The Evolution of Internet Jurisdiction: What A Long Strange Trip It Has Been

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INTRODUCTION

The growth of the Internet has been remarkable by any standard.[1] This truth is underscored by predictions from the Gartner Group[2] that business to business e-commerce, which accounted for $145

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billion worldwide in 1999, will account for $7.29 trillion worldwide by 2004.[3] It is further highlighted by the fact that traffic on the Internet doubles every 100 days, with 1 billion people expected to be connected to the Internet by 2005.[4] In short, the Internet is here to stay.

As the Internet grows, so do the legal questions associated with this new technology. Increasingly, we are learning that the laws we have relied upon, in some cases for generations, cannot adequately address Internet paradigms. For example, when David LaMacchia posted computer software on the Internet for the purpose of allowing others to download that software, and thereby engage in piracy, he was charged with committing a crime.[5] The fact that LaMacchia was charged with a crime may seem unsurprising because today what he did is a crime.[6] At the time LaMacchia posted the software, however, his actions were not criminal, which was the reluctant conclusion of the United States District Court for the District of Massachusetts.[7] Similarly, the Department of Justice and Senator Jon Kyle have tried for the last several years to push legislation that specifically prohibits Internet Gambling because the statute that is currently being used to prevent Internet gambling, the Wire

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[1] For a general discussion see Eugene R. Quinn, Jr., *Tax Implications For Electronic Commerce Over The Internet*, 4.3 J. TECH. L. & POL'Y 1, ¶¶ 1-6 (Fall 1999) <http://journal.law.ufl.edu/~techlaw/4-3/quinn.html>.

[2] The Gartner Group is a research and consulting firm specializing in Information Technologies. *See Gartner Interactive* (visited Apr. 20, 2000) <http://gartner11.gartnerweb.com/public/static/aboutgg/aboutgg.html>.

[3] *See GartnerGroup Forecasts Worldwide Business-to-Business E-Commerce to Reach $7.29 Trillion in 2004* (visited July 1, 2000) <http://gartner11.gartnerweb.com/public/static/aboutgg/pressrel/pr012600c.html>.

[4] *See The Emerging Digital Economy - Introduction* (visited Sept. 2, 1998) <http://www.ecommerce.gov/danintro.htm>

[5] United States v. LaMacchia, 871 F. Supp. 535, 536 (D. Mass. 1994).

[6] *See* The Copyright Act of 1976, 17 U.S.C. § 506 (1995).

[7] *LaMacchia*, 871 F. Supp. at 545.

Act of 1961,[8] only applies to sports betting but does not address any other form of Internet gambling.[9] Still further, Massachusetts Governor Paul Cellucci recently testified before Congress in support of making the Internet a tax free zone.[10] Governor Cellucci supports a tax free Internet not only because there is no evidence that Internet sales are harming world retailers,[11] but also the application of sales and use taxes to the Internet stemmed from the fact that these laws were not designed to apply to the Internet and, therefore, should not be applied.[12] These representative examples each demonstrate the reality that the Internet is forcing us to question whether tried and true real world legal principles apply in the digital generation.

Even seemingly ubiquitous, time honored principles must be examined, including whether a court has the power to exercise jurisdiction over a defendant because of the defendant's ties to or use of the Internet or Internet related technologies. This jurisdictional rethinking requires us to address three different but related concepts that involve the right of the sovereign to exert its power and control over people or entities that use the Internet. First, we must address whether the Internet alters our understanding of personal jurisdiction requirements under the Due Process Clause of the United States Constitution. Second, we must determine if in rem jurisdiction can be relied upon by those who seek to

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[8] *See* 18 U.S.C. 1084 (2000).

[9] For a discussion of Senator Kyle's activities with respect to prohibiting Internet gambling see Senator Kyle's statement relative to the Internet Gambling Prohibition Act. *Senator John Kyle Speech – The Internet Gambling Prohibition Act* (visited Mar. 14, 2000) <http://www.senate.gov/~kyl/s3-23-99.htm>.

[10] ***Federalism in the Information Age: Internet Tax Issues, Testimony of Governor Paul Cellucci*** (Feb. 2, 2000) <http://www.senate.gov/~budget/republican/about/hearing2000/cellucci.htm>.

[11] *Id*.

[12] *Statement of Massachusetts Governor Paul Cellucci Regarding the Advisory Commission on Electronic Commerce* (visited July 1, 2000) <http://www.state.ma.us/gov/99spch/sp041200.htm>. In this speech, Governor Cellucci stated that "[o]ld rules and old laws created in the 1930s are no longer relevant to the 21st century and the changes that this new Internet economy brings with it." *Id*.

invalidate the property interest embodied in a domain name. Finally, it is necessary to consider jurisdiction and venue as they relate to criminal prosecutions initiated as a result of Internet activities.

Courts across the country are increasingly be asked by defendants to dismiss claims and criminal charges because the sovereign does not have authority over them. Increasingly courts are forced to struggle with the reality that real world scenarios are not terribly helpful in determining whether the sovereign can or should exercise power over the defendant. Also troublesome are the potential ramifications associated with requiring an out of state defendant to defend in a foreign jurisdiction simply because the alleged wrong was enabled by Internet technologies. If anything is clear, it is that merely using the Internet cannot be the proper basis for being subjected to jurisdiction in a remote forum. This, however, begs the essential question, which is when is jurisdiction appropriate in a world where one computer has the ability to communicate within seconds with a computer located thousands of miles away?

This article will explore whether a court has the power to exercise jurisdiction over a defendant because of the defendant's ties to or use of the Internet or Internet related technologies. In order to examine this question it will first be essential to have a working understanding of the Internet, which will be discussed in Part I.[13]

Part II.A. of the article then examines personal jurisdiction in the real world,[14] followed by a discussion in Part II.B. of the evolution of personal jurisdiction as it specifically applies to what have

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[13] *See infra* note 22-34 and accompanying text.

[14] *See infra* notes 35-65 and accompanying text.

been characterized as Internet cases.[15] Because personal jurisdiction in cyberspace can be broken down into two categories of cases, Part II.B.1. explores cyberspace personal jurisdiction in general terms and will offer an alternative to the well accepted test stated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[16] which will better address the next wave of Internet personal jurisdiction cases.[17] Part II.B.2. then examines the disagreement between the several courts that have addressed personal jurisdiction in cyber-defamation cases.[18]

Part III of the article explores in rem jurisdiction in cyberspace, specifically focusing on several cases that have attempted to use in rem jurisdiction to circumvent personal jurisdictional requirements.[19] Part III also discusses why the newly enacted Anticybersquatting Consumer Protection Act is unconstitutional.[20]

Part IV then discusses several cases that address the question of whether Internet activities work to provide jurisdiction for a criminal prosecution.[21]

I. UNDERSTANDING THE INTERNET

Because the nature of the Internet is inherently amorphous it is very difficult to define exactly what the Internet is with precision and accuracy. Courts have tried, with limited success, to give a coherent, meaningful definition for the dynamic communications medium that we call the Internet.

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[15] *See infra* notes 66-217 and accompanying text.
[16] 952 F. Supp. 1119 (W.D. Pa. 1997).
[17] *See infra* notes 65-134 and accompanying text.
[18] *See infra* notes 137-217 and accompanying text.
[19] *See infra* notes 221-235 and accompanying text.
[20] *See infra* notes 236-261 and accompanying text.
[21] *See infra* notes 267-306 and accompanying text.

Perhaps the best, and certainly the most cited attempt to define the Internet can be found in the now famous district court decision in *American Civil Liberties Union v. Reno*.[22] The *ACLU* court defined the Internet as follows:

> The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks. This is best understood if one considers what a linked group of computers – referred to here as a "network" – is, and what it does. Small networks are now ubiquitous. . . . For example, in many United States Courthouses, computers are linked to each other for the purpose of exchanging files and messages (and to share equipment such as printers). These are networks.[23]

Unfortunately, this definition, while actually quite good, is not extremely helpful unless you already have at least a minimal familiarity with computers. A further problem exists because any definition of the Internet may well become inappropriate as time passes and technology advances.[24] Much of the Internet depends on state of the art technology and the implementations of that technology. The applicability of any definition for the Internet must, therefore, be measured against the ever changing cutting edge technology that makes the Internet work.

As tangible as the Internet may be to those who truly understand Internet communications, the Internet definitely has an intangible nature. This enigmatic nature of the Internet is in no small part thanks to its design. The Internet was originally created for the military purpose of providing an effective

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[22] 929 F. Supp. 824 (E.D. Pa. 1996) [hereinafter *ACLU*].

[23] *Id.* at 830-31.

[24] As an aside, many attorneys who engage in trademark practice before the United States Patent & Trademark Office will not describe what would otherwise be considered by today's standards as being an Internet related trademark. These attorneys choose to state that the mark will be used for goods or services offered over "a global communications network," rather than characterizing the goods or services as relating to "the Internet." Telephone Interview with David Morfesi, Intellectual Property Consultant on International and Domestic Trademark Issues (Apr. 17, 1999). These practitioners fear that what the Internet is today and what the term means may well become obsolete with time.

communications network that would be able to survive a nuclear attack.[25] Internet communications, therefore, continue to work even if one link in the telecommunications web is broken. Considering this original design goal and implementation of that goal it is understandable how the Internet is able to thrive without ties to a particular geographical location.[26]

The Internet is essentially a redundant series of linked computers over which information travels in an unpredictable manner.[27] This random, unpredictable manner in which communications flow over the Internet is due to the fact that information is transmitted over the Internet in small bundles called packets.[28] When information is sent over the Internet, it is broken up into component pieces, each containing a small portion of the information.[29] These component pieces or packets are then transmitted individually and can even follow different routes to its destination.[30] Once all packets forming a message have been received at the destination, they are recompiled to form the original message.[31] Because Internet communications are not direct links, in order to send information to point B the communication may be routed through point A first and then sent on to its final destination at point B.[32] The fact that Internet communications are routed in such a fashion causes not only identification problems, but also

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[25] *ACLU*, 929 F. Supp. at 831.

[26] Cyberspace Communications, Inc. v. Engler, 55 F. Supp. 2d 737, 744 (E.D. Mich. 1999).

[27] *Id.* at 745 (citing American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 164, 171 (S.D.N.Y. 1997)).

[28] A packet is a piece of an electronic message transmitted over the Internet. *Packet – Webopedia Definitions and Links* (visited Jan. 22, 2000) <http://webopedia.internet.com/TERM/p/packet.html>

[29] *See Packet Switching – Webopedia Definitions and Links* (visited Jan. 22, 2000) <http://webopedia.internet.com/TERM/p/packet_switching.html>.

[30] *Id*.

[31] *Id*.

[32] *See* Laine Stump, *Column Headline: Practical TCP/IP; Internet protocols explained; Transmission Control Protocol/Internet Protocol; Laine Stump's C++ Diary*, EXE, July 1993, at 65.

jurisdiction problems. It is difficult for even experienced users to know where information is stored, sent from, and/or routed through.

Adding further to the complexity of the Internet is the fact that Internet communications are very different than telephone communications. The telephone communication system is based on circuit-switching technology, where a dedicated line is allocated for transmission of the entire message between the parties to the communication.[33] Internet communications, on the other hand, are not accomplished through the use of a dedicated line. A message sent from an Internet user in New York may travel via one or more other states before reaching a recipient who is also sitting at a computer in New York.[34] Therefore, the lack of a physically tangible location and the reality that any Internet communication may travel through multiple jurisdictions creates a variety of complex jurisdictional problems.

II. Personal Jurisdiction

A. Personal Jurisdiction in the Real World

In *International Shoe Co. v. Washington*,[35] the United States Supreme Court embarked on a new path with respect to jurisdictional analysis, departing from its 1878 personal jurisdiction ruling in *Pennoyer v. Neff*,[36] which held that a defendant's physical presence within a given jurisdiction was a

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[33] *Id*.
[34] *Cyberspace*, 55 F. Supp. 2d at 745 (citing American Civil Liberties Union v. Johnson, 4 F. Supp. 2d 1029, 1032 (D.N.M. 1998); *American Libraries*, 969 F. Supp. at 171)).
[35] 326 U.S. 310, 316 (1945).
[36] 95 U.S. 714, 732-33 (1878).

prerequisite for proper personal jurisdiction.[37] Since the *International Shoe* decision in 1945 the Supreme Court has struggled to define the limits of personal jurisdiction.[38]

In order for a court to exercise personal jurisdiction, it is necessary for there to be sufficient contacts between the defendant and the forum state to satisfy both the state's long arm statute and the Fourteenth Amendment's Due Process Clause,[39] both of which limit the power of a court to exercise personal jurisdiction over nonresident defendants.[40] While compliance with a state's long arm statue is critical to any jurisdictional inquiry, this article will focus primarily on the Due Process requirement of the Fourteenth Amendment.[41]

The jurisdictional limits imposed by the Fourteenth Amendment[42] are very real because of the Full Faith and Credit Clause.[43] The Full Faith and Credit Clause requires that each state must accord

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[37] *Id.* at 733.

