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The Legal World Wide Web: Electronic Personal Jurisdiction in Commercial Litigation, or How to Expose Yourself to Liability Anywhere in the World with the Press of a Button

Robert M. Harkins Jr.

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The *Legal* World Wide Web: Electronic Personal Jurisdiction in Commercial Litigation, or How to Expose Yourself to Liability Anywhere in the World with the Press of a Button

Robert M. Harkins, Jr.*

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I. INTRODUCTION

Hollywood has taught us that people using computers can take over the world.¹ Recent lawsuit decisions have begun to teach us that the world can take over people using computers, too, by haling them into court thousands of miles from home or office based on electronic contact.² Literature abounds with discussion of the promising future of the "information superhighway"³ and the increasing interconnectivity of the world by electronic communication. Rarely discussed, however, is the legal impact that electronic interconnectivity may have in binding the Internet⁴ to a much slower, more physically grounded forum, the judi-

1. Or at least *almost* take over the world. *See, e.g.*, THE NET (Sony Pictures 1996); HACKERS (Metro-Goldwyn Mayer/United Artists 1996). Or that people who run the world in the future will use computers to do it. *See, e.g.*, BRAZIL (Universal 1986); 1984 (Virgin Cinema 1980). Or that computers themselves will take over the world. *See, e.g.*, THE TERMINATOR (Cinema '84/Pacific Western 1984).

2. *See infra* notes 57-88, 101-60 and accompanying text (discussing cases extending personal jurisdiction based on electronic contact).

3. The origin of this phrase is attributed to different sources, but I believe that extensive repetition by Vice President Al Gore is most responsible for emblazoning it upon the international psyche. *See, e.g.*, Al Gore, *Networking the Future: We Need a National "Superhighway" for Computer Information*, WASH. POST, July 15, 1990, at B-3.

4. The term "Internet" is used loosely throughout this Article to include all forms of electronic communication. In fact, the Internet, although the most popular electronic connector today, is one of several. Others include commercial on-line services, private bulletin board services, and corporate networks. *See* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 200 (1995).

Additionally, the Internet is often misunderstood to mean a single computer network. The reality differs significantly:

The Internet today is a worldwide entity whose nature cannot be easily or simply defined. From a technical definition, the Internet is the 'set of all interconnected IP networks'—the collection of several thousand local, regional, and global computer networks interconnected in real time via the TCP/IP Internetworking Protocol suite.

DANIEL P. DERN, THE INTERNET GUIDE FOR NEW USERS 16 (1994).

One article described the Internet as 'a collection of thousands of local, regional, and global Internet Protocol networks. What it means in practical terms is that millions of computers in schools, universities, corporations, and other organizations are tied together via telephone lines. The Internet enables users to share files, search for information, send electronic mail, and log onto remote computers. But it isn't a program or even a particular computer resource. It remains only a means to link computer users together.

cial system.⁵ While not quite matching the pace of the explosive rate of growth of Internet users,⁶ the number of electronic personal jurisdiction cases is growing, and promises to continue growing.⁷ At the same

Unlike on-line computer services such as CompuServe and America On Line, no one runs the Internet. . . .

No one pays for the Internet because the network itself doesn't exist as a separate entity. Instead various universities and organizations pay for the dedicated lines linking their computers. Individual users may pay an Internet provider for access to the Internet via its server.'

Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1365-66 n.2 (N.D. Cal. 1995) (quoting David Bruning, *Along the InfoBahn*, *ASTRONOMY*, June 1995, at 76).

The Internet began in 1969 as a Department of Defense project entitled "ARPANET," linking military computers, defense contractors, and colleges. See Barbara Kantrowitz & Adam Rogers, *The Birth of the Internet*, *NEWSWEEK*, Aug. 8, 1994, at 56; Patricia Schnaidt, *History of the Future*, *NETWORK COMPUTING*, Oct. 1, 1994, at P35. In 1990, the network was replaced with NSFNET and more advanced technology. See APRIL MARINE ET AL., *INTERNET: GETTING STARTED* 5 (1993). For a more extensive discussion of the workings of the Internet and the World Wide Web, see Gwenn M. Kalow, *Note, From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 65 *FORDHAM L. REV.* 2241 (1997).

5. Commentators have begun to wave warning flags. See Robert L. Dunne, *Detering Unauthorized Access to Computers: Controlling Behavior in Cyberspace Through a Contract Law Paradigm*, 35 *JURIMETRICS J.* 1, 9 (1994) ("Probably the ultimate insurmountable obstacle to the practical application of criminal law in cyberspace is jurisdictional."); Richard Raysman & Peter Brown, *On-Line Legal Issues*, N.Y. L.J., Feb. 15, 1995, at 30 ("The immense reach of the Internet clearly has the potential to eviscerate or circumvent any traditional jurisdictional limitations.").

6. The explosive growth of the Internet is widely known and reported. See, e.g., JILL H. ELLSWORTH & MATTHEW V. ELLSWORTH, *MARKETING ON THE INTERNET* 5 (2d ed. 1997); Byassee, *supra* note 4, at 197; Curt A. Canfield & Joseph Labbe, *Web or Windows? Planning for Internet/Intranet Technology—Explosive Growth Experienced*, N.Y. L.J., Jan. 21, 1997, at S2. The number of Internet users is doubling annually. See Graham Finnie & Kenneth Hart, *Can the Internet Do It All?*, *COMM. WK. INT'L*, Oct. 2, 1995, at 22. In 1981, there were fewer than 300 computers on the Internet. See *American Library Ass'n v. Pataki*, 969 F. Supp. 160, 164 (S.D.N.Y. 1997). By 1989, this number had grown to about 90,000, and by 1993, the number reached over 1 million. See *id.* Today there are an estimated 30 to 60 million Internet users, and this number is anticipated to exceed 100 million in 1998. See ELLSWORTH & ELLSWORTH, *supra*, at 5. In 1999 the number of Internet users is expected to reach 200 million. See *Hearst Corp. v. Goldberger*, No. 96-63620, 1997 U.S. Dist. LEXIS 2065, at *4, (S.D.N.Y. Feb. 26, 1997). By the end of the century, some expect more than 500 million Internet users. See Byassee, *supra* note 4, at 198 n.2.

7. A few personal jurisdiction decisions resting on e-mail contacts date back to the early 1990s. See, e.g., *Boudreau v. Scitex Corp. Ltd.*, No. 91-13059-Y, 1992 WL 159667 (D. Mass. June 25, 1992); *Equifax Servs. v. Hitz*, 905 F.2d 1355, 1358 (10th Cir. 1990). However, several such decisions have been published in the last two years. See *infra* Part III.A. (discussing e-mail cases). As use of the Internet increases and court decisions remain inconsistent in applying personal jurisdiction analysis, this trend is certain to continue. See *infra* Part III.A.

time, commercial use of the Internet is becoming a bigger and bigger business,⁸ demanding for the sake of commerce that some understandable parameters apply to the accompanying judicial cost.

For future discussion of the problems that may visit those engaging in electronic communication and commerce, the following hypothetical may prove helpful: Tom Jefferson, an unemployed political consultant in Virginia, decides to start a political consulting software company out of his garage. His best experiences in political consulting were in Philadelphia, so he names his company and software package Philadelphia Rules. He obtains an e-mail address of <philadelphiarules@server.com> and a website at <www.philadelphiarules.com>.⁹ While Mr. Jefferson has traveled extensively on the east coast and in some parts of Europe, he has never been west of the Mississippi River and has no intention of going there.¹⁰

Mr. Jefferson sets up the website to automate software sales, take credit card orders, and download the software directly from the Internet. As a result, he has no idea where his software is being sent. Because the Internet is accessible from anywhere on the globe, so is Mr. Jefferson's product.

One day Mr. Jefferson gets an e-mail from <benfranklin@server.com>. The author of the e-mail has created an add-on module to the PhiladelphiaRules program and proposes to license it to Mr. Jefferson for sale with the program. During successive e-mail communications, the author and Mr. Jefferson reach an agreement. Mr. Jefferson receives the program via the Internet and begins to sell it. Mr. Jefferson assumes that <benfranklin@server.com> is another political consultant whom he knew worked in the Philadelphia circuit and was most recently living in Virginia. In fact, <benfranklin@server.com> is actually Ben Franklin Johnson who lives in San Diego and owns a store named Kite & Key, a

8. See *American Libraries*, 969 F. Supp. at 173; Jill H. Ellsworth, *Staking a Claim on the Internet*, NATION'S BUS., Jan. 1, 1996, at 29. Use of the web by law firms is a case in point. The number of law firms with websites has increased 70% since 1996. See Cynthia Cotts, *Sharp Rise in Web Sites by Largest Firms*, NAT'L L. J., Oct. 6, 1997, at B7. Almost two-thirds (64%) of the 250 largest law firms have websites. See *id.*

9. This may be a good time to remind readers that this is a hypothetical. As of this writing, none of these Internet addresses actually exist. Do not try to find them. Any similarity to persons or websites living or dead is purely coincidental.

10. While not relevant to this discussion, he did once consider buying some land there.

kite sales and locksmith store. Since his days at U.C. Berkeley, political activism has been a hobby of Mr. Johnson, or "California Benny," as his friends know him. As a result, the communication and agreement Mr. Jefferson thought occurred within Virginia was all cross-continental. Similarly, California Benny erroneously assumes that Mr. Jefferson lives in Philadelphia.

As with any litigation hypothetical, Mr. Jefferson and California Benny have a falling out. Each files suit against the other in his local district court. Meanwhile, an aspiring politician named Hamilton living in Manhattan buys the software and module and feels cheated when he loses the city council race by a landslide. He files suit in his local district court for breach of contract against both Jefferson and California Benny. Finally, a company named Philadelphia Rules, Inc., actually based in Philadelphia, sues Jefferson in Pennsylvania, claiming that his e-mail name, website, and software infringe upon its trademarks. Jefferson, inundated with out-of-state cases and fearing bankruptcy, considers moving back to Paris and becoming a panhandler. But will he actually be expected to appear in court in California, Pennsylvania, and New York? And will California Benny be dragged out to New York and Virginia?

Under personal jurisdiction analysis, theoretically each court should undergo the same analysis.¹¹ However, courts in these states have applied the analysis quite differently.¹² As a result, Jefferson may be able to get the case dismissed in New York¹³ and California (depending on which California court reviews the issue),¹⁴ while being pulled into court in Pennsylvania.¹⁵ California Benny may have to appear in the

11. Each court should undergo the same personal jurisdiction analysis if that state's long-arm jurisdiction statute is coextensive with the limits of the United States Constitution. Some states have opted to restrict their jurisdiction over out-of-state persons more than the Constitution. See *infra* notes 36-40 and accompanying text (discussing long-arm statutes).

12. See *infra* notes 13-17 and accompanying text.

13. See, e.g., *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620 1997 U.S. Dist. LEXIS 2065, at *41 (S.D.N.Y. Feb. 26, 1997) (finding no personal jurisdiction); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997) (finding no personal jurisdiction). For detailed discussion of these cases, see *infra* notes 161-76 and accompanying text.

14. Compare *Hall v. LaRonde*, 66 Cal. Rptr. 2d 399, 402 (Ct. App. 1997) (extending personal jurisdiction), and *Panavision Int'l, L.P. v. Toepfen*, 938 F. Supp. 616, 622 (C.D. Cal. 1996) (extending personal jurisdiction), with *McDonough v. Fallon McElligott, Inc.*, No. 95-4037, 1996 U.S. Dist. LEXIS 15139, at *5-*6 (S.D. Cal. Aug. 5, 1996) (refusing to apply personal jurisdiction to out-of-state party). For detailed discussion of these cases, see *infra* notes 77-87, 113-17, 195-98 and accompanying text.

15. See, e.g., *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1127 (W.D. Pa. 1997) (extending personal jurisdiction). For detailed discussion of this case, see

action in Virginia,¹⁶ but not New York.¹⁷ The reason why? Modern courts are experiencing difficulty in consistent application of personal jurisdiction rules to electronic contacts by out-of-state residents. As more courts reach decisions on the issue, the law of personal jurisdiction is bound to grow more schizophrenic.

This Article addresses the problem created for courts in deciding when to assert personal jurisdiction over out-of-state parties based on electronic contacts. Section II discusses the traditional personal jurisdiction tests propounded by the U.S. Supreme Court.¹⁸ Section III reviews recent case law analyzing personal jurisdiction and electronic contacts via the Internet, through e-mail and other electronic data contacts, and by website presence.¹⁹ Section IV discusses the modes of communication that courts have analogized to the Internet and how these courts have resolved jurisdictional issues when facing more traditional contacts such as mail and advertising.²⁰ Section V discusses the future of personal jurisdiction, concluding that current overreaching by some courts stems from misapplication of personal jurisdiction precedent.²¹ Proper application of the spirit of the Supreme Court's personal jurisdiction decisions and the concept of "purposeful availment" will avoid the nightmare of a *legal* world wide web. Section V also discusses the implications of the current state of the law for businesses using the Internet, and some basic steps these businesses may take to attempt to regain some control over their jurisdictional exposure and avoid personal jurisdiction in unknown states for commercial litigation. The Internet may be a way to increase the reach of a state's power. However, a more restrained analysis based on how much a party has really purposefully availed itself to a particular jurisdiction will permit the Internet to function advantageously while continuing citizens' current level of access to their states' courts.

infra notes 151-59 and accompanying text.

