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# World Wide Web Advertising: Personal Jurisdiction Around the Whole Wide World?

Christopher W. Meyer

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## *I. Introduction*

Courts use the minimum contacts test to determine whether the Constitution limits their ability to exercise personal jurisdiction over nonresident defendants.[1] The test allows courts to exercise personal jurisdiction when

1. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (adopting minimum contacts test); *infra* Part III (describing minimum contacts test).

the defendant possesses "certain minimum contacts" such that subjecting the defendant to personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'"[2] When the Supreme Court adopted the minimum contacts test, it refused to exhaustively define either minimum contacts or traditional notions of fair play and substantial justice.[3] This decision made the minimum contacts test a flexible standard rather than a rigid rule;[4] the Court explained that "[w]hether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the Due Process Clause to insure."[5] The test's flexibility gives courts the ability to fit new contacts and new combinations of contacts within the minimum contacts test's framework.[6] Recently, federal and state courts have been called upon to use the flexibility inherent within the minimum contacts test to recognize a new genre of contacts: contacts arising from the use of the Internet's World Wide Web for advertising.[7] Several courts have

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2. *International Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

3. *See id.* at 319 (refusing to explicitly define minimum contacts). In *International Shoe*, the Court wrote: "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not cannot be simply mechanical or quantitative." *Id.*

4. *See* Hanson v. Denckla, 357 U.S. 235, 251 (1958) (explaining evolution of due process limits on personal jurisdiction).

5. *International Shoe*, 326 U.S. at 319.

6. *See* David C. Tunick, *Up Close and Personal: A Close-Up Look at Personal Jurisdiction*, 29 CREIGHTON L. REV. 1157, 1219-25 (1996) (describing types of contacts recognized by Supreme Court as sufficient to confer personal jurisdiction).

7. *See* Lori Irish Bauman, *Personal Jurisdiction and Internet Advertising*, 14 COMPUTER LAW., Jan. 1997, at 2-4 (discussing calls to exercise personal jurisdiction over nonresident World Wide Web advertisers); Dale M. Cendali & James D. Arbogast, *Net Use Raises Issues of Jurisdiction*, NAT'L L.J., Oct. 28, 1996, at C7 (discussing personal jurisdiction issues raised by Internet and CompuServe network use).

The calls to recognize World Wide Web advertising contacts are supplemented by calls to recognize all manner of other computer network contacts, including World Wide Web contacts, e-mail contacts, and various other electronic contacts. *See* Agency Rent A Car System, Inc. v. Grand Rent A Car Corp., 98 F.3d 25, 30 (2d Cir. 1996) (finding minimum contacts based in part on use of computer network reservation system located in forum); CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262-63 (6th Cir. 1996) (allowing exercise of personal jurisdiction over nonresident based in part on contacts made over CompuServe's computer network); Resuscitation Tech., Inc. v. Continental Health Care Corp., No. IP 96-1457-C-M/S, 1997 WL 148567, at *2-4 (S.D. Ind. Mar. 24, 1997) (finding e-mail messages sent from forum one basis for finding minimum contacts); Cody v. Ward, 954 F. Supp. 43, 47 (D. Conn. 1997) (finding minimum contacts arising in part from e-mail messages sent to forum); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125-27 (W.D. Pa.

obliged,[8] while other courts have refused.[9] This split creates uncertainty for

1997) (finding minimum contacts established by World Wide Web site operator who used World Wide Web page to solicit subscribers to its news and information service and who used Internet to process applications); EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., 947 F. Supp. 413, 417-22 (D. Ariz. 1996) (finding minimum contacts arising from use of electronic mail, CompuServe, and World Wide Web); Naxos Resources Ltd. v. Southam, Inc., No. CV 96-2314 WJR (MCX), 1996 WL 662451, at *3 (C.D. Cal. Aug. 16, 1996) (finding insufficient contacts based on electronic dissemination of newspaper articles via Internet, LEXIS, and Westlaw); St. Martin & Mahoney, P.L.C. v. Patton, 863 F. Supp. 311, 313-15 (E.D. La. 1994) (finding insufficient contacts arising from advertisement in national magazine/computer network); PLUS System, Inc. v. New England Network, Inc., 804 F. Supp. 111, 118-19 (D. Colo. 1992) (giving weight in minimum contacts analysis to use of Colorado-based automated teller machine (ATM) network); California Software Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1361-64 (C.D. Cal. 1986) (finding minimum contacts based, in part, on defamatory statements transmitted via interstate computer network); Hall v. LaRonde, 66 Cal. Rptr. 2d 399, 400 (Cal. Ct. App. 1997) (holding use of e-mail and telephone may establish minimum contacts over foreign defendant in California); Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So. 2d 1351, 1353 (Fla. Dist. Ct. App. 1994) (finding insufficient contacts arising from connection to and use of computer network located in forum).

8. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1332-34 (E.D. Mo. 1996) (finding minimum contacts arising from defendant's World Wide Web advertising activities); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 164-65 (D. Conn. 1996) (finding minimum contacts based, in part, on defendant's Internet (World Wide Web) advertising); State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *6-11 (Minn. Dist. Ct. Dec. 11, 1996) (finding minimum contacts arising from defendant's World Wide Web advertising activities), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997); *see also* Expert Pages v. Buckalew, No. C-97-2109-VRW, 1997 WL 488011, *2-5 (N.D. Cal. Aug. 6, 1997) (finding minimum contacts based on defendant's copying and posting of plaintiff's World Wide Web site, but refusing on reasonableness grounds to exercise jurisdiction); Digital Equip. Corp. v. Alta Vista Tech., Inc., 960 F. Supp. 456, 462 (D. Mass. 1997) (noting defendant's World Wide Web activities brought defendant over jurisdictional line); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123-25 (W.D. Pa. 1997) (noting World Wide Web activities can create contacts with forum); Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 5 (D.D.C. 1996) (weighing defendant's World Wide Web advertising contacts in favor of minimum contacts finding).

9. *See* Weber v. Jolly Hotels, No. CIV. A. 96-2582, 1997 WL 574950, at *5-6 (D.N.J. Sept. 12, 1997) (refusing to exercise general jurisdiction over World Wide Web advertiser); IDS Life Ins. Co. v. SunAmerica, Inc., 958 F. Supp. 1258, 1268 (N.D. Ill. 1997) (refusing to recognize World Wide Web site as contact sufficient to support exercise of general jurisdiction); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (describing World Wide Web contact as insufficient to support personal jurisdiction), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997); McDonough v. Fallon McElligott, Inc., No. Civ. 95-4037, 1996 WL 753991, at *3 (S.D. Cal. Aug. 5, 1996) (stating that recognition of web site as sufficient minimum contact for general jurisdiction would "eviscerate" personal jurisdiction requirement); *see also* Graphic Controls Corp. v. Utah Medical Prods., Inc., No. 96-CV-0459E(F), 1997 WL 276232, at *3-4 (W.D.N.Y. May 21, 1997) (refusing to exercise personal jurisdiction over defendant who provided "information" over World Wide Web); Hearst Corp. v. Goldberger, No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097, at *21

advertisers who want to avail themselves of the World Wide Web's opportunities, while still structuring "their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[10]

Although the World Wide Web offers advertisers tremendous economic opportunities, exposure to lawsuits in distant forums raises the costs of doing business on the World Wide Web.[11] This Note explores the constitutional limits to the exercise of personal jurisdiction over nonresident World Wide Web advertisers. It argues that while World Wide Web advertising can establish sufficient contacts to satisfy the minimum contacts test,[12] the Due Process Clause[13] requires courts to exercise restraint in their attempts to exercise personal jurisdiction over nonresident defendants based on the defendants' World Wide Web advertising activities.[14] This Note also discusses the current risks faced by advertisers because of improper application of the minimum contacts test in several World Wide Web advertising cases.[15]

Although a court's ability to exercise personal jurisdiction depends on both state and federal law,[16] this Note focuses on the constitutional limits to personal jurisdiction in World Wide Web advertising cases.[17] This Note does not address whether or when state long-arm statutes allow the exercise of personal jurisdiction based on World Wide Web advertising activities.[18]

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(S.D.N.Y. Feb. 26, 1997) (mag. j. report and recommendation) (recommending court refuse to exercise personal jurisdiction over World Wide Web advertiser).

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

11. *See* Bauman, *supra* note 7, at 2-4 (describing economic opportunities and legal risks of Internet advertising).

12. *See infra* Part IV.C (suggesting proper standard for measuring World Wide Web advertising contacts).

13. U.S. CONST. amend XIV, § 1.

14. *See infra* Parts III-V (describing minimum contacts test and its application to World Wide Web advertising contacts).

15. *See infra* Part IV.B (analyzing recent applications of minimum contacts test in World Wide Web advertising cases).

16. *See* 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 1.01[2][a], at 1-7 to -9 (2d ed. 1991 & Supp. 1996) (describing bases and limits of *in personam* jurisdiction). Personal jurisdiction refers to a court's ability to render a valid and enforceable judgment against a defendant. *Id.*

17. *See infra* Part III (describing constitutional foundations of minimum contacts analysis).

18. *See* 1 CASAD, *supra* note 16, § 1.01[2][a], at 1-8 to -9 (describing long-arm statutes). Long-arm statutes define the bases state courts may use when attempting to exercise personal jurisdiction over defendants not found within the forum. *Id.* Federal courts exercise jurisdiction according to the long-arm statute of the state in which they sit, except in special, Congressionally defined, situations. *See* FED. R. CIV. P. 4(e) (linking federal court long-arm

In addition, it avoids extensive discussion of World Wide Web-related cases where other contacts predominate over the defendant's World Wide Web advertising contacts, or otherwise significantly influence the court's minimum contacts analysis.[19]

The Note begins, in Part II, with a description of the World Wide Web and World Wide Web advertising practices and methods. Part III discusses the constitutional standards for the exercise of personal jurisdiction. Part IV criticizes current approaches used to measure purposeful minimum contacts in World Wide Web advertising cases and encourages courts to adopt a new standard that recognizes the great variety of World Wide Web advertisements and advertisers. Part V discusses whether and when fairness and reasonableness concerns may be used successfully to limit the reach of long-arm jurisdiction over World Wide Web advertisers. The Note concludes, in Part VI, with final notes on the importance of exercising care in evaluating World Wide Web advertising contacts.

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jurisdiction to state long-arm statutes). *See generally* 1 CASAD, *supra* note 16, §§ 5.02-.03 (describing federal long-arm jurisdiction).

19. *See* Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456, 462 (D. Mass. 1997) (noting defendant's minimum contacts with forum including "a contract with a Massachusetts corporation, reflecting an agreement to apply Massachusetts law, soliciting business through its Web-site, including Massachusetts business, and three sales to Massachusetts residents, etc."); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125-27 (W.D. Pa. 1997) (finding minimum contacts established by World Wide Web site operator who used World Wide Web page to solicit subscribers to its news and information service and who used Internet to process applications); Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 5 (D.D.C. 1996) (exercising jurisdiction based primarily on defendant's newspaper advertisement, but noting importance of World Wide Web advertisement); EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., 947 F. Supp. 413, 417-22 (D. Ariz. 1996) (finding minimum contacts arising from use of electronic mail, CompuServe, and World Wide Web). Several commentators have considered the jurisdictional effect of various World Wide Web contacts, including non-advertising World Wide Web contacts. *See generally* Corey B. Ackerman, Note, World-Wide Volkswagen, *Meet the World Wide Web: An Examination of Personal Jurisdiction Applied to a New World*, 71 ST. JOHN'S L. REV. 403 (1997) (analyzing World Wide Web personal jurisdiction cases); Lea Hall, Comment, *The Evolving Law of Personal Jurisdiction for Trademark Infringement on the Internet*, 66 MISS. L.J. 457 (1996) (same); Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications*, 65 FORDHAM L. REV. 2241 (1997) (same); Ira S. Nathenson, Comment, *Showdown at the Domain Name Corral: Property Rights and Personal Jurisdiction over Squatters, Poachers and Other Parasites*, 58 U. PITT. L. REV. 911 (1997) (same); David L. Stott, Comment, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site*, 15 J. MARSHALL J. COMPUTER & INFO. L. 819 (1997) (same); Leif Swedlow, Note, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337 (1997) (same); David Thatch, Note, *Personal Jurisdiction and the World-Wide Web: Bits (and Bytes) of Minimum Contacts*, 23 RUTGERS COMPUTER & TECH. L.J. 143 (1997) (same).

### *II. The World Wide Web and World Wide Web Advertising Practices*

The Supreme Court's decision to adopt a flexible minimum contacts test made the minimum contacts analysis a fact-sensitive inquiry.[20] A court must understand the quality and nature of a defendant's activities before it begins the minimum contacts analysis.[21] Unfortunately, the relative legal novelty of the Internet, the World Wide Web, and other computer networks has frustrated consistent application of the minimum contacts test to these new contacts and has led to factual errors.[22] Constitutional application of the minimum contacts test in World Wide Web advertising cases demands a deeper understanding of the World Wide Web and of World Wide Web advertising practices and methods.

#### *A. The World Wide Web: Frequently (Un)Asked Questions*

Discussion of the World Wide Web must begin with discussion of the World Wide Web's host, the Internet.[23] The Internet is the world's largest

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20. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 307 (1992) (describing flexibility of minimum contacts test).

21. *See* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (noting that application of minimum contacts test varies with quality and nature of defendant's contacts).

22. *See* Dominic Bencivenga, *Cyberspace in Court: Arguments Are Part Tradition, Part Imagination*, N.Y.L.J., Nov. 21, 1996, at 5 (describing difficulty in applying old theories to new contacts); *see also* Bensusan Restaurant Corp. v. King, No. 1383, 1997 WL 560048, at *2 (2d Cir. Sept. 10, 1997) (explaining that "attempting to apply established trademark law in the fast-developing world of the internet is somewhat like trying to board a moving bus"). Courts have experienced serious problems differentiating between contacts made on the Internet and on other kinds of computer networks. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262, 1266 (6th Cir. 1996) (mischaracterizing Patterson's CompuServe contacts as Internet contacts). In *CompuServe*, Patterson's contacts with Ohio occurred through the CompuServe computer network. *See id.* at 1260-61 (describing Patterson's contacts with Ohio). Patterson entered into contracts that specified Ohio law as the governing law. *Id.* at 1260. He transmitted thirty-two computer software files to the CompuServe system in Ohio. *Id.* at 1261. He advertised and sold his software on CompuServe's Ohio-headquartered system. *Id.* The court found purposeful availment through these and other contacts. *Id.* at 1266-68.

Despite the fact that Patterson did not actually contact CompuServe through the Internet, the court found that "Patterson consciously reached out from Texas to Ohio . . . to market his computer software on the Internet." *Id.* at 1266. The confusion in the court's minimum contacts analysis likely arose because the computer software Patterson transmitted to Ohio and stored on CompuServe's proprietary system was designed to assist in the use of the Internet. *Id.* at 1261. Other courts have repeated the *CompuServe* court's error and have treated *CompuServe* as an Internet case. *See* Zippo Mfg. Corp. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (mischaracterizing *CompuServe* as Internet case); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (same), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

23. *See* ACLU v. Reno, 929 F. Supp. 824, 836 (E.D. Pa. 1996) (explaining relationship

computer network.[24] It uses a common communications protocol[25] to link thousands of smaller computer networks and millions of individual computers around the world.[26] No single entity owns the Internet, and its global reach and internal complexity continue to frustrate efforts to control its use and its users.[27]

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between Internet and World Wide Web), *aff'd*, 117 S. Ct. 2329 (1997). *See generally* KATIE HAFNER & MATTHEW LYON, WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET (1996) (recounting Internet's history); HARLEY HAHN & RICK STOUT, THE INTERNET COMPLETE REFERENCE (1994) (providing detailed description of Internet); ED KROL & PAULA FERGUSON, THE WHOLE INTERNET FOR WINDOWS 95: USER'S GUIDE & CATALOG (1995) (providing description of Internet and World Wide Web); RAYMOND T. NIMMER, INFORMATION LAW (1996) (describing information industry); HENRY R. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY (1996 & Supp. 1997) (discussing legal aspects of National Information Infrastructure); Dan L. Burk, *Federalism in Cyberspace*, 28 U. CONN. L. REV. 1095 (1996) (describing Internet's technical operation).

