A Solution for Personal Jurisdiction on the Internet

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"The Due Process clause by ensuring the 'orderly administration of the laws' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

I. INTRODUCTION

With the advent of the Internet, factoring potential litigation costs into the cost of doing business has become much more difficult. A company wanting to avoid being hailed into court in a far off jurisdiction can do so only by severely limiting the scope of its commercial activity. Today, anyone choosing to take advantage of the Internet will find structuring Cyberspace activity to limit the scope of liability in foreign jurisdictions to be a daunting, if not impossible, task.

Recent cases interpreting the jurisdictional effect of conducting business on the Internet have reached opposite conclusions based on nearly indistinguishable facts. Predictable internet jurisdiction is becoming an oxymoron. In this

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2. Compare Graphic Controls Corp. v. Utah Medical Products, Inc., No. 96-CV-0459E(F), 1997 WL 276232 (W.D.N.Y. May 21, 1997) (maintaining a website and a toll free number is not enough to confer jurisdiction) with Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (maintaining an advertising webpage and a toll free number is enough) and Heroes, Inc. v. Heroes Found., 958 F. Supp 1 (D. D.C. 1996) (maintaining a non-profit webpage, running a newspaper ad, and offering a toll free number confers jurisdiction); and compare Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997) (maintaining a website in violation of trademark law is not enough), and CD Solutions, Inc. v. Tooker, 965 F. Supp. 17 (N.D. Tex. 1997) (also holding that a website that infringes on a trademark does not subject the defendant to jurisdiction) with Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996) (maintaining a webpage in violation of a trademark does confer jurisdiction) and Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (use of registered trademark in domain name and doing two percent of total sales with state residents was enough) and Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456 (D. Mass 1997) (breaching contract through use of trademark in a domain name is enough) as well as Naxos Resources (U.S.A.) Ltd. v. Southam, Inc., No. CV96-2314 WJR(MCx), 1996 WL 662451 (C.D.Cal. Aug 16, 1996) (holding that defamatory articles posted on LEXIS was not enough to support jurisdiction) with Edias Software Int'l v. Basis Int'l, 947 F. Supp. 413 (D. Ariz. 1996) (defamatory e-mail messages coupled with the publishing of a negative webpage and forum postings is enough) with Expert Pages Corp. v. Buckalew, No. C-97-2109-YRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997) (copying of a webpage with the intent to use the information for monetary gain and then sending defamatory e-mail messages was barely enough to be a sufficient contact but was not enough to make jurisdiction over a youthful defendant reasonable) and finally Hearst Corp. v. Goldberger, No. 96 Civ. 3620 (PKL) (AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997) (soliciting and maintaining a website for a business to be created in the future is not enough, even if the defendant has knowledge that forum state residents are currently accessing it) with State by Humphrey v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. Ct. App. 1997) (soliciting and maintaining a website for a business to be created in the future is enough, if the defendant has knowledge that forum state residents are currently accessing it).
quagmire of decisions, a few give the illusion of stability but rely on spurious differentiations for guidance.

This gilded structure comes in the form of a "sliding scale." At one "end" of the spectrum, doing business over the Internet presents the strongest case for asserting jurisdiction over a defendant for a suit arising out of that activity. At the opposite "end," a "passive" website "that does little more than make information available to those who are interested in it," offers the best chance of avoiding jurisdiction. Defining the middle ground are "interactive" websites that encourage an exchange of information. However, there are problems with the criteria defining this basic structure. Even in the "clear" cases, there are conflicting and irreconcilable decisions often coming out of the same state or district. The problem stems from the forced application of the current test for personal jurisdiction, a test which never contemplated the Internet.

One prong of the current constitutional test for in personam jurisdiction requires that for a state to assert jurisdiction over a foreign defendant the defendant must have sufficient minimum contacts with it. There must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." However, because the Internet is borderless and interactive, business can be conducted without targeting any specific state. This provides the impetus for the disparate opinions. For example, one Connecticut court viewed the posting and maintenance of a passive website on the Internet as purposeful availment "in" Connecticut, while an Arizona court required, in addition to the posting and maintenance of a passive website, another act specifically directed at Arizona.

Fundamentally, it is the tie to physical presence of the current analysis, the within the forum state requirement, that is constraining courts and preventing the development of a cohesive principle that would encourage predictable decision making. The Internet by its nature is antithetical to basic principles of federalism, respecting neither borders nor sovereign states. Courts, in an effort to protect these fundamental principles, are trying to adapt traditional in personam thinking to an untraditional medium, the Internet. The result has been a confusing mix of territorially based reasoning, leading to possibly absurd

4. Id.
5. Id.
6. See supra note 2.
results. For instance, expanding on the decision of the Connecticut court mentioned above, one could infer that using the Internet, even passively, for commercial gain is in effect targeting every state; thus, jurisdiction would be proper everywhere and the need for a jurisdictional inquiry is nearly eliminated for anyone with a commercial webpage. Equally disturbing is the logical end of the Arizona decision mentioned above. The requirement of some additional act directed at the forum, something few Internet businesses need to do, would operate as an overarching shield against the assertion of jurisdiction in all but the clearest of cases.

This paper attempts to provide a solution to this conceptual dilemma: First, by redefining the existing sliding scale; then, by reformulating the test for minimum contacts to accommodate the borderless nature of the Internet while simultaneously preserving the sovereignty of sister states. Rather than focus on activities within the forum state, the proposed model adopts and expands the “effects test” discussed in Calder v. Jones and synthesizes it with the federalism requirement of “foreseeability of suit” offered in World-Wide Volkswagen. Under the proposed analysis, personal jurisdiction turns upon the locus of the foreseeable effects of the parties’ volitional acts. Jurisdiction will lie upon a sufficient finding of volitional cause and directed effect.

Section II provides an introduction to the conceptual underpinnings of the solution offered in this paper. Section III provides a brief explication of the development of specific in personam jurisdiction. Section IV is a critical survey of Internet related decisions coupled with a reformulation of the existing sliding scale. In Section V, the new analysis is proposed, explained and then applied in a series of hypothetical examples. Finally, the conclusion summarizes how the newly structured sliding scale and re-federalized in personam test provide the framework for the development of predictable personal jurisdiction on the Internet.

II. THE INTERNET AND CYBERSPACE: REDEFINING THE WAY WE THINK

A. The Internet

The Internet is nothing more than a term used to reference a group of networked computers that are interconnected with other networked computers and the infrastructure that makes this possible. Every computer connecting to this network is given its own identifier or IP address. The driving force behind the

14. The scope of this paper will be limited to not only the constitutional analysis, but also to one aspect of that analysis, specific in personam jurisdiction. General jurisdiction is rarely an issue in Internet cases. Additionally, this paper will only briefly describe the reasonableness prong of the jurisdictional analysis. Because there has been very little controversy over the requirements of that prong, it is adopted in its entirety into the new model offered in Section IV.
success and growth of the Internet is its ability to allow these computers to "talk" to each other regardless of what "language" (Operating System) each individual computer is using.