16. *See, e.g.,* Telco Communications Group, Inc. v. An Apple A Day, Inc., 997 F. Supp. 404, 408 (E.D. Va. 1997). For a more detailed discussion of this case, see *infra* notes 120-27 and accompanying text.

17. *See, e.g.,* Hearst Corp., 1997 U.S. Dist. LEXIS 2065, at *41; *Bensusan*, 937 F. Supp. at 301. The situation is essentially the same for California Benny as for Jefferson.

18. *See infra* notes 22-56 and accompanying text.

19. *See infra* notes 57-201 and accompanying text.

20. *See infra* notes 202-36 and accompanying text.

21. *See infra* notes 237-42 and accompanying text.

II. THE TRADITIONAL PERSONAL JURISDICTION TESTS

A. *A Brief Tour: Pennoyer to International Shoe to Burger King and Asahi*

Personal jurisdiction is one of the fundamental concepts in civil procedure law in the United States and remains one of the few areas with case names that law students continue to remember after taking their exams. It is written about extensively, leaving no need for this Article to retrace extensively a worn path.²² The following, then, represents a brief encapsulation of the development of personal jurisdiction due process law in the United States as necessary to provide background for analysis of current electronic issues.

In 1877, the U.S. Supreme Court viewed personal jurisdiction through a very narrow perspective as related to the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution.²³ It held, in *Pennoyer v. Neff*, that a state could not assert jurisdiction over anyone not physically present in the state at the time of the lawsuit.²⁴ This view did not last. The Supreme Court laid a more detailed groundwork for modern personal jurisdiction analysis in the 1945 decision *International Shoe Co. v. Washington*.²⁵ In *International Shoe*, the Court held that instead of physical presence, a defendant may be subjected to a state's jurisdiction if the defendant had "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"²⁶

The Supreme Court clarified the ruling in subsequent decisions, holding, for example, that unilateral activity by a plaintiff, such as mailing a letter from the forum state to the nonresident defendant, will not be enough to meet the minimum contacts analysis.²⁷ Instead, the nonresident defendant must purposefully avail itself of the forum state's benefits to be subjected to the state's jurisdiction.²⁸ The defendant's conduct and connections with the forum state should be "such that he should reasonably anticipate being haled into court there."²⁹

22. For an extensive analysis of the current state of personal jurisdiction law, see Symposium, *Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 513 (1995); see also William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599 (1993).

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

24. *Id.* at 722.

25. 326 U.S. 310 (1945).

26. See *id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

27. See *Hanson v. Denkla*, 357 U.S. 235, 253 (1958).

28. See *id.*

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

To decide if exercise of jurisdiction over a nonresident defendant would be fundamentally fair under the Due Process Clause, the Supreme Court looked to five factors in the 1985 decision of *Burger King Corp. v. Rudzewicz*:³⁰ (1) "burden on the defendant," (2) the forum state's interest in adjudication of the dispute, (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) the interstate judicial system's interest in efficient controversy resolution, and (5) the shared interests of the states in furthering fundamental social policies.³¹ The Court held that while physical presence was not required to meet the minimum contacts requirement, the defendant must purposefully direct sufficient activity toward the forum state to be within the court's jurisdiction.³² The majority opinion in *Burger King* also suggests that commercial ties to a state should weigh more heavily than personal ties in applying the fundamental fairness analysis.³³ Finally, in 1987 the Court held in *Asahi Metal Industry Co. v. Superior Court*³⁴ that merely placing a product in the stream of commerce would not alone support extension of jurisdiction to any state where the product turned up.³⁵ *International Shoe* and its progeny lay the groundwork for any contemporary personal jurisdiction analysis.

Before a state reaches constitutional personal jurisdiction analysis, the state itself must otherwise favor exerting jurisdiction over the person.³⁶ States accomplish this through "long-arm" jurisdiction statutes.³⁷ The longest reach a state can have is coextensive with the Constitution, limited by the Due Process Clause.³⁸ However, some states

30. 471 U.S. 462 (1985).

31. *See id.* at 476-77 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292).

32. *See id.* at 476.

33. *See* DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 106 (2d ed. 1992).

34. 480 U.S. 102 (1987).

35. *See id.* at 114.

36. *See* CRUMP, *supra* note 33, at 82. To extend jurisdiction over a nonresident defendant, the case must satisfy both the state's jurisdictional statute and the Due Process Clause. *See id.*; *see also, e.g.*, *Jobe v. ATR Mktg., Inc.*, 87 F.3d 751, 753 (5th Cir. 1996); *CPC-Rexcell, Inc. v. La Corona Foods, Inc.*, 912 F.2d 241, 243 (8th Cir. 1990).

37. *See* CRUMP, *supra* note 33, at 82.

38. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1998) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"); R.I. GEN. LAWS § 9-5-33 (1996) ("Every foreign corporation, [individual, or entity] . . . that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state

have opted for "laundry list" jurisdictional statutes that claim jurisdiction over people only when the subject falls within a list.³⁹ In these cases, courts may not always reach the constitutional due process issue.⁴⁰ This Article will continue on the premise that each state will undergo due process analysis, unless otherwise noted.

When a complaint is filed against a nonresident defendant, the defendant may specially appear to challenge the jurisdiction of the court over the defendant.⁴¹ It then becomes the burden of the plaintiff to make a

"); VA. CODE ANN. § 8.01-328.1(A) (Michie 1996) (extending jurisdiction "to the extent possible under the Due Process Clause of the Constitution of the United States").

39. See, e.g., ILL. REV. STAT. ch. 110, § 2.209 (1996) (Illinois's long-arm statute); N.Y. C.P.L.R. § 302 (1996) (New York's long-arm statute). For example, one category on the laundry list will cause a New York court to extend jurisdiction over an out-of-state defendant for any tortious act committed outside the state if the defendant "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." See N.Y. C.P.L.R. § 302(a)(3)(ii) (1996).

40. See, e.g., *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997) ("Because we believe that the exercise of personal jurisdiction in the instant case is proscribed by the law of New York, we do not address the issue of due process"). The trial court, however, opted to perform the due process analysis, finding that contacts to the forum state were insufficient to extend jurisdiction under the Constitution. See *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 300-01 (S.D.N.Y.), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

41. The procedural methods of challenging personal jurisdiction in federal court are summarized as follows:

Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, legally sufficient allegations of jurisdiction. At that preliminary stage, the plaintiff's *prima facie* showing may be established solely by allegations. After discovery, the plaintiff's *prima facie* showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant. At that point, the *prima facie* showing must be factually supported.

Where the jurisdictional issue is in dispute, the plaintiff's averment of jurisdictional facts will normally be met in one of three ways: (1) by a Rule 12(b)(2) motion, which assumes the truth of the plaintiff's factual allegations for purposes of the motion and challenges their sufficiency, (2) by a Rule 56 motion, which asserts that there are undisputed facts demonstrating the absence of jurisdiction, or (3) by a request for an adjudication of disputed jurisdictional facts, either at a hearing on the issue of jurisdiction or in the course of trial on the merits. If the defendant is content to challenge only the sufficiency of the plaintiff's factual allegation, in effect demurring by filing a Rule 12(b)(2) motion, the plaintiff need persuade the court only that its factual allegations constitute a *prima facie* showing of jurisdiction. If the defendant asserts in a Rule 56 motion that undisputed facts show the absence of jurisdiction, the court proceeds, as with any summary judgment motion, to determine if undisputed facts exist that warrant the relief sought. If

prima facie showing that the defendant is subject to the court's jurisdiction or the complaint is dismissed.⁴² If the plaintiff makes the *prima facie* showing, the defendant must defend the lawsuit.

B. General vs. Specific Personal Jurisdiction

Under *International Shoe*, as clarified by later Supreme Court decisions, personal jurisdiction may apply in two cases: either when the defendant has enough contacts for "general" personal jurisdiction, or when less extensive but "specific" personal jurisdiction exists.⁴³ Under general jurisdictional analysis, a defendant with "systematic and continuous" contacts with the forum state may be haled into court for any legal dispute, whether or not related to the contacts the defendant has with the forum.⁴⁴ For example, if WRI Corporation, an Illinois corporation based in Chicago, has many offices in California and conducts extensive business there, it will be subject to a California court's jurisdiction, even if the dispute is unrelated to its California business. Such unrelated disputes could include an injury sustained in the Chicago offices by a California resident, or a contract completely negotiated, entered into, and performed in Illinois.

Specific jurisdiction is more limited and applies when the lawsuit arises out of the contact with the forum state.⁴⁵ If WRI Corporation

the defendant contests the plaintiff's factual allegations, then a hearing is required, at which the plaintiff must prove the existence of jurisdiction by a preponderance of the evidence.

Ball v. Metallurgic Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir.) (citations omitted), *cert. denied*, 498 U.S. 854 (1990); *see also, e.g.*, *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108-11 (2d Cir. 1997); *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995); *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 146 (1st Cir. 1995); *A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 80 (2d Cir. 1993); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 676 (1st Cir. 1992); *Thigpen v. United States*, 800 F.2d 393, 396 (4th Cir. 1986); *Hoffritz for Cutlery, Inc. v. Amajac, Inc.*, 763 F.2d 55, 57 (2d Cir. 1985); *Bell v. Fischer*, 887 F. Supp. 1269, 1276 (N.D. Iowa 1995).

42. *See Ball*, 902 F.2d at 197.

43. *See Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). One court has described general and specific jurisdiction as the two "flavors" of personal jurisdiction. *See Kerry Steel, Inc. v. Paragon Indus.*, 106 F.3d 147, 149 (6th Cir. 1997).

44. *See, e.g.*, *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 448 (1952) (holding that a foreign corporation doing limited, but continuous and systematic, business in Ohio is subject to in personam jurisdiction in Ohio despite the fact that the dispute was unrelated to the corporation's activities in Ohio).

45. *See, e.g.*, *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957)

had no offices or general contact with California, but entered into a contract with CPA Company in San Diego to be performed in San Diego, it is likely that WRI Corporation, while not within the general jurisdiction of California courts, would be within the court's specific jurisdiction to adjudicate disputes over the WRI-CPA contract. In conjunction with the due process requirements expounded in *Burger King*, courts view specific personal jurisdiction analysis as a tripartite test, requiring that (1) the nonresident defendant purposefully availed itself of the forum state, (2) the dispute arises from the defendant's contact with the forum state, and (3) extension of jurisdiction over the defendant would be fundamentally fair.⁴⁶

Cases turning on an out-of-state defendant's e-mail communications to the state or website presence in the state usually involve questions of specific jurisdiction.⁴⁷ The threshold for satisfying minimum contacts before considering convenience or fairness is higher for general jurisdiction than for specific jurisdiction.⁴⁸ As a result, while it is theoretically possible that an extensive electronic presence could justify extension of general jurisdiction over an out-of-state defendant without any physical contacts to a state,⁴⁹ courts have rarely done so.⁵⁰ Even

(finding specific jurisdiction where suit was based on a contract which had a substantial connection with the state).

46. See, e.g., *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997); *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995); Erwin Chemerinsky, *Assessing Minimum Contacts: A Reply to Professors Cameron & Johnson*, 28 U.C. DAVIS L. REV. 863, 866-67 (1995).

47. See *infra* notes 63-88, 101-27, 132-59 and accompanying text.

48. See *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996).

49. As one court in Illinois noted:

At some point, however, we must begin to give serious renewed consideration to the effect of such 'communications' on jurisdiction. We are now in an age where e-mail, fax, phone conferences and televideo conferences are quickly replacing plane trips and personal conferences and consultations. By these means it may now be possible to conduct a substantial amount of business in a jurisdiction without ever physically being present.