[38] David Thatch, *Personal Jurisdiction and the World-Wide Web: Bits (And Bytes) of Minimum Contacts*, 23 RUTGERS COMPUTER & TECH. L.J. 143 (1997).

[39] GTE New Media Services, Inc. v. BellSouth Corp., 199 F.3d 1343, 1347 (D.C. Cir. 2000); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1297 (10th Cir. 1999); Mink v. AAAA Dev. LLC, 190 F.3d 333 (5th Cir. 1999); Amana Refrigeration, Inc. v. Quadlux, Inc., 172 F.3d 852, 857 (Fed. Cir. 1999); Lockard v. Equifax, Inc., 163 F.3d 1259, 1265 (11th Cir. 1998); Steel Warehouse, Inc. v. Leach, 154 F.3d 712, 714 (7th Cir. 1998); Sawtelle v. Farrell, 70 F.3d 1381 (1st Cir. 1995).

[40] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

[41] In many instances the issue of whether jurisdiction is proper will rest solely upon the court's Due Process analysis because the state long arm statute in question reaches as far as the Due Process Clause permits. *See* Keeton v. Hustler Magazine, 465 U.S. 770, 775 (1984) (discussing New Hampshire's long arm statute which permits service of process whenever such service is permitted by the Due Process Clause); Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 413 (1984) (discussing that the Texas Supreme Court has interpreted the Texas long arm statute to reach as far as is permitted under the Due Process Clause).

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> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. art. XIV, § 1.

[43] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and

the judgments of each other state the same recognition that the judgment is entitled to in the jurisdiction that rendered the judgment.[44] This, however, is not true if the judgment was rendered in violation of the Due Process requirements of the Fourteenth Amendment.[45] If a court lacks personal jurisdiction over the defendant, then the judgment is void and will not be accorded full faith and credit in a foreign jurisdiction.[46] A court properly exercising personal jurisdiction is, therefore, critical for both the plaintiff[47] and the defendant.[48]

The proper analysis of personal jurisdiction cases requires that each case be divided into one of two distinct classifications – specific jurisdiction cases or general jurisdiction cases.[49] A court is said to be exercising specific jurisdiction when the law suit arises out of or is related in some way to the defendant's actual contacts with the forum state.[50] General jurisdiction, on the other hand, is characterized by a court exercising personal jurisdiction over a defendant because there are sufficient contacts between the forum state and the defendant to properly allow for the exercise of jurisdiction pursuant to the Due Process clause.[51] When a court exercises general jurisdiction, the defendant is subject to the power and authority of the court not because it has engaged in specific actions alleged in

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Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

[44] *Id*.

[45] *World-Wide Volkswagen*, 444 U.S. at 291 (citing *Pennoyer*, 95 U.S. at 732-33).

[46] *Id*.

[47] Proper jurisdiction is important to the plaintiff should the plaintiff need to rely on the Full Faith and Credit clause to execute the judgment in a foreign jurisdiction.

[48] Personal jurisdiction determinations are critical in so far as defendants are concerned because an inappropriate exercise of jurisdiction will place the defendant in the unenviable situation of either (1) defending a suit in a remote, distant jurisdiction; or (2) allowing a default judgment to be entered and subsequently arguing that personal jurisdiction was not proper.

[49] *See generally Helicopteros*, 466 U.S. at 413-15.

[50] *Id.* at 414 n.8.

[51] *Id.* at 414 n.9.

the complaint to tie a cause of action to the forum state, but rather because the forum state has general authority to exercise jurisdiction over the defendant.

In order for any court to properly exercise specific personal jurisdiction, the defendant must have certain minimum contacts with the forum state such that the exercise of personal jurisdiction over that defendant does "not offend traditional notions of fair play and substantial justice."[52] It is important to note, however, that not all contacts will give rise to the appropriate exercise of specific jurisdiction. Only when the defendant has "purposefully established minimum contacts in the forum State" is specific jurisdiction proper.[53] This "purposeful availment" requirement guarantees that a defendant will not be forced to defend a suit in a jurisdiction where contacts are only "random, fortuitous, or attenuated."[54] The "purposeful availment" requirement also works to ensure that non-residents have fair warning that a particular activity may subject them to litigation in a particular forum State.[55] The "purposeful availment" requirement, in its most basic form, is founded on the belief that the power of the sovereign over a foreign defendant can only be properly exercised when the defendant has engaged in some affirmative act within the forum State that invokes the benefits and protections of the laws of that forum State.[56]

Asahi Metal Industry Co. v. Superior Court gave the Supreme Court a chance to further clarify the purposeful availment requirement.[57] Unfortunately Justice O'Connor, writing for a plurality

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[52] *International Shoe*, 326 U.S. at 316.

[53] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985).

[54] *Id.*. at 475 (citing *Keeton*, 465 U.S. at 774).

[55] *Id.* at 472; *see also World-Wide Volkswagen*, 444 U.S. at 297 ("The Due Process Clause, by ensuring the orderly administration of the laws, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.").

[56] *Cf.* Hanson v. Denckla, 357 U.S. 235, 250-51 (1958).

[57] 480 U.S. 102 (1987).

instead of a majority, was unable to meaningfully shed light on how future courts will rule with respect to personal jurisdiction cases addressing the purposeful availment test.[58] Nevertheless, the plurality in *Asahi* used the occasion to expand previous purposeful availment case law by once again dealing with the "stream of commerce" theory.[59]

It was in *World-Wide Volkswagen* that the Supreme Court first introduced the "stream of commerce" theory. [60] The Court pointed out that the mere placement of a product into the "stream of commerce" was not a sufficient basis for the proper exercise of personal jurisdiction.[61] The Court, resting its decision upon the lack of purposeful availment, stated that mere delivery of a product into the stream of commerce without the expectation that it will be purchased by consumers in the forum State is not a proper basis for personal jurisdiction.[62]

The Court in *Asahi* took the "stream of commerce" theory one step further than did the Court in *World-Wide Volkswagen*. The plurality in *Asahi* reiterated that a defendant's awareness that a product will reach a distant foreign jurisdiction does not constitute an act of purposeful availment that would properly support personal jurisdiction.[63] The *Asahi* plurality, however, made clear that a defendant must intentionally direct a product into the forum state before personal jurisdiction is appropriate.[64] Therefore, assuming that *Asahi* is the law of the land,[65] the purposeful availment test no

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[58] Thatch, *supra* note 38, at 151 n.39 (explaining that the *Asahi* purposeful availment analysis has received mixed reviews in the lower courts).
[59] *Asahi*, 480 U.S. at 103-04.
[60] *World-Wide Volkswagen*, 444 U.S at 298-99.
[61] *Id.* at 295.
[62] *Id.* at 297-98.
[63] *Asahi*, 480 U.S. at 112-13.
[64] *Id.* at 112.

longer seems to focus on foreseeability, but rather focuses on whether the defendant affirmatively attempted to exploit a geographic market.

B. Personal Jurisdiction in Cyberspace

1. Introduction to Personal Jurisdiction in Cyberspace

a. The Evolution Begins – Pres-Kap, Inc. v. System One Direct Access, Inc.

Pres-Kap, Inc. v. System One Direct Access, Inc. is one of the earliest cases to address whether personal jurisdiction can be properly exercised based solely upon online activities.[66] The defendant, Pres-Kap, Inc., was a New York corporation doing business as Prestige Travel of Rockland.[67] The contract dispute between the plaintiff, System One Direct Access, Inc., and the defendant arose from an agreement entered into between the parties whereby the defendant, in exchange for a monthly fee, would receive access to the plaintiff's computer reservations database.[68] In early 1991, the defendant complained that the plaintiff's reservation system was malfunctioning.[69] Unable to resolve this matter, the dispute escalated to the point where the defendant stopped making payments required by the agreement, which in turn lead to the plaintiff filing suit against the defendant in Florida.[70]

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[65] A number of courts have refused to adopt the *Asahi* formulation of the purposeful availment test because, while the Supreme Court's decision in *Asahi* casts doubt on the future viability of the stream of commerce theory, prior rulings were not overruled and must be followed. *See* Dehmlow v. Austin Fireworks I, 963 F.2d 941, 947 (7th Cir. 1992); Irving v. Owens-Corning Fiberglass Corp., 864 F.2d 383, 386 (5th Cir. 1989).
[66] 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994).
[67] *Id.* at 1352.
[68] *Id.* at 1351-52.
[69] *Id.* at 1352.
[70] *Id*.

The defendant filed a motion to dismiss for lack of personal jurisdiction.[71] The defendant pointed out that its sole place of business was in Rockland County, New York, and all of its business was conducted from this single office.[72] Furthermore, the defendant argued, and the court agreed, that the defendant's only contacts with the forum state were: (1) payments required by the contract were mailed to plaintiff's billing address, which was a Miami, Florida address; and (2) the computer reservations database, which was accessible by the defendant's computers located in Rockland County, New York, was physically located in Miami, Florida.[73]

The *Pres-Kap* court, prior to ruling that exercising personal jurisdiction was inappropriate, pointed out that a contract with a party located in a foreign jurisdiction, without more, cannot automatically establish sufficient minimum contacts to warrant an out of state defendant to be required to defend suit in a foreign jurisdiction, even when the underlying cause of action alleges breach of contract.[74] As a result of this legal conclusion, together with the court's findings relative to the defendant's contact with the forum state, jurisdiction would only be proper solely as a result of the fact that the computer reservations database was located in the forum state.[75]

The *Pres-Kap* court was quite clearly concerned with the potential ramifications associated with requiring the out of state defendant to defend a suit based solely on the fact that the computer reservations database was located in Florida.[76] After pointing out that it could not allow Florida courts

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[71] *Id*.
[72] *Id*.
[73] *Id*. at 1352-53.
[74] *Id*. at 1353 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985)).
[75] *Id*.
[76] *Id*.

to exercise jurisdiction over the defendant because it offended "traditional notions of fair play and substantial justice – and therefore does not comply with the minimum-contacts due process requirement," the court eloquently expressed its concern that a contrary ruling would have far reaching and detrimental consequences for all business and professional people who use on line computer services.[77] In this regard the court stated:

> Across the nation, in every state, customers of "on-line" computer information networks have contractual arrangements with out-of-state supplier companies, putting such customers in a situation similar, if not identical, to the defendant in the instant case. Lawyers, journalists, teachers, physicians, courts, universities, and business people throughout the country daily conduct various types of computer-assisted research over telephone lines linked to supplier databases located in other states. Based on the trial court's decision below, users of such "on-line" services could be haled into court in the state in which [the] supplier's billing office and database happen to be located, even if such users, as here, are solicited, engaged, and serviced entirely instate by the supplier's local representatives. Such a result, in our view, is wildly beyond the reasonable expectations of such computer-information users, and, accordingly, the result offends traditional notions of fair play and substantial justice.[78]

The *Pres-Kap* court, in focusing on the "reasonable expectations" of the user to determine that the exercise of personal jurisdiction would offend constitutional norms,[79] indirectly acknowledged the amorphous nature of the Internet and communications in the Internet age. The *Pres-Kap* court, therefore, appropriately focused on the expectations of the user and recognized that the user would not anticipate in their wildest dreams that accessing a database would open them to jurisdiction in a foreign land.[80] To be sure, the average user may not even appreciate that the database resides in another state. This being the case, the "slippery slope" fear voiced by the *Pres-Kap* court regarding the potential

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[77] *Id*.
[78] *Id*.
[79] *Id*.

ramifications for database users,[81] and all Internet users by logical extension, are extremely well founded concerns.

b. Setting the Standard – Zippo *and Its Progeny*

Today, any discussion of personal jurisdiction in cyberspace must begin with *Zippo Manufacturing Co. v. Zippo Dot Com, Inc*.[82] The *Zippo* decision, which was issued in January 1997, has been cited by virtually every court to subsequently address the issue of whether personal jurisdiction can be properly exercised as a result of Internet activities.[83]

In *Zippo* the court was faced with a situation where the established company, Zippo Manufacturing, was the owner of a number of different trademarks on the word "zippo," the first being registered in 1934.[84] The Internet company and defendant in the case, Zippo Dot Com, registered the domain names "zippo.com," "zippo.net," and "zipponews.com," which ultimately caused the dispute.[85] The defendant, an Internet news service, had posted on its web site information about its company, advertisements, and new service.[86] The plaintiff, a Pennsylvania corporation, filed a complaint under the

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[80] *Id*.
[81] *Id*.
[82] 952 F. Supp. 1119 (W.D. Pa. 1997).
[83] *See, e.g.*, Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1297 (10th Cir. 1999) (finding the defendant's web site to be passive because the defendant "has simply posted information on an Internet Web site which is accessible to users in foreign jurisdiction"); Mink v. AAAA Dev. LLC, 190 F.3d 333 (5th Cir. 1999); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997) (finding defendant's web site to be essentially passive and jurisdiction, therefore, was inappropriate); Brown v. Ge ha-Werke GMBH, 69 F. Supp. 2d 770, 778 (D.S.C. 1999) (finding that the defendant's passive web site did not provide contacts sufficient for jurisdiction where no other contacts existed); Stomp, Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1998) (finding defendant's web site to be active because it allowed provided customer service, technical support and the ability to purchase products online).
[84] *See* U.S. Trademark Reg. No. 0317219 (Reg. Date 1934).
[85] *Zippo*, 952 F. Supp. at 1121.
[86] *Id*.