The Internet works by sending out data in small packets. The IP address of the destination computer is contained in each one. The Internet is designed to find the best route to get each packet to its destination, which may change from minute to minute. One packet may go from New York to Denver via Ontario while another packet may leave the exact same computer in New York and get to Denver via Mexico. Even more interesting is that the one that was sent last might arrive first. Packet transfer and receipt is neither linear nor sequential.\textsuperscript{15} Thus, and perhaps more relevant to jurisdictional analysis, where the information is being sent from or to is of far less significance than what is being sent. In other words, rather than view the Internet as a mysterious new means of communication, we should see it for what it really is, the gateway to Cyberspace.

\textbf{B. Cyberspace}

"Cyberspace" is a word that was originally coined by William Gibson, a science fiction writer.\textsuperscript{16} Gibson used the term to define a world that is analogous to a virtual reality that allows human mind interaction. Though we have not yet reached the level of sophistication that Gibson envisioned, we have nonetheless redefined "Cyberspace." When users go "on-line" they interact with other computers or users. The "place" where this interaction occurs is sometimes called "Cyberspace."

On its face, calling Cyberspace a "place" poses no conceptual problem. However, a place has physical properties; Cyberspace does not. Cyberspace, is a one dimensional universe made up of only time and events. It has no definite physical properties. There is no height, width, or depth, no electrons or people. Perhaps, one way to grasp this idea is to analogize Cyberspace's conceptual relationship to the Internet to the mind/brain dichotomy.\textsuperscript{17}

The mind has no physical properties, yet thoughts occur at specific times. In some sense, we can perceive that if the mind has any connection to the physical world, it is through the infrastructure that produces it, the brain. In the same way, Cyberspace can be thought of as connected to the infrastructure that produces it, the Internet. Just as "mind" and "brain" may not mean the same thing, "Cyberspace" and the "Internet" can be thought of as distinct.

\begin{footnotesize}
\begin{enumerate}
\item For jurisdictional purposes this arbitrary nature of file and information transfer should at least begin the reflection into the relevance of the Internet's physical properties to a sound jurisdictional analysis.
\item Neuromancer, 1984.
\item This paper does not assume that either the mind or Cyberspace exists. The analogy is presented here to help the reader grasp the concept of Cyberspace upon which much of the underlying logic of this paper is based.
\end{enumerate}
\end{footnotesize}
If we separate the concept of "Cyberspace" from the physical reality of the Internet, we can attack the issues created by this new technology with a greater degree of clarity and sophistication. For example, take the following scenario: assume that a New Yorker flying over Ohio engages in an in-flight video conference call with a Californian, temporarily in Hawaii, via a modem in his laptop computer. Then, during the conversation, the Californian sends a contract of sale to the New Yorker who ends the conference call, goes off-line, and edits the contract attaching his electronic signature to it. While over Denver, the New Yorker e-mails the "signed" contract to the Californian. Now suppose that the Californian claims he did not receive the signed contract and refuses to deliver the goods. Where can suit be brought? Where should suit be brought?

Under the current scheme, we would look to the connections that the California defendant has with any particular forum state. Among these we would include the physical Internet contacts, the act of sending the e-mail while over Denver, receipt of the contract while over Ohio, sending the contract from Hawaii, etc. Should it matter where any of these events took place, or should we instead focus on the volitional acts of the parties and their accompanying effects? This paper takes the latter position, the basis for this being that if we look to the Cyberspace events, rather than the Internet contacts, we will center on the fact that a Californian was contracting with a New Yorker. The focus then shifts to what those parties either expected or intended to result from there actions, and the sovereign right of states to protect their own citizens, not the outdated, outmoded, and fictitiously overweighted physical contacts of the current model.

III. TRADITIONAL JURISDICTION

A. Pennoyer and the Role of Fictions

In personam jurisdiction is rooted in physical power. Historically, under international law, a court only had power over a foreign defendant if the defendant was physically present in the forum. A sovereign had no power to hail a foreign defendant into its own court. This defendant-centered principle was introduced to our own courts in the landmark case Pennoyer v. Neff:

> [E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory. . . . [L]aws of one State have no operation outside of its

18. "Defendant-centered" refers to the nature of the analysis. Requiring actual physical presence in the territory to award a sovereign power over the defendant clearly favors the defendant. The plaintiff must accept the loss or harm incurred or bring suit in a jurisdiction where the defendant could be found.

19. 95 U.S. 714 (1877).
In addition to adopting this international law principle, the Pennoyer decision served another key function as it placed the requirements of in personam jurisdiction squarely within the Due Process Clause of the Constitution.

Requiring physical presence to confer jurisdiction caused practical problems from the beginning. In 1882, just five years after Pennoyer, St. Clair v. Cox dealt with the problem of service of process on a corporation. Facing the fiction of incorporation and that such a fictional entity could never be physically “present” in any place, the Court responded with a fiction of its own asserting that “[a] corporation of one State cannot do business in another State without the latter’s consent, express or implied.” Under St. Clair, a corporation is deemed to have submitted to the jurisdiction of the forum state by virtue of its “doing business” there.

Implied consent was extended in 1927 by the holding in Hess v. Pawloski. Acknowledging that states could no more exclude motorists from other states than they could partners from foreign partnerships, the Court declared, “[m]otor vehicles are dangerous machines... [i]n the public interest the State may... require a nonresident to answer for his conduct.” Thus, because of this strong public interest, motorists could be deemed to have consented to be sued by crossing the forum state’s border. Prior to Hess, a motorist could come into a state, cause damage, and then flee. Once the offender reached the state’s border, the injured party was forced to travel to where the defendant could be found to seek redress. Hess solved this problem, but only by expanding the fiction of implied consent.

Through implied consent, states were able to provide a convenient forum for their own citizens to litigate. By extending “presence” to include people not physically present in the forum and to juridical persons that could never be physically “present” in any forum, the court was salvaging a doctrine that was already outdated. Innovations like the car, the telephone and the radio had created a world vastly different from the time of Pennoyer, and the court was forced to create a new rule that accommodated these changes.

20. Id. at 722 (citations omitted).
22. Id. at 356, 1 S. Ct. at 359 (emphasis added) (In addition to presence, the court has always held that actual consent would also confer jurisdiction. Here, the court introduced the notion of “implied consent”).
23. Id. at 357, 1 S. Ct. at 360.
25. Id. at 356, 47 S. Ct. at 633.
B. The International Shoe Revolution

In 1945, the Supreme Court did something extraordinary. In *International Shoe v. Washington*, the court recognized the diminishing utility of “physical presence” and the increasing use of fictions and then set out to determine the principles of justice driving these decisions.26

True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit. ... But more realistically it may be said that those authorized acts [of the corporation’s agents] were of such a nature as to justify the fiction.27

The court then formulated a completely new test for jurisdiction: \[\text{"[I]f he }\text{ be not present within the territory of the forum, }\text{ he have certain minimum contacts }\ldots\text{ such that }\ldots\text{ suit does not offend 'traditional notions of fair play and substantial justice.'}\]28 The new test created a two tiered constitutional analysis: (1) there must be sufficient minimum contacts; and (2) subjecting the defendant to suit in the forum state must comport with traditional notions of fair play and substantial justice; in other words, the assertion of power must be reasonable.