MHF Ins. Agency, Inc. v. Harris of Kentucky, No. 95C 0016, 1996 U.S. Dist. LEXIS 402, at *17 n.1 (N.D. Ill. Jan. 17, 1996). This language may be seen as an update of the language in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985): "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." However, the Court in *Burger King* reiterated the need for the defendant to "purposefully direct" activities to the forum state. See *id.*

50. In at least one case, the court asserted general jurisdiction over a defendant based on ownership of a website accessible in the state. See *Haelan Prods., Inc. v. Beso Biological Research, Inc.*, No. 97-0571, 1997 U.S. Dist. LEXIS 10565, at *14-*15

with other, more concrete modes of communication such as telephone and postal mail, courts have generally refused to extend general jurisdiction over non-domiciliaries without substantial physical presence in the forum state.⁵¹

C. Forum Selection and Choice of Law Clauses

In many contracts, the parties include clauses "choosing" the appropriate forum, or jurisdiction, in which any disputes should be resolved. While not determinative, such clauses become part of the purposeful availment analysis.⁵² Using the above example, if the WRI-CPA contract includes a forum selection clause stating that any disputes should be resolved in Illinois, a court in California would be less likely to find that WRI Corporation availed itself of California's benefits or that it would be fundamentally fair to bring WRI into California court. Even if insufficient to eliminate the forum's jurisdiction over the nonresident defendant, courts will generally enforce forum selection clauses.⁵³

Similarly, parties will often include choice of law clauses in their contracts. A choice of law clause chooses which jurisdiction's law will apply to any dispute arising from the contract. Choice of law analysis is separate from minimum contacts analysis, but is considered relevant to the jurisdictional question.⁵⁴ If a court in a state other than that chosen by contract extends personal jurisdiction over the nonresident defendant, it may nevertheless apply the law of the chosen state to resolve the dispute.⁵⁵ The clause may be enforced unless there is no reasonable basis for the parties' selection or the law is contrary to a fundamental policy of the state.⁵⁶ Using our previous example, even if WRI Corporation was clearly within California's jurisdiction, the California

(E.D. La. 1997); *infra* notes 144-50 and accompanying text (discussing *Haelan*). Another court, while asserting only specific jurisdiction, entertained assertion of general jurisdiction due to a website and certain other contacts to the forum state. See *infra* EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., 947 F. Supp. 413, 422 (D. Ariz. 1996); *infra* notes 132-43 and accompanying text (discussing *EDIAS*).

51. See *infra* notes 178-81 and accompanying text.

52. See *Bell Paper Box, Inc. v. Trans W. Polymers, Inc.*, 53 F.3d 920, 923 (8th Cir. 1995).

53. See *Carnival Cruise Lines, Inc. v. Shutte*, 499 U.S. 585, 595-97 (1991); *Burger King v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985).

54. See *Burger King*, 471 U.S. at 481-82; *Bell Paper Box*, 53 F.3d at 923.

55. See *Nedlloyd Lines, B.V. v. Superior Court*, 834 P.2d 1148, 1151 (1992).

56. See *id.* at 465.

court would be likely to apply Illinois law if the WRI-CPA contract had a provision stating that the contract was to be governed by Illinois law.

III. THE CURRENT STATE OF PERSONAL JURISDICTION IN INTERNET E-MAIL AND WEBSITE CASES

Courts conducting personal jurisdiction analysis relating to electronic presence in the state generally do not distinguish between e-mail and websites; instead, they look at both as forms of Internet contact with the state.⁵⁷ However, because e-mail communications differ structurally from websites,⁵⁸ they will be reviewed separately here.

A. E-mail Cases

The concept of electronic communication as a factor in personal jurisdiction analysis is not entirely new. As far back as 1990, the Tenth Circuit looked at "electronic data communications" combined with phone and mail contacts as a basis for assertion of personal jurisdiction.⁵⁹ In 1992, the federal district court in Massachusetts viewed e-mail communications as part of the basis for personal jurisdiction, in conjunction with faxes, telephone calls, and at least one in-person visit by the defendant's employee.⁶⁰ However, in each of these cases, the courts did not cite electronic communications as a dispositive factor in the decision to extend personal jurisdiction.⁶¹ Instead, the courts merely added electronic communications to a list of contacts that otherwise would be sufficient for personal jurisdiction to exist.⁶²

In contrast, in the last couple of years, several courts have begun to base assertion of jurisdiction more directly upon e-mail communications. Generally, these courts have applied traditional personal jurisdiction

57. See, e.g., *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (distinguishing its facts, where the jurisdictional claim was based solely on website presence, from those in *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), where the claim was based primarily on e-mail and other direct electronic communication with a resident of the forum state), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

58. E-mail is sent from the creator of the e-mail to a recipient. In contrast, a website remains at a server as designated by its creator and must be "visited" by those on-line using search engine software. Those visiting a website download the data file constituting the site from the server.

59. See *Equifax Servs. Inc. v. Hitz*, 905 F.2d 1355, 1358 (10th Cir. 1990).

60. See *Boudreau v. Scitex Corp.*, No. 91-13059-Y, 1992 U.S. Dist. LEXIS 9629, at *10-*11 (D. Mass. June 25, 1992).

61. See *Equifax Servs.*, 905 F.2d at 1358; *Boudreau*, 1992 U.S. Dist. LEXIS 9629, at *10-*11.

62. See *Equifax Servs.*, 905 F.2d at 1358; *Boudreau*, 1992 U.S. Dist. LEXIS 9629, at *10-*11.

tion analysis, grouping e-mail contact with and analogizing it to mail and telephone contacts.

1. Extending Jurisdiction

a. CompuServe, Inc. v. Patterson

The most famous court decision to date regarding the Internet and personal jurisdiction continues to be the Sixth Circuit's 1996 decision in *CompuServe, Inc. v. Patterson*.⁶³ The plaintiff, CompuServe, Inc., filed suit in its home state of Ohio.⁶⁴ The defendant, a resident of Texas, entered into a contract with CompuServe to have CompuServe sell his software products over its network.⁶⁵ He subscribed to CompuServe and entered into a shareware registration agreement with CompuServe to have his software distributed electronically from Ohio.⁶⁶ He sent his software repeatedly to the CompuServe system, and advertised on the system.⁶⁷ E-mail and regular mail messages sent by the defendant to CompuServe in Ohio supplemented the advertising.⁶⁸ There was no evidence, however, of any physical visits to Ohio.⁶⁹ The court stated that while entering into a contract with an Ohio resident or placing software into the stream of commerce in isolation would not be sufficient, the combination of all contacts proved purposeful availment.⁷⁰ The court held that the electronic contacts between the defendant and

63. 89 F.3d 1257 (6th Cir. 1996). For a complete discussion of this case, see Bryce A. Lenox, Note, *Personal Jurisdiction in Cyberspace: Teaching the Stream of Commerce Dog New Internet Tricks*: *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), 22 U. DAYTON L. REV. 331 (1997).

64. *See CompuServe*, 89 F.3d at 1261.

65. *See id.* at 1260.

66. *See id.*

67. *See id.* at 1261.

68. *See id.* at 1264.

69. *See id.* at 1260.

70. *See id.* at 1265. Merely entering into a contract with a resident generally is not enough to confer jurisdiction over a nonresident defendant. *See Colwell Realty Invs., Inc. v. Triple T Inns of Arizona, Inc.*, 785 F.2d 1330, 1334 (5th Cir. 1986); *Maurice Sternberg, Inc. v. James*, 577 F. Supp. 882, 885 (N.D. Ill. 1984). Courts have held that isolated commercial contracts such as sales are not enough to subject a nonresident seller to a forum's jurisdiction. *See, e.g., Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc.*, 786 F.2d 1055, 1059 (11th Cir. 1986) (finding one-time purchase insufficient); *L & P Converters, Inc. v. H.M.S. Direct Mail Serv., Inc.*, 634 F. Supp. 365, 366 (D. Mass. 1986) (finding phone orders from forum state insufficient).

CompuServe were sufficient to extend specific personal jurisdiction over the defendant.⁷¹

Based on the amount and quality of contacts, the Sixth Circuit properly extended jurisdiction over the defendant under standard due process analysis.⁷² This was not a case where the defendant simply put a website on the Internet or exchanged e-mail communications without knowing the location of the other party. Instead, the defendant purposefully availed himself of the benefits of Ohio.⁷³ Additionally, the action arose directly from the defendant's contacts with CompuServe in Ohio.⁷⁴ As the court noted, "CompuServe, in effect, acted as [the defendant's] distributor, albeit electronically and not physically."⁷⁵ Additionally, the defendant had fair notice that he could be haled into court in Ohio. He knew that CompuServe was based in Ohio and opted to link directly to a server in Ohio for all of his communications rather than use a local server.⁷⁶ *CompuServe*, then, represents mainstream analysis based on fairly easy facts.

b. *Hall v. LaRonde*

In *Hall v. LaRonde*,⁷⁷ the Court of Appeal in Ventura County, California, recently held that "the use of electronic mail and the telephone by a party in another state may establish sufficient minimum contacts with California to support personal jurisdiction."⁷⁸ The defendant, maintaining his principal place of business in New York, entered into a contract with the plaintiff, a resident of California.⁷⁹ Under the contract, the plaintiff received a license to sell the defendant's software application.⁸⁰ The plaintiff originally contacted the defendant via e-mail regarding a module that the plaintiff created for defendant's application.⁸¹ The parties negotiated by e-mail for the plaintiff's module to become integrated into the defendant's software package.⁸² All contact was by e-mail and telephone.⁸³

71. See *CompuServe*, 89 F.3d at 1268-69.

72. See *id.* at 1263-67.

73. See *id.* at 1266.

74. See *id.* at 1267.

75. See *id.* at 1265.

76. See *id.* at 1264.

77. 66 Cal. Rptr. 2d 399 (Ct. App. 1997).

78. See *id.* at 400.

79. See *id.*

80. See *id.*

81. See *id.* at 401.

82. See *id.*

83. See *id.*

Reversing the trial court, the appellate court in *Hall* held that this contact was sufficient to create personal jurisdiction over the defendant with respect to claims arising out of the subject matter of the e-mail contact, also known as specific personal jurisdiction.⁸⁴ The court held that it was unnecessary for the defendant or a representative to physically visit California.⁸⁵ "There is no reason why the requisite minimum contacts cannot be electronic," the court stated.⁸⁶ "It is uncontroverted that [the plaintiff] reached out to New York in search for business. It is also uncontroverted that [the defendant] reached back to California."⁸⁷ Because the defendant communicated extensively with the plaintiff by e-mail, contracted with the party, and agreed to pay royalties over time to the California plaintiff, the court determined that the defendant had sufficient contacts to justify ordering him to appear in California to defend against the claim.⁸⁸

c. Other Modern Cases

In several other cases, courts have viewed e-mail communications in conjunction with other contacts as part of a holistic personal jurisdiction analysis.⁸⁹ As with the *CompuServe* and *Hall* decisions, none of

84. *See id.* at 401-02.

85. *See id.* at 402.

86. *Id.*

87. *Id.*

88. *See id. But cf. Interdyne Co. v. SYS Computer Corp.*, 107 Cal. Rptr. 499, 501 (Ct. App. 1973) (holding that nonresident purchaser dealing with a California resident through out-of-state agents, mail, or phone had insufficient contacts for personal jurisdiction).

89. *See, e.g., Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29-32 (2d Cir. 1996) (extending jurisdiction over licensees who entered into agency contracts in the forum state and regularly accessed the licensor's computer system in the forum state); *Cody v. Ward*, 954 F. Supp. 43, 45-46 (D. Conn. 1997) (holding fraudulent e-mail and phone messages were enough to extend jurisdiction); *Plus Sys., Inc. v. New England Network, Inc.*, 804 F. Supp. 111, 118-19 (D. Colo. 1992) (holding modem computer contacts by an out-of-state defendant combined with licensing contract entered into in forum state, payments made to forum state, and physical visits by defendant's representative equated to purposeful availment in Colorado and supported extension of personal jurisdiction); *Richard Howard, Inc. v. Hogg*, No. 12-96-5, 1996 Ohio App. LEXIS 5533, at *6-*9 (Ohio Ct. App. Nov. 19, 1996) (holding that e-mail transmissions could support personal jurisdiction in a case where jurisdiction could not be shown otherwise).

the cases are based solely upon e-mail exchange.⁹⁰ A common thread in these decisions is that they each analogize e-mail contacts with phone and mail contacts in attempting to extend jurisdiction to nonresident defendants.⁹¹ With these analogies, the courts find that e-mail and other contacts combine to meet the minimum contacts necessary to support personal jurisdiction.

2. Not Extending Jurisdiction

In *Pres-Kap, Inc. v. System One, Direct Access, Inc.*,⁹² a Florida court refused to extend jurisdiction over a New York travel agency.⁹³ A dispute arose between the defendant and the plaintiff, a reservation service provider.⁹⁴ The plaintiff's New York office negotiated the contract in New York, but the agency accessed the plaintiff's Florida-based computer reservation system and sent payments to Florida.⁹⁵ The court determined that these contacts were insufficient for specific personal jurisdiction, stating:

[A] contrary decision would, we think, have far-reaching implications for business and professional people who use 'on-line' computer services for which payments are made to out-of-state companies where the database is located. . . . 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.⁹⁶

A district court in Virginia recognized and avoided the extreme results that could occur from assertion of jurisdiction based on a few electronic contacts from a foreign individual.⁹⁷ In *Alton v. Wang*,⁹⁸ a Chinese Internet user sent e-mail messages and letters in response to an article authored by a Virginia resident.⁹⁹ The court concluded that such contact could not support personal jurisdiction over the individual in China who had never been to Virginia.¹⁰⁰

90. See *supra* note 73 and accompanying text.

91. See, e.g., *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065, at *39 (S.D.N.Y. Feb. 26, 1997) (comparing e-mail to mail and phone communications).