24. *See* MTV Networks v. Curry, 867 F. Supp. 202, 203 n.1 (S.D.N.Y. 1994) (describing Internet as world's largest computer network).

25. *See* ACLU v. Reno, 929 F. Supp. 824, 836 (E.D. Pa. 1996) (describing communications protocols), *aff'd*, 117 S. Ct. 2329 (1997). A communications protocol consists of a set of rules for addressing information and transmitting that information across a computer network. *Id.* In theory, these rules differ little from the rules used by the United States Postal Service for addressing envelopes and delivering them to their destinations. *See* KROL & FERGUSON, *supra* note 23, at 26-31 (comparing Internet protocols to procedures used by United States Postal Service).

26. *See ACLU*, 929 F. Supp. at 831 (estimating 9.4 million computers are linked to Internet, not including millions of personal computers linked through telephone lines).

27. *See id.* at 831 (describing Internet as international computer network). The *ACLU* court noted that the Internet exists largely as a matter of international consensus rather than government edict, stating: "It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers . . . ." *Id.* at 832; *see also* Burk, *supra* note 23, at 1109-15 (describing Internet's technical complexity); David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370-76 (1996) (describing difficulties surrounding certain Internet regulatory efforts). Despite the difficulties, national, state, and local governments are attempting to regulate Internet users, restrict Internet content, and control Internet commerce. *See* Burk, *supra* note 23, at 1095-96 (describing Internet regulation); Amy Kroll, Comment, *Any Which Way But Loose: Nations Regulate the Internet*, 4 TUL. J. INT'L & COMP. L. 275, 279-98 (1996) (describing international Internet regulatory efforts); Christopher Wolf & Scott Shorr, *Cybercops Are Cracking Down on Internet Fraud*, NAT'L L.J., Jan. 13, 1997, at B12 (describing federal and state efforts to control Internet commerce); *DOT Fines Virgin over Internet Advertising*, WALL ST. J., Nov. 22, 1995, at B8 (describing fine levied for allegedly misleading World Wide Web advertisement). These regulatory efforts have drawn criticism from numerous scholars. *See* Burk, *supra* note 23, at 1095-96 (highlighting concerns raised by state and national regulatory attempts); Johnson & Post, *supra*, at 1367 (calling for new laws and regulations designed specifically for "Cyberspace"); Joel R.

The Internet's diversity complicates jurisdictional analysis because its uses and its users differ greatly. There are multiple ways to access the network,[28] multiple owners of its component parts,[29] and multiple ways to transmit and receive information across the network.[30] Typical uses and applications include electronic mail (e-mail),[31] mailing lists and newsgroups,[32] and remote control of other computers.[33]

The variety of potential users and potential Internet contacts makes it difficult to analogize between different cases and requires courts to look

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Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911, 912 (1996) (rejecting current regulatory approaches and calling for new network governance paradigm).

28. *See ACLU*, 929 F. Supp. at 832-33 (describing Internet access from places ranging from businesses and universities to homes and coffee shops).

29. *Id.* at 832.

30. *See id.* at 834-36 (describing methods of communicating over Internet).

31. *See* EDIAS Software Int'l, Inc. v. BASIS Int'l, Ltd., 947 F. Supp. 413, 419 (D. Ariz. 1996) (describing electronic mail). "E-mail is, simply, electronic mail. Users have computer addresses to which messages can be sent. Thus, e-mail does not differ substantially from other recognizable forms of communication, such as traditional mail or phone calls, where one person has an address or phone number to reach another person." *Id.* (footnote omitted). However, e-mail accounts do not always reveal the user's location and sending e-mail is not necessarily equivalent to sending a letter to a known address or dialing a phone number. *See* Burk, *supra* note 23, at 1111-15 (describing Internet's geographical indeterminacy). Indeed, where the ultimate destination is unknown, sending an e-mail message seems more closely analogous to dialing a toll-free telephone number that gives no geographical clues to the location of the number's owner and operator. *Cf.* ACLU v. Reno, 929 F. Supp. 824, 845 (E.D. Pa. 1996) (noting "[a]n e-mail address provides no authoritative information about the addressee, who may use an e-mail 'alias' or an anonymous remailer"), *aff'd*, 117 S. Ct. 2329 (1997).

32. *See ACLU*, 929 F. Supp. at 834 (describing mailing lists and newsgroups). A mailing list (listserv) allows users to send e-mail messages that are automatically forwarded to all people who subscribe to the mailing list. *Id.* Mailing lists allow members to receive frequent updates on current developments in both generalized and specialized fields. *Id.* Newsgroups also allow communication with multiple people. *Id.* Newsgroup messages are stored in a computer database which can be accessed by the user at anytime. *Id.* Although mailing list messages are automatically sent to addresses on the list, newsgroup messages must be accessed by the user. *Id.* These newsgroups may or may not be edited or moderated. *Id.; see* KROL & FERGUSON, *supra* note 23, at 100-106 (describing mailing lists); *id.* at 175-84 (describing newsgroups).

33. *See ACLU*, 929 F. Supp. at 835 (describing remote access to computer resources through computer program Telnet). Remote computer access is an important feature of the Internet because it allows researchers and students scattered around the world to share very expensive computer resources. *See* KROL & FERGUSON, *supra* note 23, at 15 (describing resource sharing); *see also* HAFNER & LYON, *supra* note 23, at 156 (describing Telnet's 1969 origins).

closely at the circumstances of each particular case.[34] For example, sending an e-mail message to an individual and sending an e-mail message to a mailing list involve nearly identical actions.[35] The writer composes the message on her computer, addresses the message, and sends it to its destination.[36] However, these superficial similarities mask a deeper difference. When a person sends an e-mail message to an individual, the sender intends it to reach a single person.[37] When a person sends e-mail to a mailing list, the sender intends it to reach every user on that mailing list.[38] This means that a message sent to a mailing list may reach dozens of states and countries within seconds or minutes and potentially establishes contacts with each of those forums.[39] These differences matter. A court weighing an e-mail contact may be inclined to adopt a minimum contacts analysis similar to an analysis of contacts made when a nonresident sends a letter to the forum through the postal system.[40] In contrast, a court weighing mailing list contacts may find a closer analogy to contacts made through publication or mass mailings.[41] Although a discussion of the array of potential contacts the Internet allows is beyond the scope of this Note, other commentators have begun to discuss the jurisdictional impact of these contacts.[42]

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34. *See* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (describing fact-based nature of minimum contacts test). At least one court, in a case not involving issues of personal jurisdiction, has taken the time to learn about the different uses of the Internet and the differences between the Internet and other types of computer networks, such as commercial online services. *See ACLU*, 929 F. Supp. at 830-49 (giving detailed findings of fact concerning Internet and other computer networks).

35. *See* KROL & FERGUSON, *supra* note 23, at 84-85, 101-04 (noting similarities between sending messages to individuals and sending messages to mailing lists).

36. *See id.* (describing composition and transmission of e-mail).

37. *See supra* note 31 (describing e-mail).

38. *See supra* note 32 (describing mailing lists).

39. *See* KROL & FERGUSON, *supra* note 23, at 101-02 (describing mailing list membership).

40. *See* TSA, Inc. v. Nass, No. Civ. A. 96-4509, 1997 WL 47612, at *2 (E.D. Pa. Feb. 4, 1997) (describing various courts' handling of letters — and telephone calls — in minimum contacts analysis); *see also* EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., 947 F. Supp. 413, 419 (D. Ariz. 1996) (describing similarities between e-mail and traditional forms of communication such as telephones and postal system). *But see* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1332 (E.D. Mo. 1996) (explaining differences between e-mail and regular mail).

41. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773-81 (1984) (exercising personal jurisdiction over publisher who sold magazines in forum); Gordon v. ITT Corp., 273 F. Supp. 164, 166-68 (N.D. Ill. 1967) (exercising personal jurisdiction over corporations who directed mass solicitations at forum residents).

42. *See* Burk, *supra* note 23, at 1109-11 (describing Internet commerce and virtual

Cases involving World Wide Web advertising require courts to understand the World Wide Web's unique nature and special features.[43] The World Wide Web functions as an information storage and retrieval system for the Internet.[44] Two parties give the World Wide Web life: publishers and users.[45] World Wide Web publishers create Web pages and place those pages on World Wide Web sites.[46] The pages usually contain text and may also contain graphics, pictures, and links[47] to other World Wide Web pages, sound or video files, computer programs, and other data and information.[48]

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contacts); Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 ALB. L. REV. 1083, 1126-32 (1996) (proposing standard for evaluating minimum contacts in libel cases involving "cyberspace" contacts); Bruce W. Sanford & Michael L. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 U. CONN. L. REV. 1137, 1165-70 (1996) (discussing personal jurisdiction and choice of law issues related to online First Amendment issues); Kalow, *supra* note 19, at 2256-66 (discussing standards for exercising jurisdiction based on World Wide Web advertising contacts); Swedlow, *supra* note 19, at 384-89 (suggesting model rule for various electronic contacts).

43. *See* ACLU v. Reno, 929 F. Supp. 824, 836-38 (E.D. Pa. 1996) (describing World Wide Web), *aff'd*, 117 S. Ct. 2329 (1997); KROL & FERGUSON, *supra* note 23, at 117-71 (same).

44. *See ACLU*, 929 F. Supp. at 836-38 (describing information retrieval and search capabilities of World Wide Web). The World Wide Web is but one of the many ways information retrieval and searching occurs on the Internet. *Id.* For example, the File Transfer Protocol (FTP) allows Internet users to transfer computer files from a remote computer to the user's computer. *Id.* at 835. In addition, the Gopher system allows individuals to search remote computers for information. *Id.* at 835-36; *see also* HAHN & STOUT, *supra* note 23, at 297-359, 429-457 (1994) (describing various methods for searching for and retrieving information from Internet).

45. *See* Reno v. ACLU, 117 S. Ct. 2329, 2335-36 (1997) (discussing publisher and user World Wide Web perspectives). The Supreme Court explained that for publishers the World Wide Web "constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers." *Id.* at 2335. From the user's perspective, the Supreme Court found that the World Wide Web is comparable "to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services." *Id.*

46. *See ACLU*, 929 F. Supp. at 837 (describing World Wide Web publishers). World Wide Web pages provide the World Wide Web's basic content. *Id.* World Wide Web sites, which consist of World Wide Web pages and other information and programs, are stored on computers connected to the Internet. *See* MTV Networks v. Curry, 867 F. Supp. 202, 203 n.2 (S.D.N.Y. 1994) (describing World Wide Web sites).

47. *See ACLU*, 929 F. Supp. at 836-37 (describing links). Hypertext links allow users viewing a World Wide Web page to access other documents and files noted by the page's author. *Id.*

48. *See id.* (describing information retrieval and navigation aspects of World Wide Web); *see also* KROL & FERGUSON, *supra* note 23, at 117-18 (describing World Wide Web's

World Wide Web users connect to the Internet and use a computer program, called a browser, to navigate the World Wide Web and access its contents.[49] Information retrieval occurs through two basic methods. The user can either enter the address of the World Wide Web site she wants to access,[50] or if she is already viewing a World Wide Web page, that page may contain links she can select to access other sources of information.[51]

The World Wide Web's creator originally designed the World Wide Web to allow members of the international scientific community to share information and research results stored on computers located around the world.[52] Although the World Wide Web retains this basic information sharing and retrieval function, it has acquired other attributes as well.[53] In particular, it has become an advertising medium.[54] Many commercial World Wide Web sites contain few or no links to other sites and serve as little more than continuous advertisements.[55] In addition, commercial advertising

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basic operation).

49. *See* KROL & FERGUSON, *supra* note 23, at 118-19 (discussing function and operation of World Wide Web browsers).

50. *See MTV Networks*, 867 F. Supp. at 203 n.2 (S.D.N.Y. 1994) (describing Internet addresses). Internet and World Wide Web addresses come in two forms. The first form is a numeric address, similar to a telephone number, that identifies the particular computer linked to the network. *Id.* The second form also identifies the particular computer linked to the network. *Id.* However, this second form is alphanumeric and easier for the user to remember (or to guess). *Id.* An example is "www.wlu.edu." A computer user who enters this address accesses the World Wide Web home page that belongs to Washington & Lee University in Lexington, Virginia. *Washington & Lee University* (visited Sept. 8, 1997) <http://www.wlu.edu>.

51. *See* KROL & FERGUSON, *supra* note 23, at 117-53 (describing use of World Wide Web browsers, including navigation and information retrieval methods).

52. *See* Herb Brody, *The Web Maestro: An Interview with Tim Berners-Lee*, TECH. REV., July 1996, at 33, 33-34 (discussing World Wide Web's origins).

53. *See* Elizabeth Corcoran, *On the Internet, a Worldwide Information Explosion Beyond Words*, WASH. POST, June 30, 1996, at A1 (describing World Wide Web's content). Corcoran summarizes the World Wide Web's popular image and current nature:

> Today tens of millions of people are tapping into it and thousands more are initiated every day. A cross-section of the human experience, good and bad, is swirling around the Web and other conduits of the on-line dimension known as cyberspace: religious texts, blackjack games, art exhibits, political manifestos, theater timetables, love letters, ads, wanted posters, scientific treatises, drafts of first novels, peep shows.

*Id.*

54. *See* Mark Evans, *WWW.DAD.WORRIED: World Wide Web Creator Tim Berners-Lee Disappointed by Use of the Internet*, FIN. POST, Apr. 30, 1996, at 11 (describing concerns about co-opting of World Wide Web for commercial gain).

55. *See id.* (describing structure of commercial World Wide Web sites); Bart Ziegler,

supports many of the most popular World Wide Web sites.[56] Estimates of current and projected spending indicate that World Wide Web advertising will fuel much of the World Wide Web's future growth.[57]

### *B. World Wide Web Advertising: Practices and Methods*

World Wide Web advertising comes in many different forms that affect application of the minimum contacts test. All World Wide Web advertisers begin with a basic site that contains one or more pages.[58] The site and its pages may also contain a wide variety of features including text, graphics, sound, and video.[59] The basic World Wide Web site normally contains information about the advertiser and the advertiser's products and services.[60] Although the basic World Wide Web site is normally accessible to all World Wide Web users,[61] many advertisers attempt to increase the effectiveness and

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*On-Line: In Cyberspace the Web Delivers Junk Mail*, WALL ST. J., June 13, 1995, at B1 (describing commercialization of World Wide Web); *see also* Cathy Taylor, *Coca-Cola Finds Its Way to the Internet*, ADWEEK, Apr. 24, 1995, at 9, 9 (describing Coca-Cola's World Wide Web site).

56. *See* Patrick M. Reilly, *More Publishers Charging for Web Services*, WALL ST. J., May 8, 1996, at B8 (describing advertising on World Wide Web sites).