C. The Next Step After International Shoe: Defining Minimum Contacts

Although *International Shoe* introduced the sufficient minimum contacts requirement, the court left the question of what activities would qualify as “sufficient” open. In the cases following the *International Shoe* decision, courts attempted to define the boundaries of sufficient minimum contacts. *Smyth v. Twin State Improvement Corp.*, a highly influential state court decision, held that a single tort committed in the forum state would be sufficient.29 *Smyth* was then cited in an approving footnote in *McGee v. International Life Insurance*,30 where the Supreme Court ruled that the lone act of soliciting an insurance contract from outside the forum state with a resident of the forum state was enough to confer jurisdiction.31

This jurisdictional expansion was abruptly stemmed by the Court’s decision in *Hanson v. Denckla*.32 The Court conceded that “[a]s technological progress ha[d] increased the flow of commerce between States, the need for jurisdiction

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27. *Id.* at 318, 66 S. Ct. at 159.
28. *Id.* at 316, 66 S. Ct. at 158.
29. 80 A.2d 664, 669 (Vt. 1951).
31. *Id.*
over nonresidents ha[d] undergone a similar increase." Nevertheless the Court added that, "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." Distinguishing the contact in McGee as a solicitation, the Court limited the sufficiency of contacts to volitional acts. A volitional act is one "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The volitional act requirement, or purposeful availment, became an integral part of the minimum contacts analysis. Unfortunately, "purposeful availment" was merely another undefined term. The Courts' attempt to structure personal jurisdiction based upon economic benefit lead to a line of cases that relied upon a "stream of commerce" theory. The theory was introduced in Gray v. American Radiator, a 1961 Illinois decision. There, the Illinois Supreme Court ruled that it had jurisdiction over an Ohio valve manufacturer even though "the defendant's only contact with [Illinois was] found in the fact that a product manufactured in Ohio was incorporated in Pennsylvania, into a hot water heater which in the course of commerce was sold to an Illinois consumer."

D. Minimum Contacts: An Agent of Interstate Federalism

After Gray, it seemed any act of sending a product into the "stream of commerce" would potentially render a manufacturer liable to suit in any jurisdiction where a product might be sold or where a harm might occur. However, in World-Wide Volkswagen Corp. v. Woodson, the Supreme Court rejected the proposition that foreseeability of harm alone could confer jurisdiction. Expanding on a concept first alluded to in Hanson, Justice White's majority opinion clearly stated the dual purpose of the two tier analysis:

33. Id. at 250-51, 78 S. Ct. at 1238.
34. Id. at 251, 78 S. Ct. at 1238.
35. Id. at 253, 78 S. Ct. at 1240 (emphasis added).
36. One non-commercial case defining what does not constitute purposeful availment is Kulko v. Superior Court of California, 436 U.S. 84, 98 S. Ct 1690 (1978). The Court held the father's acquiescing to a child's wish to reside with a parent in another state did not confer jurisdiction over him.
38. Id. at 764 (emphasis added).
39. For example, in a highly suspect decision, a California court found jurisdiction over a non-resident pressure tank manufacturer. The plaintiff failed to find any direct link between the tank that exploded and the defendant manufacturer. In other words, there was no proof that the offending tank came to California through a "stream of commerce." Buckeye Boiler Co. v. Superior Ct. of Los Angeles, 458 P.2d 57 (Cal. 1969).
40. 444 U.S. 286, 100 S. Ct. 559 (1980).
41. In Hanson, the Court recognized the "trend of expanding personal jurisdiction" due to technological advances, and then alluded to the federalism component as it set about to stem this growth. Hanson v. Denckla, 357 U.S. 235, 250, 78 S. Ct. 1228, 1238 (1958).
Minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.\textsuperscript{42}

According to Justice White, the contacts prong protects federalism interests, and the reasonableness requirement addresses Due Process concerns. Additionally, in very firm language the opinion stressed the definitive role that federalism was to play in the analysis:

\textit{We have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism . . . \textsuperscript{[The Framers]} provided that the Nation was to be a common market, a \textquoteleft \textquoteleft free trade unit\textquoteright \textquoteleft . . . But the Framers also intended that the States retain many essential attributes of sovereignty, including, . . . the power to try causes in their courts.\textsuperscript{43}}

The Court downplayed the importance of the reasonableness requirement and held out the federalism component as an independent restriction on the sovereign power of courts.

\begin{quote}
Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum has a strong interest in applying its law[,] . . . even if the forum state is the most convenient location[,] . . . the Due Process Clause, \textit{acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgement.}\textsuperscript{44}
\end{quote}

Despite the strong language used in \textit{World-Wide Volkswagen}, the Court has since softened its view of the federalism component. In a case decided only two years after \textit{World-Wide Volkswagen}, the Court in a footnote conceded:

\begin{quote}
[\textit{I}f the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.\textsuperscript{45}}
\end{quote}

Justice White wrote the majority opinion in both cases.

\begin{itemize}
\item \textsuperscript{42} \textit{World-Wide Volkswagen}, 444 U.S. at 291-92, 100 S. Ct. at 564.
\item \textsuperscript{43} \textit{Id.} at 293, 100 S. Ct. at 565.
\item \textsuperscript{44} \textit{Id.} at 294, 100 S. Ct. at 565-66 (emphasis added).
\item \textsuperscript{45} Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10, 102 S. Ct. 2099, 2104 (1982).
\end{itemize}
In *Burger King Corp. v. Rudzewicz*, the Court once again de-emphasized its prior position. This time with Justice Brennan writing for the majority the Court warned, "[t]he Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." The majority then suggested that a proportional relationship between the federalism "minimum contacts" requirement and the Due Process reasonableness requirement existed. These opinions, when taken together, lead to the conclusion that federalism must play a definitive and independent role in the exercise of personal jurisdiction, a role that is not entirely unrelated to, but that is at least as important as, that of the "reasonableness" prong of Due Process clause analysis.

**E. Minimum Contacts: Calder v. Jones and The Cause and Effect Test**

There seemed to be a new mode of analysis on the horizon when, in *Calder v. Jones*, the Court established what might be called an "effects test." *Calder* was a libel suit brought by a California resident against a Florida tabloid. "California [was] the focal point both of the story and of the harm suffered. Jurisdiction ... [was] therefore proper in California based on the 'effects' of [the defendants] Florida conduct in California." The Court appeared to be moving away from the "purposeful availment" reasoning and toward a simpler principle of cause and effect. Further evidence of this can be found in *Burger King Corp. v. Rudzewicz*, a contract case: "It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." "Contemplated future consequences" is another way of saying foreseeable effects. The Court went on to find that the defendant had "caused foreseeable injuries to the corporation in Florida," tacitly acknowledging the cause and effect relationship implicit in the jurisdictional analysis. However, this "effects test" has not been explicitly applied outside of defamation cases.

