Oregon court's assertion of jurisdiction.²⁵

B. Minimum Contacts

In 1945, the Court's decision in *International Shoe Co. v. Washington*²⁶ established the contemporary framework for personal jurisdiction. The defendant, International Shoe Company, was a Delaware corporation with its principal place of business in St. Louis, Missouri.²⁷ International Shoe had no office in the state of Washington and made no contracts for the sale or purchase of merchandise there.²⁸ However, from 1937 to 1940 International Shoe employed eleven to thirteen salesmen who were under the direct control of sales managers from St. Louis.²⁹ These salesmen lived in Washington, sold shoes exclusively in that state, and earned commissions based upon their sales there.³⁰

The dispute arose when the state of Washington, pursuant to a state act that required employers to make contributions to an unemployment compensation fund, sought to recover unpaid contributions from International Shoe.³¹ International Shoe argued that it was "not a corporation of the state of Washington and was not doing business within the state."³² In response, Washington argued, and the Supreme Court ultimately agreed, that International Shoe had voluntarily consented to jurisdiction in the state through its activities, which included the operation of temporary offices in the state as well as sales to Washington residents.³³ The Supreme Court, in affirming Washington State's assertion of personal jurisdiction over International Shoe, created the "minimum contacts" test, which permits personal jurisdiction over a non-resident defendant, as long as the defendant has had certain minimum contacts with the forum such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice."³⁴

In essence, the "minimum contacts" test involved consideration of two concepts: (1) the nature of the contacts, and (2) the link between the contacts and the

21. 95 U.S. 714 (1877).

22. *See id.* at 729-30.

23. *See id.*

24. *See id.*

25. *See id.* at 736.

26. 326 U.S. 310 (1945).

27. *See id.* at 313.

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.* at 312.

32. *Id.*

33. *See id.* at 320.

34. *Id.* at 316.

suit.³⁵ To comport with due process, the Court held that if contacts are not continuous, which would itself subject a corporation to personal jurisdiction absent a presence in the state, the state may still have jurisdiction if the claim arises from an isolated contact.³⁶

C. General Jurisdiction

In *Helicopteros Nacionales de Colombia v. Hall*,³⁷ the plaintiff instituted a wrongful death action in the state of Texas against a Colombian corporation and others.³⁸ Although the defendant engaged in certain business activities in Texas, there was, the Court found, no relation between the accident and those activities.³⁹ However, the Supreme Court noted that due process is not offended by a state's exercise of personal jurisdiction over a defendant, even if the suit does not arise out of and is unrelated to the defendant's contacts with the forum state, so long as there are sufficient contacts of a "continuous and systematic" nature by the defendant with the state.⁴⁰ The Court labeled this type of personal jurisdiction "general jurisdiction."⁴¹

The defendant's contacts with Texas "consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston Bank; ... and sending personnel to Fort Worth for training."⁴² However, the Court refused to affirm the exercise of personal jurisdiction holding that the defendant's contacts with Texas were insufficient to support a finding of general jurisdiction.⁴³

D. Stream of Commerce

In *World-Wide Volkswagen Corp. v. Woodson*,⁴⁴ the Court shifted the focus of personal jurisdiction analysis from restrictions on a state's territorial sovereignty to the defendant's desire to predict where it might be sued.⁴⁵ The Court also, for the first time, approved a "stream of commerce" basis for jurisdiction over those in the chain of product distribution if they could reasonably foresee events that might cause harm within the forum.⁴⁶

A car purchased by plaintiffs in New York caught fire in Oklahoma.⁴⁷ Plaintiffs brought suit in Oklahoma against the car's regional distributor (which did business in New York, New Jersey, and Connecticut) and retailer (which did busi-

35. See *id.* at 317.

36. *Id.* at 318-19.

37. 466 U.S. 408 (1984).

38. See *id.* at 412.

39. See *id.* at 418.

40. See *id.* at 416 (distinguishing *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952)).

41. *Id.* at 414 n.9.

42. *Id.* at 416.

43. *Id.* at 418.

44. 444 U.S. 286 (1980).

45. See Sheehan, *supra* note 19, at 399-400.

46. Weintraub, *supra* note 16, at 536; see also Phillip F. Cramer, *Constructing Alternative Avenues of Jurisdictional Protection: Bypassing Burnham's Roadblock via § 1404(A)*, 53 VAND. L. REV. 311, 328 (2000).

47. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 288.

ness in New York).⁴⁸ The Supreme Court overruled the Oklahoma Court's assertion of jurisdiction.⁴⁹ Because the car had reached Oklahoma through the "unilateral activity" of the plaintiffs who had driven it there, the Court held that it was unreasonable for the defendants to anticipate being haled into an Oklahoma court, and therefore jurisdiction was improper.⁵⁰

The Court distinguished the facts of *World-Wide Volkswagen* from the situation in which a product is sold in the forum state as the result of "efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product" in that state.⁵¹ Under such circumstances, jurisdiction would be proper because the manufacturer or distributor could reasonably foresee being sued there.⁵² Though dicta, this was the Court's first recognition of the stream of commerce basis for personal jurisdiction. Unfortunately, the Court did not explain what types of "efforts" in a forum state would suffice to render a manufacturer or distributor amenable to suit in that state.⁵³

E. Purposeful Availment

In 1985, the Court decided *Burger King v. Rudzewicz*.⁵⁴ The defendant, Rudzewicz, a Michigan resident, applied to Burger King's Michigan district office for a franchise in the Detroit area.⁵⁵ When disagreements arose regarding certain terms of the contract, Rudzewicz negotiated with Burger King's headquarters in Miami, Florida.⁵⁶ After securing a long-term franchise agreement, Rudzewicz breached the contract, and Burger King brought suit in Florida.⁵⁷ Rudzewicz argued that he was a Michigan resident who had negotiated exclusively with the Michigan office for the franchise agreement.⁵⁸ In response, Burger King claimed that Rudzewicz breached the franchise agreement within the jurisdiction of Florida by failing to make payments to its headquarters.⁵⁹