92. 636 So. 2d 1351 (Fla. Dist. Ct. App.) (1994).

93. See *id.* at 1353.

94. See *id.* at 1352.

95. See *id.* at 1353.

96. *Id.*

97. See *Alton v. Wang*, 941 F. Supp. 66, 67-68 (W.D. Va. 1996).

98. *Id.*

99. See *id.* at 66-67.

100. See *id.* at 67-68.

B. Website Cases

1. Extending jurisdiction

In several states, courts have held that the existence of a website is enough to extend jurisdiction over the website owners. Holdings in these cases can be placed roughly into two categories: (a) a website alone will confer specific personal jurisdiction or (b) a website plus other contacts will confer specific jurisdiction.

a. Website alone cases

Decisions with the most widespread and frightening implications to businesses hold that existence of a website alone will confer specific jurisdiction. For example, in *Maritz, Inc. v. CyberGold, Inc.*,¹⁰¹ a Missouri plaintiff sued a California corporation for trademark infringement.¹⁰² The defendant had no physical contacts with Missouri.¹⁰³ The only basis for personal jurisdiction was that the defendant had a website in California that could be accessed anywhere, including Missouri.¹⁰⁴ The court held that extension of personal jurisdiction was proper, because the act of creating a website was purposeful availment of every jurisdiction globally.¹⁰⁵ The court further held that considerations of fair play and substantial justice were met because the court was adjudicating the trademark infringement claim of one of its residents.¹⁰⁶

101. 947 F. Supp. 1328 (E.D. Mo. 1996).

102. *See id.* at 1329.

103. *See id.* at 1330.

104. *See id.*

Viewed in the light most favorable to plaintiff, defendant's contacts with Missouri are as follows. [sic] CyberGold maintains an Internet site on the World Wide Web. The server for the website is presumably in Berkeley, California. The website is at present continually accessible to every Internet-connected computer in Missouri and the world.

Id. The basis for jurisdiction, as seen by the court, was that the defendant's website "appear[ed] to be maintained for the purpose of, and in anticipation of, being accessed and used by any and all internet users, including those residing in Missouri" *See id.* at 1332.

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

106. *See id.* at 1334.

The District Court in Connecticut reviewed a similar factual situation in *Inset Systems, Inc. v. Instruction Set, Inc.*¹⁰⁷ As in *Maritz*, the plaintiff claimed trademark violation.¹⁰⁸ The nonresident defendant had no employees or offices in Connecticut, nor did it regularly conduct business in Connecticut.¹⁰⁹ The defendant's only alleged contacts with Connecticut were its global Internet website and its maintenance of a national toll-free phone number.¹¹⁰ The court held that the defendant had purposefully availed itself "not only [to] the state of Connecticut, but to all states."¹¹¹ The court did not specify whether it was extending general or specific jurisdiction. However, in discussing minimum contacts, the court did not undertake the specific jurisdiction analysis, thereby implying that the defendant could be brought into court for any dispute, not merely one relating to its website.¹¹²

In *Panavision International, L.P. v. Toeppen*,¹¹³ Panavision sued an out-of-state defendant for trademark infringement.¹¹⁴ Essentially Panavision accused the defendant of "stealing" its website by purposely registering the company's name before the company could.¹¹⁵ Although the website was not actually in operation, the court held that this act was "intended to, and did, result in harmful effects in California."¹¹⁶ The court stated that the defendant purposely availed himself of the privileges of the forum by expressly aiming his conduct at the California company.¹¹⁷

While the holding in *Panavision* is somewhat consistent with trademark cases, it extends the reach of jurisdiction too far. A website does not reach into the forum state, but rather serves as a location that can be visited by people anywhere who reach out to it.¹¹⁸ While the defendant's improper motive may have been a persuasive reason to assert jurisdiction, the future ramifications of the decision should have dissuaded the court. As a later court stated, "*Panavision* appears to be one of those cases where 'hard cases make bad law.'"¹¹⁹

107. 937 F. Supp. 161 (D. Conn. 1996).

108. *See id.* at 162.

109. *See id.* at 162-63.

110. *See id.* at 164.

111. *See id.* at 165.

112. *See id.* at 164-65.

113. 938 F. Supp. 616 (C.D. Cal. 1996).

114. *See id.* at 618-19.

115. *See id.*

116. *See id.* at 622.

117. *See id.*

118. *See supra* note 4 (discussing the structure of the Internet).

119. *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 U.S. Dist LEXIS 2065, at *59 (S.D.N.Y. Feb. 26, 1997) (citing *Board of County Commr's v. Umbehr*, 116 S. Ct.

Perhaps the most egregious example of jurisdictional overreaching, however, comes from a case where the nonresident defendant did *not* have a website. A Virginia district court in *Telco Communications v. An Apple A Day*¹²⁰ extended jurisdiction over a Missouri defendant based on activities of a third party advertiser.¹²¹ Here, the defendant did not maintain a website, but rather paid another company named Business Wire for distribution of its press releases in Connecticut, New York, and New Jersey (not Virginia).¹²² As a "bonus," Business Wire then placed the releases on its databases, on-line services, and Internet sites.¹²³ Unlike defendants in other cases, this defendant did not even have a national toll-free number.¹²⁴ This fact did not deter the court, which hypothesized on the defendant's behalf, "[f]or example, if a Virginia investment bank saw their press release and called the Defendants, Defendants would not have refused the call."¹²⁵ The court found that because the third party Internet site with defendant's advertisement could be accessed at any time by Virginia residents, the advertisement "constitute[d] a persistent course of conduct . . . [] rising to the level of regularly doing or soliciting business" in the state.¹²⁶ The court concluded that "each of the Defendants made specific and purposeful moves to place the press releases on the Internet, which is the basis for jurisdiction in this case."¹²⁷

While each of the "website only" courts stretch the bounds of personal jurisdiction to entirely new areas, the *Telco* decision goes the farthest. It extends jurisdiction to a nonresident defendant based on acts of a third party, acts unknown to the defendant. This violates both the purposeful availment and the fair notice requirements of due process analysis. Juris-

2361, 2373 (1996) (Scalia, J., dissenting); *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 207 (1991) (O'Connor, J., dissenting); *Northern Sec. Co. v. United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting); *Letelier v. Republic of Chile*, 748 F.2d 790, 791 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *United States v. Mastrangelo*, 662 F.2d 946, 953 (2d Cir. 1981) (Meskill, J., dissenting) (1982)).

120. 977 F. Supp. 404 (E.D. Va. 1997).

121. *See id.* at 408.

122. *See id.* at 407.

123. *See id.*

124. *Cf. Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164 (D. Conn. 1996) (finding personal jurisdiction where defendant maintained a toll-free phone number); *see supra* notes 107-12 (discussing *Inset*).

125. *See Telco*, 977 F. Supp. at 406.

126. *See id.* at 407.

127. *See id.* at 408.

diction based upon the contacts of a party's business associates is too attenuated and may not be applied.¹²⁸

Generally, these decisions form the basis of the current personal jurisdiction scare.¹²⁹ Based on little or nothing more than creation of a website, these courts have forced the owners into courts based solely upon the location of the plaintiff.¹³⁰ In some cases, the website was not yet operational, and no actual contact had been made with the forum state.¹³¹ Clearly, this exceeds the bounds of reason and completely eviscerates the "fair notice" requirement while promoting forum-shopping, i.e., the practice of filing suit based upon which jurisdiction has law most favorable to the plaintiff, instead of the location of the parties.

Notably, however, each of these cases is based upon trademark claims arising from either the existence of a site address, or trademark or defamation claims from the content of a site. No court thus far has taken the next step of extending jurisdiction to hale a website owner into court simply because an individual who accessed the site sued, for example, for negligently providing information. Nevertheless, the analysis would be the same.

b. Website-plus cases

Some courts view ownership of a website in conjunction with other contacts as sufficient to extend personal jurisdiction. As such, these decisions are more in line with the e-mail cases because they rely on other contacts made by telephone and mail as part of the analysis.

128. See *McDonough v. Fallon McElligott, Inc.*, No. 95-4037, 1996 U.S. Dist. LEXIS 15139, at *8 (S.D. Cal. Aug. 5, 1996).

129. Scarier yet is the decision in *Haelan Products, Inc. v. Beso Biological Research, Inc.*, No. 97-0571, 1997 U.S. Dist. LEXIS 10565, at *14-*15 (E.D. La. July 11, 1997) (finding a defendant within the court's general personal jurisdiction based on a website, national ads, and a national toll-free number). For further discussion of this case, see *infra* notes 144-49 and accompanying text.

130. See also *Minnesota v. Granite Gate Resorts, Inc.*, No. C6-95-7227, 1996 WL 767431 (D. Minn. Dec. 11, 1996), *aff'd*, 568 N.W. 2d 715 (Minn. Ct. App.), *review granted*, 1997 Minn. LEXIS 829 (Minn. Oct. 31, 1997). In the *Granite Gate* situation the state's Attorney General filed for an injunction under gambling laws of the state. See *Granite Gate Resorts*, 1996 WL 767431, at *1. The court upheld jurisdiction but noted that courts "do not view the contacts the same as what is necessary for a private litigant to pursue a case . . ." See *id.* at *10. For further discussion of this case and jurisdiction over Internet gambling, see generally Nicholas Robbins, *Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet*, 2 B.U. J. SCI. & TECH. L. 7 (1996); Seth Gorman & Antony Loo, Comment, *Blackjack or Bust: Can U.S. Law Stop Internet Gambling?*, 16 LOY. L.A. ENT. L.J. 667 (1996).

131. See *Telco*, 977 F. Supp. at 408 (basing jurisdiction on "specific and purposeful moves" to advertise on the Internet).

For example, in *EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd.*,¹³² a federal district court in Arizona held that a pattern of contacts with the forum state surrounding a website was sufficient to confer specific personal jurisdiction.¹³³ The plaintiff, an Arizona corporation, entered into a contract with the defendant, a New Mexico corporation, to distribute the defendant's software products in Europe.¹³⁴ Plaintiff filed the suit in Arizona, claiming breach of contract and defamation for content posted on the defendant's website.¹³⁵ The court found that a strong argument could be made for general personal jurisdiction due to the defendant's "substantial, ongoing relationship with [the plaintiff], involving communications, visits to Arizona, sales, and Internet activities."¹³⁶ The court declined to rule on this issue, however, because it found specific personal jurisdiction to exist.¹³⁷

The *EDIAS* court reached the correct result in finding specific jurisdiction, but not due to the presence of a website. The court found specific jurisdiction based on the extensive contract entered into with the plaintiff and the ongoing agency relationship with the Arizona company.¹³⁸ The defendant had fair notice that the plaintiff could sue in Arizona because Arizona was the plaintiff's principal place of business.¹³⁹ The defendant took several trips to Arizona for contract negotiations.¹⁴⁰ The defendant sent invoices to Arizona.¹⁴¹ Lastly, the defendant contacted the plaintiff's employees via phone, fax, mail, and e-mail.¹⁴² The court mentioned the fact that the defendant had a website only with respect to defamation allegations stemming from both the website and specific e-mail messages sent to Arizona.¹⁴³

132. 947 F. Supp. 413 (D. Ariz. 1996).

133. *See id.* at 422.

134. *See id.* at 414-15.

135. *See id.*

136. *See id.* at 417.

137. *See id.*

138. *See id.* at 418.

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.* at 419-21. Courts have applied personal jurisdiction more expansively in the defamation context than in normal commercial disputes. For example, the Supreme Court has held that the minimum contacts test is met in a state where the injury is felt, including the defamed party's state of residence. *See Calder v. Jones*, 465 U.S. 783, 791 (1984).

In *Haelan Products, Inc. v. Beso Biological Research, Inc.*,¹⁴⁴ a Louisiana federal court extended jurisdiction on little more than the existence of the nonresident defendant's website.¹⁴⁵ In addition to a website, the defendant also had a national toll-free number and advertised in national trade publications.¹⁴⁶ The court held that this was sufficient to meet the minimum contacts requirement, the purposeful availment requirement, and the Due Process Clause.¹⁴⁷ The court came to this conclusion even though the defendant was based in California, had no phone number, mailing address, office, employee, or property in Louisiana, did not directly solicit any customer in Louisiana, and was unaware that it had a website.¹⁴⁸ Moreover, the court found that the defendant's contacts were enough to subject it to *general* personal jurisdiction, so that the defendant could be haled into court in Louisiana for any reason.¹⁴⁹

As with the website only cases, the *Haelan* decision is the kind of case that may instill fear in companies worldwide. It clearly overreaches, fails to understand the significance of the structure of the Internet, and, if taken up as a majority position by courts, could stifle the future of electronic communication. In the history of the Supreme Court's personal jurisdiction cases, the farthest reaches of specific jurisdiction occur when a nonresident defendant enters into a contract with someone who later moves to the forum state and the dispute arises from that contract.¹⁵⁰ The *Haelan* decision stretches the concept of personal jurisdiction beyond reason, dragging a person into court because of national and international advertising, regardless of whether the dispute concerns the advertising. Under this rationale, any defendant with a website would be within the world's jurisdiction.