57. *See* Lisa Bransten, *Changes to Intel's Co-Op Program Could Boost Web Advertising 40%*, WALL ST. J., Aug. 5, 1997, at B7 (noting growth of World Wide Web advertising, estimated at $400 million for 1997); *Internet Advertising Grows*, WALL ST. J., Dec. 12, 1996, at B7 (reporting third quarter World Wide Web advertising spending at $75.6 million, up 46% from second quarter); Megan Schnabel, *Companies Spending Big on the Net*, ROANOKE TIMES & WORLD NEWS, Aug. 18, 1996, at 1 (discussing advertising spending by major corporations such as IBM and Microsoft); Cathy Taylor, *After the Year of the Web*, ADWEEK, Jan. 15, 1996, at 27, 27-30 (discussing current and future strategies for World Wide Web advertising).

58. *See* Jill H. Ellsworth, *Staking a Claim on the Internet*, NATION'S BUS., Jan. 1, 1996, at 29, 29-30 (describing World Wide Web advertising).

59. *Id.*; *see also* ACLU v. Reno, 929 F. Supp. 924, 836-37 (E.D. Pa. 1996) (describing features of World Wide Web), *aff'd*, 117 S. Ct. 2329 (1997). Many commercial web sites contain features that go well beyond mere advertising. Many sites provide Web users with the option to contact the advertiser directly through e-mail and some even give Web users the opportunity to order products and services online. *See* David Shaw, *Internet Gold Rush Hasn't Panned Out Yet for Most*, L.A. TIMES, June 19, 1997, at A1 (discussing Internet marketing). These extra features can create additional contacts between the advertiser and the forum that affect the personal jurisdiction analysis. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123-25 (W.D. Pa. 1997) (describing different levels of commercial activity on Internet).

60. *See* Ellsworth, *supra* note 58, at 30-31 (describing several typical World Wide Web advertisements).

61. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 297 (S.D.N.Y. 1996) (describing defendant's "general access" World Wide Web site), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

impact of their advertisements by promoting, targeting, and tailoring their advertisements.

*1. Promotion and Targeting of World Wide Web Advertisements*

A World Wide Web advertisement does an advertiser little good unless consumers can find the advertisement.[62] Advertisers have a number of options to enhance the visibility and accessibility of their World Wide Web sites. Many advertisers submit descriptions of their site to World Wide Web search engines and indexes.[63] Advertisers also incorporate their site's address in their company letterhead or product packaging.[64] Some advertisers integrate their World Wide Web site into an overall marketing strategy and include the site's address in print, radio, and television advertising.[65] Finally, some advertisers pay for advertising space, called banner advertising, on other World Wide Web sites.[66]

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62. *See* Peter Coy et al., *Has the Net Finally Reached the Wall?*, BUS. WK., Aug. 26, 1996, at 62, 62-64 (describing Internet's tremendous growth and difficulty of locating information); Edward R. Silverman, *Doing Business on the Internet*, NEWSDAY, Apr. 10, 1995, at C1 (describing opportunities and problems facing businesses with World Wide Web sites).

63. *See ACLU*, 929 F. Supp. at 837 (describing search engines). Search engines are services that routinely catalog the content of the Internet and the World Wide Web and that allow users to search for information using key words. *Id.* Some services have also created indexes similar to telephone directories. *See* KROL & FERGUSON, *supra* note 23, at 127-30 (describing indexes and search engines). Print directories of World Wide Web sites, including advertising sites also exist. *See generally* HARLEY HAHN, THE INTERNET YELLOW PAGES (3d ed. 1996) (listing some Internet and World Wide Web content). Although many search engines and directories automatically search the Internet and catalog its contents, submission of the advertisement's address increases the likelihood of its inclusion. *See How to Suggest Your Site* (visited Sept. 23, 1997) <http://www.yahoo.com/docs/info/include.html> (providing information on suggesting World Wide Web sites for inclusion in Yahoo! directory).

64. *See Internet Marketing: Six Great Ways to Promote a Web Site*, ADVERTISING AGE, May 27, 1996, at M6 (discussing World Wide Web site promotion).

65. *See* Shaw, *supra* note 59, at A1 (discussing incorporation of Web site addresses into traditional advertising media); *see also* Stuart Elliot, *Advertising: I.B.M.'s Multimedia Campaign Posits That Small Is Beautiful*, N.Y. TIMES, Aug. 28, 1997, at D6 (discussing IBM's integrated advertising campaign involving print, television, and Internet). Indeed, even companies such as Yahoo! and Lycos which derive operating revenues from advertising on their World Wide Web sites advertise their own services in traditional media, such as television. *See* Kim Cleland, *Search Engines Weigh Impact of TV Campaigns*, ADVERTISING AGE, June 30, 1997, at 26 (discussing Yahoo!, Infoseek, Excite, and Lycos advertising campaigns).

66. *See* Hillary Rosner, *Growing Pains: Buying Ads on the Internet Shouldn't Be Virtually Impossible*, ADWEEK, July 8, 1996, at 10, 10-14 (discussing World Wide Web site promotions). Banner advertisements are becoming increasingly important in World Wide Web marketing. *Id.* Advertisers place the banner advertisements on Web sites such as ESPN's or the *New York Times*'s World Wide Web sites. *See* Reilly, *supra* note 56, at B8 (discussing

Many advertisers refine their promotion by targeting specific markets.[67] Demographic data collected from a variety of sources, including data collected on the Internet, provide information that allows advertisers to target specific markets.[68] These data also provide information concerning the appropriate content and design of the advertiser's World Wide Web site and effective methods and locations for promoting the site.[69]

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World Wide Web advertising strategies). The banner advertisements are typically small, but eye catching. If a user clicks on one of the banners with her computer mouse, the advertiser's full page advertisement appears. Although banner advertisements are becoming more important, there have been some growing pains. *See* Rosner, *supra*, at 12-14 (discussing difficulties in placing and maintaining banner advertisements); *see also Ad Pricing Stirs Internet Discussion: Procter & Gamble to Pay Based on 'Click Through' Rate*, DALLAS MORNING NEWS, Apr. 29, 1996, at 1D (discussing pricing models for World Wide Web banner ads).

67. *See* John M. Moran, *Getting Sold on the Web: A 'Target' Aims at Advertising*, NEWSDAY, June 30, 1996, at A67 (discussing advertisers' ability to target particular markets); *see also* Thomas E. Weber, *Software Lets Marketers Target Web Ads*, WALL ST. J., Apr. 21, 1997, at B1 (describing software designed to customize Internet advertising).

68. *See* Merrill Goozner, *An Old Glow, and Dynamic Prospects: As Ways to Measure Usage Are Developed, Internet's Potential for Advertising Grows*, CHI. TRIB., Dec. 16, 1996, at 1 (discussing World Wide Web advertising). Advertisers' attempts to target their advertisements follow long and established trends in the advertising industry. *See* VANCE PACKARD, THE HIDDEN PERSUADERS 158-66 (1957) (discussing efforts to target youth market); ARCH G. WOODSIDE, MEASURING THE EFFECTIVENESS OF IMAGE AND LINKAGE ADVERTISING 1-15 (1996) (discussing how advertising works); *see also* Andrew J. Zbaracki, Comment, *Advertising Amenability: Can Advertising Create Amenability?*, 78 MARQ. L. REV. 212, 230-34 (1994) (describing traditional advertising practices including targeting). However, the World Wide Web also possesses unique features that differentiate World Wide Web advertising from traditional advertising, including the ability of small advertisers to reach large audiences at low costs. *See* Pierre Berthon, et al., *The World Wide Web as an Advertising Medium: Toward an Understanding of Conversion Efficiency*, J. ADVER. RESEARCH, Jan. 11, 1996, at 43, 43-44 (discussing unique features of World Wide Web marketing); Donna L. Hoffman & Thomas P. Novak, *Marketing in Hypermedia Computer-Mediated Environments: Conceptual Foundations*, J. MKTG., July 1996, at 50, 51 (discussing Internet as many-to-many form of communication rather than one-to-many form of communication).

Despite the positive qualities of World Wide Web advertising, current tools for targeting specific markets still need improvement. Advertisers experience great difficulty targeting specific geographic markets because the physical location of World Wide Web users often remains hidden. *See infra* Part IV.A.2 (discussing Internet's and World Wide Web's geographic insensitivity). In addition, current measuring tools need improvement. *See* Jane Greenstein, *Advertisers Still Trying to Get a Line on Net Users Marketing*, L.A. TIMES, Dec. 2, 1996, at D5 (discussing poor quality of current tracking tools). However, many organizations are working to improve their tracking abilities. *See* Laura Rich, *Measure for Measure: What Is the Web Worth?: Calculating the Value of On-Line Media*, ADWEEK, Nov. 11, 1996, at 32, 32 (discussing pricing models and initiative to track World Wide Web usage).

69. *See* Cathy Taylor, *Interactive: Marketers Wise Up as Web Surges*, ADWEEK, Sept. 9, 1996, at 14, 14-15 (discussing World Wide Web advertising strategies); Margot Williams,

### 2. *Tailoring of World Wide Web Advertisements*

Some advertisers take promotion and targeting to an even higher level. These advertisers actually tailor the content of their advertisement to the preferences of *individual* World Wide Web users.[70] Advertisers learn information about individual users from World Wide Web site usage logs, surveys, and registration forms.[71] In addition, many advertisers use special data files called "cookies" that they place on the users' computers to track browsing habits.[72] The information collected helps advertisers control the

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*Getting Caught in the Web by Aggressive Advertisers*, WASH. POST., Apr. 1, 1996, at F16 (discussing use of site usage logs to target advertising).

70. *See* Weber, *supra* note 67, at B1 (describing software designed to target advertisements).

71. *See supra* note 69 (discussing World Wide Web advertising methods and strategies).

72. *See* Lisa Bransten, *Cookies Leave a Bitter Taste*, FIN. TIMES, Oct. 28, 1996, at 15 (describing cookies as marketing tools). Cookies, which were originally designed to streamline communications between a World Wide Web site and a World Wide Web browser, can contain information about a user's computer, World Wide Web browsing habits, and other personal information. *Id.; see All Things Considered: 'Cookie' Tracks Net User's Visits to Web Sites* (National Public Radio broadcast, July 14, 1996) [hereinafter *All Things Considered*] (discussing commercial exploitation of cookies); Williams, *supra* note 69, at F16 (describing cookies). Cookies, like other World Wide Web targeting tools have limitations, including the fact that they can only track usage of a particular computer, rather than usage by a particular individual. *See* Gudmondsson et al., *Commercialization of the World Wide Web: The Role of Cookies* (last modified Dec. 18, 1996) <http://www.2000.ogsm.vanderbilt.edu/cb3/mgt565a/group5/paper.group5.paper2.htm> (discussing limitations of cookies). In response to advertisers' attempts to use cookies to track user activities, creative programmers have developed programs that disable cookies or that remove the cookies from the user's computer. *See* John Schwartz, *Trail of Crumbs Leads Right to the Cyber-Cookie Jar*, WASH. POST, June 24, 1996, at F19 (noting existence of software that blocks cookies); *see also ZDNet Tackles Web Cookie Privacy Concerns with Introduction of Free 'CookieMaster' Software Utility*, PR NEWSWIRE, Dec. 20, 1996, *available in* WESTLAW, PRWIRE database (discussing computer program that blocks cookies); *Pretty Good Privacy, Inc. Introduces PGPcookie.cutter for Private and Anonymous Web Browsing*, BUS. WIRE, Dec. 9, 1996, *available in* WESTLAW, BWIRE database (describing program that blocks or filters cookies); John M. Moran, *'Cookie' Tracing Files Raise Web Privacy Issues*, AUSTIN AM.-STATESMAN, June 14, 1997, at D4 (describing "PGP cookie.cutter" program). PGP's program allows users to specify which World Wide Web sites are allowed to create or access cookie files. Moran, *supra*, at D4; *see also* Joshua Quittner, *Invasion of Privacy*, TIME, Aug. 25, 1997, at 28, 32-33 (describing various ways to block information collection). In addition, World Wide Web browsers such as Netscape's Navigator and Microsoft's Internet Explorer provide users with the option to block cookies. *See* Gudmondsson et al., *supra* (discussing responses to cookies and their perceived threat to privacy). Several important players in the development of World Wide Web and Internet standards, including Microsoft and Netscape, have proposed a new standard for protecting users' privacy. *See High-Tech Firms Develop Internet Privacy Standard*, WASH. POST, May 27, 1997, at E1 (describing new information collection standard). This new Open Profiling Standard would give users greater control over personal information sought by World Wide

types of banner advertisements placed on other World Wide Web pages, and it allows advertisers to alter their advertisements to provide information specifically tailored to individual World Wide Web users.[73] The variety of advertising techniques and the varying levels of technical sophistication among World Wide Web advertisers complicates application of the minimum contacts test to World Wide Web advertising contacts.[74] Thus, a court needs a clear understanding of the advertiser's contacts before it can effectively (and constitutionally) apply the minimum contacts test to the advertiser's World Wide Web activities.

### *III. Due Process and Personal Jurisdiction*

The Due Process Clause[75] protects individual liberty by prohibiting unwarranted assertions of personal jurisdiction.[76] The modern minimum contacts test, which is used to determine whether an exercise of personal jurisdiction satisfies due process, consists of two interrelated requirements.[77]

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Web advertisers. *Id.*; *see* Don Clark, *Rivals Microsoft and Netscape Team Up to Protect Consumer Privacy on the Web*, WALL ST. J., June 12, 1997, at B14 (describing Open Profiling Standard).

73. *See All Things Considered*, *supra* note 72 (discussing commercial exploitation of cookies).

74. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123-25 (W.D. Pa. 1997) (describing different kinds of online contacts and different approaches to those contacts); *infra* Part IV.C (suggesting proper approach for analyzing World Wide Web advertising contacts).

75. U.S. CONST. amend. XIV, § 1.

76. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1878) (linking due process and personal jurisdiction); *see also* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing minimum contacts test for testing due process limits on exercise of personal jurisdiction). The Supreme Court has described protection of individual liberty as the driving concern behind the constitutional limits on personal jurisdiction. *See* Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982) (rejecting federalism as main concern of limits on personal jurisdiction); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985) (describing Due Process Clause's protection of individual liberty rather than federalism). *But see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-94 (1980) (noting importance of federalism in constitutional limits to personal jurisdiction). Despite the Supreme Court's statements to the contrary, some scholars still argue that federalism plays an important role in Supreme Court and lower court personal jurisdiction jurisprudence. *See* Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 690 (1987) (remarking on central role of federalism in personal jurisdiction decisions); *see also* Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105, 133-34 (1991) (describing importance of sovereignty concerns in minimum contacts analysis).

77. *See* Stephens, *supra* note 76, at 105-06 (describing modern two-step minimum con-

First, the defendant must have purposefully created contacts with the forum, and those contacts must rise to a level such that the defendant could reasonably expect to face lawsuits in the forum based on its contacts.[78] Second, the exercise of jurisdiction must be fair and reasonable.[79]

### *A. Minimum Contacts*

The Supreme Court has called the purposeful minimum contacts requirement "the constitutional touchstone" of the minimum contacts test.[80] The requirement prevents the exercise of personal jurisdiction based on the conduct of another,[81] and it prohibits the exercise of personal jurisdiction based on random, fortuitous, or attenuated contacts.[82] Purposeful minimum contacts exist in two general situations. A court can find that purposeful minimum contacts exist if the defendant purposefully availed "itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[83] Some examples of purposeful availment include selling products in the forum,[84] selling magazines in the forum,[85] and contracting with forum residents.[86] A court can also find that

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tacts test as unworkable).

78. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (describing minimum purposeful contacts requirement).

79. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 114-16 (1987) (applying fairness and reasonableness considerations to invalidate exercise of personal jurisdiction); *see also Burger King*, 471 U.S. at 477 (describing fairness and reasonableness considerations).

80. *See Burger King*, 471 U.S. at 474 (describing importance of purposeful minimum contacts requirement).

81. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (rejecting minimum contact created by unilateral action of third party).

82. *See Burger King*, 471 U.S. at 475 (describing limits to minimum contacts requirement) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)).

83. *See Hanson*, 357 U.S. at 253 (defining purposeful availment requirement).

84. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (explaining that regular sale of products in forum provides a reasonable basis for exercising jurisdiction "if [defendant's] allegedly defective merchandise has there been the source of injury to its owner or others"). *But see Asahi*, 480 U.S. at 112 (1980) (O'Connor, J., plurality opinion) (arguing "placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State").

85. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773-74 (1984) (finding circulation of magazines in forum supports exercise of personal jurisdiction in libel action based on contents of magazine).

86. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479-80 (1985) (explaining that defendant voluntarily assumed obligations connected to forum by entering long-term franchise agreement with forum resident); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (finding due process satisfied when suit is based on contract which had substantial

purposeful minimum contacts exist if the defendant directed its intentional conduct toward the forum and that conduct had foreseeable harmful effects in the forum state.[87] Printing libelous statements about a forum resident in a national publication satisfies this effects test.[88] Although World Wide Web advertisements may contain libelous statements or may otherwise involve intentionally tortious conduct calculated to cause injury in the forum,[89] ordinarily World Wide Web advertisements will be evaluated under the purposeful availment standard.[90] Accordingly, this Note focuses on discussion of the appropriate standards for finding purposeful availment of a forum through

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connection with forum).

87. *See* Calder v. Jones, 465 U.S. 783, 791 (1984) (holding that jurisdiction over nonresidents was proper because of their intentional conduct calculated to cause injury in California). In *Calder*, the Court found that the defendant's intentional and allegedly tortious conduct directed at the forum made suit in the forum reasonably foreseeable. *Id.* at 790.

88. *See id.* (finding printing of libelous statements in *National Enquirer* established purposeful contacts with target's home state, California).

89. *See* Counts & Martin, *supra* note 42, at 1126-30 (1996) (discussing standard for exercising personal jurisdiction based on libelous statements made on Internet). Another example of an Internet and World Wide Web related tort that allows use of the effects test is "cybersquatting." *See* Panavision, Int'l v. Toeppen, 938 F. Supp. 616, 618-19 (C.D. Cal. 1996) (describing Toeppen's registration and ransoming of domain names such as "camdenyards.com," "frenchopen.com," and "aircanada.com."). Cybersquatters register Internet addresses containing trademarks or other highly suggestive names of corporations, events, and products. *Id.* at 619. The cybersquatters then demand money to relinquish the names. *Id.* In *Panavision*, the district court applied the effects test to find minimum contacts between the forum (home of the plaintiff corporation) and the Illinois defendant who was ransoming two domain names. *Id.* at 621-22; *see* Nathenson, *supra* note 19, at 945-46 (discussing grounds for exercising jurisdiction over "squatters").

90. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300-01 (S.D.N.Y. 1996) (applying purposeful availment analysis), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1332-34 (E.D. Mo. 1996) (same); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (same); *see also* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123-26 (W.D. Pa. 1997) (noting that in cases involving commercial activity such as advertising, court's ability to find purposeful availment and personal jurisdiction depends on "the nature and quality of commercial activity that an entity conducts over the Internet"); *infra* Part IV (discussing standards for finding purposeful availment in World wide Web advertising cases). *But see* Expert Pages v. Buckalew, No. C-97-2109-VRW, 1997 WL 488011, at *2-3 (N.D. Cal. Aug. 6, 1997) (finding minimum contacts based on tortious effects of defendant's Internet-related conduct directed at forum); *infra* note 359 (discussing *Expert Pages*); Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456, 468-70 (D. Mass. 1997) (finding "purposeful availment" existed because of "effect" of defendant's World Wide Web activities); Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3, ¶¶ 54-58 (1997) <http://www.student.virginia.edu/~vjolt/vol1/BURK.htm> (arguing *CyberGold* court applied *Calder* effects test in its minimum contacts analysis); *infra* note 196 (questioning Professor Burk's interpretation of *CyberGold*).

the World Wide Web.[91] Regardless of the method of creating the contacts, the Supreme Court requires a "substantial connection" between the defendant and the forum before a court may constitutionally exercise personal jurisdiction.[92]

Part IV argues that World Wide Web advertisers can purposefully avail themselves of a forum through the World Wide Web.[93] However, the mere fact that a person puts an advertisement on the World Wide Web is insufficient to prove or disprove the existence of a substantial connection between a forum and a defendant.[94] A court faced with a jurisdictional allegation based on World Wide Web advertising contacts must conduct a fact-based analysis of the defendant's intent and reasonable expectations to determine whether the defendant fortuitously contacted the forum or whether the defendant purposefully availed itself of the forum through the World Wide Web.[95]

Based on the level of contacts between the defendant, the forum, and the litigation, a court may exercise two types of personal jurisdiction: general jurisdiction and specific jurisdiction.[96] General jurisdiction, which allows a court to exercise jurisdiction over any claim brought against the defendant, exists when the defendant's contacts with the forum are systematic and continuous.[97] Specific jurisdiction exists when the plaintiff's claim

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91. *See infra* Part IV (describing current and proposed methods for finding purposeful availment in World Wide Web advertising cases).

92. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (explaining need for substantial connection between forum and defendant before finding purposeful minimum contacts) (quoting McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)).

93. *See infra* Part IV.C (arguing that World Wide Web advertising contacts demonstrate purposeful availment in some situations).

94. *See infra* Part IV.B.1.c (describing defendant's mere awareness that World Wide Web advertising reaches forum as insufficient to support constitutional exercise of personal jurisdiction).

95. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (explaining that "the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there"); *infra* Part IV.C (explaining due process limits to finding substantial connections based on World Wide Web advertising).

96. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-63 (1966) (defining general and specific jurisdiction).

97. *See* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414-15 (1984) (noting relationship or connection between claim and contact not required for personal jurisdiction where defendant's forum related activities are continuous and systematic); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445-49 (1952) (finding due process satisfied by exercise of jurisdiction over claim unrelated to defendant's systematic and continuous business activity in forum); *see also* Tunick, *supra* note 6, at 1199-1210 (describing general

"arises from or relates to" the defendant's contacts with the forum.[98]

No court has yet exercised general jurisdiction over a nonresident World Wide Web advertiser and four factors make it unlikely that any court will make the attempt. First, courts rarely exercise general jurisdiction.[99] Second, World Wide Web advertising does not create systematic and continuous contacts.[100] Third, many courts have already refused to exercise

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jurisdiction and contacts supporting its exercise).

98. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985) (describing arise from or relate to requirement). Courts apply two different standards for the "arise from or relate to requirement." *See* Mark M. Maloney, Note, *Specific Personal Jurisdiction and the "Arise from or Relate to" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265, 1276-86 (1993) (describing different approaches to arise from or relate to requirement). In *Shute v. Carnival Cruise Lines*, the Ninth Circuit applied a "but for" test to determine whether the plaintiff's claim arose out of the defendant's contacts with the forum. Shute v. Carnival Cruise Lines, 897 F.2d 377, 385-86 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991), *discussed in* Maloney, *supra*, at 1278. In *Shute*, the Ninth Circuit found the plaintiff's claim of personal injury, which resulted from a slip and fall on a cruise ship in international waters off the coast of Mexico, sufficiently related to the defendant's "business solicitation activities" in the forum and allowed the exercise of personal jurisdiction in the forum. *Shute*, 897 F.2d at 382. Other courts apply a substantive-proximate cause test that does not allow the exercise of jurisdiction in cases similar to *Shute*. *See* Pizarro v. Hoteles Concorde Int'l, 907 F.2d 1256, 1259 (1st Cir. 1990) (refusing to exercise specific jurisdiction based on slip and fall injury in Aruba, where defendant's only contacts with forum constituted newspaper advertisements), *discussed in* Maloney, *supra*, at 1283-84; *see also* Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545, 1568-70 (1994) (describing "but for" causation analysis in personal jurisdiction cases); Maloney, *supra*, at 1268-82 (describing application of "but for" and "substantive-proximate cause" tests for specific personal jurisdiction). The substantive-proximate cause approach requires direct legal relevance between the contract and the claim. *See* Maloney, *supra*, at 1282-83 (describing substantive-proximate cause test). Regardless of what test is used, a close relationship between the contact and the claim increases the likelihood of finding personal jurisdiction. *See* Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (describing minimum contacts test's focus on "the relationship among the defendant, the forum, and the litigation"); *see also* Zbaracki, *supra* note 68, at 236-37 (describing importance of relationship between claim and contact in advertising cases). This Note does not consider whether the unique qualities of the World Wide Web should influence the selection of either the substantive-proximate cause test or the but-for test in the specific jurisdiction analysis. All of the specific jurisdiction World Wide Web cases decided as of this writing have involved trademark or other claims substantially related to the advertisement. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1127 (W.D. Pa. 1997) (noting trademark infringement claim arises in forum where substantial amount of injury occurs); Maloney, *supra*, at 1282 (explaining substantial relationship exists where contacts are proof of cause of action).

99. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 630-43 (1988) (noting that exercise of general jurisdiction has become rare).

100. *See* Weber v. Jolly Hotels, No. CIV. A. 96-2582, 1997 WL 574950, at *6 (D.N.J. Sept. 12, 1997) (explaining Internet advertising does not create continuous and substantial

general jurisdiction based on World Wide Web advertising contacts.[101] Finally, in most disputes involving World Wide Web advertising, courts will be able to exercise specific jurisdiction.[102] Accordingly, this Note discusses the constitutionality of attempts to exercise specific personal jurisdiction over World Wide Web advertisers.

### *B. Fairness and Reasonableness Considerations*

When the Supreme Court adopted the minimum contacts test in *International Shoe Co. v. Washington*,[103] fairness was an integral part of the single step minimum contacts test.[104] A court could exercise personal jurisdiction

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contacts with forum); *cf.* Reno v. ACLU, 117 S. Ct. 2329, 2343 (1997) (explaining World Wide Web sites are not as "invasive" as radio or television). In *Reno*, the Supreme Court struck down two key provisions of the Communication Decency Act of 1996 that attempted to regulate indecent and patently offensive speech. *Id.* at 2334. The Court placed great weight on the District Court's conclusion that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden." *Id.* at 2343 (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)); *see also* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 299 (S.D.N.Y. 1996) (noting it requires several affirmative steps to access World Wide Web advertisements), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997); Tunick, *supra* note 6, at 1199-1210 (describing high level of contacts necessary for finding of continuous and systematic contacts).

101. *See Weber*, 1997 WL 574950, at *5-6 (refusing to exercise general jurisdiction over World Wide Web advertiser); IDS Life Ins. Co. v. SunAmerica, Inc., 958 F. Supp. 1258, 1268 (N.D. Ill. 1997) (refusing to recognize World Wide Web advertising as continuous and systematic contact); McDonough v. Fallon McElligott, Inc., No. Civ. 95-4037, 1996 WL 753991, at *4 (S.D. Cal. Aug. 5, 1996) (refusing to exercise general jurisdiction based on maintenance of World Wide Web site accessible from forum); *see also* Naxos Resources Ltd. v. Southam, Inc., No. CV96-2314 WJR (MCX), 1996 WL 35387, at *2 (C.D. Cal. June 3, 1996) (refusing to exercise general jurisdiction based on electronic dissemination of newspaper articles via Internet, LEXIS, and Westlaw).

102. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1332-34 (E.D. Mo. 1996) (noting that litigation arose out of defendant's contacts with forum).

103. 326 U.S. 310 (1945).

104. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (adopting minimum contacts test). In *International Shoe*, the Supreme Court considered whether the Due Process Clause allowed the exercise of jurisdiction over a corporation not "present" within the forum. *Id.* at 315-16. Washington had sued International Shoe to recover unpaid contributions to the state's unemployment compensation fund. *Id.* at 311-12. International Shoe did not maintain an office in Washington, did not execute sales contracts in the forum, and did not keep any merchandise there. *Id.* at 313. However, International Shoe employed several salesmen in the state. *Id.* International Shoe argued that the exercise of personal jurisdiction violated due process because "its activities within the state were not sufficient to manifest its 'presence' there and that in its absence the state courts were without jurisdiction." *Id.* at 315. The Supreme Court rejected the company's argument. *Id.* at 316. The Court explained that traditional fictions such as corporate presence were unnecessary to establish personal jurisdic-

so long as the defendant maintained sufficient minimum contacts such that maintenance of the suit did not violate traditional notions of fair play and substantial justice.[105] In *World-Wide Volkswagen Corp. v. Woodson*,[106] the Supreme Court separated the fairness inquiry from the minimum contacts analysis and transformed the *International Shoe* minimum contacts test into a two-step inquiry.[107] The Supreme Court decided that once a court finds

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tion, so long as the defendant established "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The Court found that a corporation's exercise of the privilege of conducting activities within a forum "may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *Id.* at 319. The Court noted that International Shoe's salesmen lived in Washington, worked within Washington, and received commissions based on their sales in Washington. *See id.* at 313-14 (describing International Shoe's contacts with Washington). Based on these and other contacts, the Court found Washington's exercise of jurisdiction constitutional. *Id.* at 320. The Court also found that the defendant had received sufficient notice of the suit and that Washington had the power to levy a tax based on defendant's employment of salesmen in the forum. *Id.* at 320-21.

Justice Black concurred on different grounds in a separate opinion. *Id.* at 322 (Black, J., concurring). He argued that Washington had the power to levy the tax in question by virtue of congressional consent and prior court decisions. *Id.* In addition, he argued against adopting broad rules concerning due process. *Id.* Justice Black cautioned that ultimately the Court's decision could be used to restrict state or federal power on the ground that "it does not conform to this Court's idea of natural justice." *Id.* at 326.

105. *See id.* at 316 (adopting minimum contacts test).

106. 444 U.S. 286 (1980).

107. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980) (adding fairness and reasonableness analysis to *International Shoe* minimum contacts test). In *World-Wide Volkswagen*, the Supreme Court considered whether the Oklahoma courts could exercise personal jurisdiction over a New York car dealer (Seaway) and a regional distributor incorporated in New York (World-Wide Volkswagen) based on contacts proximately created by the car buyer. *Id.* at 288-89. The plaintiffs purchased a car in New York. *Id.* at 288. The car exploded after a collision in Oklahoma. *Id.* The plaintiffs argued that the car's presence in Oklahoma was a foreseeable consequence of selling automobiles and that the accident created sufficient contacts between the defendants and the forum. *Id.* at 295. However, the Court explained that although the plaintiffs' unilateral action in taking the car to Oklahoma was foreseeable, that unilateral action and the accident were insufficient to create minimum contacts between the defendants and the forum. *Id.* at 298 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1957)). The Court found "no 'contacts, ties, or relations'" sufficient to subject the defendants to personal jurisdiction in Oklahoma. *Id.* at 299 (quoting *International Shoe*, 326 U.S. at 319). In the course of its opinion, the Court also noted that in addition to determining whether the minimum contacts test allows the exercise of jurisdiction, a court should also determine whether the exercise of jurisdiction would be fair and reasonable. *Id.* at 292; *see infra* notes 108-09 and accompanying text (describing *World-Vide Volkswagen* fairness and reasonableness factors).

that minimum contacts exist, that court must then consider five fairness and reasonableness considerations that may affect its ability to exercise personal jurisdiction.[108] According to the Court, these considerations include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies."[109] These considerations are double-edged, because they can restrict or broaden a court's jurisdictional reach.[110] However, in all cases, these fairness and reasonableness consider-

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Justice Brennan dissented. *Id.* at 299 (Brennan, J., dissenting). Justice Brennan criticized the Court for giving insufficient weight to Oklahoma's interests and for failing to determine whether the defendants would suffer any actual inconvenience. *Id.* at 299-300. He also criticized the Court for accepting the proposition that a defendant could be haled into a forum when it places products into the stream of commerce with the expectation that the products will be purchased in the forum, while rejecting the proposition that a defendant could be haled into court when a consumer brings a product "*intended* to be moved around" into the forum. *Id.* at 306-07. Justice Brennan concluded that there was a strong connection between the defendants and Oklahoma and that the defendants had received sufficient benefits from the forum which allowed the constitutional exercise of personal jurisdiction. *Id.* at 307.