Lanham Act[87] alleging trademark dilution,[88] infringement,[89] and false designation,[90] as well as a claim under Pennsylvania state trademark law for dilution.[91]

The *Zippo* court was first forced to address the defendant's motion to dismiss for lack of personal jurisdiction.[92] The defendant's motion was based on the fact that its contacts with Pennsylvania, the forum state, occurred almost exclusively over the Internet.[93] Notwithstanding this fact, there were some 3,000 Pennsylvania citizens who were subscribers to the defendant's fee based news service.[94] Moreover, the defendant did have other business ties with seven Internet Service Providers,[95] two of which were located in the Western District of Pennsylvania.[96]

The question presented to the court was whether the defendant, a California corporation with its principal place of business in Sunnyvale, California, had sufficient contacts with the forum state to properly establish personal jurisdiction in Pennsylvania.[97] Ultimately, the *Zippo* court determined that the defendant's customer base and ISP agreements provided the requisite contact with Pennsylvania to

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[87] The Lanham Act of 1946, 15 U.S.C. § 1051 et seq (1997 & Supp. 2000).
[88] 15 U.S.C. § 1125(c) (1997 & Supp. 2000).
[89] 15 U.S.C. § 1114 (1997 & Supp. 2000).
[90] 15 U.S.C. § 1125(a).
[91] 54 PA. CONS. STAT § 1124 (1996 & Supp. 2000).
[92] *Zippo*, 952 F. Supp. at 1122-27.
[93] *Id*. at 1121.
[94] *Id*.
[95] Internet Service Providers, commonly referred to as ISPs, are companies that provide access to the Internet, usually for a flat monthly fee. *ISP – Webopedia Definitions and Links* (visited Jan. 20, 2000) <http://webopedia.internet.com/TERM/I/ISP.html>. An ISP provides its clients with a software package that is loaded onto the client's computer, a username and password to access an account registered to the client, and a local access telephone number that can be used together with a modem to connect to the Internet. *Id*.
[96] *Zippo*, 952 F. Supp. at 1121.
[97] *Id*.

allow the court to exercise specific personal jurisdiction.[98] In January 1997, when the *Zippo* court answered this question, only a few courts had discussed personal jurisdiction as it applies to activities carried out over the Internet.[99] The *Zippo* court, surveyed those cases and, in what has become the often cited foundation for all Internet personal jurisdiction analysis, explained:

> The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.[100]

The *Zippo* court recognized that a sliding scale approach must be used to determine the "level of interactivity and commercial nature of the exchange of information" occurring as the result of a particular web site being accessed.[101] This sliding scale approach, rather than a bright line rule authorizing

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[98] *Id.* at 1125-27.

[99] CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996).

[100] *Zippo*, 952 F. Supp. at 1123-24 (citations and footnotes omitted).

[101] *Id*. at 1124.

personal jurisdiction as a result of any Internet activities, has repeatedly been adopted by virtually all courts addressing this issue.[102]

The *Zippo* sliding scale approach to Internet personal jurisdiction, which has been widely praised, is not without its faults. To be sure, the language of the test seems precise and accurate. Nevertheless, even the *Zippo* court falls prey to the same analytical problems that have plagued other courts. The *Zippo* court does not define passive web sites as those where information is simply posted on the Internet.[103] The court rather explains that "[a] passive Web site . . . does *little more* than make information available. . . ."[104] The critical question left unanswered by the court is the meaning of "little more." In truth, it would have been better for the *Zippo* court to say that a passive web site is one that does *no more* than make information available to Internet users. The need for this seemingly trivial distinction will become clear.

The *Zippo* court cites *Bensusan Restaurant Corp. v. King*[105] as an example of a passive web site.[106] In *Bensusan* the plaintiff was the owner of the federally registered trademark "The Blue Note," which was also the name of its New York City jazz club.[107] In April of 1996, the defendant posted a web site

[102] Millennium Enter., Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907, 914 (D. Or. 1999); Patriot Sys., Inc. v. C-Cubed Corp., 21 F. Supp. 2d 1318, 1324 (D. Utah 1998).
[103] *Zippo*, 952 F. Supp. at 1124.
[104] *Id.* (emphasis added).
[105] 937 F. Supp. 295 (S.D.N.Y. 1996).
[106] *Zippo*, 952 F. Supp. at 1124.
[107] *Bensusan*, 937 F. Supp. at 297.

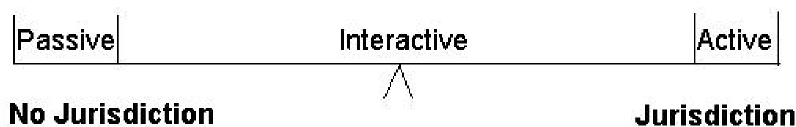
to promote his own jazz club.[108] The controversy arose because the defendant used a logo on his web site that the plaintiff argued was substantially similar to its own logo.[109] The *Bensusan* court explained:

> The [defendant's] Web site is a general access site, which means that it requires no authentication or access code for entry, and is accessible to anyone around the world ho has access to the Internet. It contains general information about the club in Missouri as well as a calendar of events and ticketing information. The ticketing information includes the names and addresses of ticket outlets in Columbia[, Missouri] and a telephone number for chare-by-phone ticket orders, which are available for pick-up on the night of the show at the [defendant's] Blue Note box office in Columbia.[110]

There is nothing in the *Bensusan* decision that suggests that any level of activity or inter-activity was occurring. Nevertheless, due to the language in *Zippo*, one must conclude that the *Zippo* court also would have characterized as passive at least some web sites that did in fact do more than simply provide information available to all Internet users. In expanding the definition of passive web sites, the *Zippo* court has needlessly undercut the simplicity of its own sliding scale approach.

The *Zippo* sliding scale approach can be best described by Figure 1, which can be viewed as a continuum drawn as a grid. In this grid there are three categories into which any personal jurisdiction case can be placed. One way to use this grid to assist in analysis is to first classify all web sites as

Figure 1



[108] *Id.*
[109] *See generally id.*
[110] *Id.*

passive and, therefore, beginning in the extreme left portion of the passive pigeon hole in Figure 1. As the facts of each case are analyzed, the web site will slide along the continuum until it reaches its appropriate place in the *Zippo* grid. Those web sites staying on the extreme left portion of the passive pigeon hole will be those web sites that do nothing more than merely provide the user with information. Those web sites that do little more than provide the user with information will still be in the passive pigeon hole, but will be shifted to the right. Those sites that do a little more than provide a little information would, according to the *Zippo* test, find themselves placed in the extreme left portion of the interactive pigeon hole.

While this analytical structure defined in the *Zippo* case does significantly assist in determining whether a web site is passive, interactive, or active, the framework is slightly flawed. Most courts do seem to be correctly solving the Internet jurisdiction puzzle under the *Zippo* framework but the fact remains that we are viewing first hand the evolution of the common law of the Internet. There are still a vast array of cases yet to be decided and the *Zippo* framework may not be adequate to address challenging cases that the future holds because in some regards it does not adequately recognize that virtually all web sites are in reality either interactive or active. Chief Judge Paul Barbadoro of the United States District Court for New Hampshire recently recognized this truth in *Dagesse v. Plant Hotel N.V.*, where he explained that the *Zippo* framework frequently provides no clear answer to jurisdictional questions because it is best suited to address only those cases involving web sites that are either clearly passive or clearly active.[111]

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[111] No. 98-713-B, slip. op. at 23-24 (D.N.H. Jan. 5, 2000) ("The *Zippo Manufacturing* analysis is most helpful when the web site at issue fits neatly into one of the extremes at either end of the spectrum."). For a copy of this opinion see

Recently the United States Court of Appeals for the Fifth Circuit adopted the *Zippo* sliding scale framework in *Mink v. AAAA Development LLC*.[112] In *Mink*, however, the Fifth Circuit fell victim to the very problem that the exact language of the *Zippo* test allows. Specifically, the Fifth Circuit held that the defendant's web site was insufficient to require the defendant to submit to personal jurisdiction.[113] In so holding, the Fifth Circuit pointed out that the defendant's web site: (1) posts information about its products and services; (2) provides users with printable mail-in order forms; (3) provides a toll free telephone number and real world mailing address; and (4) allows for e-mail to be sent to the defendant by Internet users who visit the site.[114] Based on these facts, the Fifth Circuit concluded that the defendant's web site was nothing "more than passive advertisement which is not grounds for the exercise of personal jurisdiction."[115]

By characterizing the defendant's web site as passive in *Mink*, the Fifth Circuit needlessly disregarded the fact that the defendant's web site did indeed allow for interaction between itself and visitors to its web site. Apparently, the Fifth Circuit found this level of interactivity to be so meaningless that it was incapable of defeating characterization as passive. While ultimately the fact that the defendant's web site was found to be passive did not affect the jurisdiction outcome, the fact remains that the defendant's web site was indeed interactive and should have been characterized as interactive by the court. By allowing the characterization of truly interactive web sites as passive, the range of what will be considered passive will only increase as Internet communication technology evolves and as

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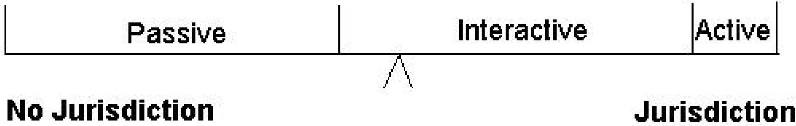
Dagesse v. Plant Hotel, NV (visited Mar. 9, 2000) <http://www.nhd.uscourts.gov/C:/Opinions/00/00NH009.PDF>.

[112] 190 F.3d 333 (5th Cir. 1999).

[113] *Id.* at 336.

[114] *Id.* at 336-37.

dependence on the Internet continues to grow. The fear is that continued encroachment of allegedly passive web sites into the interactive characterization may force the



Zippo framework to be better described by Figure 2, which would begin to render the *Zippo* framework unusable.

Characterization of a web site as interactive under the *Zippo* framework does not necessarily result in a finding that personal jurisdiction is proper. To the contrary, this is exactly where the pure, albeit modified, *Zippo* framework is much more appealing. First, it is important to realize that no Internet law[116] topic is more settled than the *Zippo* understanding that: (1) passive web sites alone cannot give rise to personal jurisdiction; and (2) active web sites do give rise to personal jurisdiction. With this understanding in hand, a modified *Zippo* analytical framework should look more like Figure 3, which is a modified *Zippo* sliding scale approach.

A close look at Figure 3 demonstrates that the passive web site is not represented on this sliding scale. This is because we know and can readily accept that a web site that has no interaction cannot be

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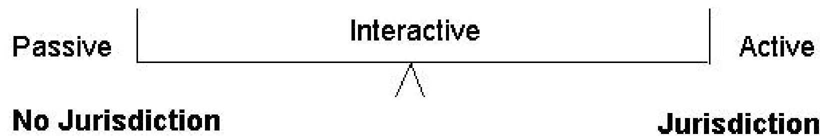
[115] *Id.* at 337.

[116] While we freely use the label "Internet Law," there is no substantive area of law known as "Internet Law." Nevertheless, the Internet forces us to deal with issues that are substantially different from those issues that are traditionally faced in the "real world." Moreover, due to the technology that makes the Internet work, "real world" substantive law does not always neatly apply to what would otherwise seem to be equivalent Internet scenarios. The term "Internet Law" is, therefore, frequently used to describe the various and sometimes convoluted legal issues that arise as a result of Internet communications.

Figure 3



the basis for personal jurisdiction. As a matter of fact, no court has ever held that an Internet advertisement alone is enough for general personal jurisdiction.[117] This is true because a ruling to the contrary would subject every individual or entity with a web site to jurisdiction in every state, which would eviscerate personal jurisdiction requirements.[118] Therefore, slightly modifying the *Zippo* definition of a passive web site to the point where passive web sites are now considered those web sites that do no more than provide information without opportunity for any level of interaction, we can start with a premise that is incontestable while at the same time preventing any further expansion of the definition of a passive web site. Likewise, it is clear and hardly questionable that a web site that allows for the active engagement in e-commerce does provide a legitimate basis for the exercise of personal jurisdiction. Accordingly, because there is no contestable jurisdiction question connected with active web sites, Figure 3 removes them from the continuum as well. What is left, therefore, is the real problem area, if there is any, which is the interactive range.

As discussed above, some courts have chosen not to really address the sliding scale portion of the *Zippo* analysis but have chosen to characterize admittedly small, and perhaps even inconsequential,

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[117] *See Brown*, 69 F. Supp. 2d at 777 ("[N]o court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state.") (citing *Cybersell*, 130 F.3d at 418).