If *EDIAS* presents a case of proper extension of jurisdiction and *Haelan* a clear case where the nonresident defendant should not be subject to a forum's jurisdiction, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*¹⁵¹ perhaps illustrates best the gray zone in between. In *Zippo*,

144. No. 97-0571, 1997 U.S. Dist. LEXIS 10565 (E.D. La. July 11, 1997).

145. *See id.* at *14-15.

146. *See id.* at *3.

147. *See id.* at *14-15.

148. *See id.* at *3.

149. *See id.* at *9 n.2 (holding that specific jurisdiction factors need not be addressed based on a court's discussion of general jurisdiction).

150. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957). This decision is seen as the high water mark of personal jurisdiction, a position from which the Supreme Court retreated significantly the following year in *Hanson v. Denckla*, 357 U.S. 235, 251-52 (1958). *See* Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 535 (1995).

151. 952 F. Supp. 1119 (W.D. Pa. 1997).

the defendant, a California corporation, was haled into court in Pennsylvania.¹⁵² The defendant sold passwords to Internet users that were in turn used to access the defendant's information.¹⁵³ It marketed the service through a website posted on a server in California.¹⁵⁴ At the time of the filing of the trademark infringement suit, the defendant had 3000 subscribers in Pennsylvania, approximately two percent of its total business.¹⁵⁵ The court employed a "sliding scale" analysis of contacts,¹⁵⁶ concluding that the number of contacts had slid past the jurisdiction point.¹⁵⁷ The court also reasoned that the acts of sending information to Pennsylvania subscribers constituted trademark dilution, therefore requiring only that the test for specific jurisdiction be met to extend the court's jurisdiction over the defendant.¹⁵⁸ Courts in Massachusetts, New York, and New Jersey have reached the same result based upon similar facts.¹⁵⁹

While the court in *Zippo* takes pains to carefully reason its decision, its misanalysis of the specific jurisdiction question leads to the wrong result. While the court states that it is asserting specific personal jurisdic-

152. *See id.* at 1121.

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.* at 1124.

157. *See id.* at 1127.

158. *See id.*; *see also* *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616, 622 (C.D. Cal. 1996) (analyzing trademark infringement under "effects" test and finding that the dispute arising from website contacts with the forum state met specific jurisdiction requirements); *supra* notes 113-17 (discussing *Panavision*). Other courts have reviewed trademark infringement claims as unrelated to contacts made by individuals in the forum state, and thereby requiring general jurisdiction. *See, e.g.,* *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1332-34 (E.D. Mo. 1996) (finding the existence of an accessible website enough to meet the general personal jurisdiction test required); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164-65 (D. Conn. 1996) (finding the existence of an accessible website enough to give court jurisdiction but failing to specify whether it was extending general or specific jurisdiction); *see also supra* notes 101-12 (discussing *Maritz* and *Inset*).

159. *See, e.g.,* *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456, 468-72 (D. Mass. 1997) (finding that a website created minimum contacts); *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F. Supp. 494, 498-500 (S.D.N.Y. 1997) (finding a website with six subscribers and \$150 per month in income from the forum state enough to confer jurisdiction for a trademark infringement suit); *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 2-5 (D.D.C. 1996) (extending jurisdiction for trademark infringement based on advertising in the jurisdiction's primary newspaper and having website accessible in the jurisdiction).

tion, many of the contacts should really be characterized as unrelated, or only slightly related, to the dispute and should really apply only to a general personal jurisdiction analysis. As the Supreme Court held in *Burger King*, it is not merely the number, but the quality of the contacts that should be reviewed.¹⁶⁰ This rule should apply not only to the purposeful availment requirement, but also to the requirement that the dispute arise from the contact or contacts to assert personal jurisdiction.

2. Not Extending Jurisdiction

New York has staked out the opposing camp on the website jurisdiction question, consistently refusing to subject non-domiciliaries to its jurisdiction. In *Bensusan Restaurant Corp. v. King*,¹⁶¹ for example, Richard King, a resident of Columbia, Missouri, and owner of a small club named "The Blue Note," posted a website on the World Wide Web.¹⁶² The corporate owner of "The Blue Note" jazz club in New York City filed suit in New York for trademark infringement, trademark dilution, and unfair competition.¹⁶³ The plaintiff alleged personal jurisdiction over King based solely on the fact that King's website was accessible in New York.¹⁶⁴ There was no allegation that King sold or attempted to sell anything in New York through use of the website.¹⁶⁵

The district court granted King's motion to dismiss for lack of personal jurisdiction, holding that New York's long-arm statute did not cover the situation and that constitutional due process considerations prevented extension of jurisdiction over King.¹⁶⁶ The court applied standard due process analysis, but departed from courts of other states by analogizing to the Supreme Court decision in *Asahi*.¹⁶⁷ "Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state."¹⁶⁸ As a result, the court held that a website was not enough contact with the forum state to invoke personal jurisdic-

160. See *Burger King v. Rudzewicz*, 471 U.S. 462, 474-75 (1985); see also *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1119 (6th Cir. 1994); *Stuart v. Spademan*, 772 F.2d 1185, 1194 (5th Cir. 1985).

161. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

162. See *id.* at 297.

163. See *id.* at 297-98.

164. See *id.* at 301 ("There is in fact no suggestion that King has any presence of any kind in New York other than the Web site that can be accessed worldwide.").

165. See *id.*

166. See *id.*

167. See *id.*

168. *Id.*

tion.¹⁶⁹ On appeal, the Second Circuit affirmed the district court's ruling on state law grounds and declined discussion of due process.¹⁷⁰

A very similar factual situation presented itself to the Southern District of New York in *Hearst Corp. v. Goldberger*.¹⁷¹ In *Hearst Corp.* the plaintiff, a New York corporation, sued the defendant, an individual business owner in New Jersey, for trademark infringement.¹⁷² Ari Goldberger, the defendant, was an attorney in Cherry Hill, New Jersey; the primary basis for personal jurisdiction was that Mr. Goldberger created a website that had been electronically visited by computers in New York.¹⁷³ He did not sell any products or services in New York.¹⁷⁴ After a detailed review of Internet personal jurisdiction case law,¹⁷⁵ the court concluded that extension of jurisdiction for maintenance of a website that could be accessed in New York would violate a nonresident's due process rights and refused to extend jurisdiction.¹⁷⁶

Perhaps the farthest-reaching attempts by plaintiffs to use website ownership to extend personal jurisdiction come from New York¹⁷⁷ and New Jersey.¹⁷⁸ In *Howard v. Klynveld Peat Marwick Goerdeler*,¹⁷⁹ the plaintiff claimed that a Netherlands general partnership was within New York's jurisdiction because it advertised on the Internet.¹⁸⁰ The defendant had no physical contacts with the United States.¹⁸¹ The claim for employment discrimination did not stem from the website, so the plaintiff attempted to use the site to establish general personal jurisdic-

169. *See id.*

170. *See* *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 29 (2d Cir. 1997).

171. No. 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065 (S.D.N.Y. Feb. 26, 1997).

172. *See id.* at *1.

173. *See id.*

174. *See id.*

175. *See id.* at *49-*63.

176. *See id.* at *63-*66. In contrast to these decisions, the same district recently found that a website with some minimal other contacts was enough to support personal jurisdiction. *See American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F. Supp. 494, 498-99 (S.D.N.Y. 1997) (asserting jurisdiction over a Georgia defendant in a trademark infringement and unfair competition case based on website with six New York subscribers).

177. *See Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654 (S.D.N.Y. 1997).

178. *See Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997).

179. 977 F. Supp. 654 (S.D.N.Y. 1997).

180. *See id.* at 662.

181. *See id.* at 661.

tion.¹⁸² The Southern District of New York granted the foreign defendant's motion to dismiss, holding that the Internet advertising did not constitute a systematic and continuous course of doing business in New York.¹⁸³

Similarly, in *Weber v. Jolly Hotels*,¹⁸⁴ a New Jersey resident sustained injuries in a hotel in Sicily, Italy.¹⁸⁵ The plaintiff alleged jurisdiction over the Italian corporate hotel owner based on the fact that the hotel owner had a website with pictures and descriptions of the hotel facilities and rooms and telephone numbers.¹⁸⁶ The court quoted the *Hearst* decision to find the contacts inconsistent with traditional personal jurisdiction case law.¹⁸⁷ It found the situation analogous to advertising in a national magazine, finding that such contact could not support jurisdiction.¹⁸⁸ The court held, "[e]xercising jurisdiction in such a case would be unjust and would disrespect the principles established by *International Shoe* and its progeny."¹⁸⁹

In other similar cases, courts have also refused to extend personal jurisdiction when based solely on website access in the forum state. In *Cybersell, Inc. v. Cybersell, Inc.*,¹⁹⁰ the Ninth Circuit Court of Appeals rejected the claim of an Arizona corporation named Cybersell that a Florida corporation of the same name infringed on its trademark by maintaining a website accessible in Arizona.¹⁹¹ There was no other contact with Arizona, and the only "hit" on the Florida company's website consisted of the visit by the plaintiff.¹⁹² The court noted that "no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state."¹⁹³ The court held that the mere existence of a passive website is not sufficiently directed to each forum where people could access the site.¹⁹⁴

182. *See id.* at 661-63.

183. *See id.* at 662.

184. 977 F. Supp. 327 (D.N.J. 1997).

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

186. *See id.* at 329-31.

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

188. *See id.*

189. *See id.* at 334.

190. 130 F.3d 414 (9th Cir. 1997).

191. *See id.* at 415.

192. *See id.* at 419.

193. *See id.* at 418.

194. *See id.* at 419.

Otherwise, every complaint arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located. That would not comport with traditional notions of what qualifies as purposeful activity invoking the bene-

In *McDonough v. Fallon McElligott, Inc.*,¹⁹⁵ the defendant was sued by a California corporation for alleged copyright violations.¹⁹⁶ The plaintiff claimed the following bases for personal jurisdiction: defendant hired independent contractors in California, advertised in California newspapers, and had a website.¹⁹⁷ The court refused to extend jurisdiction, stating, "[b]ecause the Web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists Thus, the fact that [the defendant] has a Web site used by Californians cannot establish jurisdiction by itself."¹⁹⁸ In *SF Hotel Co. v. Energy Investments, Inc.*,¹⁹⁹ a federal court in Kansas also dismissed a trademark claim on jurisdictional grounds when the sole basis of jurisdiction was the fact that the defendant had a website accessible in Kansas.²⁰⁰

A theme among these decisions is the careful consideration of the ramifications of extending jurisdiction based on a global electronic presence. However, these cases do not necessarily provide comfort to businesses concerned about being brought before courts in their jurisdictions. In both New York and California, recent court decisions have extended jurisdiction over nonresident defendants in cases with similar facts.²⁰¹

fits and protections of the forum state.

Id. at 420 (citing *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985)); see also Randall Broberg & Eric Hagen, *Cyberspace Has Borders, But They're Ill-Defined*, L.A. DAILY J., Dec. 12, 1997, at 5 (discussing the *Cybersell* case and its implications). See also *Shapiro v. Santa Fe Gaming Corp.*, No. 97 C6117, 1998 U.S. Dist. LEXIS 2488, at *6 (N.D.Ill. Feb. 26, 1998) (a passive, nonadvertising website and toll-free phone number held insufficient to satisfy jurisdiction or venue); *Graphic Controls Corp. v. Utah Med. Prods.*, No. 96-CV-0459 E(F), 1997 U.S. Dist. LEXIS 7448, at *10 (W.D.N.Y. May 21, 1997) (same); *Mallinekrodt Med., Inc. v. Sonus Pharms., Inc.*, Civ. No. 97-1732 (PLF), 1998 U.S. Dist. LEXIS 136, at *24 (D.D.C. Jan. 5, 1998) (posting messages to national electronic bulletin board held insufficient to confer jurisdiction).

195. No. 95-4307, 1996 U.S. Dist. LEXIS 15139 (S.D. Cal. Aug. 5, 1996).

196. See *id.* at *2-*3.

197. See *id.* at *4-*7.

198. *Id.* at *7.