In reaching its decision, the Court enunciated a two-part test. First, the Court examined what it termed "purposeful availment," which essentially analyzed whether the defendant, based on his contacts with a particular forum, should have foreseen that a potential dispute would render him amenable to that state's jurisdiction.⁶⁰ Second, the Court examined the reasonableness of subjecting the defendant to suit in another forum.⁶¹ Under this part of the test, the Court considered the following factors: (1) "the burden on the defendant [of defending in a foreign state]"; (2) "the forum state's interest in adjudicating the dispute"; (3) "the plaintiff's

48. See *id.* at 288 & n.3. Plaintiffs also sued the manufacturer and importer of the car, but these defendants did not appeal jurisdiction to the Supreme Court. See *id.*

49. See *id.* at 299.

50. *Id.* at 297-99.

51. *Id.* at 297.

52. See *id.* at 297-98 (citing *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961)).

53. See Sheehan, *supra* note 19, at 404-05.

54. 471 U.S. 462 (1985).

55. See *id.* at 466.

56. See *id.* at 467.

57. See *id.* at 468.

58. See *id.* at 469.

59. See *id.* at 468.

60. *Id.* at 474.

61. See *id.* at 476.

interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversy"; and (5) "the shared interest of the ... states in furthering fundamental substantive social policies."⁶²

Applying the new test to the facts, the Court noted several facts that justified the exercise of personal jurisdiction over the defendant: (1) Rudzewicz had "reached out" of Michigan to negotiate with Burger King's Florida headquarters; (2) all franchise agreements were approved and enforced in Florida; and (3) the particular contract at issue specified that it was governed by Florida laws.⁶³ The Court also concluded that, aside from the fact that Rudzewicz should have anticipated litigation in Florida, it was reasonable for him to defend the suit in Florida.⁶⁴

F. Stream of Commerce—An Inconclusive Reprise

In *Asahi Metal Industry Co. v. Superior Court*,⁶⁵ the plaintiff, who had been involved in a motorcycle accident, filed a products liability action in California against Cheng Shin Company, a Taiwanese manufacturer of tires.⁶⁶ Cheng Shin in turn filed a cross complaint seeking indemnification from Asahi Metal Industry Company, the Japanese manufacturer of the tire's valve assembly.⁶⁷ After the plaintiff settled his claim against Cheng Shin, only the indemnification claim between Cheng Shin and Asahi remained.⁶⁸ Because Cheng Shin had named other California defendants in its cross complaint, as a matter of efficiency it chose to sue Asahi in California.⁶⁹

Although Asahi's sales to Cheng Shin took place in Taiwan, there was little dispute that Asahi's products eventually made their way to the United States.⁷⁰ Nonetheless, applying the second part of the *Burger King* test, eight Justices agreed that California's exercise of jurisdiction in this case was unreasonable.⁷¹ The burden on Asahi was heavy because it was forced to litigate the case in a foreign country; California's interest in the case was light because its citizen had settled; and Cheng Shin had not shown why it would be more convenient to litigate the case in California rather than Taiwan or Japan.⁷²

As to the first part of the *Burger King* test, however, the Court was unable to reach a consensus.⁷³ Justice O'Connor in an opinion that commanded four votes,⁷⁴ argued that the placement of a product into the stream of commerce, without more, was not an act of the defendant purposely directed toward the forum state and, as

62. *Id.* at 477.

63. *See id.* at 479-81.

64. *See id.* at 486.

65. 480 U.S. 102 (1987).

66. *See id.* at 106.

67. *See id.* at 105.

68. *See id.*

69. *See Asahi Metal Indus. Co. v. Superior Court*, 702 P.2d 543, 553 (Cal. 1985).

70. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. at 107.

71. *See id.* at 112.

72. *See id.* at 114.

73. *See id.*

74. *See id.* at 108. Justice O'Connor delivered the opinion of the Court, and Chief Justice Rehnquist, Justice Powell, and Justice Scalia joined this portion of the Court's opinion.

such, did not satisfy the requirements for personal jurisdiction.⁷⁵ For O'Connor, "additional conduct" proving that the defendant had "an intent or purpose to serve the market in the forum state" was needed, such as designing the product for the market in the state or advertising in the state.⁷⁶

Contrarily, Justice Brennan's opinion, which also commanded four votes, presented a quite different interpretation of the stream of commerce theory.⁷⁷ The stream of commerce, according to Justice Brennan, "refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distribution to retail sale."⁷⁸ From Justice Brennan's perspective, regardless of whether the defendant engages in additional conduct directed toward the forum state, as long as the defendant's products make their way into that forum state, "the possibility of a lawsuit there cannot come as a surprise."⁷⁹

Justice Stevens, the ninth vote, wrote a third opinion.⁸⁰ He was joined in this opinion by Justices White and Blackmun, both of whom also joined Justice Brennan's opinion on the stream of commerce issue.⁸¹ Stevens did not articulate a clear rule on the stream of commerce issue, and instead appeared to advocate a case-by-case approach based on the "volume, the value, and the hazardous character" of the products making their way into the forum state.⁸² As a result, *Asahi* left unresolved the issue of whether placing a product in the stream of commerce, without more, suffices to give a state to which the product eventually arrives the power to exercise personal jurisdiction.

Normally, courts can apply the "purposeful availment" standard, weigh the facts, and then determine whether personal jurisdiction complies with "fair play and substantial justice." In cases involving the flow of products into the stream of commerce, some courts follow Justice O'Connor's opinion in *Asahi* which provides that "something more," such as advertising in the forum, is required before a court can exercise personal jurisdiction.⁸³ Other courts follow Justice Brennan's opinion, finding the flow of products into the stream of commerce to be sufficient.⁸⁴ Still other courts have managed to avoid the issue entirely.⁸⁵

However, as the following cases and discussion indicate, the previous standards have proved unhelpful in providing courts with a standard by which to ren-

75. *See id.* at 112-13.