**F. Reasonableness: Traditional Notions of Fair Play and Substantial Justice**

The test for in personam jurisdiction under the due process clause is a two part inquiry. Once the plaintiff proves that the defendant has sufficient minimum

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47. Id. at 474, 105 S. Ct. at 2183.
48. Id. at 477, 105 S. Ct. 2184.
50. Id. at 789, 104 S. Ct. 1486 (citations omitted) (emphasis added).
52. Id. at 479, 105 S. Ct. 2185 (emphasis added).
53. Id. at 480, 105 S. Ct. 2186 (emphasis added).
contacts with the forum state, the plaintiff must then prove that the exercise of jurisdiction would be reasonable. This reasonableness prong has at least four factors:  

1. the interest of the forum state in the litigation;  
2. the interest of the plaintiff in being able to bring suit in that particular forum and the consequences if jurisdiction does not lie;  
3. the burden on the defendant created by having to defend in a distant forum; finally,  
4. efficiency concerns are weighed, namely, the availability and proximity of witnesses and information, and whether or not a more appropriate forum exists. As noted earlier, the application of these factors has not been very problematic. The only real area of ambiguity is in the relationship between reasonableness and minimum contacts. This was one of the issues before the Court in Asahi Metal Industry Co. v. Superior Court of California.  

G. Asahi: The Catalyst Behind the Chaos

Asahi, a “stream of commerce” case, presented the Court with an opportunity to do what was done in International Shoe. The Court could have revisited existing in personam jurisprudence to derive a modern jurisdictional analysis better suited to changing societal and economic needs. Instead, the Court opted to continue the existing two tier analysis. The Court was unanimous in the result but split (4-4-1) on the proper analysis to employ to reach that result.  

Justice O'Connor's opinion garnered four votes. Her opinion stated that for jurisdiction to lie the defendant must do more than merely place its product into the stream of commerce with the foreseeable knowledge that it will be sold in the forum state. The defendant must also do some act which directs its product at the forum state's market. This may be shown through the defendant’s act of “designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who [acts as the defendant’s] sales agent in the forum state.”  

Justice Brennan's opinion also attracted four votes. He argued against requiring more than foreseeability of a product's destination to satisfy the purposeful availment requirement. Brennan and three other justices found that:

56. None of the justices thought the California court had jurisdiction. Also, none thought the lower court's assertion of jurisdiction was reasonable. However, four justices would have found minimum contacts, four would not and one would have passed on the question. Id. at 105, 107 S. Ct. at 1028.
57. Id. at 112, 107 S. Ct. 1032.
58. Id., 107 S. Ct. at 1032.
The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.59

For Justice Brennan, purposeful availment is not a highly technical definition requiring additional proof of marketing strategies, but a simple question of economic benefit sustained indirectly by virtue of the forum state’s laws.

Justice Stevens wrote the third opinion. He passed on the stream of commerce/purposeful availment debate, contending that, “[a]n examination of minimum contacts is not always necessary to determine whether a state court’s assertion of personal jurisdiction is constitutional.”60 Notably, all of the justices found the assertion of jurisdiction in this case to be unreasonable.

H. Where Are We Now?

There are at least two controlling interpretations of purposeful availment in the stream of commerce context coming out of the Asahi opinion: one requiring an additional act specifically directed at the forum’s market; the other, holding that foreseeability of a product’s destination is enough. In the Internet context, which opinion is followed is probably of less significance than one might envision. The newness of the Internet allows courts the freedom to develop the law in this area. Even if courts were to follow the more demanding O’Connor analysis, they could simply hold that advertising on the Internet is the same as advertising directed at the forum state, thus, the extra requirement offers no real guidance and presents no impediment to an expansive construct of jurisdiction.61

IV. INTERNET JURISDICTION: A CRITICAL ANALYSIS OF THE SLIDING SCALE

A. CompuServe and Bensusan: Persuasive Authority or Misinterpreted Precedent?

As mentioned in the introduction, there is a court defined sliding scale developing on the Internet.62 The structure stems primarily from two “early Internet” decisions. The case usually cited as being the paradigm example of when a court should find jurisdiction is CompuServe, Inc. v. Patterson.63 CompuServe involved a contract dispute. The case most often cited for the circumstances describing when jurisdiction should not be found is Bensusan

59. *Id.* at 117, 107 S. Ct. 1034.
60. *Id.* at 121, 107 S. Ct. 1037.
61. See supra text accompanying notes 8-11.
63. 89 F.3d 1257 (6th Cir. 1996).
Restaurant Corp. v. King, a trademark infringement case. While these cases seemingly define the polar ends of the sliding scale, relying on them as a basis from which to develop a new area of the law is problematic. The holdings attributed to each case are often misinterpretations by later courts grasping for a foundation upon which to build a new body of law.

The facts of CompuServe do not support the proposition that doing business on the Internet should ipso facto confer jurisdiction. CompuServe was not actually an Internet case at all. The dispute was over who owned the rights to an Internet navigation program. The defendant claimed that he used the CompuServe online service to sell his programs and that CompuServe, Inc. then misappropriated both the name and the program. When he threatened to take CompuServe, Inc. to court in Texas, they initiated an action against him in Ohio. The lower court found merely subscribing to an online service and contracting to upload programs to an Ohio server to be advertised and sold on that service, was too attenuated to confer jurisdiction over a claim not arising out of either the sale of that software or non-performance of the contract. The appellate court disagreed.

Without regard to the correctness of that result, which is at least suspect, this was not a contract formed over the Internet nor was business being done over the Internet. In fact in 1993, when the circumstances of the case occurred, sophisticated browsers were just being introduced; the Internet was still dominated by universities and governmental organizations. Accordingly, citing CompuServe as a “doing business on the Internet” case is inaccurate.

Citing Bensusan for the proposition that passive web pages should not confer jurisdiction is equally problematic, although Bensusan was an Internet case and did involve a passive website. The error occurs when other jurisdictions adopt Bensusan without taking note of New York’s law. New York’s jurisdictional statute does not go to the limits of the Constitution. Exercising personal jurisdiction over a nonresident defendant there requires something that most states do not, physical presence.

New York law, according to the court, held “jurisdiction cannot be asserted over a nonresident defendant under [CPLR section 302] unless the nonresident commits an act in this state. This is tantamount to a requirement that the defendant or his agent be physically present in New York.” The extent of the burden created by this interpretation, on New York residents, is made evident in a citation to the comments to CPLR section 302, “if a New Jersey domiciliary were to lob a bazooka shell across the Hudson River at Grant’s tomb, Feathers would appear to bar the New York courts from asserting personal jurisdiction.