199. No. 97-1306, 1997 U.S. Dist. LEXIS 19711 (D. Kan. Nov. 19, 1997).

200. See *id.* at *9.

201. See, e.g., *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F. Supp. 494, 498-99 (S.D.N.Y. 1997) (asserting jurisdiction over a Georgia defendant in a trademark infringement and unfair competition case based on a website with six New York subscribers); *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616, 622 (C.D.

IV. ANALOGIZING TO TELEPHONE, MAIL, AND ADVERTISING CONTACTS

Several courts have looked to cases involving telephone, mail, and advertising when deciding whether personal jurisdiction applies to non-resident defendants based on electronic contacts, including e-mail and websites.²⁰² The benefit of analogy to these media is that they have a more extensive history and developed personal jurisdiction analysis. But what exactly do the phone, mail, and advertising cases tell us about minimum contacts? Before ascertaining how close electronic contacts are to existing technologies, we must determine in the first instance whether these technologies give us any consistent criteria. If application of personal jurisdiction analysis is already confused with regard to existing media, then it will not be very helpful in paving the way for jurisdictional analysis in the future.

A. Telephone and Mail Cases

In many cases, courts have held that use of interstate methods of communication, such as telephone lines and mail, are insufficient to establish personal jurisdiction.²⁰³ Additionally, without a contract, phone calls in-

Cal. 1996) (extending specific jurisdiction over a nonresident defendant in a trademark infringement case based on the existence of website). In comparison, in both *Hearst* and *Bensusan* the website had no commercial links to the forum. See *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065, at *1 (S.D.N.Y. Feb. 26, 1997); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997); *supra* notes 161-76 and accompanying text (discussing *Hearst* and *Bensusan*). In *Hearst*, the website was not yet operational, so no electronic contact had been made. See *Hearst*, 1997 U.S. Dist. LEXIS 2065, at *63-66; *supra* notes 171-76 (discussing *Hearst*). The *American Network* decision, however, indicates that the cautionary language in *Hearst* and *Bensusan* may not extend very far.

202. See, e.g., *Hearst Corp.*, 1997 U.S. Dist. LEXIS 2065, at *39 (denying personal jurisdiction based upon Internet contact); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1261 n.5 (6th Cir. 1996) (comparing e-mail to other mail); *Bensusan Restaurant*, 937 F. Supp. at 301; *McDonough v. Fallon McElligott, Inc.*, No. 95-4037, 1996 U.S. Dist. LEXIS 15139 (S.D. Cal. Aug. 5, 1996) (denying personal jurisdiction based upon Internet contact).

203. See, e.g., *Bell Paper Box, Inc. v. Trans W. Polymers, Inc.*, 53 F.3d 920, 923 (8th Cir. 1995) (stating that the use of interstate facilities, including mail and phone lines, cannot alone establish minimum contacts); *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1390-91 (9th Cir. 1995) (asserting that phone calls and acceptance of money from state's residents were insufficient for general jurisdiction); *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1119 (6th Cir. 1994) (holding letters and phone calls to a resident inadequate to establish sufficient minimum contacts for personal jurisdiction); *Casualty Assurance Risk Ins. Brokerage Co. v. Dillon*, 976 F.2d 596, 600 (9th Cir. 1992) (finding that sparse correspondence did not support jurisdiction in defamation case); *Market/Media Research v. Union Trib. Publ'g Co.*, 951 F.2d

to the forum state generally will not support jurisdiction.²⁰⁴ However,

102, 105 (6th Cir. 1991) (stating that telephone calls and mail sent to Ohio were insufficient for personal jurisdiction); *Roth v. Garcia Marquez*, 942 F.2d 617, 622 (9th Cir. 1991) (“[b]oth this court and the courts of California have concluded that ordinarily use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the [forum state]”) (quoting *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985)); *Wines v. Lake Havasu Boat Mfg.*, 846 F.2d 40, 43 (8th Cir. 1988) (finding no purposeful availment where the defendant advertised in the forum state through a nationally publicized journal); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 816 (9th Cir. 1988) (finding no jurisdiction where the parties formed the contract in England but signed it in the forum state, with execution and termination conducted by mail); *Stuart v. Spademan*, 772 F.2d 1185, 1193-94 (5th Cir. 1985) (holding that communication between a resident and nonresident regarding a developing contract was not purposeful availment); *Peterson*, 771 F.2d at 1262 (holding that internal communications are not purposeful availment); *Bond Leather Co. v. Q. T. Shoe Mfg. Co.*, 764 F.2d 928, 932-35 (1st Cir. 1985) (finding four letters to the forum state, at least one phone call from the forum state to the plaintiff, and a guarantee to plaintiff of payment for goods sold to another corporation collectively insufficient to extend personal jurisdiction); *Institutional Food Mktg. Ass’n v. Golden State Strawberries, Inc.*, 747 F.2d 448, 456 (8th Cir. 1984) (finding that phone conversations and written correspondence were insufficient contacts); *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1029 (5th Cir. 1983) (finding interstate communications made to the forum state insufficient); *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 655-56 (8th Cir. 1982) (finding the use of the telephone, mail, and banking insufficient to establish personal jurisdiction); *Scullin Steel Co. v. National Ry. Utilization Corp.*, 676 F.2d 309, 314 (8th Cir. 1982) (finding the use of interstate telephone and mail services insufficient to satisfy minimum contacts requirement); *Lakeside Bridge & Steel v. Mountain State Constr.*, 597 F.2d 596, 604 (7th Cir. 1979) (finding the minimum contacts requirement not satisfied by interstate telephone calls and written correspondence between the parties); *Capital Dredge & Dock Corp. v. Midwest Dredging Co.*, 573 F.2d 377, 380 (6th Cir. 1978) (holding that mail and phone contacts were not enough to establish personal jurisdiction); *Agrashell, Inc. v. Bernard Sirota Co.*, 344 F.2d 583, 587 (2d Cir. 1965) (negotiating and executing contracts for goods by phone and mail was insufficient to establish personal jurisdiction); *Breiner Equip. Co. v. Dynaquip, Inc.*, 539 F. Supp. 204, 206 (E.D. Mo. 1982) (“Neither use of the mails, telephone calls, nor unilateral activities on the part of the plaintiff . . . is enough to subject a defendant to service of process in Missouri.”); *Bross Util. Serv. Corp. v. Aboubshait*, 489 F. Supp. 1366, 1371-72 (D. Conn.) (“[T]ransmission of communications between an out-of-state defendant and a plaintiff within the jurisdiction does not, by itself, constitute the transaction of business in the forum state”), *aff’d*, 646 F.2d 559 (2d Cir. 1980).

204. *See, e.g., Digi-Tel Holdings, Inc. v. Proteq Telecomms. (PTE), Ltd.*, 89 F.3d 519, 523 (8th Cir. 1996) (noting that mail and faxes alone cannot establish jurisdiction); *Far W. Capital, Inc. v. Towne*, 46 F.3d 1071, 1077 (10th Cir. 1995) (stating the well-established principle that telephone contacts alone are not necessarily sufficient to es-

when such contacts are widespread enough, and lead to contractual or other relationships in the forum state, they are reviewed as part of the rationale to extend jurisdiction over the nonresident defendant.²⁰⁵

establish personal jurisdiction); *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1119 (6th Cir.) (1994) (reasoning that contractual relations alone do not satisfy the requirements for personal jurisdiction); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 511 (2d Cir. 1994) (finding that an isolated phone call is not enough to establish personal jurisdiction); *CPC-Rexcell, Inc. v. La Corona Foods, Inc.*, 912 F.2d 241, 243-44 (8th Cir. 1990) (finding that several phone orders by nonresident defendant to plaintiff were insufficient for personal jurisdiction); *Nicholas v. Buchanan*, 806 F.2d 305, 307-08 (1st Cir. 1986) (stating that telephone calls and letters into the state were not enough to meet due process jurisdictional requirements); *Fiedler v. First City Nat'l Bank*, 807 F.2d 315, 316-18 (2d Cir. 1986) (holding three telephone calls and one mailing into the forum state insufficient for personal jurisdiction); *Fox v. Boucher*, 794 F.2d 34, 37 (2d Cir. 1986) (stating that a single telephone call was insufficient for personal jurisdiction); *C & H Transp. Co. v. Jensen and Reynolds Constr. Co.*, 719 F.2d 1267, 1269 (5th Cir. 1983) (refusing to extend jurisdiction over defendant for phone calls made to the forum state); *Mayes v. Leipziger*, 674 F.2d 178, 184-85 (2d Cir. 1982) (refusing to extend jurisdiction for phone calls and letters into forum state); *Scheidt v. Young*, 389 F.2d 58, 60 (3d Cir. 1968) (finding a newspaper advertisement and plaintiff's call in response to such advertisement insufficient for minimum contacts); *Premier Lending Servs., Inc. v. J.L.J. Assocs.*, 924 F. Supp. 13, 16 (S.D.N.Y. 1996) (holding that defendant's telephone, fax, and mail contacts were insufficient to impose jurisdiction); *Beckett v. Prudential Ins. Co.*, 893 F. Supp. 234, 239 (S.D.N.Y. 1995) (finding one telephone call insufficient for personal jurisdiction); *Taurus Int'l Inc. v. Titan Wheel Int'l Inc.*, 892 F. Supp. 79, 81-82 (S.D.N.Y. 1995) (stating that one mailing was not enough to support jurisdiction even in a trademark infringement action); *Lawrence Wisser & Co. v. Slender You, Inc.*, 695 F. Supp. 1560, 1562-63 (S.D.N.Y. 1988) (finding that telephone calls and faxes into New York, including calls to New York media, were not sufficient for personal jurisdiction); *Slocum v. Sandestin Beach Resort Hotel*, 679 F. Supp. 899, 901-03 (E.D. Ark. 1988) (holding interstate telephone calls and mail not sufficient for personal jurisdiction); *Advance Realty Assoc. v. Krupp*, 636 F. Supp. 316, 318 (S.D.N.Y. 1986) (holding that defendant's business registration was insufficient for jurisdiction); *Bennett Indus., Inc. v. Laher*, 557 F. Supp. 965, 967-69 (N.D. Tex. 1983) (holding that a flyer soliciting business and phone calls was insufficient to assert personal jurisdiction); *Lichtenstein v. Jewelart, Inc.*, 95 F.R.D. 511, 514-15 (E.D.N.Y. 1982) (reiterating that courts must look to the quality of contacts, not quantity when deciding to exercise personal jurisdiction); *Empresa Nacional Siderurgica, S.A. v. Glazer Steel Co.*, 503 F. Supp. 1064, 1065-66 (S.D.N.Y. 1980) (placing an order via telex machine does not establish personal jurisdiction); *CDI Contractors, Inc. v. Goff Steel Erectors Inc.*, 783 S.W.2d 846, 847 (Ark. 1990) (holding that a nonresident subcontractor's bid to a general contractor over the phone was not enough to hale the subcontractor into court in the general contractor's state); *Valley Wide Health Servs., Inc. v. Graham*, 738 P.2d 1316, 1318 (N.M. 1987) (finding that a call from a health care clinic doctor to New Mexico was not enough for jurisdiction over the clinic); *Morrill v. Tong*, 453 N.E.2d 1221, 1228 (Mass. 1983) (holding that phone calls were insufficient for minimum contacts); *Professional Personnel Mgmt. Corp. v. Southwest Med. Assocs., Inc.*, 628 N.Y.S.2d 919, 919-20 (App. Div. 1995) (finding interstate negotiations by telephone, facsimile or mail insufficient to extend jurisdiction).

205. See, e.g., *Whelen Eng'g Co., Inc. v. Tomar Elecs., Inc.*, 672 F. Supp. 659, 663-64

Courts sometimes also differentiate between calling into a forum state and merely receiving calls from the forum state.²⁰⁶ Courts' analyses of telephone and mail contacts relate to both quantity and quality of the contacts. Even an entire direct mail advertising campaign constituting thousands of mailings may be insufficient to confer jurisdiction because the quality of the contact is very low,²⁰⁷ whereas a few phone calls and mailings, if establishing a significant substantive link to the forum state, may be enough to extend jurisdiction over a nonresident defendant.²⁰⁸

B. National Advertising Cases

The Supreme Court has not ruled on whether advertising in a national publication without more may constitute purposeful availment of those states to which the publication is sent.²⁰⁹

Courts have often held that advertising in national publications is not enough to meet the minimum contacts requirement under the Due Process Clause.²¹⁰ Furthermore, even when the advertisements result in

(D. Conn. 1987) (finding personal jurisdiction over the defendant when he knowingly and repeatedly placed advertisements in the forum state).

206. *Compare* Continental Am. Corp. v. Camera Controls Corp., 692 F.2d 1309, 1314-15 (10th Cir. 1982) (holding that calling into a forum state injected business into the state) *with* Wilson v. Belin, 20 F.3d 644, 650-51 (5th Cir. 1994) (receiving unsolicited telephone calls was insufficient for jurisdiction).