76. *Id.* at 112.

77. *See id.* at 116. Justice White, Justice Marshall, and Justice Blackmun joined Justice Brennan's opinion.

78. *Id.* at 117.

79. *Id.*

80. *See id.* at 121.

81. *See id.*

82. *Id.* at 122.

83. *See, e.g.,* Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 683 (1st Cir. 1992); Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 375 (8th Cir. 1990).

84. *See, e.g.,* Ruston Gas Turbines, Inc. v. Donaldson Co., Inc., 9 F.3d 415, 419-21 (5th Cir. 1993); Irving v. Owens-Corning Fiberglass Corp., 864 F.2d 383, 386 (5th Cir. 1989), *cert. denied*, 493 U.S. 823; DeMoss v. City Market, Inc., 762 F. Supp. 913, 918 (D. Utah 1991); Abuan v. General Elec. Co., 735 F. Supp. 1479, 1486 (D. Guam 1990); Curtis Management Group v. Academy of Motion Pictures Arts and Sciences, 717 F. Supp. 1362, 1369 (S.D. Ind. 1989); Wessinger v. Vetter Corp., 685 F. Supp. 769, 777 (D. Kan. 1987); Hall v. Zambelli, 669 F. Supp. 753, 756 (S.D. W. Va. 1987).

85. *See* Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1566 (Fed. Cir. 1994) (avoiding the issue because jurisdiction would be permissible under either test); *see also* Renner v. Lanard Toys Ltd., 33 F.3d 277, 282 (3d Cir. 1994) (most circuits have chosen to avoid taking

der consistent decisions regarding the assertion of personal jurisdiction based on Web activity. In essence, aside from the complex nature of the Web itself, much of this ambiguity stems from the Supreme Court's split-decision in *Asahi*.

IV. DETERMINING WHERE THE WEB IS FOR PURPOSES OF PERSONAL JURISDICTION

As the Supreme Court noted in its 1985 *Burger King* decision, even though a defendant may not be physically present within a particular forum, personal jurisdiction can nonetheless be exercised, provided that the suit does not offend notions of fair play and substantial justice.⁸⁶ Generally, the previously discussed cases regarding personal jurisdiction provide a consistent foundation for assessing whether a defendant will be amenable to suit in a particular forum.

However, courts have been unpredictable in determining where a defendant will be subject to suit based on Web activity. This unpredictability poses serious concerns for Web site creators; these creators need to know what Web contacts, if any, will suffice to render them amenable to suit in a given forum. Aside from the unpredictability, there is a need for courts to develop a balanced and consistent approach to this issue. If, on the one hand, courts are inclined to treat the mere act of creating a Web site as a contact sufficient to sustain personal jurisdiction, then the creator of a Web site could be liable to suit in all fifty states, even if the site was intended only for local consumption. If, on the other hand, courts consistently refuse to exercise personal jurisdiction based on Web contacts, then the Web is likely to become an uncontrollable form of virtual anarchy as a result of courts' unwillingness to, for example, enforce broken contracts. If, as presently is the case, courts remain inconsistent, the resulting ambiguities could deter many individuals from creating Web sites, thereby stunting the growth of the Web.

Part of the unpredictability has resulted because courts have struggled in determining how to conceptualize the nature of Web contacts.⁸⁷ For instance, unlike making a telephone call, where one knows whether or not the call is directed to another state, when one visits a Web site, one generally has no indication of the geographical area one is contacting.⁸⁸ Similarly, unlike placing an advertisement in a national newspaper that circulates in a certain state, when an ad is posted on the Web the ad does not physically travel to a certain location, though it is easily accessible twenty-four hours a day from any location.⁸⁹

There are typically two different approaches used to conceptualize the Web, the "spider web" approach and the "highway" approach.⁹⁰ Whereas the spider

sides and instead have looked to the facts of the individual case); *Tobin v. Astra Pharm. Prods., Inc.*, 993 F.2d 528, 543-44 (6th Cir. 1993) (deciding the case on the facts in the record and avoiding the issue of which analysis applies); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993) (facts permit jurisdiction under either analysis); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 382 n.3 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991) (same).

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

87. See *Rollo*, *supra* note 3 at 679; *Boland* *supra* note 3 at 16.

88. This analogy, with some modification, is from Beth I. Boland & Diane Gwin, *The Internet and Personal Jurisdiction Under the Constitution*, BOSTON B.J. Jan.-Feb. 2000, at 16.

89. See *id.*

90. These two approaches conceptualizing Internet contacts are widely used by legal academics. See, e.g., *Boland*, *supra* note 3 at 16-17; *Rollo*, *supra* note 3 at 667; *Swedlow*, *supra* note 3 at 337.

web approach is highly expansive and tends to mirror Justice Brennan's reasoning from *Asahi*, the highway approach provides a much narrower view and tends to reflect Justice O'Connor's reasoning from *Asahi*. The three cases below are illustrative not only of the two approaches to conceptualizing Web contacts, but also of the obvious split among various jurisdictions regarding what constitutes sufficient contacts and purposeful availment when it comes to Web activity.