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64. 126 F.3d 25 (2d Cir. 1997).
65. 89 F.3d at 1260-61.
67. Bensusan, 126 F.3d at 28 (citing comment to CPLR § 302:17; citing Feathers v. McLucas, 209 N.E.2d 68 (1965)).
over the New Jersey domiciliary in an action by an injured New York plain-
tiff."\(^{68}\) The court went on to hold:

In the absence of some indication by the New York Court of Appeals
that its [decision] in Feathers . . . no longer represents the law of New
York, we believe it would be impolitic for this Court to hold otherwise.
Applying these principles, we conclude that Bensusan has failed to
allege that King . . . committed a tortious act \textit{in New York} as required
by [New York law].\(^{69}\)

From this it should be clear that \textit{Bensusan} on its law can easily be distinguished
in any state whose long arm statutes either go to the constitutional limits or
simply do not require physical presence in the state.

While the efficacy of citing these two cases remains uncertain, \textit{CompuServe}
and \textit{Bensusan} were the first appellate level “Internet” cases and as such set the
standard that courts are now using. For this reason, the remainder of this section
of the paper will critically survey the Internet cases by the classifications derived
therefrom and clearly set out in \textit{Zippo Manufacturing Co. v. Zippo Dot Com}.\(^{70}\)

\subsection*{B. Doing Business on the Internet: The Easy Case?}

As the term “sliding scale” denotes, most cases are based upon facts that
implicate more than one category. However, of the three nominate categories,
(1) doing business, (2) interactive, and (3) passive, this is the least helpful.
\textit{CompuServe} has been cited as the easy case, the “doing business” rationale, and
often erroneously. One court discussing the sliding scale declared that “where
a defendant clearly does business \textit{over the Internet[,,]} [i]f the defendant enters
into contracts with residents of a foreign jurisdiction that involve knowing and
repeated transmission of computer files \textit{over the Internet}, personal jurisdiction
is proper," and then cited \textit{CompuServe}.\(^{71}\)

The problem with citing \textit{CompuServe} for this general proposition is not that
the holding in that case was obviously wrong or that subsequent holdings have
been wrong. Rather, it is that the hard issues have not been dealt with and the
wholesale adoption of this principle in so critical a context is premature. In
\textit{CompuServe}, both parties were contracting with full knowledge of the other’s
location, the contract was written, the signatures were written, most importantly,
the entire dispute was an unremarkable interstate copyright controversy. The
 technological issue was merely a red herring. The court did not have to
determine where the contract was perfected or who initiated an anonymous

\begin{footnotes}
\footnote{68. \textit{Id.} (emphasis added).}
\footnote{69. \textit{Id.} at 29 (emphasis added).}
\footnote{70. 952 F. Supp. 1119 (W.D.PN. 1997).}
\footnote{71. SF Hotel Co. v. Energy Investments, Inc., No. 97-1306-JTM, 1997 WL 749498 *10 (D.
Kan. Nov. 19, 1997) (emphasis added).}
\end{footnotes}
exchange. The parties did not have to guess each other's location or presume each other's existence. These are the problems raised by the Internet. These are the issues that have not been faced.

However, because courts and law review articles continue to cite CompuServe as a persuasive Internet case, the soundness of this reliance is becoming less important. Instead, the assertion that doing repeated business on the Internet should confer "de facto" jurisdiction should be questioned outright. This proposition would seem to confer simultaneous jurisdiction as it takes at least two parties to transact business. But this is simply too strong and goes too far in this context because even when a party is contracting over the Internet, the great distances that are traversed should make the courts more, not less, sensitive to the fact that the assertion of jurisdiction must be reasonable.

Hall v. LaRonde reveals the possible injustice that can occur in the absence of a reasonableness analysis. The plaintiff, a California resident, sought out and contracted with the defendant, a New York resident, through e-mail messages. The defendant was to incorporate the plaintiff's software into his own and then pay the plaintiff one dollar for every license sold. The defendant honored their agreement the first year and paid the plaintiff $2633.60. Thereafter, the defendant continued to sell the product, but made no further payments. The plaintiff brought suit in California, and the defendant successfully moved to quash service. On appeal, the court found the contacts to be sufficient. This was a question of fact to be decided properly by the court, and no issue is made of that finding here. However, after finding sufficient minimum contacts the focus, in a proper discussion, shifts to reasonableness.

The Hall court found the defendant's claim of unreasonableness to be "late" as it was raised on appeal. However, the defendant did not need to raise it earlier; he won at trial. The defendant's claim was that suit in California would "effectively deprive him of his right to represent himself." The California court's response was that, "[s]uch a claim, if accepted, could be used to defeat jurisdiction in most cases."

Perhaps the court should have said, "if true." After all, the plaintiff decided not to bring the action in Federal Court; presumably because the amount in controversy would have precluded diversity jurisdiction. The plaintiff made $2,600 in the first year. The case was decided in about a year and a half. Assuming the number of sales doubled in that time, the amount not received

72. On October 10th, 1997, a KeyCite search on Westlaw found more than 67 different citations to the case. At that time, it was less than two years old.
73. 66 Cal. Rptr. 2d 399 (2d Dist. 1997).
74. Id. at 403.
75. Id. (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477, 105 S. Ct. 2174, 2185 (1985)).
76. Id.
77. Id.
78. See F.R.C.P. 28 § 1332.
would be in the neighborhood of $10,000. This is likely to be less than even the mere cost of defending in Ventura, California and, therefore, patently unreasonable in a breach of contract case. Through the assertion of jurisdiction, the California court was infringing on New York's right to protect its citizens.

C. Defamation and Intentional Misstatements: A Better Proposition

While the "doing business" rationale occupies a tenuous position at the "easy case" end of the scale there is a line of cases better suited for the role: those based on defamation or intentionally misleading statements. Out of the four high-tech decisions discussed in this section, three found jurisdiction and one found sufficient contacts but questionably held that the assertion of jurisdiction would have been unreasonable. Posting a defamatory webpage or broadcasting disparaging e-mail will almost certainly render the offending party subject to jurisdiction.

One early case, California Software, Inc. v. Reliability Research Inc., involved allegedly false statements sent over a network that closely resembles the Internet. A message sent from any terminal connected to the network would be simultaneously broadcast across the country to every other terminal connected to the system. In their message, the defendants warned anyone purchasing the software from the plaintiffs would be held "financially responsible for misuse [sic]." Under a Calder like rationale the court easily found that the defendants "intentionally directed the effects of their conduct into [California]."

Two more recent, cases following this same reasoning also found jurisdiction. The first, Edias Software International v. Basis International, explicitly incorporating Calder held, "Basis' e-mail messages . . . and CompuServe Web site . . . count as an additional 'contacts' [sic] under a minimum contacts analysis, but additionally confer jurisdiction . . . under the 'effects test.'" Telco Communications v. An Apple a Day went even further and without explicitly labeling the analysis as an "effects test" the court said, "[i]n addition, because Telco is located here, the firm absorbed the harm here."