[118] *Dagesse*, No. 98-713-B, slip. op. at 21-22 ("The consensus among courts that have focused explicitly on the issue is that general jurisdiction cannot be founded solely on the existence of a defendant's internet [sic] web site. As many courts have recognized, to hold that the mere existence of an internet [sic] web site establishes general jurisdiction would render any individual or entity that created such a web site subject to personal jurisdiction in every state. Such a rule would eviscerate the personal jurisdiction requirement as it currently exists. . . .").

interactivity as passive.[119] Such a characterization, however, forces cases that should be at the far left end of the interactive range into the passive range. Forcing such interactive cases into the passive range is not necessary because, as can be demonstrated by Figure 3, if the interactivity is truly low enough to place the web site at the far left end of the interactive range, the scale will tilt in favor of a finding that no jurisdiction is warranted. The outcomes in these types of cases would not change, but the analytical framework that will allow future courts to focus on and address the thorny issues that will surely arise as increasing numbers of interactive cases present themselves would be in place.

Returning to the facts of *Mink*, the defendant's web site was passive except for the provision of the ability to send e-mail.[120] Virtually all sites today carry this capability. All a user needs to do is click on a hyperlink name and an e-mail program is opened, thereby allowing communications to begin. Some other web sites employ a different approach, choosing to have users fill out a form that is not linked to the users e-mail program, but rather is web-based. In either case, the interactivity is very low and the temptation is perhaps overwhelming to characterize such a site as passive. The truth of the matter, however, is that this is not passive, it does represent some level of interactivity. If the *Zippo* sliding scale approach stands for anything then it should and must be allowed to function and it must be able to address even inconsequential cases of interactivity.

Admittedly, the need for such an approach is not altogether apparent based on the facts of *Mink*. But consider the situation where, as in *Mink*, there is no interactivity except for e-mail communications. In this hypothetical, however, there are repeated e-mail contacts back and forth

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[119] *See Mink*, 190 F.3d at 336-37; *see also Brown*, 69 F. Supp. 2d at 777.
[120] *Mink*, 190 F.3d at 337.

between the merchant and Internet user. The merchant e-mails the user a brochure that can be printed, and the merchant also e-mails the user a price quote. All that has occurred so far is communication via e-mail, yet it seems terribly disingenuous to characterize this hypothetical as passive. Nevertheless, under the *Mink* approach "the presence of an electronic mail access . . . is insufficient to establish personal jurisdiction."[121] There seems to be no accounting for the nature, quantity, and quality of these e-mail communications, which is in direct opposition to the spirit of the *Zippo* approach. As with any sliding scale test, the facts of the case must be considered. Strict and unyielding adherence to the *Zippo* suggestion that some passive web sites may offer minimal interactivity without losing a passive classification invites the very "pigeon-holing" that undercuts the simplicity of the sliding scale approach. An example of the arbitrariness permitted as a result of characterizing truly interactive web sites as passive can be found in *Cybersell, Inc. v. Cybersell, Inc.*[122] In *Cybersell*, the defendant, an Internet advertising and marketing firm, had a web site that encouraged users to e-mail the company to learn more about its services.[123] Ultimately, the court determined that the defendant's web site was of limited interactivity because, while users were encouraged to submit their names and addresses so they could receive company information, users could not sign up online to receive defendant's services.[124] Therefore, jurisdiction was inappropriate.[125]

Prior to finding the defendant's web site to be of such limited interactivity that it was indeed passive, the *Cybersell* court correctly recognized that interactive web sites present issues unique and

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[121] *Id*.
[122] 130 F.3d 414 (9th Cir. 1997).
[123] *Id*. at 416.
[124] *Id*. at 419.

analytically different from those presented by either passive or active web sites.[126] In explaining this difference, the court cited to *Maritz, Inc. v. Cybergold, Inc.*[127] as an example of a prototypical interactive web site case.[128] In *Maritz*, however, the defendant's web site was not truly operational.[129] By going to the defendant's site, all that a user could accomplish was "to put their names on [the defendant's] mailing list and get up- to-date information about the [defendant's] company and its forthcoming Internet service."[130] Ultimately, the *Cybersell* court determined that the defendant's web site was not interactive,[131] presumably because it was not similar enough to the interactive site described in *Maritz*. The only substantive difference, however, between the defendant's web site in *Maritz* and the defendant's web site in *Cybersell* was that in *Maritz* 131 residents of the forum state had registered for the mailing list,[132] while in *Cybersell* there was no evidence that any residents of the forum state had sent inquiries to the defendant.[133] To be sure, it may indeed be difficult to reconcile the jurisdiction decisions in these two cases, but it is even harder to reconcile how these courts were able to categorize virtually identical web sites differently. It is for this reason that a modified *Zippo* test should be adopted and courts should refrain from characterizing interactive web sites as passive.

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[125] *Id.* at 419-20.
[126] *See id.* at 418.
[127] 947 F. Supp. 1328 (E.D. Mo. 1996).
[128] *Cybersell*, 130 F.3d at 418.
[129] *Maritz*, 947 F. Supp. at 1330.
[130] *Id*.
[131] *Cybersell*, 130 F.3d at 420.
[132] *Maritz*, 947 F. Supp. at 1333.
[133] *Cybersell*, 130 F.3d at 419.

In essence, under the modified *Zippo* approach, set forth in Figure 3, truly passive web sites, such as a typical restaurant web site, will result in a finding of no jurisdiction.[134] Active web sites, which are best exemplified by Amazon.com and other e-commerce giants, are at the other end of the spectrum; the end of the spectrum where personal jurisdiction questions are not problematic and where personal jurisdiction will be readily exercised. Somewhere in the middle lay the interactive web sites, that may not allow for jurisdiction, which do not allow for easy classification and which mandate a flexible framework in order to handle the ever changing nature of e-business.

The very nature of e-business will force change in the way all business is conducted in the future. Some restaurants have abandoned a truly passive web site in favor of what must be characterized as an interactive web site.[135] These restaurants allow customers to both make reservations and place orders over the Internet.[136] No sale has occurred over the Internet, but the precursor to a sale has been set in a much more definite way that would be possible if the web site was truly passive. Failure to characterize such a case as interactive simply because only e-mail is involved would prevent the court from ever inquiring as to the nature and character of the e-mail communication, which goes against the spirit and intent of the court's ruling in *Zippo*.

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[134] This is true because it is impossible for a restaurant to sell anything over the Internet. The restaurant can only place its menu, hours of operation and pictures of its facilities on its web site. While this type of web site can be very useful to promote business, ultimately anyone doing business with the restaurant must, in a real world sense, physically travel to the restaurant. No business or solicitation to do business has occurred anywhere other than at the physical, real world location of the restaurant.

[135] *Interdining – Dining Services* (visited July 9, 2000) <http://www.interdining.com>.

[136] *Interdining – About Us* (visited July 9, 2000) <http://www.interdining.com/about.htm>.

2. Defamation and Internet Personal Jurisdiction

a. Defamation in the Real World

Defamation is essentially any false communication that injures another's reputation or good name.[137] In order to be successful in a defamation action, the plaintiff must establish that the defendant published or publicly spoke a false and defamatory statement concerning the plaintiff.[138] A communication qualifies as defamatory if it tends to harm the reputation or good name of the plaintiff.[139] The plaintiff must also demonstrate that the statement was either defamatory per se[140] or defamatory per quod.[141]

In addition to the above requirements the plaintiff must also address whether the defamatory statement was made willfully, recklessly or negligently.[142] This is true because

> one who publishes a defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.[143]

This rule for public officials and public figures, however, differs from the general rule applicable when a private individual is defamed. When a private person is defamed the publisher of the defamatory

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[137] *See generally* 50 AM. JUR. 2D *Libel and Slander* §§ 6-9 (1995).

[138] Andrews v. Prudential Sec., Inc., 160 F.3d 304, 308 (6th Cir. 1998).

[139] *Id.*

[140] Defamation per se occurs when defamation occurs merely because the words were spoken, Cook v. Winfrey, 141 F.3d 322, 329 (7th Cir. 1998), or in other words the defamatory meaning is clear on its face without need to reference extrinsic proof. *See* 50 AM. JUR. 2D. *Libel and Slander* §§ 140-143 (1995); BLACK'S LAW DICTIONARY 417 (6th ed. 1990).

[141] Defamation per quod is, in contrast with defamation per se, not clearly defamatory on its face. In order to appreciate the defamatory meaning it is necessary to examine extrinsic proof and determine if defamation results from the listener's interpretation of the words through innuendo. *Cook*, 141 F.3d at 329; *see also* 50 AM. JUR. 2D. *Libel and Slander* §§ 140-143 (1995); BLACK'S LAW DICTIONARY 417 (6th ed. 1990).

[142] RESTATEMENT (SECOND) OF TORTS § 580A (1976).

communication will be liable in a defamation action "if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them."[144] Finally, it is important to note that the defendant who defames a public official or public figure in relation to a purely private matter will be judged under the standard set forth in the Restatement (Second) of Torts § 580A for defamation against private persons.[145]

The reason private individuals are treated differently than public officials or public figures is because both public officials and public figures seek the public's attention.[146] Moreover, the first remedy in response to any alleged defamation is the self help remedy of "using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."[147] This being true it only stands to reason that those individuals who are in the media eye, namely public officials and public figures, "enjoy significantly greater access to the channels of effective communication and hence have more realistic opportunity to counteract false statements than private individuals normally enjoy."[148]

b. Defamation in Cyberspace

In the real world it has been necessary to protect private individuals against defamation to a greater extent than either public officials or public figures. Nevertheless, in the Internet age this may not be necessary. Increasingly, more and more private individuals are able to access the Internet through

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[143] *Id*.
[144] RESTATEMENT (SECOND) OF TORTS § 580B (1976).
[145] *Id*.
[146] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).
[147] *Id*. at 344.

mechanisms such as personal home pages, small business web sites, news groups,[149] list serves,[150] chat rooms,[151] and bulletin boards.[152] As access continues to grow and online communities grow and prosper, it may no longer make sense to have a different standard of culpability for those who defame private individuals because private individuals will have access to rebut the falsehoods and to get the truth out into the open. While society is admittedly probably not ready to embrace this change just yet, one area of defamation law that is ripe for reconsideration is the area of jurisdiction.

In the real world, jurisdiction is appropriate in defamation cases where the plaintiff resides.[153] This is true because if there is any harm to the reputation or good name of the plaintiff that harm will result in the community where the plaintiff resides.[154] Essentially, in the real world courts have no qualms about subjecting a defendant to personal jurisdiction in the place where the plaintiff resides if it is

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[148] *Id.*

[149] News groups are online forums. *Newsgroup – Webopedia Definitions and Links* (visited Feb. 17, 2000) <http://webopedia.internet.com/TERM/n/newsgroup.html>. Internet users can sign up for literally thousands of different newsgroups covering every conceivable interest. *Id.* To view and post messages to a newsgroup, you need a news reader, which is a program that runs on your computer and connects you to a news server on the Internet. *Id.*

[150] A list serve is a list of e-mail addresses that will each receive a particular message simply by sending the message to the central address. *Listserv – Webopedia Definitions and Links* (visited Mar. 23, 2000) <http://webopedia.internet.com/internet_and_online_services/electronic_mail/listserv.html>. For example, everyone enrolled at a particular university could be added to a global university list serve. *Id.* Anyone wishing to send a message to the list serve would type in a signal e-mail address and the message would be distributed to everyone on the list. *Id.*

[151] A chat room is a virtual location on the Internet or a space provided by an Internet Service Provider where a small number of individuals (perhaps 25) can gather and speak in a community setting by typing messages that appear in almost real time to all those in the room. *Chatroom – Webopedia Definitions and Links* (visited Mar. 23, 2000) <http://webopedia.internet.com/TERM/c/chat_room.html>.

[152] A bulletin board is an electronic message center that is generally devoted to a specific interest group or topic. *Bulletin Board – Webopedia Definitions and Links* (visited Feb. 17, 2000) <http://webopedia.internet.com/TERM/b/bulletin_board_system_BBS.html>. Bulletin boards allow Internet users to review messages left by others, and leave their own messages if they so desire. *Id.*

[153] Calkder v. Jones, 465 U.S. 783, 788-89 (1984); *see also* Gordy v. Daily News, L.P., 95 F.3d 829, 932-33 (9th Cir. 1996); Mart v. Hess, 703 N.E.2d 190, 192-93 (Ind. Ct. App. 1998).

[154] *Id.*

foreseeable that the injury would result in that location.[155] Nevertheless, the Internet does significantly alter this rather straight forward analysis. The Internet allows individuals to communicate using their own name, a friends name, anonymously, or under an assumed name and identity. It is, therefore, difficult to know who is sending a message, but likewise equally difficult to know who you are defaming. Given this reality, foreseeability on the Internet takes on a life of its own insofar as defamation is concerned.