207. *See, e.g.*, Wims v. Beach Terrace Motor Inn, Inc., 759 F. Supp. 264, 269 (E.D. Pa. 1991) (mailing 6000 brochures to prospective patrons was held insufficient to confer jurisdiction).

208. *See, e.g.*, Wynoski v. Millet, 759 F. Supp. 439, 443-44 (N.D. Ill. 1991) (holding a single advertisement for an airplane sale, coupled with a sale in the forum state, sufficient to extend jurisdiction over a nonresident defendant).

209. *See* Haelan Products, Inc. v. Beso Biological Research, Inc., 1997 U.S. Dist. LEXIS 10565, at *6 (E.D. La. July 14, 1997) (finding that advertising on the Internet, coupled with a toll-free phone number, satisfied the due process clause requirements for purposeful availment).

210. *See, e.g.*, Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop., 17 F.3d 1302, 1305 (10th Cir. 1994) ("[M]ere placement of advertisements in nationally distributed papers or journals does not rise to the level of purposeful contact with a forum required by the Constitution in order to exercise personal jurisdiction over the advertiser."); Sunbelt Corp. v. Noble, Denton & Assoc., Inc., 5 F.3d 28, 33 n.10 (3d Cir. 1993) (finding a single advertisement in a national publication reaching the forum state insufficient to establish personal jurisdiction); Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1200 (4th Cir. 1993) ("[A]dvertising and solicitation activities alone do not constitute the 'minimum contacts' required for general jurisdiction."); Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 181, 184 (5th Cir. 1992) (stating that a

sales, this is not seen as transacting business in the purchasers' state.²¹¹

national journal advertisement and direct mailings to the forum state were insufficient to establish personal jurisdiction); *Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128, 1131 (10th Cir. 1991) (finding multiple national trade magazine advertisements insufficient for general personal jurisdiction); *Charlie Fowler Evangelistic Ass'n, Inc. v. Cessna Aircraft Co.*, 911 F.2d 1564, 1566 (11th Cir. 1990) (stating that advertising in forum state's telephone directory was not purposeful availment); *Pizarro v. Hoteles Concorde Int'l, C.A.*, 907 F.2d 1256, 1260 (1st Cir. 1990) (stating that advertising in a local newspaper was not enough for general jurisdiction over a personal injury claim in a different jurisdiction); *Wines v. Lake Havasu Boat Mfg., Inc.*, 846 F.2d 40, 43 (8th Cir. 1988) (finding national trade advertisements insufficient to support jurisdiction); *Singletary v. B.R.X., Inc.*, 828 F.2d 1135, 1136-37 (5th Cir. 1987) (stating that advertising in national publications that reach the forum state was not enough to establish personal jurisdiction); *Johnston v. Frank E. Basil, Inc.*, 802 F.2d 418, 420 (11th Cir. 1986) (finding advertising in a national publication insufficient to establish personal jurisdiction); *Fidelity & Cas. Co. v. Philadelphia Resins Corp.*, 766 F.2d 440, 446-47 (10th Cir. 1985) (finding national trade advertisement, even though leading to a sale, insufficient for general personal jurisdiction); *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 66 & n.8 (3d Cir. 1984) (finding local newspaper advertisement insufficient to extend personal jurisdiction); *Growden v. Ed Bowlin & Assoc., Inc.*, 733 F.2d 1149, 1151-52 & n.4 (5th Cir. 1984) (holding that an advertisement in the forum state was insufficient to establish jurisdiction in a suit arising from the product advertised); *Loumar, Inc. v. Smith*, 698 F.2d 759, 763-64 (5th Cir. 1983) (stating that national advertising alone was insufficient for personal jurisdiction); *Lands-O-Nod Co. v. Bassett Furniture Indus., Inc.*, 708 F.2d 1338, 1341 (8th Cir. 1983) (finding a national trade publication, together with attendance at a trade show advertisement insufficient to support jurisdiction for a trademark dispute in the forum state); *Reliance Steel Prods. Co. v. Watson, Ess, Marshall & Enggas*, 675 F.2d 587, 589 (3d Cir. 1982) (finding the Martindale-Hubbell legal directory listing insufficient to establish personal jurisdiction); *Cascade Corp. v. Hiab-Foco AB*, 619 F.2d 36, 37-38 (9th Cir. 1980) (sending a letter to the forum state alleging patent infringement insufficient for jurisdiction); *Benjamin v. Western Boat Bldg. Corp.*, 472 F.2d 723, 730-31 (5th Cir. 1973) (finding that without concomitant sales, advertising in national magazines does not establish personal jurisdiction); *Seymour v. Parke, Davis & Co.*, 423 F.2d 584, 587 (1st Cir. 1970) (finding advertising and employing salesmen in the forum state insufficient to establish jurisdiction). *But cf. Fidelity & Cas. Co.*, 766 F.2d at 447 (10th Cir. 1985) (stating that an advertisement related to the cause of action may support jurisdiction); *Tidgewell v. Loon Mountain Recreation Corp.*, 820 F. Supp. 630, 632 (D. Mass. 1993) (holding a foreign company's advertisements sufficient for personal jurisdiction in forum state); *Whelen Eng'g Co., Inc. v. Tomar Elecs., Inc.*, 672 F. Supp. 659, 667 (D. Conn. 1987) (extending personal jurisdiction over a defendant in an infringement action where allegedly infringing advertisements were in thirty publications available in the forum state); *McFaddin v. National Executive Search, Inc.*, 354 F. Supp. 1166, 1169 (D. Conn. 1973) (finding that six advertisements over six months in duration were enough for personal jurisdiction).

211. See 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 4.02[1][a][ix], at 4-50 to 4-54 (2d ed. 1991); see also, e.g., *Frieling v. Malowest, Inc.*, 814 F. Supp. 75, 76 (W.D. Okla. 1993) (stating that the fact that nonresident defendant's radio advertisements were heard within the forum state was insufficient for extension of jurisdiction).

In certain cases, courts have refused to extend jurisdiction for advertisements in the forum state even where such advertisements were coupled with multiple sales and shipments of goods into the state.²¹² However, advertising is a component reviewed by courts as a reason to extend personal jurisdiction when, together with other contacts, the overall presence amounts to purposeful availment and puts the nonresident defendant on fair notice.²¹³

Regarding national advertising, the Fifth Circuit has propounded the following factors to determine whether such publication is sufficient: "(1) Whether the publications defendant advertised in circulated in the forum state; (2) Whether the defendant advertised in these publications frequently, regularly, or occasionally; (3) What amount of business was obtained from the advertisements; and (4) Whether the defendant attempted to limit the states in which its product was marketed."²¹⁴ By using this test, the court in *Haelan Products* reached a decision to extend jurisdiction over a nonresident defendant with no physical ties to the forum state based on advertising in four national publications plus the Internet along with maintenance of a national toll-free number.²¹⁵

Because of the ability of individuals to directly access a website and enter into transactions with the website owner, some courts have held that websites are more like direct mailing contacts than national advertisements.²¹⁶ Isolated contacts by mail will not meet the minimum con-

212. See *CASAD*, *supra* note 211, at 4-50 to 4-54.

213. See *CASAD*, *supra* note 211, at 4-50 to 4-54; CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1069, at 355 (1987); see, e.g., *Cabbage v. Mercheant*, 744 F.2d 665, 668-70 (9th Cir. 1984) (extending jurisdiction over nonresident physicians who advertised in a phone directory in the forum state and received a substantial portion of their business from the forum state); *Wynoski v. Millet*, 759 F. Supp. 439, 443-44 (N.D. Ill. 1991) (holding that an advertisement for the sale of an airplane in a national publication coupled with the sale of such plane in the forum state was sufficient for personal jurisdiction).

214. See *Haelan Products, Inc. v. Beso Biological Research, Inc.*, No. 97-0571, 1997 U.S. Dist. LEXIS 10565, at *7 (E.D. La. July 11, 1997); see also *Vault Corp. v. Quaid Software Ltd.*, 775 F.2d 638, 640 (5th Cir. 1985) (extending jurisdiction over a defendant who advertised in seven national magazines without attempting to limit the states where the product was marketed); *Loumar Inc. v. Smith*, 698 F.2d 759, 763 (5th Cir. 1983) (finding advertisements placed in nationally circulated publications insufficient minimum contacts).

215. See *Haelan Products*, 1997 U.S. Dist. LEXIS 10565, at *7-*8.

216. See, e.g., *Minnesota v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 718-21 (Minn. Ct. App. 1997).

tacts requirement.²¹⁷ However, in at least one case, a campaign of direct mail solicitation has been held sufficient to extend specific personal jurisdiction over the advertiser.²¹⁸

C. *Problems with Attempting to Analyze Electronic Contacts by Analogy to Phone, Mail, and Advertising Contacts*

Courts have suggested that electronic means of communication parallel more traditional modes and should be treated in the same manner for jurisdictional analysis.²¹⁹ Certain fundamental differences show this to be problematic in application, however. Notably, courts that apply a more limited view of jurisdiction tend to discuss e-mail and websites as similar to phone, mail, and advertising contacts,²²⁰ whereas courts more expansively asserting jurisdiction refuse to apply these analogies.²²¹

Because there is a certain consistency to phone, mail, and advertising cases, there is a value to analogizing. However, the analogies can only take us so far. Courts are correct when they find such analogies limited in their usefulness. However, courts that refuse to analogize tend to place electronic contacts on the wrong side of the purposeful availment line when compared with older technologies.

1. Breakdown of Telephone and Mail Analogy

The word e-mail indicates a mode of mail, much like postal mail, i.e., sending letters or other writings via the U.S. Postal Service or other physical delivery system. The reality differs in several important ways.

217. See, e.g., *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1118-19 (6th Cir. 1994) (holding that correspondence to an individual in the forum state was insufficient to extend jurisdiction over dispute arising from relationship between the parties).

218. See, e.g., *Transamerica Corp. v. Transfer Planning, Inc.*, 419 F. Supp. 1261, 1262 (S.D.N.Y. 1976) (holding that 100 to 250 brochures sent to the forum state were sufficient for personal jurisdiction in a trademark infringement action).

219. See, e.g., *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065, at *39 (S.D.N.Y. Feb. 26, 1997).

220. See, e.g., *id.*; *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1261 n.5 (6th Cir. 1996); *McDonough v. Fallon McElligott, Inc.*, No. 95-4307, 1996 U.S. Dist. LEXIS 15139, at *6 (S.D. Cal. Aug. 5, 1996).

221. See, e.g., *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1332 (E.D. Mo. 1996) ("Because the Internet is an entirely new means of information exchange, analogies to cases involving the use of mail and telephone are less than satisfactory in determining whether defendant has 'purposefully availed' itself to this forum."). For a more complete discussion of the *Maritz* decision, see *supra* notes 101-06 and accompanying text.

First, unlike postal mail, it is often impossible to know to what physical location an e-mail is being sent.²²² Internet addresses do not have postal codes that foretell when a communication will cross jurisdictional lines.²²³ In fact, addresses may be misleading in that regard. Using our hypothetical, a Pittsburgh resident communicating with Mr. Jefferson at <philadelphiarules.com> would in fact be sending an e-mail to Virginia, unwittingly making interstate contact, just as Mr. Jefferson was mistaken in his belief that he was communicating only within Virginia when he was really sending and receiving messages to and from California.

E-mail messages may also be copied and forwarded to multiple locations with equal ease, so that even if the sender knew where the first copy was headed, other future copies would be completely out of the sender's control. For example, California Benny, by agreeing to license his module to Jefferson, has no control of where the data will go.

Also, the entire attitude and etiquette of communicating via e-mail differs significantly from postal mail. E-mail is less formal, easier to use, less expensive, and quicker than postal mail. Instead of taking days, it may take minutes, which can result in multiple communications over the course of a few hours. In this way e-mail is closer to a "written phone call" than a letter. Many Internet users find e-mail even less intrusive than a phone call because it may be accessed at the recipient's convenience, or deleted without reading its contents.

Unlike postal mail, several commercial transactions involving e-mail may never culminate in an exchange of physical product. A growing field of commerce finds itself residing entirely in cyberspace. For example, software sold on the Internet may be downloaded directly via the Internet, as with Mr. Jefferson in our hypothetical. The future also promises an increase in information-for-fee services, which never leave the electronic world.

Additionally, e-mail differs from phone contacts. In many cases, a person knows where he or she is calling. Instead, e-mail communications

222. See Dale M. Cendali & James D. Arbogast, *Net Use Raises Issues of Jurisdiction*, NAT'L L.J., Oct. 28, 1996, at C7 (stating that jurisdiction may be harder in e-mail cases than regular mail/phone cases, because e-mails do not show location of recipient, so it is impossible for a defendant to knowingly reach out to the forum); George P. Long III, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177, 1178-79 (1994) (noting that Internet users can exchange information anonymously).