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82. Id. at 1358 n.2.
88. 977 F. Supp. at 408.
Remarkably, the only court that failed to find jurisdiction over the non-resident defendant undeniably had facts that should have conferred jurisdiction. In *Expert Pages v. Buckalew*, the plaintiff was an Internet based company that provided "[t]he largest free on-line expert witness and consultant website and database for the legal profession." The defendant, Buckalew, was "a young adult", although the opinion did not state just how young, who created a website that provided the same services as Expert Pages’ site. The causes of action were copyright infringement and, among other things, misappropriation. To develop his website Buckalew copied information off of the Expert Pages’ site and then sent disparaging comments to companies and firms that advertised on Expert Pages. The defendant was largely unsuccessful garnering "only twelve paying customers." The court found the defendant’s act of pirating information for monetary gain and then sending defamatory e-mail to existing Expert Page clients to be "barely greater than the constitutional threshold," of minimum contacts. In doing so, the court emphasized the defendant’s failure to start a successful enterprise in the burden analysis.

The burden on the defendant of defending himself in this district appears to be substantial. He is a pro se defendant. His business does not appear to have been terribly successful . . . . [He] does not appear to have any other commercial or business activities [and] [h]e resides on the other side of the country.

Although the defendant appeared, the court found that suit in California would effectively deprive him of the chance to defend himself. Apparently, the court was willing to make the plaintiff, who had done no wrong, travel thousands of miles to seek redress against someone who stole information and engaged in unfair trade practices, because, the defendant was (1) unsuccessful, (2) a young adult, and (3) far away. The likelihood that another court will follow this reasoning is questionable. Regardless, all four cases lead to one conclusion, using the Internet to commit intentional torts will nearly always be a sufficient minimum contact, thus, rendering the tortfeasor amenable to suit wherever the impact is felt.

D. The Middle of the Road: Interactive Websites

The middle ground on the sliding scale, as defined by the *Zippo* court, “is occupied by interactive Web sites where a user can exchange information with

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89. 1997 WL 488011.
90. *Id.* at *9-10.
91. *Id.*
92. *Id.*
93. *Id.*
the host computer." If this is true, and interactive means the exchange of information between host and user, every website on the Internet is interactive. To access a site on the Internet, the user must send a request to the host computer to transmit the information comprising the host's page. Delving deeper into a site requires the same interaction. Analysis of the cases reveals a lack of consensus on, and understanding of, what makes a website interactive.

The Zippo court, cited Maritz, Inc. v. CyberGold, Inc. as the case that exemplified the middle of the "scale." The plaintiff, in that case, sought to enjoin the defendant's use of the "CyberGold" trademark. The CyberGold website was to be a site where users could get on a mailing list and receive advertisements particularly suited to their interests. The court early in the case said the website was "operational." However, in a contradictory statement toward the end of the opinion, the court pronounced, "[a]lthough, the defendant's internet service is not operational yet, plaintiff's [claim] is not necessarily premature." The court found that although the defendant had not earned one dollar or sent the first advertisement to an e-mail address, the defendant was nonetheless "doing business," because the website gave information about the upcoming service and solicited for addresses to be used at some unspecified date in the future. The defendant argued that this was indicative of a passive website. The court, while admitting that the site was merely informational in its present form, disagreed, holding that it was designed for commercial gain in the future.

On indistinguishable facts a New York case found the lack of an operational site to be of great significance. Where as here, defendant has not contracted to sell or actually sold any goods or services to New Yorkers, a finding of personal jurisdiction in New York based on an Internet website would mean that there would be nationwide (indeed worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site.

According to the Zippo court's interpretation of Maritz, interactive website jurisdiction is determined by "examining the level of interactivity and commercial nature of the exchange of information." How this can be distinguished from the doing business rationale is uncertain as doing business requires commercial activity as well.

95. Id.
97. Id. at 1330.
98. Id. at 1335.
100. Id. at *2.
102. Id. at 1123.
Not only are the cases unclear about what constitutes interactivity, and the definitions of "interactive" unhelpful, but the conceptual line between doing business and interactivity on the sliding scale is non-existent. However, when "doing business" is examined in conjunction with the level of interactivity a rational basis for jurisdiction emerges. Thus, doing business buttressed, when necessary, by a discussion of interactivity should define the middle of the sliding scale. Asking the question of interactivity and commerciality in this light refocuses the issue on whether the defendant was actually doing business and the expectations that were likely to flow from this activity and not whether the website was passive or interactive.

E. Passive Website Cases: a Synonym for Unpredictability

_Bensusan_ was a passive website case; the website in question merely provided information about the Blue Note nightclub. Nevertheless, _Bensusan_ is indicative of the misdirection that occurs in these cases. Forcing the plaintiff to argue that a site is interactive, and the defendant that it is passive, obfuscates the underlying minimum contacts issue. In most of these cases the question is who owns the rights to a certain trademark. Outside of the First Use doctrine, deciding whether or not there has been activity on a webpage is irrelevant to the question of ownership.103

Rather than focus on the cause of action, which lies in tort, courts find jurisdiction based upon over broad generalizations and assertions, such as: "advertising via the Internet is solicitation of a sufficient repetitive nature to confer jurisdiction,"104 and "[t]hrough its website, [the defendant] has consciously decided to transmit information to all internet users . . . . Thus, [the defendant's] contacts . . . favor the exercise of personal jurisdiction."105 If these statements are accurate, the posting of any commercial website is itself enough to confer national jurisdiction. Taken to its logical conclusion, this could be extended to the owners of hyperlinks106 as well.

Equally troubling statements are made in cases that fail to find jurisdiction. In _Cybersell, Inc. v. Cybersell, Inc._,107 a trademark case, the court stated, "[the defendant] entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona. . . . We therefore hold that [the defendant's] contacts are insufficient to establish purposeful availment."108 The

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103. The actual requirements for trademark jurisdiction is beyond the scope of this paper.
104. _Inset Sys._, 937 F. Supp. at 164.
106. A hyperlink is a link that appears on a webpage to another website. Usually, a hyperlink will be an advertisement and therefore, according to these statements, will effectively be de facto jurisdiction buttons.
107. 130 F.3d 414 (9th Cir. 1997).
108. _Id._ at 419-20.
reasoning here is problematic because it directly disregards the cause of action. The plaintiffs claim was not that the Florida defendant was stealing their Arizona business, but that they were unlawfully using a trademark on their webpages. The difference is one of policy.

Trademarks and copyrights protect intellectual property by conferring certain rights over the name or symbol to the holder. Suppose that a California company, Badco, reserves the domain name www.bigmac.com and operates a pornographic website at that address. Now suppose that McDonald's is a Delaware corporation with its principal place of business in Maine and that it owns all rights to "BigMac." Additionally, Badco's website specifically excludes all Maine and Delaware residents from entering the site. Therefore, Badco intentionally does no business whatsoever with Maine or Delaware. If McDonald's brought suit in Maine, following the reasoning of the Cybersell court, Badco enters into no contracts, no sales and receives no telephone calls in Maine, thus McDonald's would be forced to bare the added expense and cost of litigation in California to protect a mark that it already owns. This result encourages abuse and disfavors rightful owners of copyrights and trademarks.