Similar problems arise due to the decentralized nature of the Internet, which was a primary focus of the government's design goals.[156] This decentralization means that the Internet is far more dependent on logical abstraction than upon any physical implementation.[157] Essentially, the Internet is a logical entity and not a physical entity.[158] Given this reality courts, will be hard pressed to identify a physical location so closely tied to the defamatory communication that the exercise of jurisdiction would not offend traditional notions of fair play when there exist no other justifiable reasons for exercising jurisdiction over a defendant. Nevertheless, despite the ephemeral nature of the Internet and Internet communications, one court has attempted just such a hopeless task.

i. The Internet Is Located In Virginia

On May 26, 1999, Judge Ellis of the Eastern District of Virginia issued a rather troubling decision on the defendants' motion to dismiss for lack of personal jurisdiction in *Bochan v. La*

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[155] *Id*.
[156] *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996) [hereinafter *ACLU*].
[157] Richard S. Zembek, *Comment: Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 342 (1996) (citing footnote 5).
[158] *Id*.

Fontaine.[159] In this case, the court was faced with an Internet libel suit brought by a Virginia plaintiff against defendants from Texas and New Mexico.[160] The plaintiff alleged that he was defamed in Virginia by the posting of libelous messages from both Texas and New Mexico to an Internet newsgroup.[161]

With respect to the defendant La Fontaine, the court determined that the appropriate Virginia long arm statute was section 8.01-328.1(A)(3), which allows Virginia courts to exert jurisdiction over defendants who cause tortious injury within the Commonwealth of Virginia.[162] The court explained this section of the Virginia long arm statute was appropriate because the issue, at least with respect to the defendant La Fontaine, was "whether the La Fontaines committed a tort (i.e., libel) in Virginia by posting certain messages to an Internet newsgroup via AOL and Earthlink.net."[163] In answering this question in the affirmative, the court found that because the La Fontaine's used their AOL account to post the allegedly defamatory messages and because the AOL server is located in Virginia, sufficient ties to Virginia existed and personal jurisdiction was proper under section 8.01-328.1(A)(3).[164] In this regard the court attempted to explain that:

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[159] 68 F. Supp. 2d 692 (E.D. Va. 1999).
[160] *Id.* at 694-95.
[161] *Id.* at 695. While the actual defamatory statements are not relevant to determine jurisdiction in a defamation action it is important to note, however, that the defendants accused the plaintiff in not so subtle terms of being a pedofile, sexual predator and pervert. *Id*. at 695-96. It is, therefore, at least conceivable that the nature of the alleged defamatory remarks did, at least on a subconscious level, influence the court's decision with respect to jurisdiction. *See generally id*. at 695-97.
[162] *Id.* at 698. "A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's . . . Causing tortious injury by an act or omission in this Commonwealth . . . . " VA. CODE ANN. § 8.01-328.1(A)(3) (Michie 1999).
[163] *Bochan*, 68 F. Supp. 2d at 698.
[164] *Id.* at 699.

> [A] prima facie showing of a sufficient act by the La Fontaines in Virginia follows from their use of the AOL account, a Virginia-based service, to publish the allegedly defamatory statements. According to Bochan's expert, because the postings were accomplished through defendant's AOL account, they were transmitted first to AOL's USENET server hardware, located in Loudon County, Virginia. There, the message was apparently both stored temporarily and transmitted to other USENET servers around the world. Thus, as to the La Fontaines, because publication is a required element of defamation, and a prima facie showing has been made that the use of USENET server in Virginia was integral to that publication, there is a sufficient act in Virginia to satisfy was § 8.01-328.1(A)(3).[165]

Apparently, the La Fontaines should have known that the AOL server was located in Virginia. The AOL web site does clearly say that their corporate headquarters are located in Dulles, Virginia, however, there is no mention on the AOL site about the location of their servers.[166] As a result of the court's decision, it would appear that all Internet users should demand to know, and perhaps even have a duty to know, where their ISP's servers are located before they agree to such service. Additionally, once the location of the servers is determined, users should demand that no additional servers be added to the system outside the jurisdiction boundaries defined by the location of the original servers. This is true because if the *Bochan* decision is taken to its logical extreme and servers are added outside the original jurisdictional boundaries, the unaware defendant could well be hailed into court in yet another jurisdiction.[167]

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[165] *Id.*

[166] *See AOL Corporate* (visited Feb. 24, 2000) <http://www.corp.aol.com/whoweare.html>.

[167] It would, of course, be ridiculous to impose such obligations upon either Internet users or ISPs. As the Internet expands, companies will need to expand server capacity. It will often times be most efficient to place servers in more than one location, unbeknownst to the end user.

Essentially, the La Fontaines were subject to jurisdiction in Virginia because they were unlucky enough to have selected AOL as their ISP.[168] If only the La Fontaines had subscribed to Microsoft Network as their ISP, they would clearly have been safe from Virginia jurisdiction because Microsoft is located in Redmond, Washington.[169] Resting a jurisdictional analysis on such a benign and fortuitous decision, however, seems on a visceral level to offend that which a jurisdictional inquiry is meant to protect; namely an individuals rights under the Due Process clause. It is indeed hard to justify this ruling as being within the "traditional notions of fair play and substantial justice."[170]

As disturbing as the finding of personal jurisdiction is with respect to the La Fontaines, the finding of personal jurisdiction against the defendant Harris is perhaps even more disturbing.[171] Harris did not use AOL, but rather used an ISP located in California.[172] The plaintiff argued that jurisdiction over Harris was appropriate under section 8.01-328.1(A)(3) because the allegedly defamatory messages were downloaded in Virginia, and therefore publication, the last act necessary for libel, occurred in Virginia.[173] The court, however, pointed out that a number of courts in "non-Internet contexts have uniformly held that defamatory statements generated outside a forum state and transmitted by telephone or mail to the forum are not 'acts' in the forum as required by section 8.01- 328.1(A)(3) or other similar long-arm statutes."[174] The plaintiff's inability to resort to section 8.01-328.1(A)(3),

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[168] *Bochan*, 68 F. Supp. 2d at 699-700.
[169] *See Microsoft – Corporate Information* (visited Feb. 22, 2000) <http://www.microsoft.com/mscorp/>.
[170] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
[171] *Bochan*, 68 F. Supp. 2d at 700.
[172] *Id*.
[173] *Id.* at 700 n.26.
[174] *Id.* (citing Weller v. Cromwell Oil Co., 504 F.2d 927, 931 (6th Cir.1974); Margoles v. Johns, 483 F.2d 1212 (D.C. Cir.1973); Davis v. Costa-Gavras, 580 F. Supp. 1082, 1087 (S.D.N.Y. 1984); St. Clair v. Righter, 250 F. Supp. 148, 150-51

however, did not end the long arm inquiry. The plaintiff next argued that section 8.01-328.1(A)(4), which allows for jurisdiction if the defendant regularly does business in the Commonwealth of Virginia, was applicable.[175] The court agreed.

The court correctly recognized that "personal jurisdiction primarily on the basis of Internet activity generally focus[es] on the nature and quality of activity that a defendant conducts over the Internet."[176] Nevertheless, the court went on to state that Internet advertising accessible to Virginia residents twenty-four hours a day does in fact constitute solicitation of business in Virginia sufficient to satisfy the personal jurisdiction requirements of section 8.01-328.1(A)(4).[177] Taken to its logical end this would mean that purely passive web sites that are accessible in Virginia twenty-four hours a day would work to create personal jurisdiction. Such a ruling does gain direct support from both *Telco Communications v. An Apple a Day*[178] and *Inset Systems, Inc. v. Instruction Set, Inc.*,[179] however, virtually every other court that has addressed cases presenting similar facts has ruled to the contrary.

In *Inset Systems*, which was relied upon by *Telco Communications*, the court explained that the defendant was subject to jurisdiction in Connecticut because: (1) it maintained a toll free telephone

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(W.D. Va. 1966), *disapproved on other grounds*, Beaty v. M.S. Steel Co., 401 F.2d 157 (4th Cir.1968); Krantz v. Air Line Pilots Assoc., Int'l, 427 S.E.2d 326, 328 (Va. 1993)); *see also* Booth v. Leaf, 40 F.3d 1243, 1994 WL 620651 (4th Cir.1994) (unpublished disposition) ("§ 8.01-328.1(A)(3) does not grant jurisdiction over a person who wrote and mailed an allegedly defamatory letter outside Virginia.").

[175] *Bochan*, 68 F. Supp. 2d at 701.

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's . . . Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth . . .

VA CODE ANN. § 8.01-328.1(A)(4).

[176] *Bochan*, 68 F. Supp. 2d at 701.

[177] *Id.* at 700.

[178] 977 F. Supp. 404 (E.D. Va. 1997).

number; and (2) 10,000 Connecticut residents had Internet access and could, if they so desired, access the defendant's web site.[180] There was no evidence in the *Inset* case that any Connecticut residents did in fact access the defendant's web site. Likewise, there was no discussion of whether the defendant's web site was passive, interactive or active.[181] The exercise of jurisdiction was, therefore, based not on reality but on a theoretical possibility. Quite correctly the *Inset* decision has been characterized as representing "the outer limits of the exercise of personal jurisdiction based on the Internet."[182]

Not withstanding that *Inset* has been characterized as the outer most limits on jurisdiction, *Bochan* goes one step further. In *Bochan*, there was not only an absence of evidence to suggest that any Virginia residents visited the defendant Harris' web site, but the defendant's web site also included a straight forward, unambiguous statement that it sold its products only in New Mexico.[183] Furthermore, the defendant had never sold a single product to a Virginia resident.[184] To the fact that a product had been sold to a Virginia resident, the court responded that this reality did not matter given that the defendant had posted messages to various Internet newsgroups that made it appear as if there were no geographical limits placed on buyers.[185] In essence, not only did the defendant's twenty-four hour web site allow for jurisdiction under the Virginia long arm statute, but the defendant's postings to

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[179] 937 F. Supp. 161 (D. Conn. 1996).
[180] *Id.* at 164.
[181] The *Inset* case was decided prior to *Zippo* and, therefore, whether it has any remaining viability outside of the Eastern District of Virginia and the District of Connecticut is in doubt. This is particularly true because there was no effort by the court to classify the web sites, which since *Zippo* has become the standard analytical approach.
[182] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125 (W.D. Pa. 1997).
[183] *Bochan*, 68 F. Supp. 2d at 697.
[184] *Id*.
[185] *Id.* at 702.

an Internet newsgroup, which were wholly unrelated to the operative facts of the case, also permitted jurisdiction under the Virginia long arm statute.[186]

To be sure, any personal jurisdiction analysis requires a two part test, which the *Bochan* court did perform. Having found that the applicable Virginia statute permitted the exercise of jurisdiction, the court then turned its attention to this Due Process inquiry.[187] The court stated because the plaintiff resided in Virginia the defendants should have anticipated that any reputational harm would be felt most heavily in Virginia.[188] Accordingly, the defendants should have foreseen the possibility that they would be hailed into court in Virginia and, therefore, the exercise of jurisdiction did not offend "traditional notions of fair play and substantial justice."[189]

ii. A Sudden Departure from Bochan

In *Rannoch, Inc. v. Rannoch Corp.*, just one month after the *Bochan* decision, Judge Ellis, the same judge who ruled that the defendants in *Bochan* were subject to jurisdiction in the Eastern District of Virginia, again addressed the issue of jurisdiction based on Internet activities.[190] In *Rannoch*, which was not a defamation case, the plaintiff asserted that jurisdiction was appropriate over the defendant because of the defendant's web site.[191] While there were no sales conducted over the defendant's web site the web site did provide (1) contact information, including a toll free telephone number, fax number, real world address, and e-mail address; (2) an interactive form that could be filled out by any visitor and

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[186] *Id*.
[187] *Id*.
[188] *Id*.
[189] *Id.* (citing *International Shoe*, 326 U.S. at 316).
[190] 52 F. Supp. 2d 681 (E.D. Va. 1999).

returned to the defendant; (3) hyperlinks that made it possible to directly send e-mail to the defendant; and (4) an interactive form for use by potential web site advertisers.[192] Based on these findings, together with Judge Ellis' recent *Bochan* decision, a betting man would probably wager that the court would exercise jurisdiction over the defendant. The betting man would, of course, lose this bet.