Justice Marshall, joined by Justice Blackmun, also dissented. *Id.* at 313 (Marshall, J., dissenting). Justice Marshall argued that jurisdiction in this case was not premised on an isolated incident, but was instead premised "on the deliberate and purposeful actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles." *Id.* at 313-14. Justice Marshall emphasized that it was fair to require a commercial actor to answer for the consequences of its commercial activities in those forums were the activities cause negative effects. *Id.* at 317. In a separate dissenting opinion, Justice Blackmun added that automobiles regularly travel across state lines and that the defendants received benefits from Oklahoma, including its maintenance of its roads. *Id.* at 318-19 (Blackmun, J., dissenting). Justice Blackmun argued that *International Shoe* allowed the exercise of jurisdiction in this and similar cases involving automobile retailers and distributors. *Id.* at 319.

108. *See id.* at 291-92 (describing role of fairness and reasonableness in minimum contacts test).

109. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (internal quotation marks omitted) (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

110. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 113 (1987) (O'Connor, J., plurality opinion) (explaining Due Process Clause forbids unreasonable assertions of personal jurisdiction and refusing to exercise jurisdiction despite finding of minimum contacts between defendant and forum because of fairness concerns); *Burger King*, 471 U.S. at 477 (describing role of fairness and reasonableness in minimum contacts analysis). In *Burger King*, the Court explained: "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* at 477 (internal citations omitted) (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780

ations ensure that a court's attempted exercise of jurisdiction satisfies "traditional notions of fair play and substantial justice."[111] These fairness and reasonableness considerations may become critical for the proper measurement of World Wide Web advertising contacts.[112]

### *IV. Purposeful Minimum Contacts Arising from World Wide Web Advertisements*

This Part discusses the standards for finding purposeful minimum contacts in World Wide Web advertising cases. It begins by discussing the initial hurdles to finding purposeful minimum contacts in World Wide Web advertising cases.[113] It continues with a discussion of the current standards for analyzing World Wide Web advertising contacts.[114] Finally, Part IV suggests that courts adopt a flexible two-step approach for analyzing World Wide Web advertising contacts.[115]

#### *A. Initial Hurdles*

Unique features of the World Wide Web and the Internet create initial, yet surmountable, hurdles to finding purposeful minimum contacts in World Wide Web advertising cases. The World Wide Web's system for transferring information complicates attempts to find purposeful availment.[116] In addition, the Internet's internal structure makes it difficult to determine which forums the advertiser intends or should reasonably expect its advertisement to reach.[117]

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(1984); Calder v. Jones, 465 U.S. 783, 788-89 (1984); McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957)).

111. Milliken v. Meyer, 311 U.S. 457, 463 (1940), *quoted in* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). *But see* Stephens, *supra* note 76, at 105-06 (calling modern two-step minimum contacts test unworkable).

112. *See infra* Part V (discussing importance of fairness and reasonableness considerations in World Wide Web advertising cases).

113. *See infra* Part IV.A (discussing initial hurdles to finding purposeful minimum contacts).

114. *See infra* Part IV.B (discussing and criticizing current World Wide Web jurisdictional jurisprudence).

115. *See infra* Part IV.C (suggesting standard for analyzing World Wide Web advertising contacts).

116. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (requiring purposeful availment of forum by defendant); *infra* Part IV.A.1 (discussing jurisdictional implications of World Wide Web's request-and-response system).

117. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (requiring purposeful direction of activities toward residents of forum); *infra* Part IV.A.2 (discussing Internet's and World Wide Web's geographic insensitivity).

### 1. *The World Wide Web's Request-and-Response System*

The World Wide Web's request-and-response system for transferring information creates superficial minimum contacts difficulties.[118] World Wide Web publishers place information on World Wide Web sites located in a particular forum and connected to the Internet.[119] World Wide Web users who want to access the advertisement send a request to the computer that contains the publisher's World Wide Web site, and the site's computer automatically responds to the user by sending the requested World Wide Web page.[120] In this system, the advertisement only enters the forum upon the request of the user.[121]

The unilateral action of a third party cannot establish minimum contacts under *International Shoe*.[122] In the request-and-response system, a World Wide Web user normally must take several affirmative steps to gain access to a World Wide Web advertisement.[123] This raises the analytical problem of whether the user avails himself of the forum where the World Wide Web site is located or whether the advertiser avails himself of the forum where the user is located.[124] However, the problem is more apparent than real for purposeful availment purposes.

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118. *See* Burk, *supra* note 23, at 1111-15 (describing potential jurisdictional impact of World Wide Web's request-and-response system).

119. *See* ACLU v. Reno, 929 F. Supp. 824, 837 (E.D. Pa. 1996) (describing World Wide Web publishing), *aff'd*, 117 S. Ct. 2329 (1997). The World Wide Web's technical operation is not always as clean as this statement indicates. For example, the common practice of caching (storing) copies of popular World Wide Web pages on different computers to ease Internet traffic often obscures the actual location of the World Wide Web page and other Internet resources. *See id.* at 848-49 (describing problems in identifying origin of Internet content because of caching).

120. *See* Reno v. ACLU, 117 S. Ct. 2329, 2343 (1997) (noting World Wide Web pages do not reach user unbidden). Some World Wide Web advertisements, particularly banner advertisements, reach the user without conscious effort by the user. *See* Quittner, *supra* note 72, at 34 (noting World Wide Web site operators place banner advertisements on non-advertising World Wide Web sites). In addition, sometimes users access advertisements by mistake. *But cf. Reno*, 117 S. Ct. at 2336 (noting that users rarely encounter sexually explicit material by accident).

121. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 299 (S.D.N.Y. 1996) (noting several affirmative steps required by forum resident to access foreign World Wide Web advertisement), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

122. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (interpreting *International Shoe* minimum contacts test as forbidding exercise of personal jurisdiction unless defendant purposefully avails itself of forum); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (adopting minimum contact test).

123. *See Bensusan*, 937 F. Supp. at 299 (describing access of World Wide Web sites).

124. *See* Burk, *supra* note 23, at 1111-15 (describing purposeful availment issues raised by request-and-response system).

In stream of commerce cases, courts have rejected attempts by manufacturers to insulate themselves from findings of purposeful minimum contacts through the creation of complex product distribution and marketing systems.[125] The key factor weighing in favor of finding purposeful availment in those stream of commerce cases has been the actual placement of the product into the stream of commerce.[126] Similarly, the World Wide Web's unique distribution system should not insulate publishers from findings of purposeful minimum contacts simply because a World Wide Web advertisement, continuously available to forum residents, only enters the forum upon the request of the advertiser.[127]

An advertiser does everything necessary for its advertisement to reach a forum when it places its advertisement on the World Wide Web.[128] This interpretation eliminates the superficial obstacle to finding purposeful minimum contacts posed by the World Wide Web's request-and-response system.[129] However, due process still requires an analysis of the advertiser's

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125. *See* Poyner v. Erma Werke Gmbh, 618 F.2d 1186, 1190 (6th Cir. 1980) (exercising personal jurisdiction over manufacturer who used independent distributor), *discussed in* Stephens, *supra* note 76, at 111; Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta, 553 F. Supp. 328, 331 (E.D. Pa. 1982) (exercising personal jurisdiction over manufacturer "once or twice removed" from final sale), *discussed in* Stephens, *supra* note 76, at 111-12; Rostad v. On-Deck, Inc., 372 N.W.2d 717, 720-22 (Minn. 1985) (exercising personal jurisdiction over defendant who used independent distributors to distribute products in forum and citing other cases where courts exercised personal jurisdiction over defendants who established indirect contacts with forum through stream of commerce), *cited in* State v. Granite Gate Resorts, Inc., No. C6-97-89, 1997 WL 557670, at *5 (Minn. Ct. App. Sept. 5, 1997).

126. *See* Stephens, *supra* note 76, at 111-12 (describing irrelevance of complex distribution systems in minimum contacts analysis).

127. *See* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (emphasizing continuous availability of World Wide Web advertisement in forum).

128. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1332 (E.D. Mo. 1996) (describing purposefulness of placing advertisements on World Wide Web). The *CyberGold* court stated: "By simply setting up, and posting information at, a website in the form of an advertisement or solicitation, one has done everything necessary to reach the global internet audience." *Id.*

129. *See* State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *7 (Minn. Dist. Ct. Dec. 11, 1996) (rejecting defendant's argument that posting World Wide Web advertisement does not constitute purposeful availment), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997). The *Granite Gate* court also quotes Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032, 1044 (S.D.N.Y. 1996), which although not a personal jurisdiction case, explains the legal significance of the World Wide Web's request-and-response system. *Granite Gate*, 1996 WL 767431, at *9. In *Chuckleberry*, the United States District Court for the Southern District of New York stated: "By inviting United States users to download these images, Tattilo is causing and contributing to their distribution within the United States." *Chuckleberry*, 939 F. Supp. at 1044. However, the *Chuckleberry*

intent and reasonable expectations to determine whether the advertiser actually established contacts with the forum that give rise to the foreseeability of suit within the forum.[130]

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court refused to find that it could prohibit the defendant from operating a World Wide Web site merely because the defendant's site was accessible within the forum. *Chuckleberry*, 939 F. Supp. at 1039. The *Chuckleberry* court explained that "[s]uch a holding would have a devastating impact on those who use this global service." *Id.* at 1039-40; *see* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (refusing to exercise personal jurisdiction based on mere availability of World Wide Web advertisement in forum), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

The Supreme Court's decision in Reno v. ACLU, 117 S. Ct. 2329 (1997), may also ultimately affect the legal significance of the World Wide Web's request-and-response system in the minimum contacts analysis. In *Reno*, the Court declared two key provisions of the Communications Decency Act of 1996 (CDA) unconstitutional on First Amendment grounds. *See id.* at 2334 (finding provisions designed to protect minors from "indecent" and "patently offensive" speech unconstitutional). Both the district court and the Supreme Court were influenced by the fact that several affirmative steps are required to access information on the Internet and its World Wide Web. ACLU v. Reno, 929 F. Supp. 824, 844-45 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997); Reno v. ACLU, 117 S. Ct. 2329, 2343 (1997). The district court explained that "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial." *ACLU*, 929 F. Supp. at 845. The Supreme Court agreed with the district court's use of the "dial-a-porn" case, Sable Communications of California v. FCC, 492 U.S. 115 (1989), to measure the constitutionality of the CDA. *Reno*, 117 S. Ct. at 2346. Like the district court, the Supreme Court took note of the fact that "the Internet is not as 'invasive' as radio or television." *Id.* at 2343; *cf. Bensusan*, 937 F. Supp. at 299 (noting several affirmative steps required to access World Wide Web page).

It remains to be seen which of three alternatives courts will ultimately adopt concerning the jurisdictional significance of the request-and-response system: (1) that the method of transmission is irrelevant; (2) that the method of transmission weighs against a finding of purposeful availment; or (3) that the method of transmission prevents a finding of purposeful availment based on World Wide Web advertising contacts.

130. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (explaining importance of foreseeability of suit in minimum contacts analysis). In *World-Wide Volkswagen*, the Court explained that

> the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

*Id.* While placement of products into the stream of commerce constitutes a purposeful act, there still remains a question concerning which forums the defendant attempted to reach. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion) (requiring additional conduct by defendant indicating intent to serve forum); *id.* at 116-17 (Brennan, J., concurring) (rejecting additional conduct approach, but still requiring defendant's awareness that products are marketed in forum). Similarly, although placement of an advertisement on the World Wide Web constitutes a purposeful act, there still remains a question concerning which forums the advertiser attempted to reach.

### 2. *The Internet's Geographic Insensitivity*

The Internet — including its World Wide Web — has an expansive geographic reach that allows information to pass without reference to limits imposed by territorial borders.[131] This feature gives advertisers access to consumers located throughout the United States and around the world.[132] However, this geographic insensitivity also complicates efforts to direct or to limit the geographical reach of an advertisement.[133] A World Wide Web user in New York usually accesses World Wide Web sites with little or no knowledge of whether the information accessed is stored on a computer in New York, California, or Great Britain.[134] Similarly, many World Wide Web advertisers possess little reliable information concerning the physical location of users who access their advertisements.[135] Even where the advertiser possesses such information concerning the user's location, technological

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131. *See* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (describing Internet's global reach), *aff'd*, 117 S. Ct. 2329 (1997); Johnson & Post, *supra* note 27, at 1370-71 (describing ease of trans-border Internet communication).

132. *See ACLU*, 929 F. Supp. at 831 (describing world wide reach of World Wide Web).

133. *See* Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456, 462-63 (D. Mass. 1997) (discussing Internet's lack of territorial boundaries and difficulty in controlling dissemination of information); *see also* American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 171 (S.D.N.Y. 1997) (discussing infeasibility of restricting access to Internet communications). In *American Libraries Ass'n*, several organizations challenged a New York law that criminalized distribution of pornographic materials to minors via the Internet and other computer communications networks. *Id.* at 161-64. Likening the Internet to a highway or railroad, the district court found that New York's statute violated the Commerce Clause. *Id.* at 161, 183-84. The court observed:

> An internet user who posts a Web page cannot prevent New Yorkers or Oklahomans or Iowans from accessing that page and will not even know from what state visitors to that site hail. Nor can a participant in a chat room prevent other participants from a particular state from joining the conversation. Someone who uses a mail exploder is similarly unaware of the precise contours of the mailing list that will ultimately determine the recipients of his or her message, because users can add or remove their names from a mailing list automatically. Thus, a person could choose a list believed not to include any New Yorkers, but an after-added New Yorker would still receive the message.

*Id.* at 171.

134. *See* Burk, *supra* note 23, at 1111 (describing Internet user's disinterest in or ignorance of geographic locations of Internet resources).

135. *Id.* (describing World Wide Web site owner's ignorance of identity of its site's users). *But see* State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *8-9 (Minn. Dist. Ct. Dec. 11, 1996) (noting activities of World Wide Web advertiser who collected information concerning user's identity and geographic location), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997).

limitations render attempts to control access to World Wide Web advertisements ineffectual or self-defeating.[136]

The Internet's, and consequently the World Wide Web's, geographical insensitivity places the issue of purposefulness at the heart of World Wide Web advertising cases.[137] Purposeful minimum contacts arise when the defendant purposefully avails himself of the benefits and protections of the forum's laws[138] or when the defendant engages in conduct directed toward the forum that has foreseeable negative effects in the forum.[139] However, the geographic indifference surrounding most transmissions of information on the World Wide Web leaves courts without a reliable guide of the defendant advertiser's intent and reasonable expectations.[140] Did the advertiser intend to avail itself of a limited number of forums,[141] of every forum,[142] or of

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136. *See ACLU*, 929 F. Supp at 844-49 (describing difficulties restricting access to sexually explicit material on Internet); *American Library Ass'n*, 969 F. Supp. at 171 (S.D.N.Y. 1997) (explaining "no aspect of the Internet can feasibly be closed off to users from another state"). The *American Libraries Ass'n* court explained that

> an 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.