The result of the conflicting positions described above has been unpredictability. The more principled reasoning appears in cases adopting a wholesale "effects test" analysis. These cases tend to look primarily at two factors: (1) where was the harm felt, and (2) whether the defendant should have known where the harm would be felt. The "effects test" has yielded more consistent results; although, courts adopting the test tend to find jurisdiction. Consequently, entertaining the supposition that a passive website is a shield from personal jurisdiction is unwise.

Alternatively, the vacancy at this end of the scale can be easily filled. Rather than rely on an unworkable notion of "passive," this end of the scale should be reserved for "non-commercial" Internet activity. Publishing a "non-commercial" website provides the best opportunity to avoid personal jurisdiction. Someone publishing a personal homepage, even an interactive page, does not ordinarily expect to be hailed into court in a far-off jurisdiction. The foreseeability requirement of the Due Process clause, presents an exceedingly difficult hurdle to overcome and provides the best protection from the reach of foreign courts.

F. The Redefined Sliding Scale

Each of the three nominate categories should be redefined to reflect what is actually happening in the case law:

109. See supra note 3 and accompanying text.
1. Intentional Torts: Committing intentional torts in Cyberspace will ordinarily confer personal jurisdiction over the tortfeasor where the impact of the tort is felt.

2. Commercial Activity: Engaging in Cyberspace commerce will more probably than not confer personal jurisdiction for an action arising out of that activity.

3. Non-Commercial Activity: Non-commercial or personal websites will not ordinarily subject the owner of the site to the power of foreign courts.

This framework lays the ground for consistency by rectifying the conceptual problems underlying the current sliding scale. However, one more thing is required: a more suitable test for personal jurisdiction.

V. A SOLUTION FOR INTERNET JURISDICTION

By its nature the Internet is antithetical to principles of federalism, neither knowing nor respecting borders and states. The Internet consists of a mass of individual entities interacting in manner unlike ever before, and often with a high degree of anonymity. On the Internet, harm can be done by an entity without purposeful availment of the privileges or protections of any particular foreign state’s laws. This has lead to cases that are difficult to reconcile. However, a principle can be extrapolated from these decisions to achieve the desired results: predictability, fairness and preservation of the federal system in Cyberspace.

Within the revised sliding scale, outlined in Section IV above, the adoption of a slightly modified Calder “effects test” should yield not only a higher degree of predictability, but also a conceptually grounded methodology well suited for forthcoming technological advances. The principle of volitional cause and directed effect laid out in Calder when synthesized with the federalism component of World-Wide Volkswagen provides a test for jurisdiction that contemplates borderless activity. Rather than focus on activity directed at a particular state, this analysis focuses on activity directed at particular individuals who necessarily reside in particular states, and allows for jurisdiction relative to the locus of harm. The proposed model has three components to determine purposeful availment based on Internet conduct:

1. Whether the defendant committed a volitional act that;

2. Caused significant harm;

3. To an entity that the defendant knew or should have known would be harmed by the activity, thus, making suit on the harmful result of that conduct foreseeable.
This test is designed to be the framework within which to develop predictable Internet jurisdiction. Application of this test on the revised sliding scale demonstrates how this test provides a vehicle for consistency, fairness and federalism.

A. Hypothetical 1. (In General: The Application of the Test within the Revised Sliding Scale)

Suppose that a couple is divorcing in state Y, and that the wife in the interim moved to state X, and that the husband posted nude pictures of his wife with another man on his own personal webpage, and listed the page on every major search engine. The wife then loses her job because her employer discovers the pictures, happens to be a church, and does not wish to be associated with the incident. She then sues in state X. The husband moves to dismiss for lack of personal jurisdiction. Ordinarily, under the new test and revised sliding scale model, a non-commercial or personal website would not confer jurisdiction. But here, the defendant: (1) volitionally posted the pictures, (2) caused damage to his wife’s reputation and her loss of employment, and (3) intended to harm her by this activity. Under this example, the commission of the intentional tort in Cyberspace would outweigh the fact that the tort was committed through a personal webpage and should confer jurisdiction over the husband in state X.

B. Hypothetical 2. (The Second Factor: Significant Harm)

Consider the facts of Bensusan. A company, Newco, with full knowledge that the name “The Blue Note” is owned by another company, Oldco, posts a webpage using the mark. The website itself is merely an advertisement for Newco. Oldco sues for trademark infringement. Application of the new test within the sliding scale refocuses the issue from the erroneous passive-interactive debate to a question of foreseeability and fairness.

Regarding the first factor, the act of publishing a webpage with the infringing mark was a volitional act. The second, however, poses problems for the plaintiff. Oldco must allege facts that amount to a significant harm. This will be determined on a case by case basis, but note that dutiful inquiry into “significant harm” avoids the over broad and underdeveloped characterizations of the Internet seen in current trademark cases. A webpage that may “reach as many as 10,000 Internet users in Connecticut alone,” is not sufficient by itself to confer “de facto” jurisdiction. The plaintiff must show that what has, is, or will occur, causes significant harm. Additionally, the fact that no business is transacted in the state by the offending party is not itself dispositive of the

111. Or, more accurately, developed on a case by case basis as every motion in opposition to personal jurisdiction should be determined on a case by case basis.

question (i.e. McDonald's in the hypo in section IV would have a viable claim that it was being significantly harmed by the association of its mark with pornographic material).

Applying the facts of this hypothetical situation, Oldco's burden to prove "significant harm" should be proportionately lessened since Newco was aware of the ownership of the mark by Oldco. However, if Oldco is not significantly harmed, then forcing Oldco to travel to protect its rights respects the sovereignty of the defendant's state and its right to protect its citizens while not infringing on the plaintiff's right to due process. Thus, the addition of the "significant harm" component not only addresses Federalism concerns, it provides a means flexible enough to ensure that the sovereignty of sister states is maintained even in the face of future unforeseen advances in communication.

C. Hypothetical 3. (The Third Factor: Knew or Should Have Known)

Incorporating the facts from above, but omitting knowledge of ownership, implicates facts similar to those of Maritz, Hearst, and Cybersell. In Maritz, the mark was not yet registered, although applications had been filed. In Hearst, the defendant was using the malaprop EsqWire.com and the plaintiff was the publisher of Esquire magazine. In Cybersell, there was no claim that the defendant even knew that the plaintiff's owned the mark in question.

Each of these cases can be used to demonstrate the intended effect of having to show that the defendant knew or should have known of the ownership by the plaintiffs (the third factor). As alluded to in the last hypothetical, the degree of knowledge bears proportionately on the level of significance that must be shown. The greater the culpability, the less significant the harm that must be shown.