The court went on to point out that the defendant (1) had not conducted any business of any kind within the Commonwealth of Virginia; (2) had not conducted business with or assisted in any way any Virginia residents; (3) conducted no advertising or promotional activity directed toward Virginia; (4) was not authorized to do business in Virginia; and (5) owned no property in Virginia.[193] The court concluded that

> there appears to be nothing more than the placement of the web site on the Internet with knowledge of the possibility that the site might be accessed in Virginia. This alone does not satisfy the due process jurisdictional standard, particularly where, as here, [the plaintiff] has made no showing that [the defendant] when it chose its corporate name, had any knowledge of [the plaintiff] or its trademarks.[194]

Therefore, the only distinction between the *Rannoch* decision and the *Bochan* decision, at least insofar as the defendant Harris is concerned, is that in *Rannoch* the defendant who allegedly committed trademark infringement did so unknowingly,[195] while in *Bochan* the defendant Harris knowingly committed the alleged defamation.[196] This distinction without a difference misses the point because: (1) registration of a mark gives constructive notice of the registrant's claim of ownership, thereby defeating

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[191] *Id*. at 683.
[192] *Id*.
[193] *Id*.
[194] *Id*. at 685.
[195] *Id*. at 683.
[196] *See Bochan*, 68 F. Supp. 2d at 695-96.

any claim of ignorance;[197] and (2) unintentional and unknowing use of another's trademark is still infringement.[198] Essentially, the *Rannoch* defendant's blissful ignorance, which was enjoyed because of its failure to conduct a trademark search, was rewarded.

iii. Disagreement Over Jurisdiction in Cyber-Defamation Cases

In June of 1999, the Court of Appeals for the Second District of California issued a ruling in *Jewish Defense Organization, Inc. v. Superior Court*,[199] which directly conflicted with the ruling of the Eastern District of Virginia in *Bochan*. This California case originated when in October of 1997, the plaintiff in an underlying lawsuit filed a complaint against the Jewish Defense Organization and Mordechai Levy for defamation.[200] The complaint alleged that in 1997 the Jewish Defense Organization and Levy together posted a web site containing defamatory statements about the plaintiff.[201] After granting the plaintiff time to proceed with discovery with respect to the jurisdictional dispute raised by the defendants the trial court ruled that personal jurisdiction was indeed proper.[202] The defendants filed a petition for writ of mandate challenging the trial court ruling regarding personal jurisdiction.[203]

Although the trial court proceeding was not terribly clear and needlessly full of inconsequential jurisdictional facts that described the feud between the parties, the Appellate Court recognized that based on the facts of record the defendants' only contacts with the forum state after 1989 consisted of:

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[197] 15 U.S.C. § 1072 (1997).
[198] *See* 15 U.S.C. §§ 1114(1), 1125(a).
[199] 85 Cal. Rptr. 2d 611 (Cal. Ct. App. 1999).
[200] *Id*. at 614.
[201] *Id*.
[202] *Id*. at 616.
[203] *Id*.

(1) mail being sent by the defendants into California in connection with another libel lawsuit filed by the plaintiff against another party; and (2) the defendants contracted with one or more Internet Service Providers who happened to be located in California.[204] The court quickly dispatched with the mail link as providing a justifiable basis for jurisdiction because there was no evidence the documents mailed were defamatory, and they were not related in any way to the lawsuit at hand.[205] The court next turned its attention to the defendants' web hosting contract with the California Internet Service Providers.

After reciting the well established legal principles at the foundation of both general and specific jurisdiction the court concluded that based on the record there was an insufficient basis for the assertion of general jurisdiction over the defendants.[206] Turning now to specific jurisdiction, the court explained that in order to prevail the plaintiff "must establish [that] the causes of action arose out of an act committed or transaction consummated in California, or that petitioners performed some other act by which they purposefully availed themselves of the benefits and protections of the state's laws."[207] The court further explained that the mere fact that the allegedly defamatory statements may be published in California was, without more, not enough to warrant the exercise of specific jurisdiction.[208] The critical question in this defamation case was "whether or not it was foreseeable that a risk of injury by defamation would arise in the forum state."[209]

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[204] *Id*. at 618.
[205] *Id*. at 619 n.2.
[206] *Id*. at 618.
[207] *Id*. at 619.
[208] *Id*.
[209] *Id*.

It is reasonable to expect the bulk of any harm suffered as a result of defamation would be most severe at the domicile of the plaintiff.[210] In the underlying defamation action, however, the plaintiff was not domiciled in California, but rather had his full time residence in New York.[211] Likewise, the plaintiff also failed to establish that he had any clients in California or that the alleged defamatory statements would cause an impact on any business interests or reputation in California.[212] The plaintiff argued only that he "spends considerable professional time in California."[213] The court, therefore, concluded that the harm, if any, was not suffered in California. As a result, jurisdiction was inappropriate in California simply because a defamation theory was plead.[214]

After finding a lack of minimum contacts based solely on the fact that allegedly defamatory material was published in California, the court turned to whether jurisdiction would be proper as a result of the defendants' Internet activities.[215] Before reaching its conclusion on this point the court quoted heavily from both *Zippo* and *Pres-Kap*, making it clear that it was particularly concerned with the possible boundless nature of personal jurisdiction based on Internet activities.[216] The court then concluded that specific jurisdiction could not be exercised over the defendants:

> In the instant case, defendants were mere customers of Internet service providers who happened to maintain offices or databases in California; such providers were engaged by JDO from its computer in New York . . . . [W]e conclude that defendants' conduct of contracting, via computer, with Internet service providers, which may be California corporations or which may maintain offices or databases in California, is insufficient to

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[210] *Id*.
[211] *Id*. at 620.
[212] *Id*.
[213] *Id*.
[214] *Id*.
[215] *Id*.
[216] *Id*. at 621.

constitute "purposeful availment" and does not satisfy the first prong of the three-part test for specific jurisdiction.[217]

Therefore, not only was there no defamatory harm in California, but the defendants' tenuous Internet connections did not provide a sufficient basis for personal jurisdiction.[218]

It is indeed difficult to reconcile *Jewish Defense Organization* with *Bochan*. They were based on virtually identical operative facts, yet these two courts disagreed within two weeks of each other. Given that: (1) *Zippo* has unquestionably been recognized and adopted as the leading authority for all Internet personal jurisdiction cases;[219] (2) *Zippo* characterizes the *Bochan* rational as constituting the "outer limits" of acceptable Internet based jurisdiction;[220] and (3) Judge Ellis' seemingly contradictory ruling in *Rannoch* indicates that future courts likely will tend toward accepting the *Jewish Defense Organization* rationale and rejecting the *Bochan/Inset* line of cases.

III. IN REM JURISDICTION

While personal jurisdiction deals with jurisdiction over a person, in rem jurisdiction refers to when an action is instituted directly against a piece of property. Increasingly in rem jurisdiction is becoming an important weapon in combating cybersquatting,[221] but there remains questions about whether such actions violate a defendant's due process rights.[222]

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[217] *Id.* at 621-22.
[218] *Id.* at 622.
[219] *See, e.g.*, Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1297 (10th Cir. 1999); Mink v. AAAA Dev. LLC, 190 F.3d 333 (5th Cir. 1999); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997); Brown v. Geha-Werke GMBH, 69 F. Supp. 2d 770, 778 (D.S.C. 1999); Stomp, Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1998).
[220] *See generally Zippo*, 952 F. Supp. at 1125 (characterizing *Inset Systems* as the outer most limits on jurisdiction).
[221] Cyber squatting is the act of registering a popular Internet address, such as a company name or the name of a famous individual, with the intent of selling it to who the real world would perceive to be the "rightful" owner of that

A. In Rem in the Real World

The seminal in rem jurisdiction case is the Supreme Court's decision in *Shaffer v. Heitner.*[223] In *Shaffer*, the Court was faced with making a decision regarding the constitutionality of a Delaware statute that allowed Delaware state courts to exercise jurisdiction by sequestering property located in Delaware.[224] The defendant-appellants argued that the Delaware sequestration statute was unconstitutional as applied because it violated the Due Process Clause of the Fourteenth Amendment by allowing the state court to exercise jurisdiction despite the absence of sufficient minimum contacts.[225] The plaintiff-appellant[226] argued that because the action was brought as a quasi in rem proceeding, which is traditionally based on attachment or seizure of property that is present in a particular jurisdiction, the court need not even consider whether minimum contacts existed.[227]

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address. *Cyber-Squatting and Cyber-Piracy* (visited May 20, 2000) <http://www.houstoninternetlaw.com/cyber_squatting.html>. While beyond the scope of this article, it should be noted that the World Intellectual Property Organization (WIPO) has issued a report outlining what it feels would be appropriate anti-cybersquatting tactics. *See WIPO Internet Domain Study* (visited May 17, 2000) <http://ecommerce.wipo.int/domains/process/eng/processhome.html>. The Internet Corporation for Assigned Names and Numbers, better known as ICANN, has adopted a Uniform Domain Name Dispute Resolution Policy based largely on the WIPO work. *See ICANN – Uniform Domain Name Dispute Resolution Policy* (visited May 17, 2000) <http://www.icann.org/udrp/udrp.htm>.

[222] In order for in rem jurisdiction to be appropriate to combat cybersquatting it is a necessary pre-requisite that the domain name in question be property. The question of whether a domain name is property is beyond the scope of this paper. Because the several courts that have addressed this issue have treated the domain name as property, *see* Porsche Cars North America, Inc. v. Porsch.com, 51 F. Supp. 2d 707 (E.D. Va. 1999); Caesars World, Inc. v. Caesars-Palace.com (visited July 1, 2000) <http://www.ipwatchdog.com/ceasarsworld.html>, and because the Anticybersquatting Consumer Protection Act itself treats domain names as property, this will be assumed for purposes of this article.

[223] 433 U.S. 186 (1977).

[224] *Id.* at 189.

[225] *Id*.

[226] The plaintiff was the owner of a single share of stock in the Greyhound Corporation who brought this action, which alleged that the individual defendants had violated their duties to Greyhound shareholders by causing it to engage in actions that ultimately lead to a substantial damages award in an antitrust suit, which was unrelated to this action. *Id.* at 190.

[227] *Id.* at 196.

The Supreme Court ultimately held that even if an action is characterized as in rem, traditional notions of fair play require that jurisdiction be exercised if, and only if, in personam jurisdiction can be asserted over the property owner.[228] In reaching this conclusion, the Supreme Court appropriately recognized that if a court is able to exercise jurisdiction over a piece of property through jurisdiction over the property, it will be able to command the presence of defendants who may be only remotely tied to the forum state.[229] This, in the Court's view, violated the Due Process requirement.[230] The Court explained that to say in rem jurisdiction is different from in personam jurisdiction is a legal distinction without a difference; nothing more than a legal fiction.[231] In this regard the Supreme Court stated:

> The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.[232]

After *Shaffer*, how much, if any, constitutional validity quasi in rem jurisdiction retains is unknown.[233] What is known, however, is that in rem jurisdiction is only appropriate when in personam jurisdiction is appropriate. To be sure, this will not make a difference in the vast majority of cases, particularly those cases dealing with a dispute over the property.[234] It is, however, important to recognize that the Supreme Court specifically chose not to make the mere existence of property in the

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[228] *Id.* at 216-17.
[229] *Id.* at 209.
[230] *Id*.
[231] *Id.* at 212.
[232] *Id*.
[233] 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1121 (2d ed. 1987).
[234] *Shaffer*, 433 U.S. at 207-08.

forum state dispositive. The Court instead said that "the presence of property in a State *may* bear on the existence of jurisdiction,"[235] thereby implying that there will be cases where in rem jurisdiction will be specifically prohibited even though the property is in fact located in the forum State.

B. In Rem Jurisdiction in Cyberspace

1. In Rem Before the Anticybersquatting Consumer Protection Act - Porsche Cars North America, Inc. v. Porsch.com

Perhaps the first Internet plaintiff to resort to using in rem jurisdiction was Porsche Cars North America, Inc. (hereinafter "Porsche Cars"), who markets and sells cars, goods, accessories and services under the trademarks "PORSCHE" and "BOXSTER."[236] In the Spring of 1999 the company initiated an in rem proceeding against approximately 128 allegedly misleading domain names,[237] all of

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[235] *Id.* at 207 (emphasis added).

[236] Porsche Cars North America, Inc. v. Porsch.com, 51 F. Supp. 2d 707 (E.D. Va. 1999).