*Id.* at 183.

137. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (requiring purposeful direction of activities toward forum before exercising personal jurisdiction). In *Burger King*, the Court called the purposeful minimum contacts requirement "the constitutional touchstone" of the minimum contacts analysis. *Id.* at 474.

138. See Hanson v. Denckla, 357 U.S. 235, 253 (1958) (explaining purposeful availment requirement).

139. *See* Calder v. Jones, 465 U.S. 783, 789-91 (1984) (introducing effects test); *see also supra* Part III.A (describing purposeful minimum contacts analysis).

140. *See* Burk, *supra* note 23, at 1109-11 (discussing virtual contacts). Professor Burk argues that application of the minimum contacts test to Internet contacts would lead to anomalous results because "the network's structural indifference to geographic position is incongruous with the fundamental assumptions underlying the *International Shoe* test." *Id.* at 1109.

141. *See* Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40, 43 (8th Cir. 1988) (finding advertisement in nationally circulated trade magazine insufficient to establish purposeful availment of forum). The *Lake Havasu* court found that the defendant (whose business was centered in Arizona and California) had directed its advertisement toward those forums and not toward Minnesota. *Id.*

142. *See* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (noting that "Instruction has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states").

"Cyberspace"[143] itself?[144] Does the placement of an advertisement on the World Wide Web alert the defendant to the reasonable foreseeability of suit within every forum the advertisement reaches?[145] Although it is unlikely that courts would ever recognize "Cyberspace" as a unique jurisdiction free from control by territorial-based courts,[146] the courts disagree about whether the

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143. *See* STEVEN E. MILLER, CIVILIZING CYBERSPACE: POLICY, POWER, AND THE INFORMATION SUPERHIGHWAY 1 (1996). Cyberspace is a term of art. According to Miller, Cyberspace "represents the transformation of communications technology from a connection between locations into a location of its own." *Id.* The term Cyberspace was coined by science fiction writer William Gibson well before the Internet gained public prominence. WILLIAM GIBSON, NEUROMANCER 51 (1984). Gibson defined Cyberspace as "[a] consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts . . . A graphic representation of data abstracted from the banks of every computer in the human system." *Id.* Psychologist Sherry Turkle describes Cyberspace as a psychological phenomenon:

> The use of the term "cyberspace" to describe virtual worlds grew out of science fiction, but for many of us, cyberspace is now part of the routines of everyday life. When we read our electronic mail or send postings to an electronic bulletin board or make an airline reservation over a computer network, we are in cyberspace. In cyberspace, we can talk, exchange ideas, and assume personae of our own creation. We have the opportunity to build new kinds of communities, virtual communities, in which we participate with people from all over the world, people with whom we converse daily, people with whom we may have fairly intimate relationships but whom we may never physically meet.

SHERRY TURKLE, LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET 9-10 (1996) (footnote omitted). Even the Supreme Court has described Cyberspace as a unique place: "Taken together, these tools constitute a unique medium — known to its users as 'cyberspace' — located in no particular geographic location but available to anyone, anywhere in the world, with access to the Internet." Reno v. ACLU, 117 S. Ct. 2329, 2334-35 (1997).

144. *See* Swedlow, *supra* note 19, at 378-81 (describing nonterritorial "paradigm" for evaluating personal jurisdiction claims against World Wide Web advertisers).

145. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (noting defendant must have "fair warning" of possibility of suit within forum); World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980) (noting defendant's conduct must give rise to reasonable anticipation of suit within forum).

146. *See supra* note 27 (describing efforts to regulate Internet). Some scholars support the establishment of Cyberspace as its own jurisdiction. *See* Johnson & Post, *supra* note 27, at 1367-68 (calling for new jurisdiction: Cyberspace). Johnson and Post argue:

> Global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility — and legitimacy — of laws based on geographic boundaries. While these electronic communications play havoc with geographic boundaries, a new boundary, made up of screens and passwords that separate the virtual world from the "real world" of atoms, emerges.

*Id.* at 1367; *see also* Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1743-44 (1995) (discussing options of regulating Cyberspace by analogy to past or starting anew). In

simple act of placing an advertisement on the World Wide Web constitutes purposeful availment of every forum the World Wide Web reaches.[147]

### B. Current Approaches to Weighing World Wide Web Advertising Contacts

Courts began active consideration of the jurisdictional effect of World Wide Web advertising in early 1996.[148] Several courts have since decided that World Wide Web advertising creates a substantial connection with the forum that allows or at least weighs in favor of the exercise of specific personal jurisdiction.[149] For these courts, the mere placement of an advertisement on the World Wide Web creates a substantial connection with the forum.[150] However, another court has decided that World Wide Web advertising contacts alone do not create a substantial connection with a forum and do not support the exercise of specific personal jurisdiction.[151] This court

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addition, some argue that legal events can occur in Cyberspace. *See* Kwatra v. MCI, Inc., No. 96 Civ. 2491 (DC), 1996 WL 694444, at *3 (S.D.N.Y. Dec. 4, 1996) (noting plaintiffs' argument that case's events occurred in "New York, New Jersey, Virginia, and Cyberspace").

Whether or not the courts ever recognize "Cyberspace" as a jurisdiction, every Internet user remains subject to at least one jurisdiction. *See* Richard S. Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 346-47 (1996) (describing continued effectiveness of real world jurisdictional paradigms).

147. *Compare* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (noting placement of advertisement on World Wide Web is purposefully directed toward all states), *with* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (finding mere placement of advertisement on World Wide Web does not constitute purposeful availment of forum), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

148. *See Inset*, 937 F. Supp. at 162-63 (describing defendant's World Wide Web advertising activities).

149. *See id.* at 165 (exercising personal jurisdiction over World Wide Web advertiser); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1332-34 (E.D. Mo. 1996) (finding sufficient minimum contacts between forum and defendant for exercise of specific jurisdiction); State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *8-10 (Minn. Dist. Ct. Dec. 11, 1996) (finding minimum contacts between defendant and forum), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997); Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 5 (D.D.C. 1996) (weighing defendant's World Wide Web advertisement in favor of exercise of jurisdiction).

150. *See CyberGold*, 947 F. Supp. at 1333 (noting that transmission of advertising information to all Internet users favors exercise of personal jurisdiction); *Inset*, 937 F. Supp. at 165 (noting that Internet and toll-free telephone numbers are designed to reach residents of every state); *Granite Gate*, 1996 WL 767431, at *10 (explaining that placement of solicitation on Internet establishes minimum contacts with forum).

151. *See Bensusan*, 937 F. Supp. at 301 (finding that placement of advertisement on World Wide Web does not demonstrate purposeful availment of forum); *see also* Weber v.

explained that proof of additional conduct, beyond mere placement of an advertisement on the World Wide Web, is necessary to establish a substantial connection.[152]

The prevailing approaches for analyzing World Wide Web advertising contacts — "mere placement" and "additional conduct" — derive from the approaches developed by Justice O'Connor and Justice Brennan in the stream of commerce case *Asahi Metal Industry Co. v. Superior Court.*[153] Unfortu-

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Jolly Hotels, No. CIV. A. 96-2582, 1997 WL 574950, at *6 (D.N.J. Sept. 12, 1997) (finding placement of advertisement on Internet does not constitute purposeful availment); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (exercising personal jurisdiction over defendant, but citing *Bensusan* and noting passive World Wide Web advertisement alone does not establish purposeful availment of forum); Graphic Controls Corp. v. Utah Medical Prods., Inc., No. 96-CV-0459E(F), 1997 WL 276232, at *3-4 (W.D.N.Y. May 21, 1997) (finding toll-free telephone number and information available on Internet do not demonstrate purposeful availment of any particular forum, including New York); Hearst Corp. v. Goldberger, No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097, at *21 (S.D.N.Y. Feb. 26, 1997) (mag. j. report and recommendation) (recommending court not exercise personal jurisdiction over nonresident World Wide Web advertiser).

152. *See Bensusan*, 937 F. Supp. at 301 (explaining need for additional evidence suggesting defendant purposefully availed itself of forum).

153. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion) (finding additional conduct required to create substantial connection between contact and claim in stream of commerce case); *id.* at 117 (Brennan, J., concurring) (finding defendant's mere awareness that product is marketed in forum establishes foreseeability of suit). In *Asahi*, the Court considered whether California could exercise personal jurisdiction over an alien defendant based on the defendant's mere awareness that the component parts it placed into the stream of commerce would reach the forum State. *Id.* at 105. *Asahi* involved a third-party indemnification action brought by a Taiwanese manufacturer against a Japanese supplier. *Id.* at 106. The indemnification action arose out of a products liability suit brought in California by an injured California resident against the Taiwanese manufacturer. *Id.* at 105-06. The plaintiff and original defendant settled the products liability suit, thus leaving only the indemnification action. *Id.* at 106. The third-party defendant's only contacts with the forum consisted of the sale of tire valve assemblies to the Taiwanese manufacturer who incorporated the valve assemblies into tires in Taiwan and then distributed the tires worldwide. *Id.* Some of the tires reached California. *Id.*

The Court found, eight-to-zero, that the exercise of personal jurisdiction over the Japanese defendant was unreasonable and unfair under the Due Process Clause because of "the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum state." *Id.* at 116. However, the Court split four-to-four over whether the defendant purposefully availed itself of California. *Id.* at 104, 112-13 (O'Connor, J., plurality opinion), 117 (Brennan, J., concurring). Justice O'Connor argued that the defendant's mere awareness that products placed into the stream of commerce might or would enter the forum did not satisfy due process. *Id.* at 112 (O'Connor, J., plurality opinion). She argued that purposeful availment required additional conduct indicating the defendant's intent to serve the forum market. *Id.* Justice Brennan argued that the defendant's mere awareness that a product is marketed in the forum establishes the foreseeability of suit in the forum. *Id.* at 117 (Brennan, J., concurring).

nately, both the mere placement and the additional conduct approaches are too rigid to provide a consistently constitutional minimum contacts analysis in World Wide Web advertising cases.[154] Instead, courts should adopt a more flexible minimum contacts analysis that recognizes the great variation in the quality and nature of World Wide Web advertisements themselves.[155]

### *1. The Mere Placement Approach to World Wide Web Advertising Contacts*

Three courts have used the mere placement approach to World Wide Web advertising contacts to assert jurisdiction over nonresident defendants.[156] In *Inset Systems, Inc. v. Instruction Set, Inc.*,[157] the United States District Court for the District of Connecticut exercised personal jurisdiction over a Massachusetts computer company whose Internet (World Wide Web)[158] advertisement contained elements that allegedly infringed the plaintiff's trademarks.[159] In *Maritz, Inc. v. CyberGold, Inc.*,[160] the United States

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Justice Stevens refused to join either opinion on the issue of purposeful availment. *Id.* at 121 (Stevens, J., concurring). He argued that a determination of purposeful availment and minimum contacts was unnecessary once the Court determined that the exercise of jurisdiction was unfair and unreasonable. *Id.* at 122.

154. *See infra* Part IV.B.1.c (describing difficulties in applying mere placement approach); *infra* Part IV.B.2.c (describing difficulties in applying additional conduct approach).

155. *See infra* Part IV.C (suggesting flexible two-step approach for analyzing World Wide Web advertising contacts).

156. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1334 (E.D. Mo. 1996) (exercising jurisdiction over nonresident World Wide Web advertiser); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (exercising jurisdiction over nonresident based on existence of defendant's World Wide Web advertisement and toll-free telephone number); State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *6-11 (Minn. Dist. Ct. Dec. 11, 1996) (exercising personal jurisdiction based on World Wide Web advertising contacts), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997).

157. 937 F. Supp. 161 (D. Conn. 1996).

158. The *Inset* court refers to Instruction Set's World Wide Web advertisement as an Internet advertisement throughout the opinion. This Note, for the sake of uniformity, describes the defendant's advertisement as a World Wide Web advertisement. *See* Burk, *supra* note 23, at 1111 n.70 (noting that *Inset* involved World Wide Web site).

159. *See* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1995)(exercising personal jurisdiction over nonresident World Wide Web advertiser); *see infra* Part IV.B.1.a.i (discussing *Inset*). The *Inset* court found both the Connecticut long-arm statute and the Due Process Clause satisfied. *Id.* at 162. First, the court found that Instruction Set's activities satisfied the Connecticut long-arm statute which allowed the exercise of jurisdiction over any claim arising "out of any business solicited in this state by mail or otherwise if the corporation has repeatedly so solicited business" *Id.* at 163-64 & n.2. The court then found that the defendant's advertising activities constituted purposeful availment of Connecticut and

District Court for the Eastern District of Missouri also exercised jurisdiction over a nonresident advertiser whose World Wide Web advertisement contained allegedly infringing marks.[161] Finally, in *State v. Granite Gate Resorts, Inc.*,[162] a Minnesota state district court exercised personal jurisdiction over a World Wide Web advertiser on consumer protection-related claims.[163] In each case, the courts found the mere use of the World Wide Web for advertising contributed to, or fully established, minimum contacts and justified the court's exercise of specific personal jurisdiction.[164]

This Section begins with a description of the facts of and the minimum contacts analysis applied in *Inset*, *CyberGold*, and *Granite Gate*.[165] It continues with an argument that the mere placement approach derives from the stream of commerce analysis used by Justice Brennan in his concurring opinion in *Asahi*.[166] This Section concludes that mere placement approach

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that the exercise of jurisdiction satisfied traditional notions of fair play and substantial justice. *Id.* at 164-65.

160. 947 F. Supp. 1328 (E.D. Mo. 1996).

161. Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1334 (E.D. Mo. 1996) (exercising personal jurisdiction over nonresident World Wide Web advertiser); *see infra* Part IV.B.1.a.ii (discussing *CyberGold*). The *CyberGold* court found both state and federal personal jurisdiction requirements satisfied. *Id.* The court refused to determine whether placement of an advertisement on the World Wide Web satisfied "transaction of any business" provision in Missouri's long-arm statute. *Id.* at 1331. Instead, the Court found that the advertisement satisfied the statute's "commission of tortious act" provision because of the allegations of trademark infringement. *Id.* The court then determined that the exercise of jurisdiction satisfied due process. *Id.* at 1332-34; *infra* note 196 (discussing *CyberGold* court's minimum contacts analysis).

162. No. C6-95-7227, 1996 WL 767431 (Minn. Dist. Ct. Dec. 11, 1996).

163. State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *11 (Minn. Dist. Ct. Dec. 11, 1996) (exercising personal jurisdiction over World Wide Web advertiser), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997); *see infra* Part IV.B.1.a.iii (discussing *Granite Gate*). The district court combined its long-arm jurisdiction analysis and its minimum contacts analysis because Minnesota's long-arm statute extends to the limits of the Due Process Clause. *Id.* at *6 (discussing Minnesota's due process analysis) (citing Marquette Nat'l Bank v. Norris, 270 N.W.2d 290, 294 (Minn. 1978) (explaining Minnesota's transacting business provision in long-arm statute extends jurisdiction to limits of due process)).

164. *See CyberGold*, 947 F. Supp. at 1333 (finding defendant "consciously decided to transmit advertising information to all internet users," including Missouri Internet users); *Inset*, 937 F. Supp. at 163 (explaining defendant directed its advertising to all Internet users, including Connecticut Internet users); *Granite Gate*, 1996 WL 767431, at *10 (finding World Wide Web advertisement established in anticipation of access "by any and all Internet users, including Minnesota residents).