A. *The Spider Web Approach*

The spider web approach is extremely expansive. In essence, whenever a person places information on the Web he or she is "present" at every location from which that information is accessed.⁹¹ If, for example, X from Kentucky places information on the Web, and that information is accessed from New York, California, and Texas, X is present, for purposes of personal jurisdiction, in New York, California, Texas, and Kentucky. As another example, if a person in Kentucky accesses a Web site from Alaska, then the contact, for purposes of personal jurisdiction, has occurred in both Kentucky and Alaska.⁹²

This approach parallels Justice Brennan's dissent in *Asahi*, in which he asserted that placing a product into the stream of commerce, without more, is sufficient to sustain personal jurisdiction when the defendant's products made their way into the forum state.⁹³ Similarly, from the spider web approach, information placed on the Web is taken into all jurisdictions and, therefore, a person who posts that information should presumably foresee that potential litigation will render him amenable to suit in any state.⁹⁴

As the following analysis illustrates, while some courts have justified the decision to exercise personal jurisdiction—based on the existence of a Web site alone—by superficially setting forth a test for purposeful availment or minimum contacts,⁹⁵ other courts have explicitly held that the existence of a Web site itself is sufficient for purposes of purposeful availment.⁹⁶ Subsection One analyzes a case in which the court suggests that its decision to exercise personal jurisdiction is based on the satisfaction of a three-part test concerning minimum contacts. However, as is clear from a reading of the case, the three-part test set forth by the court is clearly not satisfied by the facts at issue; rather, the court's underlying reasoning mirrors the spider web approach. Subsection Two, on the other hand, analyzes a case in which the court explicitly utilizes the spider web approach. Lastly, subsection three discusses the inherent problems of the spider web approach.

1. *Spider Web Approach: Disguised by Three-Part Test*

In *Maritz, Inc. v. Cybergold, Inc.*,⁹⁷ the United States District Court for the Eastern Division of Missouri utilized the spider web approach in finding a Califor-

91. See Boland, *supra* note 3, at 16.

92. Other commentators use similar hypotheticals to explain this approach. See, e.g., Rollo, *supra* note 3, at 679.

93. Other commentators have noted the similarity between the "spider web" approach and Brennan's opinion in *Asahi*. See, e.g., Rollo, *supra* note 3 at 678; *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (Brennan, J., dissenting).

94. See Rollo, *supra* note 3, at 678.

95. See, e.g., *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

96. See, e.g., *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).

97. 947 F. Supp. 1328 (E.D. Mo. 1996).

nia defendant amenable to suit in Missouri. The plaintiff, a Missouri corporation, brought a trademark infringement action against Cybergold, Inc., a California-based Web site.⁹⁸ The plaintiff argued that Cybergold's alleged infringement on Maritz's trademark was causing economic harm and injury to Maritz within the state of Missouri.⁹⁹

Cybergold had relatively little contact with the state of Missouri. For instance, Cybergold maintained a Web site which was accessible from every internet-connected computer in Missouri and the world.¹⁰⁰ Although the site was operational, Cybergold's actual service, which was to provide a mailing list to individuals regarding various topics, was not yet in operation.¹⁰¹ Cybergold's Web site was accessed by Missouri residents 131 times.¹⁰²

The court used a three-part test, adapted from *Soo Line Railroad Co. v. Hawker Siddeley Canada, Inc.*,¹⁰³ to determine whether sufficient contacts existed between the defendant and Missouri: (1) "the nature and quality of the contacts with the forum state"; (2) "the quantity of those contacts"; and (3) "the relation of the cause of action to the contacts."¹⁰⁴ Though the court declared that the above test would provide the basis for its decision, it nonetheless, at least implicitly, placed its emphasis on the mere fact that Cybergold's Web site was accessible from the plaintiff's forum state.

As for the first factor, the court reasoned that Cybergold had "consciously decided to transmit advertising information to all Internet users, knowing that such information would be transmitted globally."¹⁰⁵ Therefore, Cybergold's contacts were of such a quality and nature that they favored the exercise of personal jurisdiction.¹⁰⁶

In terms of the second factor, the quantity of the contacts, the court noted that Cybergold's Web site had been accessed 131 times by Missouri residents.¹⁰⁷ Because the information transmitted was intended as a promotion of Cybergold's upcoming service and a solicitation for Web users, the court reasoned that the defendant had purposefully availed itself of the privilege of conducting business in Missouri.¹⁰⁸

With regard to the third factor, the court found that the litigation in this action was closely linked to Cybergold's Internet contacts with Missouri, and that the exercise of personal jurisdiction did not offend notions of "fair play and substantial justice."¹⁰⁹ Ultimately, the court held that, because Cybergold should have reasonably anticipated the possibility of being haled into court in Missouri, as well as any other state in which the Web site was accessible, personal jurisdiction over the defendant was appropriate.¹¹⁰

98. *See id.* at 1329.

99. *See id.* at 1331.

100. *See id.* at 1330.

101. *See id.*

102. *See id.*

103. 950 F.2d 526, 528-29 (8th Cir. 1991) (relying on *International Shoe v. Washington*, 362 U.S. 310 (1945)).

104. *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. at 1322-34.

105. *Id.* at 1333.

106. *See id.*

107. *See id.*

108. *Id.*

109. *Id.* at 1333-34.

110. *See id.* at 1334.

In essence, *Maritz* represents a fairly expansive conceptualization of Web contacts. Although Cybergold's Web site had been accessed in Missouri, the evidence showed that, at most, it had only been viewed by Missouri residents a total of 131 times. Furthermore, there was little evidence that Cybergold had purposely directed its Web site toward Missouri residents.¹¹¹ However, under the approach adopted by this court, when one consciously transmits advertising information via the Web, and that information is accessed in a particular forum, one has purposely availed oneself of the privileges and laws of that forum, and should anticipate being haled into court there.