[237] *Id.* at 709. *Porsche* Cars brought suite against the following domain names: porsch.com, porschecar.com, porschagirls.com, 928porsche.com, accessories4porsche.com, allporsche.com, beverlyhillsporsche.com, boxster.com, boxster.net, boxsters.com, buyaporsche.com, calporsche.com, e-porsche.com, everythingporsche.com, formulaporsche.com, ianporsche.com, idoporsche.com, laporsche.com, lynchporsche.com, myporsche.com, newporsche.com, parts4porsche.com, p0[zero]rsche.com, passion-porsche.com, porsche.net, porsche.org, porsche-911.com, porsche-911.net, porsche-944.com, porsche-accessories.com, porsche-autos.com, porsche-books.com, porsche-carrera.com, porsche-cars.com, porsche-city.com, porsche-classic.com, porsche-exchange.com, porsche-leasing.com, porsche-lynn.com, porsche-modellclub.com, porsche-munich.com, porsche-net.com, porsche-nl.com, porsche-online.com, porsche-rs.com, porsche-sales.com, porsche-service.com, porsche-supercup.com, porsche-web.com, porsche356.com, porsche4me.com, porsche4sale.com, porsche911.com, porsche911.net, porsche911.org, porsche911parts.com, porsche914.com, porsche924.com, porsche944.com, porsche993.com, porsche996.com, porscheag.com, porscheaudiparts.com, porschebooks.com, porscheboxster.com, porschecarrera.com, porschecars.com, porschecarsales.com, porschecarsforsale.com, porschecasino.com, porschechat.com, porscheclassified.com, porscheclub.net, porscheclub.org, porscheconnection.com, porschedealer.com, porschedealer.net, porschedealers.com, porschedealers.net, porschedirect.com, porschedirect.net, porschedoctor.com, porschefans.com, porschefleet.com, porscheformula.com, porschefx.com, porschegt.com, porschehaus.com, porschelease.com, porscheloan.com, porscheloans.com, porschelynn.com, porschemail.com, porschenow.com, porschenut.com, porscheonline.com, porscheowner.com, porscheowners.com, porscheownersclub.com, porscheparts.com, porscheparts.net, rschephiles.org, porscheproducts.com, porscheracing.com, porscherims.com, porsches.com, porschesales.com, porschesalestoday.com, porschescape.com, porscheservice.com, porschesplayhouse.com, porschestore.com, porschestore.net, porschestuff.com, porschesucks.com, porschetoday.com, porschetrader.com, porscheweb.com, porscheworld.com, porschezentrum.com, porschezentrum.net, porshce.com, pristineporsche.com, prosche.com, ultimateporsche.com,

which contained either the word porsche or a word of similar derivation. Although Porsche Cars owns the domain names "porsche.com" and "porsche-usa.com" many other similar and perhaps misleading domain names, such as "porsch.com", are owned by others who, according to Porsche Cars, have no legal interest in the corporation or trademarks.[238] The reason Porsche Cars decided to file this action as an in rem proceeding was to obviate the need to file an in personam action against each of those responsible for registering the 128 allegedly misleading domain names in question.[239]

Two of the domain names at issue "porsche.net" and "porscheclub.net" filed an appearance through counsel and moved to dismiss the complaint for lack of jurisdiction.[240] The defendants argued that the court lacked personal jurisdiction because the Trademark Dilution Act, the basis for the plaintiff's complaint, does not permit in rem proceedings.[241]

The applicable federal rule, Rule 4(n) of the Federal Rules of Civil Procedure, allows in rem jurisdiction over property if (1) a federal statute provides for such jurisdiction; or (2) if state law so permits but personal jurisdiction cannot be obtained.[242] In this case Porsche Cars sought relief only

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usedporsche.com, usedporsches.com, winaporsche.com. For a copy of the complaint filed by Porsche Cars, see *Porsche Cars North America, Inc. v. Porsh.com* (visited Feb. 14, 2000) <http://www.mama-tech.com/pc.html>.

[238] *Porsche Cars*, 51 F. Supp. 2d at 709.

[239] *Id*.

[240] *Id.* at 710.

[241] *Id.* at 711-12.

[242] (n) Seizure of Property; Service of Summons Not Feasible.

(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule.

(2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.

under a federal statute because no comparable state theory was available.[243] Therefore, only the former was a possible justification for the court to exercise jurisdiction.

Rule 4(n) is only applicable, however, if the Trademark Dilution Act allows for such action. With this in mind the court pointed out that the Trademark Dilution Act "does not expressly preclude in rem lawsuits, [but] its language speaks strongly in favor of allowing in personam actions alone."[244] The court further noted that even if the Trademark Dilution Act could read in such a way as to allow in rem actions against allegedly diluting marks, the constitutionality of the Trademark Dilution Act itself would be unnecessarily brought into question.[245]

Relying on the Supreme Court's reasoning in *Shaffer*, the court ultimately concluded:

> Although in rem proceedings purport to affect nothing more than the disposition of property, they necessarily affect the interests of persons as well. As a result, courts generally cannot exercise in rem jurisdiction to adjudicate the status of property unless the Due Process Clause would have permitted in personam jurisdiction over those who have an interest in the res.
>
> In light of this constitutional requirement, the Trademark Dilution Act cannot be read to permit in rem actions against allegedly diluting marks without regard to whether in personam jurisdiction could have been exercised against those who use those marks in commerce.[246]

Porsche Cars' attempt to get around the personal jurisdiction requirement was, therefore, thwarted.

FED. R. CIV. P. 4(n).

[243] The court specifically pointed out that "neither the Virginia legislature nor the Virginia courts have recognized claims for trademark dilution under state law." *Porsche Cars*, 51 F. Supp. 2d at 711 (citing Circuit City Stores, Inc. v. OfficeMax, Inc., 949 F. Supp. 409, 418 (E.D. Va. 1996)).

[244] *Id.* at 712.

[245] *Id.* In so holding the court, relying heavily on *International Shoe*, stated that it could not "presume that Congress intended the Trademark Dilution Act to operate in a way that so blindly ignores 'traditional notions of fair play and substantial justice.'" *Id.* at 713 (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[246] *Id.* at 712.

2. The Anticybersquatting Consumer Protection Act

The much anticipated Anticybersquatting Consumer Protection Act,[247] which was passed on November 29, 1999 as part of the Consolidated Appropriations Act of 2000,[248] attempts to address what some characterize as the growing nemesis of the Internet – cybersquatting. While the bill attempts to curb cybersquatting in a number of ways, the pertinent part of the bill for purposes of this Article is section 3002 of the Act, which will amend section 43 of the Lanham Act, codified at 15 U.S.C. 1125.[249] Section 3002 of the Act adds subsection (d) to 15 U.S.C. § 1125, which deals with the prevention of cybersquatting in general.[250] The relevant addition for purposes of this in rem jurisdiction discussion is section (d)(2), which provides:

> (A) The owner of a mark may file an in rem civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located if–
>
> (i) the domain name violates any right of the owner of a mark registered in the Patent and Trademark Office, or protected under subsection (a) or (c); and
>
> (ii) the court finds that the owner–
>
> (I) is not able to obtain in personam jurisdiction over a person who would have been a defendant in a civil action under paragraph (1); or
>
> (II) through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) by–
>
> (aa) sending a notice of the alleged violation and intent to proceed under this paragraph to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar; and
>
> (bb) publishing notice of the action as the court may direct promptly after filing the action.
>
> (B) The actions under subparagraph (A)(ii) shall constitute service of process.

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[247] To be codified primarily at 15 U.S.C. § 1125(d) and 15 U.S.C. § 1129(b).

[248] Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

[249] *Id.* at 1501A-45.

[250] *Id.*

(C) In an in rem action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which--

(i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or

(ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.

(D) (i) The remedies in an in rem action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark. Upon receipt of written notification of a filed, stamped copy of a complaint filed by the owner of a mark in a United States district court under this paragraph, the domain name registrar, domain name registry, or other domain name authority shall–

(I) expeditiously deposit with the court documents sufficient to establish the court's control and authority regarding the disposition of the registration and use of the domain name to the court; and

(II) not transfer, suspend, or otherwise modify the domain name during the pendency of the action, except upon order of the court.

(ii) The domain name registrar or registry or other domain name authority shall not be liable for injunctive or monetary relief under this paragraph except in the case of bad faith or reckless disregard, which includes a willful failure to comply with any such court order.[251]

The new section 1125(d)(2) would in fact make Federal Rule of Civil Procedure 4(n) applicable to, and provide for, in rem jurisdiction of the type sought by the plaintiff in *Porsche Cars*. This is true because a reading of Federal Rule of Civil Procedure 4(n), which allows for in rem jurisdiction if the federal statute controlling the substantive cause of action permits such an action, together with the newly enacted section 1125(d)(2), appears to allow for cybersquatters around the world to be hauled into court in Virginia simply because that is where the domain name registrar is located.

[251] 15 U.S.C. § 1125(d) (1997 & Supp. 2000)

3. After the Anticybersquatting Consumer Protection Act - Caesars World, Inc. v. Caesars-Palace.com

In *Caesars World, Inc. v. Caesars-Palace.com*, the Eastern District of Virginia was faced with a dispute demanding that the court address the constitutionality of the in rem provisions of the Anticybersquatting Consumer Protection Act.[252] In *Caesars World*, the plaintiff filed an action against a number of domain names, alleging violations of the Anticybersquatting Consumer Protection Act.[253] The operative facts of *Caesars World* are identical to those of *Porsche Cars*. The only difference between the two cases is the enactment of the Anticybersquatting Consumer Protection Act, which provides for in rem jurisdiction if the owner of the trademark could not obtain in personam jurisdiction over the alleged cybersquatter.[254]

Relying on the dicta found in *Porsche Cars* and the United States Supreme Court's decision in *Shaffer*, the defendants argued that the in rem jurisdiction provisions of the newly enacted Anticybersquatting Consumer Protection Act were unconstitutional.[255] The district court, however, disagreed and inappropriately read *Shaffer* to mean that in rem proceedings are appropriate even in the absence of minimum contacts sufficient to support personal jurisdiction so long as the underlying cause of action is related to the property located in the forum state.[256] *Shaffer* cannot, however, stand for this proposition. As discussed earlier, the Supreme Court did not say that the mere existence of property in

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[252] For a copy of this decision, see Caesars World, Inc. v. Caesars-Palace.com (visited July 1, 2000) <http://www.ipwatchdog.com/ceasarsworld.html> [hereinafter *Caesars World*].
[253] *Id*.
[254] 15 U.S.C. 1125(d)(2)(A)(ii).
[255] *Caesars World* (visited July 1, 2000) <http://www.ipwatchdog.com/ceasarsworld.html>.
[256] *Id*.

the forum state is dispositive.[257] The Court instead said that "the presence of property in a State *may* bear on the existence of jurisdiction,"[258] which by necessary implication means that the Court was leaving open the possibility that property could be located in the forum state without in rem jurisdiction being appropriate. The fundamental inquiry under *Shaffer*, which the *Casesars World* court failed to appreciate, is that in rem jurisdiction is only appropriate when "traditional notions of fair play and substantial justice" are not offended.[259]

A review of the Anticybersquatting Consumer Protection Act shows that "[t]he owner of a mark may file an in rem civil action against a domain name . . . if . . . the owner is not able to obtain in personam jurisdiction over a person who would have been a defendant in a civil action . . . ."[260] It is, thus, clear that the in rem jurisdiction provisions do violate the direct constitutional dictates set forth in *Shaffer*. If the rem jurisdiction provisions of the Anticybersquatting Consumer Protection Act are to be held constitutional, it will require a fundamental rethinking of due process requirements vis-a-vis in rem jurisdiction.[261]

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[257] *Shaffer*, 433 U.S. at 207.

[258] *Id.* (emphasis added).

[259] *Id*.

[260] 15 U.S.C. 1125(d)(2)(A)(ii).

[261] Those knowledgeable about trademark cancellation counterclaims in opposition proceedings may be tempted initially to disagree with this conclusion. McCarthy, however, points out that:

> In a cancellation proceeding, it is a registration that may be canceled, not the mark itself. A registration confers only procedural and substantive advantages. Common-law ownership rests upon adoption and use, not upon registration. The fact that cancellation of a registered mark merely denies the procedural and substantive benefits of the Lanham Act is brought out by those cases where plaintiff's registration was canceled, but plaintiff still prevailed under common-law principles of unfair competition.

4. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 20:68 (4th ed. 1997). Essentially, because registration does not create a trademark, cancellation of a registration does not cancel rights in the trademark because these rights do not find their source in the registration. Therefore, while cancellation proceedings do at first glance seem similar to in rem proceedings against a domain name, cancellation proceedings

4. After the Anticybersquatting Consumer Protection Act – Porsche *revisited*

Recently, on June 9, 2000, in an unpublished disposition,[262] the United States Court of Appeals for the Fourth Circuit vacated and remanded Judge Cacheris' decision in *Porsche Cars*.[263] The Fourth Circuit vacated and remanded so that Judge Cacharis could determine whether or not in rem jurisdiction would be appropriate under the Anticybersquatting Consumer Protection Act.[264] The Fourth Circuit felt this was particularly called for in this case because at the time Judge Cacheris issued his decision prior to the enactment of the Anticybersquatting Consumer Protection Act.[265]

Given Judge Cacheris' statements in his original *Porsche Cars* decision,[266] which were admittedly *dicta*, it seems highly likely that he will find the Anticybersquatting Consumer Protection Act is indeed unconstitutional insofar as it allows for in rem jurisdiction where personal jurisdiction is lacking. Should Judge Cacheris reach such a conclusion there would be a conflict not only within the Fourth Circuit, but the conflict would exist within the United States District Court for the Eastern District of Virginia. This is true because both Judge Cacheris and Judge Albert V. Bryan, the author of the *Caesar World* decision, both sit in the Eastern District of Virginia.

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are not in rem proceedings because the property is the trademark and not the registration. Significant common law trademark rights still exist even if the registration is canceled, which is not true if a domain name is ordered to be transferred.

[262] According to Fourth Circuit Local Rule 36(c), the citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Fourth Circuit.

[263] Porsche Cars North America, Inc. v. AllPorsche.com, __ F.3d __ , 2000 WL 742185 (4th Cir. 2000).

[264] *Id*.

[265] *Id*.

[266] *See Porsche Cars*, 51 F. Supp. 2d at 712.