165. *See infra* Part IV.B.1.a (discussing *Inset*, *CyberGold*, and *Granite Gate*).

166. *See infra* Part IV.B.1.b (discussing Justice Brennan's mere awareness test).

is too inflexible for consistently constitutional application of the minimum contacts test to World Wide Web advertising contacts.[167]

### *a. The Mere Placement Approach in Practice*

#### *i.* Inset Systems, Inc. v. Instruction Set, Inc.

*Inset* involved a trademark dispute between two computer companies.[168] The Connecticut plaintiff, Inset, brought suit in Connecticut against the Massachusetts defendant, Instruction Set, on a variety of claims including trademark infringement.[169] Instruction Set maintained a World Wide Web site with the domain name "inset.com"[170] and the toll-free telephone number "1-800-US-INSET."[171] Inset owned the federally registered trademark "Inset."[172] The court found minimum contacts despite the defendant's assertions that it did not regularly conduct business in Connecticut and that it did not have employees in the state.[173] The court based its finding of minimum contacts primarily on the defendant's World Wide Web advertising activities.[174]

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167. *See infra* Part IV.B.1.c (explaining deficiencies in mere placement test).

168. *See* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 162 (D. Conn. 1996) (describing plaintiff's and defendant's businesses).

169. *See id.* at 161-62 (describing plaintiff's claims). The plaintiff's additional claims included state trademark infringement, unfair competition, dilution, injury to business reputation, and unfair trade practices. *Id.* at 162.

170. *See* KROL & FERGUSON, supra note 23, at 33-38 (discussing domain names). Domain names are simply the addresses of computers that host World Wide Web sites, or perform other Internet functions. *Id.* Examples of domain names include "whitehouse.gov," "wlu.edu," and "ibm.com." Internet domain names and addresses have caused countless disputes because of relatively lax registration standards that allow individuals to register Internet addresses containing either registered trademarks or other names highly suggestive of easily recognized corporations, events, or products. *See* Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 619 (C.D. Cal. 1996) (describing Toeppen's registration and ransoming of domain names such as "camdenyards.com," "frenchopen.com," and "aircanada.com"). Many cases involving the Internet and the World Wide Web, including World Wide Web advertising cases, center on disputes involving domain names. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1121 (W.D. Pa. 1997) (involving dispute over, *inter alia*, rights to addresses "zippo.com," "zippo.net," and "zipponews.com"); *Toeppen*, 938 F. Supp. at 619 (involving dispute over rights to "panavision.com" and "panaflex.com"); *Inset*, 937 F. Supp. at 163 (involving, *inter alia*, rights to address "inset.com"); MTV Networks v. Curry, 867 F. Supp. 202, 203-04 (S.D.N.Y. 1994) (concerning operation of "mtv.com" by former MTV employee).

171. *Inset*, 937 F. Supp. at 163.

172. *Id.*

173. *See id.* at 164 (noting defendant's arguments urging dismissal on jurisdictional grounds).

174. *See id.* at 164-65 (finding minimum contacts based on defendant's World Wide Web

The *Inset* court began its minimum contacts analysis by noting that Instruction Set's advertising activities had several unique characteristics that justified the court's finding of minimum contacts.[175] First, the court noted that World Wide Web advertising and toll-free telephone numbers "are designed to communicate with people and their businesses in every state."[176] Next, the court observed that World Wide Web advertisements could reach as many as ten thousand Connecticut Internet users.[177] Finally, the court determined that World Wide Web advertisements are more pervasive and accessible than television and radio advertisements.[178] According to the *Inset* court, these factors gave Instruction Set sufficient warning of potential lawsuits arising from its use of the World Wide Web for advertising.[179] In addition, the court briefly noted the absence of any mitigating factors which would have rendered the exercise of jurisdiction unfair and unreasonable.[180]

*ii.* Maritz, Inc. v. CyberGold, Inc.

*CyberGold* involved a trademark dispute between two companies that independently were developing Internet-delivered advertising services.[181]

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advertising activities). The court also counted the defendant's toll-free telephone number as a contact. *Id.* at 163.

175. *See id.* at 165 (comparing World Wide Web advertising with other, more traditional, advertising media).

176. *Id.*

177. *Id.*

178. *See id.* (describing differences between World Wide Web advertisements and advertisements in other media, including television and radio). Earlier, during its discussion of the reach of Connecticut's long-arm statute, the court also explained that World Wide Web advertisements are more enduring than print advertisements "which are often quickly disposed of and reach a limited number of potential consumers." *Id.* at 164.

179. *See id.* at 165 (finding Instruction Set "could reasonably anticipate the possibility of being hailed into court" in Connecticut); *see also* World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286, 296-98 (1980) (requiring sufficient warning that defendant's actions may give rise to suits in forum).

180. *See Inset*, 937 F. Supp. at 165 (discussing considerations of fairness and reasonableness). The court determined that the defendant bore no particularly onerous burden in defending suit in Connecticut. *Id.* In particular, the court noted the "minimal" distance between the Massachusetts defendant and Connecticut. *Id.* The court also found that Connecticut possessed an interest in adjudicating the dispute which involved issues of Connecticut law and found that Connecticut could dispose of the matter efficiently. *Id.* After making these observations, the court concluded that the exercise of jurisdiction satisfied traditional notions of fair play and substantial justice. *Id.*

181. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1330 (E.D. Mo. 1996) (describing CyberGold's advertising plans). The court described the plaintiff's and defendant's advertising activities in a subsequent opinion which did not address jurisdictional issues.

CyberGold established a World Wide Web site that encouraged users to submit their name and other personal information to CyberGold.[182] CyberGold was planning to use this information to send future targeted advertisements to registered recipients;[183] however, at the time of the suit, only CyberGold's basic World Wide Web site was active.[184] Maritz sued and claimed that CyberGold's name and advertising infringed Maritz's Goldmail trademark.[185]

The *CyberGold* court began its jurisdictional analysis by listing all of CyberGold's contacts with the forum: "CyberGold maintains an internet site on the World Wide Web . . . [that is] continually accessible to every internet-connected computer in Missouri and the world."[186] The court described no contacts between the defendant and the forum other than those created by the defendant's World Wide Web advertisement. Thus, the court found that CyberGold's World Wide Web advertisement alone established minimum contacts with Missouri.[187]

The court explained its minimum contacts finding by noting the unique features of the Internet compared to traditional (and more familiar) forms of communication.[188] The court called the Internet "an entirely new means of information exchange."[189] It then described the Internet as "a tremendously more efficient, quicker, and vast means of reaching a global audience" compared to both the postal system and toll-free telephone numbers.[190] The court placed special emphasis on its finding that when the CyberGold World Wide Web site responded to the user's request for information, the site "indiscriminately" responded.[191] The court used these comparisons to find

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*See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1338, 1338-40 (E.D. Mo. 1996) (denying plaintiff's request for temporary injunction); *see also* Laura Castaneda, *Marketers Are Suing Over Gold*, S.F. CHRON., July 23, 1996, at C1 (describing CyberGold and Maritz advertising services); Debra Aho Williamson, *Golden Opportunities Tangle in Legal Battle*, ADVERTISING AGE, July 15, 1996, at 14 (same).

182. *See CyberGold*, 947 F. Supp. at 1330 (discussing CyberGold's data collection methods).

183. *See id.* (discussing CyberGold's advertising strategy).

184. *Id.*

185. *Id.* at 1329, 1336.

186. *Id.* at 1330.

187. *See id.* at 1334 (finding minimum contacts arising from World Wide Web advertising contacts).

188. *See id.* at 1332 (describing unique features of Internet and World Wide Web).

189. *Id.*

190. *See id.* (comparing Internet and more traditional forms of communication).

191. *See id.* at 1333 (analogizing between World Wide Web's automatic request-and-response system and hypothetical advertiser's ability to decide whether or not to respond to

that "the nature and quality of contacts provided by the maintenance of a website on the internet are clearly of a different nature and quality than other means of contact with a forum . . . ."[192]

The *CyberGold* court's finding that World Wide Web advertising contacts create unique contacts left it with a critical decision to make. Freed from traditional precedents, it needed to decide "[w]hether sufficient minimum contacts . . . can be established solely through the use of computers and electronic communications."[193] The court cited three cases, including *Inset*, to support its conclusion that CyberGold purposefully availed itself of Missouri through its use of the World Wide Web for advertising.[194] The determinative factor for the court was its observation that "[b]y simply setting up, and posting information at, a website in the form of an advertisement or a solicitation, one has done everything necessary to reach the global internet audience."[195] According to the court, this simple action satisfied the purposeful availment requirement.[196] The court also determined that its

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requests made by regular mail).

192. *Id.*

193. *Id.* at 1333-34.

194. *Id.* at 1334 (citing CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996) (exercising personal jurisdiction over nonresident defendant based in part on defendant's use of plaintiff's computer network); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (asserting personal jurisdiction based on defendant's use of Internet and toll-free telephone numbers for advertising); California Software Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1363 (C.D. Cal. 1986) (exercising personal jurisdiction based on effects of defendant's tortious communications transmitted via computer network)).

195. Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1332 (E.D. Mo. 1996).

196. *See id.* at 1334 (concluding defendant's World Wide Web activities constituted purposeful availment of forum). One commentator has argued that the *CyberGold* court applied the *Calder v. Jones* effects test rather than a *Hanson v. Denckla* purposeful availment analysis. *See* Burk, *supra* note 90, ¶¶ 55-57 (arguing *CyberGold* court improperly applied *Calder* standard); *see also supra* notes 83-86 and accompanying text (describing *Hanson* purposeful availment standard); *supra* notes 87-90 and accompanying text (describing *Calder* effects test). However, a close reading of the *CyberGold* court's minimum contacts analysis suggests that the court did not actually apply *Calder*. *See CyberGold*, 947 F. Supp. at 1332-34 (applying minimum contacts test to defendant's World Wide Web adverstising contacts). In its state law analysis, the court followed earlier cases and invoked the "commission of a tortious act" provision of the Missouri long-arm statute which allows the exercise of jurisdiction over defendants who commit tortious acts outside the forum that cause negative effects within the forum. *Id.* at 1331; *see* May Dept. Stores Co. v. Wilansky, 900 F. Supp. 1154, 1160-61 (E.D. Mo. 1995) (finding state tortious act provision satisfied against defendant Bon-Ton); Peabody Holding Co. v. Costain Group PLC, 808 F. Supp. 1425, 1433-34 (E.D. Mo. 1992) (finding state tortious act provision satisfied where defendant's extraterritorial acts caused effects in forum). However, in its minimum contacts analysis the *CyberGold* court repeatedly emphasized that it found the exercise of jurisdiction satisfied due process because the plaintiff

exercise of personal jurisdiction was fair and reasonable.[197]

### *iii.* State v. Granite Gate Resorts, Inc.

The cause of action in *Granite Gate* differed from the causes of action *Inset* and *CyberGold*, but the court's basis for finding minimum contacts remained the same.[198] *Inset* and *CyberGold* involved trademark-related

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had "purposefully availed itself of the privilege of doing business" within the forum. *Id.* at 1333-34. Indeed, the *CyberGold* court undertook its extensive minimum contacts analysis because it noted that both the *May* and *Peabody* courts had refused to exercise jurisdiction solely on the basis of the defendants' tortious actions which caused effects in the forum. *Id.* at 1331-32; *see May Dept. Stores*, 900 F. Supp. at 1161 (refusing on due process grounds to exercise jurisdiction over defendant Bon-Ton whose only contact with forum was impact of extraterritorial tortious act); *Peabody*, 808 F. Supp. at 1437-38 (refusing to exercise personal jurisdiction over defendant Altus based on tortious effects of extraterritorial conduct).

Professor Burk argues that the *CyberGold* court used *California Software Inc. v. Reliability Research, Inc.*, which in turn relied upon *Calder*, to extend "the *Calder* rule to find jurisdiction in the plaintiff's home state, because the effect of the alleged tort was felt there." Burk, *supra* note 90, ¶ 55; *see* California Software Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1361-64 (C.D. Cal. 1986) (applying *Calder*). Although the *California Software* court relied on *Calder* for its own jurisdictional holding, the *CyberGold* court did not cite *California Software* on this point. Instead, the *CyberGold* court used *California Software* to support the proposition that Internet communications "are of a different nature" that consequently increases the permissible scope of personal jurisdiction based on Internet contacts. *CyberGold*, 947 F. Supp. at 1334; *see California Software*, 631 F. Supp. at 1363 (finding computer communications broaden permissible scope of personal jurisdiction). The *CyberGold* court cited two other cases in the same section (neither of which invoked *Calder*) to support the same point. *Id.* (citing *Inset* and *CompuServe* to support argument that quality and nature of electronic communications expand permissible scope of personal jurisdiction); *see also* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263-67 (6th Cir. 1996) (finding defendant purposefully availed himself of privilege of doing business in Ohio); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (finding defendant purposefully availed itself of privilege of doing business within Connecticut).

197. *See CyberGold*, 947 F. Supp. at 1334 (finding exercise of personal jurisdiction fair and reasonable). The court noted that Missouri held an interest in adjudicating the dispute. *Id.* The court also noted that the plaintiff had a strong interest in adjudicating the dispute in Missouri. *Id.* Finally, the court found that CyberGold failed to demonstrate a burden in having to defend an action in the forum. *Id.* The court did not discuss "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" nor did it mention "the shared interest of the several States in furthering fundamental substantive social policies." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (citations omitted).

198. *See* State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *1 (Minn. Dist. Ct. Dec. 11, 1996) (describing claims against defendant), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997); *id.* at *10 (basing minimum contacts finding on mere accessibility of World Wide Web advertisement in forum); *infra* notes 199-201 and accompanying text (describing claims and minimum contacts analysis in *CyberGold*, *Inset*, and *Granite Gate*).

claims.[199] *Granite Gate* involved claims of consumer fraud, false advertising, and deceptive trade practices.[200] In all three cases, the courts found that the mere placement of an advertisement on the World Wide Web demonstrated the defendant's purposeful availment of the forum.[201]

In *Granite Gate*, the defendants maintained a World Wide Web site that advertised their sports gambling service.[202] Minnesota's attorney general argued that the advertisements were illegal in Minnesota and that by explicitly and implicitly touting the advertisement's legality,[203] the defendants violated Minnesota law and brought themselves within reach of Minnesota's long-arm jurisdiction.[204] The court agreed with the attorney general's jurisdictional theory.[205]

The *Granite Gate* court undertook an extensive analysis of the defendants' contacts with Minnesota.[206] In particular, the court noted that the defendants placed an advertisement on the World Wide Web, knowing that the advertisement "had to reach national markets that included Minne-

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199. *See CyberGold*, 947 F. Supp. at 1329, 1334-36 (discussing plaintiff's Lanham Act trademark infringement claim); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 162 (D. Conn. 1996) (describing plaintiff's trademark infringement and other related claims).

200. *See Granite Gate*, 1996 WL 767431, at *1 (discussing state's claims against defendant World Wide Web advertiser).

201. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1334 (E.D. Mo. 1996) (finding placement of advertisement on global World Wide Web established purposeful availment of forum); *Inset*, 937 F. Supp. at 163 (same); *Granite Gate*, 1996 WL 767431, at *10 (same).

202. *See Granite Gate*, 1996 WL 767431, at *1-5 (describing defendants' World Wide Web advertising activities). The defendants were Granite Gate Resorts, Inc., a Nevada corporation doing business as On Ramp Internet Computer Services, and Kerry Rogers, the president of On Ramp. *Id.* at *2.