Under the Maritz facts, the question of ownership had not yet been resolved by the patent office. Whether the defendant could have known of the plaintiff's ownership is unclear. Because the very premise on which the plaintiff is suing is uncertain, the risk of injustice is higher; therefore, the harm being caused must be of greater significance than when there is no doubt about ownership. Where the risk of unfairness to the defendant is great and the plaintiff's rights cannot be pleaded conclusively, foreseeability of suit should not be presumed. However, even in this case if the plaintiff, the rightful owner of the mark, can meet this elevated burden then the risk of unfairness shifts to the plaintiff and the plaintiff's state has a constitutional claim to jurisdiction.

Under the Hearst facts, the defendant can be presumed to know that Esquire magazine exists. However, "EsqWire" is a malaprop, and this can be asserted as a defense to foreseeability. The likelihood that the defendant might be sued for trademark infringement is greater than in Maritz, where ownership was uncertain, but less than Bensusan, where the defendant acknowledged the

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113. The defendant was planning to offer on-line legal services.
plaintiff's ownership, and the amount harm required should fall somewhere in the middle as well.

Lastly, the Cybersell scenario is offered here to demonstrate how potential defendants can avoid jurisdiction by mitigating the circumstances surrounding the cause of action. There, the defendant had no knowledge of the plaintiff's ownership until forty-five days prior to suit. Prior to that it took steps to avoid suit by changing the domain name as the plaintiffs requested. Additionally, the plaintiffs filed suit less than forty-five days after notifying the defendant of the violation even though the defendant had already stopped using "www.cybsell.com". The lack of prior knowledge and subsequent good-faith efforts should increase the plaintiff's burden of alleging "significant harm." The plaintiffs must argue that in spite of the compliance with, and recognition of, their rights, those rights are still being harmed to a degree that warrants hailing the defendants into their jurisdiction. Allowing potential defendants to mitigate the harm and thereby reduce their chances of having to defend in a foreign jurisdiction, not only furthers the respecting of trademarks, but potentially reduces case loads. Fewer plaintiffs will travel to unfamiliar waters to bring suit, and offending parties will discontinue the infringing conduct to lessen their costs in the dispute. Of course, if the plaintiff had in fact owned the "Cybersell" mark and had been significantly harmed prior to compliance, personal jurisdiction would still be proper.

D. Hypothetical 4. (Application to a Hard Case)

John Doe, who is domiciled in Portage, Michigan, creates a website. He is an anarchist and like many anarchists he believes in the free flow of disruptive information. To this end, he offers all kinds of anarchy materials including, but not limited to, bomb making instructions on his site. The information he offers was obtained from various sources and even John cannot trace the origins of most of it.

Not long after creating the site, a teenager, Billy, who resides with his parents in Tampa, finds John's website. Billy then decides to see if John's bomb making instructions actually work. He prints them out, heads for the tool shed, and gathers some otherwise innocuous materials. During construction something goes wrong and the bomb prematurely explodes. Billy is left physically deformed and in a vegetative state.

Somehow, the printed instructions survive the explosion. On that piece of paper is the URL of John's anarchy site. John's parents find the paper. After visiting the website, the parents, wishing to save other parents the same grief, decide to bring suit in Florida.

114. 130 F.3d at 415-16 (but, the defendant's homepage had not yet been updated and still read, "Welcome to Cybersell").
In deciding the jurisdictional issue under the new scheme, we first look to where John fits on the revised sliding scale. No intentional tort has been committed, nor has any business been conducted, through his website. Thus, John’s website is a noncommercial personal webpage that should not ordinarily confer jurisdiction. However, the inquiry does not end there as the new test must be applied once a “position” on the scale has been determined.

The first factor, volitional activity, is easily met under these facts, as John posted his webpage with the potentially harmful information on it. The second factor, whether this caused significant harm, is somewhat debatable, but not for our purposes. The defendant’s volitional act can be plausibly alleged to have caused the plaintiff’s injuries and those injuries would easily meet any minimum standard of significant harm. The real difficulty arises in the application of the third factor.

Whether Billy is an entity that John knew or should have known would be harmed by the posting of his information, thus, making suit on the harmful result of his conduct foreseeable, is uncertain. John could have known that someone might build a bomb using his information, and even that this activity was dangerous. However, John, according to the facts, was not inciting Billy to make a bomb. If John, instead of posting bomb making information, posted information on gun cleaning, another incontestably dangerous activity, with the same resultant injuries, jurisdiction would not lie under the new analysis. The degree of culpability and foreseeability are insufficient to warrant the intrusion on the sovereignty of the defendant’s home state. Here, where John has neither profited from, nor committed an intentional tort through, his website, and the degree of foreseeability is uncertain, the plaintiffs cannot carry the burden under the new scheme and should be made to go to where the defendant can be found.

Changing the facts demonstrates how the degree of culpability changes with a shift in position on the sliding scale. Suppose that John’s website offers the same information but at the bottom of the bomb making page reads the following: “IF YOU LIKE THIS, I CAN SHOW YOU HOW TO MAKE ONE EVEN BIGGER. JUST SEND FIVE DOLLARS TO . . . .” Now, the “scales” tip in the plaintiff’s favor.

By attempting to transact business through his website, the defendant has moved closer to the center of the sliding scale. Accordingly, a greater degree of culpability attaches, lowering the threshold for jurisdiction. Furthermore, this conduct seems more like an inducement to make a bomb than under the prior facts. Notice, that as the defendant’s conduct becomes more culpable, there is a proportionate rise in foreseeability under the third factor. Thus, what was a

115. One could argue that the “cause” here is too attenuated or even protected speech under the first amendment, however, “cause” in this context is not meant to provide an opportunity to try the issue on its merits at the pleading stage. Rather, it is meant to provide a threshold for courts to take jurisdiction over a foreign state’s resident. In other words, the objection is not well founded if any plausible connection between the volitional act and the alleged harm can be made.
close case is now made easy and suit is now properly brought where the plaintiff can be found.

V. CONCLUSION

Cases and controversies arising in the borderless ether of Cyberspace have presented new and unique conceptual issues. These issues are about to get more complicated. Soon, the world will be on-line twenty-four hours a day, seven days a week, communicating at speeds that make speed irrelevant. When this happens, documents, voices, faces, programs and lives will be instantaneously shared at a distance. Personal jurisdiction analysis in this environment must be developed to uphold the constitutional principles it was designed to protect, Federalism and traditional notions of fairplay and substantial justice. The current analysis is grounded in physical presence. The Internet is not.

The solution offered in this paper is designed to accommodate this lack of physical presence by mandating that the activity be directed at an entity that has a domiciliary state, rather than at the domiciliary state itself. This small shift in the analysis better serves the protective function required by Asahi and World-Wide Volkswagen. Under this new scheme, both defendants and plaintiffs are given notice as to what Internet conduct will and will not render them liable to suit.

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