2. Web Site Alone Is Sufficient

In *Inset Systems, Inc. v. Instruction Set, Inc.*,¹¹² the United States District Court for the District of Connecticut utilized the spider web approach in finding a Massachusetts corporation amenable to suit in Connecticut. The plaintiff, Inset Systems, Inc. (Inset), was a corporation with its principal place of business in Connecticut.¹¹³ Inset's business consisted of developing and marketing computer software.¹¹⁴ The defendant, Instruction Set, Inc. (ISI), was a corporation with its principal place of business in Massachusetts.¹¹⁵ ISI provided computer technology support to various organizations.¹¹⁶

There was no dispute that Inset owned the trademark, "Inset."¹¹⁷ Although Inset had not authorized ISI to use its trademark, ISI obtained "Inset.com" as its Internet domain address, which was then used to market its services.¹¹⁸ As a result, Inset brought a trademark infringement action in Connecticut against ISI.¹¹⁹

The defendant argued that personal jurisdiction was lacking because it did not have sufficient minimum contacts within Connecticut to satisfy the requirements of due process.¹²⁰ The plaintiff, however, responded that minimum contacts were established due to the defendant's use of the Web site in conducting business within the state of Connecticut.¹²¹

To determine whether the exercise of personal jurisdiction was appropriate, the court, drawing largely on *World-Wide Volkswagen* and *International Shoe*, examined two factors. First, the Court considered whether the corporate defendant had "minimum contacts" with the forum state such that it should have reasonably anticipated being haled into court there.¹²² Second, it considered whether maintenance of the suit in the forum state would offend traditional notions of fair play

111. Neither the Court nor the facts expressly indicate that Cybergold purposely chose not to direct its Web site toward Missouri residents; however, it is fairly implicit from the facts that this is so, especially considering that Cybergold's Web site had only been accessed by Missouri residents a total of 131 times.

112. 937 F. Supp. 161 (D. Conn. 1996).

113. *See id.* at 162.

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.* at 163.

118. *See id.*

119. *See id.* at 162.

120. *See id.* at 164.

121. *See id.*

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

and substantial justice.¹²³

The court listed two reasons why the first element was satisfied. First, the court reasoned that the defendant had directed its advertising activities via the Internet toward not only the state of Connecticut, but to all states.¹²⁴ Second, the advertisements were available continuously to any Internet user.¹²⁵ Based on these two cursory explanations, the court concluded that ISI had purposefully availed itself of the privilege of doing business within Connecticut and, therefore, could have anticipated being haled into court there.¹²⁶ The court likewise found that, based on the relatively short distance between Connecticut and Massachusetts, personal jurisdiction comported with notions of fair play and substantial justice.¹²⁷

3. Problems with the Spider Web Approach

As the previous cases illustrate, there are inherent problems in applying the so-called spider web approach in resolving personal jurisdiction issues based on Web activity. The mere existence of a Web site appears to be the type of "random or attenuated" contact that should be insufficient to establish minimum contacts according to the Supreme Court.¹²⁸

In both *Maritz* and *Inset*, the courts looked at the nature of the defendants' contacts. In particular the courts examined whether the defendants had purposefully availed themselves of the privileges of conducting business in the particular fora such that they should have anticipated being haled into court in those fora. However, both courts neglected to consider whether the defendants had purposely directed their contacts particularly or exclusively toward the fora in question. Instead, the courts based their decisions on the idea that, since the Internet Web sites were transmitted globally, the defendants' contacts obviously reached the fora in question, resulting in purposeful availment. This approach overlooks the question of whether the defendants purposely availed themselves of the protections and privileges of the fora in question.

The expansive approach adopted by the courts in *Maritz* and *Inset* appears to follow Justice Brennan's reasoning in *Asahi*, in which he stated that placing a product in the stream of commerce, without more, is sufficient to establish purposeful availment, as long as the defendant is aware that her product is being marketed in the forum state.¹²⁹ *Maritz* and *Inset* imply that because the Web carries information into every jurisdiction, a defendant purposefully avails itself in every jurisdiction because the defendant should realize that his or her Web site can reach all fora which the Web reaches.

There are inherent problems with analogizing Web cases to Brennan's reasoning in *Asahi*. Most importantly, the entire nature of the Web is markedly different

123. See *id.* (citing *International Shoe v. Washington*, 326 U.S. 310, 316 (1940)).

124. See *id.* at 165.

125. See *id.*

126. See *id.*

127. See *id.*

128. See, e.g., *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985) (noting that "'random,' 'fortuitous,' or 'attenuated' contacts," as well as "unilateral activity of another party or a third person" is insufficient to establish minimum contacts); *supra* note 3, at 16 (expressing a similar view that the spider web approach is inconsistent with Supreme Court precedent).

129. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 117 (1987) (Brennan, J., concurring).

than typical situations involving manufacturers who place their products into the stream of commerce. In the latter, a manufacturer of a product will at least, under most circumstances, have knowledge as to whether its product is being marketed in a particular forum state. Often, however, when one places information on the Web, the information is not being marketed toward a particular geographical area. Likewise, one placing the information on the Web normally does not know the precise geographical area from which the information will be accessed. By relying on Justice Brennan's reasoning from *Asahi* to decide personal jurisdiction issues based on Web contacts, courts are overlooking important considerations. For instance, factors such as a defendant's intent to establish contacts with a forum, and even his knowledge as to whether he has done so, are seemingly ignored under this line of reasoning.

From both a practical and legal standpoint, the spider web approach is flawed. It subjects the sponsor of a Web site to suit in every state or country. Consequently, the possibility of being haled into a distant court provides a disincentive to anyone contemplating the placement of information on the Web. Businesses, and especially private individuals, may realistically conclude that the burdens of having to defend a suit in a distant forum far outweigh the benefits of having a Web site.

B. The Highway Approach

The highway approach is a narrower approach.¹³⁰ Under this approach, rather than being "present" at every location in which a site is accessed, as is the case under the spider web approach, an individual can only be one place at once.¹³¹ Courts adopting this model generally analyze the direction of the contact between the plaintiff and defendant.¹³²

Thus, while contact initiated by the plaintiff would typically be considered unilateral (and inadequate under *Burger King*¹³³), contact initiated by a defendant would more likely suffice for personal jurisdiction.¹³⁴ For example, assume that a Kentucky resident accesses a California-based Web site. If that is the full extent of the contact, there will be no Kentucky jurisdictional contact. If, however, the California-based Web site actively solicits business or information from the Kentucky resident, then the contacts may be viewed as occurring in both Kentucky and California. Similarly, if the California site-operator receives information regarding the Kentucky resident's geographical location, then the contacts may also be viewed as occurring in both Kentucky and California.¹³⁵

In essence, therefore, courts adopting this view generally determine personal jurisdiction based on whether the Web site is "passive" or "interactive."¹³⁶ If the Web site is merely passive, it is unlikely that personal jurisdiction will be exer-

130. Various legal scholars have discussed the "highway" approach. See, e.g., Boland, *supra* note 3, at 16; Rollo, *supra* note 3, at 683; Swedlow, *supra* note 3, at 337.