IV. JURISDICTION AND VENUE IN CASES OF CYBER CRIME

Technological developments that make it easier for people to communicate with each other not only present difficult questions relating to civil jurisdiction, but they also present difficult questions relating to the location a crime has been committed and whether or not a defendant can be subject to criminal prosecution in a particular jurisdiction.

A. Instant Messenger Goes Interstate — United States v. Kammersell

The facts in *United States v. Kammersell*[267] were not in dispute. Both the prosecution and the defense agreed that the defendant sent his girlfriend a bomb threat in hopes that she would be sent home from work, thereby freeing her up to go on a date.[268] Likewise, it was undisputed that the defendant accomplished the sending of this threat by using America Online's "Instant Messenger"[269] service.[270] Finally, it was also undisputed that when the defendant sent the threat from his computer in Utah, it traveled to the AOL servers located in Virginia and then from Virginia back to Utah where it ultimately appeared on his girlfriend's computer screen.[271]

If the facts of *Kammersell* were agreed upon, the application of those facts to the operative law was hotly contested. The jurisdictional statute in question was 18 U.S.C. § 875(c), which provides:

Whoever transmits in interstate or foreign commerce any communication containing any

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[267] 196 F.3d 1137 (10th Cir. 1999).
[268] *Id.* at 1138.
[269] Instant Messenger is America Online's software that allows individuals to communicate by typing messages that when sent appear in a pop-up window on the recipients screen in more or less real time. *See About AOL Instant Messenger* (visited Feb. 23, 2000) <http://www.aol.com/aim/about.html>. Instant Messenger can be used by individuals who have AOL as their Internet Service Provider, as well as by those who do not have AOL as their ISP but who have downloaded the software from the AOL web site. *Id.*
[270] *Kammersell*, 196 F.3d at 1138.
[271] *Id.*

> threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.[272]

Section 875(c) was enacted by Congress in 1934 and had its last significant amendment in 1939,[273] which lead the defendant to argue that it should not be literally applied to communications sent via the Internet.[274]

The defendant specifically argued that the court must interpret section 875(c) in light of the "sweeping changes in technology over the past 60 years . . . ."[275] The prosecution counter argued that the plain meaning of section 875(c) was clear and that because the instant message in question was sent from Utah to Virginia and then back to Utah, it had been "transmitted in interstate commerce," which is all that is necessary to invoke jurisdiction based on a threatening communication.[276] The defense, however, pointed out that "[b]ecause so many . . . locally-sent Internet messages are routed out of state, under the government's interpretation, federal jurisdiction would exist to cover almost any communication made by . . . modem, no matter how much it would otherwise appear to be intrastate in nature."[277] While the court did agree that the defendant's position was compelling and that Congress should perhaps reconsider the scope of section 875(c) in light of Internet technologies, the defendant could not rely on the argument to escape criminal prosecution where the statutory language literally allows for such federal prosecution.[278]

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[272] 18 U.S.C. § 875(c) (2000).
[273] *Kammersell*, 196 F.3d at 1138.
[274] *See id*. at 1139.
[275] *Id*.
[276] *Id*.
[277] *Id*.
[278] *Id*.

Admittedly cases such as *Kammersell*, which deal with the unsavory and far too common practice of using the Internet to send bogus bomb threats, do not tend to arouse the fears generally associated with growing and seemingly endless encroachment of the federal government into our daily lives. While definitely not the right battle-cry, perhaps we should be concerning ourselves with the breadth of *Kammersell* jurisdiction.

In *Hanson v. Denckla*, the Supreme Court observed that "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase."[279] Perhaps it is time to examine the converse. Given the increasing flow of Internet communication between States, which result in many instances where those communicating have no idea that the communication is being transmitted half way around the world rather than just down the street, we should consider the need for a retreat from a rule that subjects each and every Internet user to the reach of the federal government simply by using a server located in a foreign state.

B. United States v. Thomas

In *United States v. Thomas*, the United States Court of Appeals for the Sixth Circuit addressed whether the defendants, who were the owners and operators of an adult bulletin board, can be charged with a crime for their part in allowing the transmission of obscene materials via the Internet.[280] The defendants, Robert and Carleen Thomas, placed sexually explicit pictures on their bulletin board and allowed paying members of their service to access, transfer and download these

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[279] 357 U.S. 235, 250-51 (1958).

[280] 74 F.3d 701 (6th Cir. 1996).

images to their own computers.[281] As a result of these activities the defendants were indicted by a federal grand jury for the Western District of Tennessee.[282] The primary charges, Counts 1 - 7, alleged violations of federal obscenity laws.[283] The primary statute in question was 18 U.S.C. § 1465, which states:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travels in interstate commerce, or uses a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.[284]

The defendants argued that they did not violate section 1465 because the statute did not apply to the transmission of intangible objects such as computer files because the images at issue "involved an intangible string of 0's and 1's which became viewable images only after they were decoded by . . . the [downloading] member's computer."[285] The court, however, disagreed and found that the transportation of obscene images over the Internet did appropriately trigger criminal liability under section 1465, even though the images were nothing more than a series of electronic signals that could not be viewed during transit.[286]

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[281] *Id*. at 705.
[282] *Id*.
[283] *Id*. at 706.
[284] 18 U.S.C. § 1465 (1984 & Supp. 2000)
[285] *Thomas*, 74 F.3d at 706-07.
[286] *Id*. at 709.

Perhaps more interesting, however, is that the Sixth Circuit relied upon *United States v. Maxwell*.[287] The defendant, Colonel Maxwell, was convicted for violations of section 1465[288] for e-mailing obscene materials to others.[289] The *Thomas* court explained that Colonel Maxwell was convicted "because he transmitted obscene visual images electronically through the use of an on-line computer service."[290] The *Thomas* court equated what Colonel Maxwell had accomplished via e-mail to what the defendants were accused of doing by opening their computer up for users to download obscene images.[291] The *Thomas* court, therefore, ultimately concluded that the plain meaning of section 1465, which prohibits knowingly transporting obscene materials, made the *Thomas* defendants' decision to open their computer illegal, regardless of the fact that the defendants did not transport or send any images or information via the Internet.[292]

It is important to recognize that while the *Thomas* court correctly characterized Colonel Maxwell's crime as a transmission of obscene materials, the court either mischaracterized or misunderstood what was being accomplished through the defendants' adult bulletin board service.

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[287] 45 M.J. 406 (C.A.A.F. 1996).

[288] Colonel Maxwell was convicted, for violations of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, which provides:

> Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as "clauses 1, 2, and 3" of Article 134. Clause 1 offenses involved [sic] disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law including law made applicable through the Federal Assimilative Crimes Act . . . . If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article.

The conduct that triggered criminal liability under the Uniform Code of Military Justice was a violation of § 1465.

[289] *See Maxwell*, 45 M.J. at 414.

[290] *Thomas*, 74 F.3d at 708.

[291] *Id.* at 709.

[292] *Id.* at 708.

While Maxwell did take steps to affirmatively transmit obscene images, the defendants in *Thomas* did nothing of the kind. The *Thomas* defendants merely opened their computer up and allowed others to download the obscene images.[293] The *Thomas* court, therefore, mistakenly understood the words "download", "send", "receive" and "transmit" as synonyms for each other, despite the fact that these terms are hardly interchangeable.

As already discussed, even the court agreed that what actually occurred was that an individual wishing to access the obscene material would sign on his or her computer, use a telephone and modem to connect to the defendants' computer in California, locate the information and "download" the information.[294] This entire process was initiated by the person downloading the information. The defendants did not "send" or "transmit" the information as was the case in *Maxwell*, but rather the defendants only provided access to their computer.[295] While access to their computer was a necessary prerequisite for the dissemination of the obscene images, the actual transmission of the images was accomplished by the undercover government agent, not the defendants.[296] Therefore, in order for the court to find that the defendants had violated section 1465 it was necessary for the court to stretch the meaning of the statute to make it a crime to allow another to access obscene material, rather than narrowly construing the plain and unambiguous language of the statute, which prevents the knowing transportation.[297]

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[293] *See id.* at 705.
[294] *Id.*
[295] *See id.*
[296] *Id.* at 709.
[297] *See* Abbigale E. Bricker, *You Can't Always Get What You Want: Government's Good Intentions v. The First Amendment's Prescribed Freedoms in Protecting Children From Sexually-Explicit Material on the Internet*, 6

Notwithstanding the defendants' inability to convince the Sixth Circuit that they did not transport the obscene material, but rather only provided access to it, which is not prohibited by the explicit language of section 1465, the *Thomas* defendants next argued that even if they did violate section 1465 venue was improper in the Western District of Tennessee.[298] Prior to ruling on this issue, the Sixth Circuit reviewed the familiar real world venue requirements, pointing out that venue is appropriate in any district where a criminal offense has been committed.[299] Further, the court explained that it is well settled that "venue for federal obscenity prosecution lies in any district from, through, or into which the allegedly obscene material moves."[300] Ultimately the court ruled that venue was appropriate in the Western District of Tennessee because the obscene materials, which originated from the defendants computer in California, were viewable and printable in Tennessee.[301] Therefore, regardless of the fact that the defendants did not send anything into the Western District of Tennessee the court ruled venue appropriate because that is where the obscene images "ultimately ended up."[302]

Assuming the court did intend to expand the definition of what constitutes transporting obscene material under section 1465, it should come as no surprise that venue was found to be appropriate in Tennessee. What should, however, be alarming is that the defendants could have been prosecuted for violating section 1465 in any jurisdiction through which the obscene material passed. This is particularly alarming when you recall that a message is divided into packets before it is sent and each packet is

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RICH. J.L. & TECH 17, ¶ 13 (1999).

[298] *Thomas*, 74 F.3d at 709.

[299] *Id.* (quoting United Stated v. Beddow, 957 F.2d 1330, 1335 (6th Cir. 1992)).

[300] *Id.* (citing United States v. Peraino, 645 F.2d 548, 551 (6th Cir. 1981)).

[301] *Id.* at 710.

[302] *Id*.

transmitted individually.[303] These individual packets can, and often do, follow different routes to the ultimate destination. Once all the packets forming a message arrive at the destination the packets are reassembled into the original message.[304] Therefore, it is not only possible, but quite probable that obscene images transmitted over the Internet are incapable of being obscene while in transit, this being true because at no point are all of the component pieces together. To understand this concept consider, an obscene image to be a puzzle that is together. When transmitted the pieces of the puzzle each get separated and sent over the Internet via different paths. The pieces of the puzzle are then reassembled at the destination. Therefore, while the whole puzzle once assembled may well be obscene, no one piece of the puzzle is obscene in and of itself.

Another alarming aspect of such a global, all encompassing venue rule is that when data is sent via the Internet there is no way to know what path will be followed. As discussed earlier it is conceivable that a message sent from one New York user to another New York user may travel around the globe, through countless jurisdictions, prior to being delivered.[305] The problem is that the sender has no control over where the material will travel en route to its ultimate destination. It is, therefore, impossible to know what community standards will be applied when determining whether the material sent over the Internet is obscene.[306] What will happen, absent an Internet community standard, is that obscenity on the Internet will be determined by the sensitivities of the most conservative community

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[303] *See supra* notes 27-32 and accompanying text.

[304] *See Packet Switching*, *supra* note 29.

[305] This is, after all, exactly what allowed the defendant in *Kammersell* to be prosecuted by the federal government for transmitting a threat across state lines.

[306] Under the Supreme Court's obscenity test in *Miller v. California*, 413 U.S. 15, 24 (1973), it is essential to apply the contemporary community standards when determining if material is in fact obscene.

having access to the Internet. The only solution to this problem is to rethink either (1) the traditional venue rules that allow for the prosecution of federal obscenity crimes in every jurisdiction through which the obscene material travels; or (2) the traditional reliance on community standards when determining whether material sent via the Internet is obscene. Absent a solution to this problem communications over the Internet will be unnecessarily chilled for fear of prosecution in some remote jurisdiction through which obscene materials was unknowingly sent.

CONCLUSION

Government regulators, legislators, judges and attorneys are scrambling to catch up with the ever changing technology. Even those areas where laws have been enacted and interpreted in such a way to make them applicable to the Internet, the use and growth of the technology continues to push the envelope and demand that we continuously reevaluate our understanding and acceptance of even fundamental legal principles. It should, therefore, come as no surprise that we are constantly faced with unique fact patterns that force us to rethink our understanding of the applicability of even a fundamental concept such as jurisdiction. The truth, however, is that if we are challenged by the applicability of something as fundamental as jurisdiction, what surprises lurk for us in the shadows of the Internet?

At every step in our journey through the Internet maze we are confronted with new challenges, changing technology, and outdated legal principles that just do not neatly apply to the Internet. Just when we seem to have everything under control and moving in the right direction the rules change. One truth that we apparently must learn to accept is that the Internet stops for no one, not even government regulators and legislators. This Internet odyssey of ours is far from over, indeed, it has been but a short

trip in relative terms. Nevertheless, given the speed of change and the rapid maturation of the technology and its uses, our journey has already been long and at times strange. Surveying the present landscape it is clear that things will only get more interesting.