223. See Cendali & Arbogast, *supra* note 222, at C9.

are more akin to national toll-free number phone services.²²⁴ In such an event, the caller often never knows what jurisdiction is being called, and the recipient at best learns of the call's origins upon receipt of the bill a month later. Similarly, Mr. Jefferson's automated website will send information and even sell product without Jefferson ever knowing its destination. Several phone services sell information and bill to a credit card, never exchanging a physical product. Unfortunately, case law regarding jurisdiction over toll-free phone number information providers is less developed than that regarding e-mail or websites.²²⁵ Case law regarding other phone contacts does not closely meet the indicia of the Internet.

Thus, analogy to current technology is imprecise at best.²²⁶ Instead, e-mail is less substantial than either postal mail or phone contacts, and certainly less availing of a jurisdiction. The application of personal jurisdiction contacts often comes down to a subjective weighing of the quality of contacts, and when conducting this analysis, courts should consider the informality accompanying e-mail exchanges. If the result is an entire contractual relationship and the parties know where to expect disputes to be resolved, as in *CompuServe*, electronic contacts may be enough to confer jurisdiction. However, in many cases the casual exchange of e-mail to unknown persons and destinations, even if accompanied by a commercial transaction, does not sufficiently show purposeful availment to the forum state, and should not lead to extension of personal jurisdiction over the nonresident defendant.

At least one court has also discussed the analogy of websites to telephone and mail contacts, including toll-free phone numbers and direct mailing.²²⁷ In *Maritz* the court determined that such analogies did not

224. See Richard S. Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 370-76 (1996).

225. See, e.g., *Dart Int'l, Inc. v. Interactive Target Sys., Inc.*, 877 F. Supp. 541, 545 (D. Colo. 1995) (refusing to extend jurisdiction over a nonresident based on existence of a toll-free number accessible in the state); *Walsh v. Maryland Bank, N.A.*, 806 F. Supp. 437, 441 (S.D.N.Y. 1992) (accord); *Composite Marine Propellers, Inc. v. Vanderwoude*, 741 F. Supp. 873, 877-78 (D. Kan. 1990) (refusing to extend personal jurisdiction over nonresident defendant based on advertisements in two national magazines and a toll-free number accessible to forum residents). *But cf.* *Haelan Products, Inc. v. Beso Biological Research, Inc.*, No. 97-0571, 1997 U.S. Dist. LEXIS 10565, at *14-*15 (E.D. La. 1997) (extending jurisdiction on little more than the existence of a website).

226. "When people look at the Internet and try to draw analogies to existing communications, it doesn't work, because the Internet is a little of everything." Jared Sandberg, *On-Line: Regulators Try to Tame the Untamable On-Line World*, WALL ST. J., July 5, 1995, at B1 (quoting Scott Charney, Chief of the Justice Department's computer crime unit).

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

withstand analysis of the technology differences because a website was much lower cost and more efficient than the other communication technologies.²²⁸ While this is correct, the *Maritz* court used this to justify a more expansive view of jurisdiction.²²⁹ In fact, the lower cost and universal accessibility of websites increases the likelihood that a website owner is not purposefully directing activity toward any state. Instead, the website owner creates a location and awaits visitors, and unlike an advertised toll-free number, the website often must be specifically sought out using a search engine. These factors point away from, not toward, purposeful availment and fair notice of personal jurisdiction.

2. Websites and National Advertising Analysis

Similarly, courts may analogize websites to national advertisements. Like national ads, a website is accessible throughout the country. Courts have often refused to extend jurisdiction when the only contact alleged is a national advertisement.²³⁰ However, some courts have extended specific personal jurisdiction over advertisers in national media when the dispute arises directly from the advertisement itself.²³¹ As a result of this split, even if a website technologically was similar to national advertising, the national advertising analogy would not prove especially helpful.

Websites are not exactly like national media advertising, and should be seen as lesser contacts. Review of the Fifth Circuit test regarding national advertising in the website context illustrates the key differences. Recall that the Fifth Circuit uses a four-factor test for national publications: "(1) Whether the publications defendant advertised in circulated in the forum state; (2) Whether the defendant advertised in these publications

228. *See id.*

229. *See id.*

230. *See, e.g.,* *Droukas v. Divers Training Academy, Inc.*, 376 N.E.2d 548, 551 (Mass. 1978) (holding that general advertising alone will not confer jurisdiction, even when leading to a sale).

231. *See, e.g.,* *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 412 (7th Cir. 1994) (holding that television broadcast into the forum state was sufficient for personal jurisdiction); *Holmes v. TV-3, Inc.*, 141 F.R.D. 692, 696 (W.D. La. 1991) (accord); *Viacom Int'l, Inc. v. Three Star Telecast, Inc.*, 639 F. Supp. 1277, 1280 (D.P.R. 1986) (accord); *Thomas Jackson Publ'g Inc. v. Buckner*, 625 F. Supp. 1044, 1046 (D. Neb. 1985) (accord); *United Med. Lab., Inc. v. CBS, Inc.*, 256 F. Supp. 570, 572 (D. Ore. 1966) (accord).

frequently, regularly, or occasionally; (3) What amount of business was obtained from the advertisements; and (4) Whether the defendant attempted to limit the states in which its product was marketed."²³²

Immediately we can see that the factors do not apply well to websites. The first factor is meaningless in the website context because a website either circulates nowhere or everywhere. Technically, the website exists only at the server and must be sought out from any other location to download its files. The downloading process and any other interaction such as links to other sites can be seen as interaction occurring between the site's server and the visitor's computer. As a result, the question of circulation is fruitless.

Similarly, the second factor regarding frequency of publication is inapplicable because a website is again either constantly advertising or never really advertising. The website is always accessible. However, it leads an essentially passive existence because a user must utilize some kind of search engine software to find the site. In this way a website is more like a billboard sitting in one place. The user's search software is like a directory of billboards, and the Internet enables the user to track down and instantaneously visit billboards globally. The billboard does not leap from its structural supports to seek out prospective customers.

The fourth factor, relating to attempts of a defendant to limit the reach of the advertisement, is perhaps the least useful of all, because at present there is no way to stop particular geographical locations from visiting a website.²³³ A website is automatically accessible everywhere.²³⁴

While some courts recognize differences between websites and print advertising, they misunderstand the realities of the Internet as they relate to purposeful availment. These courts tend to find websites more exten-

232. See *Haelan Prods., Inc. v. Beso Biological Research Inc.*, No. 97-0571, 1997 U.S. Dist. LEXIS 10565, at *7-*14 (E.D. La. July 14, 1997).

233.

[A]n Internet user cannot foreclose access to her work from certain states or send differing versions of her communication to different jurisdictions. In this sense, the Internet user is in a worse position than the truck driver or train engineer who can steer around Illinois or Arizona, or change the mudguard or train configuration at the state line; the Internet user has no ability to bypass any particular state.

American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 183 (S.D.N.Y. 1997). "The Internet has no territorial boundaries. To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps 'no there there,' the 'there' is *everywhere* where there is Internet access." *Digital Equip. Corp. v. AltaVista Tech. Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997).

234. See *Digital Equip.*, 960 F. Supp. at 462.

sive than print media, and fail to recognize that websites are far less "availing" or directed toward a forum than print advertising.²³⁵

This leaves only the third factor, the amount of business obtained from the advertisement. To the extent the website leads to sales, these become additional contacts with the forum state. Once enough contacts have been made in this regard, and product has been sent into the forum state with the knowledge of the seller, the seller will have purposefully availed itself of the jurisdiction. But until then, the mere presence of a website will not lead the owner to anticipate a lawsuit in any particular jurisdiction. The website itself is simply too ephemeral and widespread to find that the owner is availing itself of the benefits of any jurisdiction outside the location of the server where the data resides.

While some courts recognize differences of websites from print advertising, they misunderstand the realities of the Internet as they relate to purposeful availing. They tend to find the website more extensive, but fail to recognize the less-availing nature of the presence.²³⁶

As a starting place, one bright-line rule that courts should extend is that a passive website by itself, with no other transaction, is not purposeful availing for general or specific jurisdiction. This rule should apply as well to cases attempting to litigate website names.

However, as discussed above, websites offering products and services for sale cannot be analogized to national advertising. These cases must turn on the facts surrounding the sale or sales as well as other accompanying contacts with the forum state.

V. CLARIFYING JURISDICTION IN ELECTRONIC COMMERCIAL TRANSACTIONS

A. *Courts Should Not Create a Legal World Wide Web*

There is no need to invent a different test for personal jurisdiction due to new technology.²³⁷ Instead, a practical application of the current test

235. See, e.g., *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164 (D. Conn. 1996) (extending jurisdiction because the website is a continuous advertisement instead of a one-time mass-mailing).

236. See, e.g., *id.*

237. There may be other reasons to develop new personal jurisdiction guidelines, such as decreasing business costs and giving nonresidents a sense of security regarding jurisdiction that does not currently exist. See Rex. R. Perschbacher, *Preface: Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 513 (1995).

should yield results as consistent as in other substantive areas. The rationale behind the purposeful availment requirement, as the Supreme Court stated in *Burger King*, is:

[I]ndividuals have “fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,” . . . [T]he Due Process Clause “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”²³⁸

This “fair warning” requirement is satisfied when the defendant has purposefully directed activities at the forum state.²³⁹

The common link among decisions refusing to extend jurisdiction over out-of-state parties with little other contact than e-mail or website presence in a state is that they comprehend the vast interconnectivity of the Internet and consider the ramifications that the decision to extend personal jurisdiction may have on the judicial system. Conversely, those decisions extending jurisdiction not only tend to ignore the purposeful availment and fair warning language from *Burger King* and *World-Wide Volkswagen*, they also ignore the ramifications of their decisions.

The need for restraint comes primarily from the fact that the pace of the Internet so far has outpaced the technological capabilities of courts in the United States. One day, perhaps widespread use of teleconferencing will reduce the burden of “appearing” in far away cases. At that time, courts may utilize a joint jurisdiction over residents of two different cases, and a modified personal jurisdiction analysis will be fruitful. Currently, however, due process considerations mandate that courts take a closer look at how much any Internet user is truly purposefully availing itself to jurisdictions across the globe.

B. Business Practices and Electronic Jurisdiction

The current, confused state of personal jurisdiction analysis and the propensity of several states to extend jurisdiction for little other than accessibility of a website may cause concern for businesses, especially those who cannot afford expensive litigation in far-off forums. For those businesses that maintain websites, and have begun to take advantage of the ease and speed of e-mail, certain lessons can be learned from cases involving telephone, mail, and advertising.

238. *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

239. *See id.*

Currently, it may not be possible to establish a website that limits its own jurisdictional accessibility. However, a website owner can take measures to announce that it is not availing itself of other forums. A website owner can begin by informing visitors of the geographical location of the site. The owner can publish a disclaimer that it is not, through posting of the site, intending to avail itself of the benefits of any other location. The website's home page may include a statement that all interactions are considered to occur in the state where the website is posted. As a more extreme measure, the owner may opt not to contract with persons of certain jurisdictions where the location of such persons can be ascertained, or refuse to send any physical product via postal mail to certain jurisdictions when ordered. Unless necessary for commercial purposes, a less interactive website is also less likely to be seen as directed activity toward other jurisdictions, and therefore less likely to extend jurisdiction over a nonresident defendant.

The website may include forum selection and choice of law provisions in any commercial transaction entered through the website, in the same manner that such provisions are used in most commercial contracts today. The forum selection clause may help to tailor the location of a dispute resolution.²⁴⁰ If a defendant is unable to avoid being brought into court outside its home state, a choice of law provision may be the next best thing, applying the law of the defendant's home state to the substance of the dispute.²⁴¹ Additionally, an arbitration provision may lead to an alternative forum that may be better suited to dealing with technological issues surrounding the Internet.²⁴² A recognition that e-mail contacts will be scrutinized for minimum contacts and purposeful availment analysis may lead to similar protective measures in e-mail attachments.

On a macro level, those concerned with judicial interpretation of due process considerations may work to persuade state legislatures to take a more restrictive stance. In a jurisdiction with a laundry-list statute, elec-

240. See *Carnival Cruise Lines, Inc. v. Shutte*, 499 U.S. 585, 594-95 (1991) (presuming forum selection clause valid to transfer case to jurisdiction stated in agreement between plaintiff and defendant).

241. See, e.g., CAL. CIV. CODE § 1646.5 (West Supp. 1998); *Nedlloyd Lines, B.V. v. Superior Court*, 3 Cal. 4th 459, 464-65 (1992).

242. For a discussion of the potential effectiveness and particular suitability of private arbitration to handle disputes involving the Internet, see Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 93-100 (1996).

tronic contacts may be defined specifically and narrowly as a separate line item. In a state with a long-arm statute coextensive with the Due Process Clause, the legislature may supplement the statute with a section more narrowly discussing electronic contacts. Most of all, it is important for businesses to think about jurisdictional and identity issues before entering into any contractual arrangements, and especially long-term contractual arrangements, over the Internet.