131. See, e.g., Swedlow, *supra* note 3.

132. See, e.g., Boland, *supra* note 3, at 17.

133. See *Burger King Corp. v. Rudzewicz*, 471 U.S. at 474.

134. See Boland, *supra* note 3, at 17.

135. Other commentators have used similar hypotheticals to explain this approach. See, e.g., Rollo, *supra* note 3, at 683.

136. See Boland, *supra* note 3, at 17.

cised, since the Web site owner has made no contacts with the plaintiff's forum. Instead, the plaintiff has unilaterally contacted a Web site in which no interaction occurs between the plaintiff and the Web site owner. If the Web site is interactive, the likelihood that personal jurisdiction will be exercised increases, since the owner of the Web site is actively engaging with others, either by conducting business or by receiving information regarding the geographical locations of those contacting his site.

Subsection One analyzes a case in which the court utilizes the highway approach to find the mere existence of a passive Web site insufficient to exercise personal jurisdiction over the defendant. As Subsection Two discusses, the rationale supporting the highway approach is markedly similar to Justice O'Connor's reasoning in *Asahi*.

1. Web Site Alone is Insufficient

In *Bensusan Restaurant Corp. v. King*,¹³⁷ the United States District Court for the Southern District of New York, in applying the highway approach, declined to exercise personal jurisdiction.¹³⁸ The plaintiff, Bensusan, was a New York corporation that owned a jazz club in New York City known as "The Blue Note."¹³⁹ Bensusan owned all rights to the registered trademark, "The Blue Note."¹⁴⁰ The defendant, Mr. King, lived in Missouri and owned a club there also called "The Blue Note."¹⁴¹ To promote his club, King posted a Web site on the Internet that contained a logo virtually identical to the logo used by Bensusan.¹⁴² The Web site was accessible to anyone around the world and required no access code for entry.¹⁴³ Based on the existence of the Web site, Bensusan brought an action in New York against King for trademark infringement.¹⁴⁴

King argued that New York lacked personal jurisdiction, because he resided in Missouri and had not purposely directed his Web site at New York residents.¹⁴⁵ In response, Bensusan claimed that because the defendant's Web site was accessible in New York, King should have foreseen that the site would be viewed in New York.¹⁴⁶

The court set forth a two-part test substantially similar to the tests utilized by the courts in *Inset* and *Maritz*, however, the court here reached a different conclusion. First, for purposes of minimum contacts, the court looked at "(1) whether the defendant purposefully availed himself of the benefits of the forum state; [and] (2) whether the defendant's conduct and connection with the forum state [were] such that he should reasonably anticipate being haled into court there."¹⁴⁷ Second, the

137. 937 F. Supp. 295 (S.D.N.Y. 1996). For a thorough discussion of this case, see John P. Collins, Jr., Note, *Trying to Board A Moving Volkswagen*, 16 YALE L. & POL'Y REV. 535 (1998).

138. See *Bensusan Restaurant Corp. v. King*, 937 F. Supp. at 301.

139. See *id.* at 297.

140. See *id.*

141. See *id.*

142. See *id.*

143. See *id.*

144. See *id.*

145. See *id.* at 299.

146. See *id.* at 300.

147. *Id.* at 300 (quoting *Independent Nat'l Distributors, Inc. v. Black Rain Communicators, Inc.*, No. 94 Cir. 8464, 1995 WL 571449, at *5-6 (S.D.N.Y. Sept. 28, 1995)).

court examined whether exercising personal jurisdiction was reasonable.¹⁴⁸

The court made its decision based on the first prong involving minimum contacts and purposeful availment. Having found that King simply created a Web site and permitted anyone to access it, the court found that there were no allegations that King had encouraged New York residents to access his site.¹⁴⁹ In addition, as to Bensusan's argument "that King should have foreseen that users could access the site in New York," the court concluded that such an argument was insufficient to satisfy due process.¹⁵⁰ Drawing on Justice O'Connor's plurality opinion from *Asahi*, the court explained that creating a Web site, like placing a product into the stream of commerce, requires more in order to be considered an act directed toward the forum state.¹⁵¹

2. *The Highway Approach Mirrors Justice O'Connor's Opinion in Asahi Metal Industry Co. v. Superior Court*

As *Bensusan* illustrates, the highway approach closely resembles the rationale of the plurality opinion from *Asahi*.¹⁵² In *Asahi*, the plurality stated that the mere placement of a product in the stream of commerce, without more, is not an act purposefully directed toward the forum state, even if the defendant is aware that the stream may sweep his product into the forum state.¹⁵³ Similarly, "creating a site, like placing a product in the stream of commerce, may be felt nationwide—or even world-wide—but, without more, it is not an act purposely directed toward the forum state."¹⁵⁴

V. PROPOSALS AND PRACTICAL CONSIDERATIONS

Currently, the existing case law on personal jurisdiction based on Web contacts is markedly inconsistent. While many cases have dealt with this issue,¹⁵⁵ the three cases discussed in Section IV are illustrative of the obvious split among various jurisdictions regarding what constitutes sufficient contacts and purposeful availment when it comes to Web activity.

148. *See id.* at 301.

149. *See id.*

150. *Id.*

151. *See id.*

152. Other commentators have noted the consistency between the "highway" approach and the plurality opinion in *Asahi*. *See, e.g.,* Boland, *supra* note 3, at 17.

153. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

154. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. at 301.

155. *See, e.g.,* Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996); *Molnlycke Health Care v. Dumex Med. Surgical Prod. Ltd.*, 64 F. Supp. 2d 448 (E.D. Pa. 1999); *American Homecare Fed'n, Inc. v. Paragon Scientific Corp.*, 27 F. Supp. 2d 109 (D. Conn. 1998); *Quality Solutions, Inc. v. Zupanc*, 993 F. Supp. (N.D. Ohio 1997); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Animation Station, Ltd. v. Chicago Bulls, LP*, 992 F. Supp. 382 (S.D.N.Y. 1998); *Superguide Corp. v. Kegan*, 987 F. Supp. 481 (W.D.N.C. 1997); *Telco Communications v. An Apple A Day*, 977 F. Supp. 404 (E.D. Va. 1997); *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456 (D. Mass. 1997); *Hearst Corp. v. Goldberger*, No. 96 Civ. 3670 (PKL) (AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997); *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1 (D.D.C. 1996); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1996); *McDonough v. Fallon McElligott, Inc.*, 1996 WL 753991 (S.D. Cal. 1996).

As such, it is currently difficult for those who operate Web sites to gauge if, and where, they would be amenable to suit in the event a dispute arises. This Part sets forth several proposals, as well as practical considerations, that would add predictability and continuity to personal jurisdiction issues arising from Web activity.

A. O'Connor's Opinion in *Asahi*: An Appropriate Starting Point

The highway approach, which is consistent with the plurality opinion from *Asahi*, currently provides the best framework for determining whether to exercise personal jurisdiction based on Web activity. The *Bensusan* court utilized this approach when it held that creating a Web site, like placing a product into the stream of commerce, is not enough to be considered an act directed toward the forum state.¹⁵⁶

The highway approach appears to be fundamentally more sound than the spider web approach, from both a practical and legal perspective. For instance, the highway approach ensures that Web site owners will not be haled into a foreign court based solely on the mere utilization of a Web site; in turn, individuals contemplating placing information on the Web are less likely to be deterred from doing so. Also, by focusing on whether the Web site is passive or interactive, as well as by requiring "something more" than just the Web site itself, this approach correctly places an emphasis on the defendant's intent to avail himself of a particular forum's laws and benefits.

B. A Hierarchy of Web Contacts

In addition to utilizing the highway or *Asahi* approach, courts should develop a three-tier hierarchical system to categorize Web contacts. Other commentators have suggested that some type of hierarchy of Web contacts would be useful.¹⁵⁷ For example, Eric Schneiderman has proposed a six-tiered hierarchy of Web contacts by which, he argues, courts should evaluate a defendant's contacts with a forum.¹⁵⁸ His six categories of contacts are: (1) when one views "business card" sites; (2) when one browses; (3) Web sites "that solicit and obtain information about a user"; (4) "the purchase and delivery of information in the form of web-pages through the Internet"; (5) the "purchase and delivery of computer software" via the Internet; and (6) financial transactions.¹⁵⁹

We agree that personal jurisdiction should turn on the level of contacts between the defendant and the forum state, and on the need for a uniform method of characterizing such contacts. However, we believe that Schneiderman's proposal, while certainly thorough, may lead to further confusion. We worry that the current confusion over whether courts should take a spider web or highway approach may simply be replaced by confusion over how to categorize a given type of contact. A simpler and more predictable approach is the three-level hierarchy which we propose below.

156. See *Bensusan Restaurant Corp. v. King*, 937 F. Supp. at 300.

157. See Schneiderman, *supra* note 3, at 1, 4, 31; Swedlow, *supra* note 3.

158. See Schneiderman, *supra* note 3, at 1, 4, 31.

159. *Id.*

1. Three Distinct Levels of Contacts

We divide Web contacts into three levels. The first is comprised of Web contacts that result from one simply browsing passive Web sites. The second level of Web contacts occurs when one consummates a purchase via the Web. Lastly, the third level of Web contacts is comprised of large-scale financial transactions.

a. Level One: Passive Browsing

As for the first level of Web contacts—the viewing of passive Web sites—contacts such as these should not suffice to create personal jurisdiction over the Web site creator in the jurisdiction from which the site is accessed. There are two distinct aspects of this level of contacts. First, there are passive Web sites that, rather than actively soliciting others to purchase goods or services directly through the Web site, consist of those in which the user merely views the site in order to obtain certain information. Examples include Web sites such as CNN.com, MSNBC.com, and even businesses that use the Web to advertise certain products and services—so long as those actual products and services cannot be directly purchased through the Web site itself. With passive Web sites, there are no purchases consummated via the Web site and no exchanges of information between the site-operator and the user.

Second, there also arise situations in which the Web site may be more than merely passive in nature, but the facts of a given case indicate that the site has been only passively browsed by those in a particular forum. For example, in *Maritz* and *Inset*, there was no evidence that any purchases or financial transactions had taken place via the Web. Rather, the facts indicated that, at the most, residents from each respective forum state had passively browsed the respective Web sites; as such, under this proposal, personal jurisdiction would not have been exercised in either case.

Essentially, if the Web site operator does not know the precise geographical location of those contacting his Web site—because no information has been exchanged or no purchase has been consummated between the Web site owner and a user—it is difficult to argue that the site-operator has purposely availed himself of another state's laws and privileges by actively directing his contacts toward a particular forum. Passive Web sites and mere passive browsing, therefore, should not suffice to establish personal jurisdiction.

b. Level Two: Purchasing

The second level involves contacts that occur when a user accesses a Web site in order to purchase information, goods, or services. Examples would include providing a credit card number to purchase a book from Amazon.com; purchasing a subscription to WallStreetJournal.com; providing a credit card number in order to purchase airline tickets or to reserve a hotel room; or any other type of online order in which the consumer supplies information, such as a shipping address, to the Web site operator. With contacts such as these, the Web site owner has actively directed his or her contacts toward those who purchase his or her services; additionally, there is normally an exchanging of information, with the user providing his credit card number, shipping address, or other personal information to the Web site.

As the previous Subsection indicates, there are also scenarios in which a Web site is designed to solicit purchasers, but the facts suggest that the site has only been passively browsed. Take, for example, the hypothetical posed in the introduction of this Article, in which Mr. Jones, who operates a Web site designed to allow his local customers to place orders directly through the Web, is being sued in both Missouri and New York. If the facts demonstrate that residents of Missouri and New York have merely passively browsed Mr. Jones' Web site—even though the Web site does allow for the direct purchase of merchandise—the contacts would fall under level one, and personal jurisdiction would not be established. On the other hand, if the facts show that Missouri or New York residents have actually placed orders through the Ohio-based Web site, those states' exercise of personal jurisdiction over Mr. Jones would be more reasonable.

Contacts arising under this level should create a rebuttable presumption that personal jurisdiction is proper.¹⁶⁰ The presumption, however, should be rebuttable only if the Web site operator can make both of two showings. First, the operator should have to show that she neither intended nor reasonably expected that persons within the forum state would make a purchase from the site. This might be the case if, for example, a local deli accepts carry-out lunch orders placed over its Web site. Ordinarily, however, this showing will be difficult to make, as it is unreasonable to expect that most goods offered for sale over the Web will be purchased by only local buyers.

The second showing that should be required to rebut the presumption of personal jurisdiction is that the defendant did not know and could not reasonably be expected to know that purchases were being made from the forum state. If the deli owner sells nonperishable items over the Web and several orders come in from a foreign state with a delivery address in that state, then the owner should be liable to suit in that state. A Web site owner should not be permitted to hide her head in the sand and avoid personal jurisdiction by claiming to be ignorant of the ascertainable jurisdictions from which her customers hail.

c. Level Three: Financial Transactions

The third and highest level of contacts would occur when large-scale financial transactions, such as buying stock or transferring funds, are conducted via the Web. Whereas the second level of Web contacts involves situations where one purchases goods or services, the third level of contacts would consist solely of those situations in which one transfers funds from, for example, an account at Fidelity Investments, or buys or sells securities or stock via the Web. Because the level of interaction between a Web site owner and a user is extremely high under this category of Web contacts, and since large-scale investment firms and banks tend to target their business activities nationwide, it is clear that such a financial institution has purposely transacted its business in a given forum state;¹⁶¹ as such, personal jurisdiction is proper per se.

Used in conjunction with the plurality opinion from *Asahi* or the highway approach, the three distinct levels of Web activity discussed above provide a more

160. Mr. Schneiderman also argues for a non-rebuttable presumption of jurisdiction when such contacts are present.

161. *See id.* at 5.

predictable foundation for courts to analyze when considering the quantity and quality of Web contacts.

2. Consistency with *Asahi*

The three levels of Web contacts discussed above are consistent with O'Connor's "stream-of-commerce-plus" opinion in *Asahi*. As the first level of contacts, which consists of passive Web sites or passive browsing, can be analogized as the simple act of placing a product (here, a Web site) in the stream of commerce, it does not, by itself, suffice for personal jurisdiction. However, the second level of contacts, which involves the selling of services or goods to those who provide credit card numbers or other personal information regarding their geographical location, contains the "additional conduct" described by Justice O'Connor in *Asahi*. Therefore, contacts arising under the second level should create a rebuttable presumption that personal jurisdiction is proper. The third level of contacts, which involves the transferring of funds or the buying and selling of stock and securities, provides a per se approach that the Web site owner should have foreseen possible litigation within a given forum; similarly, contacts arising under the third level also contain the "additional conduct" described in O'Connor's *Asahi* opinion.

C. Practical Considerations for Those Placing Information on the Web

If courts are inclined to utilize Justice O'Connor's opinion from *Asahi* or the highway approach, then the knowledge and intent of the defendant will certainly be relevant. Therefore, the use of a disclaimer may provide some protection to Web site operators. For example, a jurisdiction disclaimer, such as the following could be utilized: "By accessing this site, you are contacting a computer in (state). All disputes arising from this Web site are to be governed under the laws and courts of (state)."¹⁶² A Web page provider could even make a user's consent to the disclaimer a prerequisite to entering the site.¹⁶³ While a jurisdictional disclaimer would certainly not be conclusive, nor should it be, in determining the forum for potential litigation, it may assist courts in determining whether a particular defendant has purposefully availed himself of the laws of another forum.¹⁶⁴

Also, if a company is providing services through a Web site such that a contract is used, the company should specify that the contract will be completed in the company's home state after the company accepts it.¹⁶⁵ Similarly, if a company is advertising positions of employment on its Web site, the company should state that any disputes resulting from the hiring process will be governed under the laws and court of the company's home state.¹⁶⁶

162. This piece of practical advice has also been suggested by Leif Swedlow, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY L. REV. 337 (1997). See also Elizabeth Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151 (2000).

163. See Swedlow, *supra* note 3.

164. See Boland, *supra* note 3, at 32.

165. See *id.*

166. See *id.*

VI. CONCLUSION

Courts are inconsistent on the issue of under what circumstances a court in one state may exercise personal jurisdiction over the operator of a Web site where the Web site is operated from a foreign state, but is accessed from the state in which the court sits. Some courts have taken a spider web approach, under which the operator of a Web site is deemed to be jurisdictionally "present" at every location from which her site is accessed. Other courts have taken a highway approach, under which the operator of a Web site is jurisdictionally present in a foreign state only if the operator has somehow "reached out" to a person or entity in the foreign state, such as by soliciting information from, or selling a product over the Web to, a person or entity in the foreign state. We believe that the highway approach is the approach that courts should take. Without more, however, the highway approach is indeterminate; it provides little guidance as to what constitutes sufficient "reaching out" to justify the foreign state's exercise of personal jurisdiction. We propose a three-level hierarchy of contacts to govern whether, and under what circumstances, the contacts between a Web site operator and a person or entity in a foreign state suffice to create personal jurisdiction over the Web site creator in that foreign state. We believe that this approach provides courts with a fair, determinate, and straight-forward standard to guide future cases.