203. *See id.* at *5 (explaining federal law prohibits "betting or wagering through wire communication facilities").

204. *See id.* at *5, *10-11 (describing state's arguments); *see also* Burk, *supra* note 23, at 1116 (describing position of Minnesota attorney general's office regarding exposure to liability for World Wide Web commercial activities).

205. *See* State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *6-11 (Minn. Dist. Ct. Dec. 11, 1996) (applying minimum contacts analysis to defendants' World Wide Web advertising contacts), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997).

206. *See id.* at *6-10 (describing defendants' contacts with forum). The court employed a five-step test to determine whether the defendants' contacts with the forum allowed the exercise of personal jurisdiction. *Id.* at *6. The five steps included: (1) the quantity of the defendants' contacts with the forum, (2) the nature and quality of the contacts, (3) the connection between the cause of action and the contacts, (4) the state's interest in providing a forum, and (5) the convenience of the parties. *Id.* The court found that the defendants' contacts easily satisfied each of these steps. *Id.* at *7-11.

sota."[207] The court also noted that the defendants maintained a mailing list that included information about the users who accessed the defendants' site (including names and addresses of users).[208] The court determined that many of those users were Minnesota residents.[209] Finally, the court observed that the defendants tracked their site's usage and kept logs that indicated Minnesota based computers were used to access the site.[210]

Although the *Granite Gate* court thus identified many factors that contributed to its finding of purposeful availment,[211] one factor dominated the court's minimum contacts analysis.[212] The court found that the defendants' World Wide Web advertisement "logically appear[ed] to be maintained for the purpose and in anticipation of being accessed and used by any and all Internet users, including Minnesota residents."[213] The court explained that "[w]hen one sets up and posts advertising information, one does everything necessary to reach the global Internet audience."[214] According to the court, the World Wide Web's reach and efficiency made the mere availability of a World Wide Web advertisement in the forum a sufficient ground for the exercise of jurisdiction.[215] Finally, like the courts in *Inset* and *CyberGold*, the *Granite Gate* court found that considerations of fairness and reasonableness did not provide the defendants a safe haven.[216]

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207. *Id.* at *7.

208. *See id.* at *8 (describing defendants' maintenance of mailing list).

209. *See id.* at *5 (explaining defendants' refusal to turn over mailing list allowed court to assume existence of Minnesota residents on list for purposes of court's ruling on defendants' motion to dismiss).

210. *See id.* at *9 (describing defendants' usage tracking and logs).

211. *See* State v. Granite Gate Resorts, Inc., No. C6-97-89, 1997 WL 557670, at *3 (Minn. Ct. App. Sept. 5, 1997) (describing contacts found by district court), *aff'g*, No. C6-95-7227, 1996 WL 767431 (Minn. Dist. Ct. Dec. 11, 1996).

212. *See* State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *7 (Minn. Dist. Ct. Dec. 11, 1996) (noting one defendant's awareness that Internet advertisement had to reach Minnesota), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997).

213. *Id.* at *10.

214. *Id.*; *see* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1332 (E.D. Mo. 1996) (explaining that "[b]y simply setting up, and posting information at, a website in the form of an advertisement or solicitation, one has done everything necessary to reach the global internet audience"); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (finding that "Instruction had directed its advertising activities via the Internet and its toll-free number toward not only the State of Connecticut, but to all states").

215. *See Granite Gate*, 1996 WL 767431, at *10 (describing basis for exercising jurisdiction). The court explained that solicitation via the Internet "certainly arises to the type of promotional activity or active solicitation to provide the minimum contacts necessary for exercising personal jurisdiction over nonresidents." *Id.*

216. *See id.* at *11 (discussing considerations of fairness and reasonableness). The court

A Minnesota appeals court recently affirmed the district court's decision in *Granite Gate*.[217] The court of appeals noted that the district court found several contacts between the defendants and the forum that supported the exercise of jurisdiction.[218] However, the court of appeals agreed with the district court that the key contact supporting the exercise of jurisdiction was the defendants' action in setting up a commercial World Wide Web site accessible in the forum.[219] The court of appeals explained that the defendants' Internet advertising, although not specifically directed at Minnesota, "demonstrated a clear intent to solicit business from markets that include Minnesota" and had resulted in multiple contacts with Minnesota and at least one successful solicitation.[220] Finally, the court of appeals also found that considerations of fairness and reasonableness did not limit its ability to exercise personal jurisdiction.[221]

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noted Minnesota's strong interest in enforcing its consumer protection laws. *Id.* The court also found no undue burden on the defendant in defending suits in the forum. *Id.* The court explained that because the defendant reserved the right to sue its customers in the customers' home states or Belize, an undue burden argument could not be accepted. *Id.*

217. State v. Granite Gate Resorts, Inc., No. C6-97-89, 1997 WL 557670, at *5 (Minn. Ct. App. Sept. 5, 1997), *aff'g*, No. C6-95-7227, 1996 WL 767432 (Minn. Dist. Ct. Dec. 11, 1996). The court of appeals found that "Internet advertisements are similar to broadcast and direct mail solicitations." *Id.* at *5. The court used Minnesota and foreign case law to support its argument that these similarities supported the exercise of jurisdiction. *Id.* However, many courts have found that nationwide advertising is not sufficient to subject a defendant to personal jurisdiction. *See* Zbaracki, *supra* note 68, at 235-37 (discussing jurisdictional effect of nationwide advertising and observing that courts ordinarily look for additional contacts to support exercise of jurisdiction); *see also* Reno v. ACLU, 117 S. Ct. 2329, 2343 (1997) (explaining World Wide Web sites are not as "invasive" as radio or television).

218. *See id.* at *3 (describing contacts between defendant and forum).

219. State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *10 (Minn. Dist. Ct. Dec. 11, 1996) (finding minimum contacts based on availability of advertisement in forum), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997); State v. Granite Gate Resorts, Inc., No. C6-97-89, 1997 WL 557670, at *7 (Minn. Ct. App. Sept. 5, 1997) (same). The court of appeals also mentioned contacts such as telephone calls placed by Minnesota residents after accessing the defendant's advertisement. *Id.* at *3. However, the court's purposeful availment analysis focuses on the defendants' World Wide Web advertising activities, indicating that the defendants' non-World Wide Web advertising contacts do not materially affect the court's overall analysis.

220. *Granite Gate*, 1997 WL 557670, at *7. The court of appeals apparently counted the subscription by the state's investigator as a contact (and as the successful solicitation) between the defendant and the forum. *Id.* at *2, *7. *But see* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333 n.4 (E.D. Mo. 1996) (refusing to count 180 "contacts" created by plaintiff when it accessed defendant's World Wide Web site because "[i]f such contacts were to be considered, a plaintiff could always try to create personal jurisdiction").

221. *See Granite Gate*, 1997 WL 557670, at *6-7 (noting state's strong interest and lack of great inconvenience to defendants).

*b. Evolution from Mere Awareness in Stream of Commerce Cases*

In his concurring opinion in *Asahi*, Justice Brennan argued that a court may exercise personal jurisdiction when products the defendant places into the stream of commerce cause injury in a forum.[222] Justice Brennan's approach does not require defendants to possess or maintain any other contacts with the forum.[223] Justice Brennan's approach does not require the defendant to target or serve any forum in particular.[224] Justice Brennan's approach requires only the defendant's actual knowledge that the product is marketed in the forum.[225] This relaxed minimum contacts standard is restricted only by the fairness and reasonableness considerations identified in *World-Wide Volkswagen*.[226]

The similarities between Justice Brennan's mere awareness standard in *Asahi* and the mere placement standard in *Inset*, *CyberGold*, and *Granite Gate* are striking.[227] The World Wide Web mere placement approach allows the exercise of jurisdiction when the advertisement the defendant places on the World Wide Web reaches the forum and causes injury.[228] The mere placement approach does not require the defendant to possess or maintain any other contacts with the forum.[229] The mere placement approach does not

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222. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 117 (1987) (Brennan, J., concurring) (explaining placement of goods into stream of commerce establishes foreseeability of suits in forums where defendant knows products are marketed); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (explaining jurisdictional effect of placing products into the stream of commerce). In *World-Wide Volkswagen*, the Court explained: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.*

223. *See Asahi*, 480 U.S. at 117 (Brennan, J., concurring) (rejecting need for additional conduct directed toward forum).

224. *See id.* (noting that benefits accrue to defendant regardless of whether defendant engaged in conduct specifically directed toward forum).

225. *Id.*

226. *See World-Wide Volkswagen*, 444 U.S. at 292 (listing fairness and reasonableness considerations); *supra* Part III.B describing fairness and reasonableness considerations).

227. *See* Burk, *supra* note 23, at 1116-17 (describing similarities between Justice Brennan's approach and Minnesota attorney general's position).

228. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333-34 (E.D. Mo. 1996) (exercising personal jurisdiction over World Wide Web advertiser); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 164-65 (D. Conn. 1996) (same); State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *10-11 (Minn. Dist. Ct. Dec. 11, 1996) (same), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997).

229. *See CyberGold*, 947 F. Supp. at 1333 (finding Internet advertisement sufficient to establish specific jurisdiction over defendant); *supra* Part IV.B.1.a.ii (describing *CyberGold* case); *Inset*, 937 F. Supp. at 165 (finding Internet advertisement and toll-free telephone

require the defendant to target or serve any forum in particular.[230] Finally, the mere placement test is theoretically limited by the considerations of fairness and reasonableness articulated in *World-Wide Volkswagen*.[231]

### *c. Difficulties in Applying the Mere Placement Approach*

Justice Brennan's opinion carried only four votes in *Asahi*.[232] However, its application in a number of subsequent lower court decisions lends credibility to the application of the mere placement approach in *Inset*, *CyberGold*, and *Granite Gate*.[233] Indeed, placement of products into the stream of commerce and placement of advertisements on the World Wide Web bear superficial similarities that invite application of stream of commerce approaches to World Wide Web advertising contacts.[234] For example, placing a product into the stream of commerce and advertising on the World Wide Web both involve commercial activity that can reach multiple forums.[235] However, critical differences between the World Wide Web and the stream of commerce weigh strongly against wholesale application of a stream of commerce analysis to World Wide Web advertising contacts.[236]

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number sufficient to establish specific jurisdiction in Connecticut); *supra* Part IV.B.1.a.i (discussing *Inset*); *Granite Gate*, 1996 WL 767431, at *10 (exercising jurisdiction over World Wide Web advertiser based entirely on World Wide Web advertisement); *supra* Part IV.B.1.a.iii (describing *Granite Gate*).

230. *See CyberGold*, 947 F. Supp. at 1333 (finding purposeful availment through World Wide Web site that transmits information globally); *Inset*, 937 F. Supp. at 165 (finding purposeful availment through Internet advertisement and toll-free telephone directed at all states, including Connecticut); *Granite Gate*, 1996 WL 767431, at *10 (finding advertisement established purposeful availment).

231. *See CyberGold*, 947 F. Supp. at 1334 (applying considerations of fairness and reasonableness); *Inset*, 937 F. Supp. at 165 (same); *Granite Gate*, 1996 WL 767431, at *10-11 (same); *infra* Part V (describing potential role of fairness and reasonableness considerations in World Wide Web advertising cases).

232. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 104, 116-21 (1987) (Brennan, J., concurring) (arguing minimum contacts existed but that considerations of fairness and reasonableness rendered exercise of jurisdiction unconstitutional) (joined by White, Marshall, Blackmun, JJ.).

233. *See* 1 CASAD, *supra* note 16, § 2.04[2][e], at 2-97 n.269 (describing effect of and judicial reaction to *Asahi*); Zbaracki, *supra* note 68, at 225-30 (describing lower court treatment of Justice Brennan's and Justice O'Connor's opinions in *Asahi*).

234. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (analogizing between placement of products into stream of commerce and creation of advertisement on World Wide Web), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

235. *See* Burk, *supra* note 23, at 1116-17 (noting superficial similarities between stream of commerce and World Wide Web).

236. *See* Stott, *supra* note 19, at 838-41 (describing differences between Internet stream

A subtle yet important modification of Justice Brennan's approach by the courts in *Inset*, *CyberGold*, and *Granite Gate* illustrates the profound theoretical differences between World Wide Web advertising and placing goods into the stream of commerce. Justice Brennan's stream of commerce approach requires the defendant's actual knowledge that a product it placed into the stream of commerce is marketed in the forum.[237] If a court cannot determine that the defendant knew its products reached the forum, the court cannot exercise jurisdiction.[238] In contrast, the *Inset*, *CyberGold*, and *Granite Gate* courts require only the defendant's knowledge that its World Wide Web advertisement can reach forums where the World Wide Web reaches.[239]

The substitution of actual awareness in the stream of commerce analysis for constructive awareness in the World Wide Web advertising analysis is a natural result of the difficulty advertisers face in determining who accesses their advertisements on the World Wide Web.[240] The World Wide Web ignores physical geography as it brings information to users.[241] Although some World Wide Web advertisers track usage of their World Wide Web sites,[242] a threshold actual knowledge requirement would severely limit a court's ability to reach many World Wide Web advertisers.

The relative predictability of the stream of commerce compared to the relative unpredictability of the World Wide Web also weakens the applicability of Justice Brennan's stream of commerce approach in World Wide Web

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of commerce and regular stream of commerce).

237. *See Asahi*, 480 U.S. at 117 (Brennan, J., concurring) (explaining actual awareness requirement). In *Asahi*, Justice Brennan explained that due process is satisfied "[a]s long as the participant in this process is aware that the final product is being marketed in the forum State." *Id.*

238. *Id.*

239. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (explaining that "CyberGold has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally"); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (finding that "Instruction has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states"); State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *10 (Minn. Dist. Ct. Dec. 11, 1996) (explaining that "[w]hen one sets up and posts advertising information, one does everything necessary to reach the global Internet audience"), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997).

240. *See* Burk, *supra* note 23, at 1112-15 (describing difficulty in identifying Internet user's geographic location).

241. *See* Johnson & Post, *supra* note 27, at 1370-76 (describing Internet's insensitivity to physical geography).

242. *See Granite Gate*, 1996 WL 767431, at *8-9 (describing defendants' efforts to track users of its World Wide Web site).

advertising cases.[243] In *Asahi*, Justice Brennan noted that "[t]he 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."[244] Justice Brennan also noted that defendants who place products into the stream of commerce receive economic and regulatory benefits from forums where their products are sold, whether or not the defendant engages in any additional conduct directed toward the forum.[245] In contrast, information on the World Wide Web frequently reaches unknown or unanticipated audiences because distribution depends, to a large extent, on the user's request for information.[246] Less predictability in World Wide Web advertising means less foreseeability that World Wide Web advertisements will enter the forum.[247]

In stream of commerce cases, Justice Brennan's standard gives manufacturers, distributors, and retailers the ability to alter their behavior while remaining active participants in commerce.[248] A manufacturer who places products into the stream of commerce retains the ability to control the prod-

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243. *See* Stott, *supra* note 19, at 839-41 (arguing Internet's worldwide reach gives insufficient notice to advertisers and requires application of Justice O'Connor's additional conduct standard rather than Justice Brennan's mere awareness standard in World Wide Web advertising cases).

244. Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 117 (Brennan, J., concurring).

245. *See id.* (describing benefits received from forum). Lower courts have split over which approach to follow after *Asahi*. *See* 1 CASAD, *supra* note 16, § 2.04[2][e], at 2-97 n.269 (describing lower courts' treatment of *Asahi*); Zbaracki, *supra* note 68, at 225-30 (same).

246. *See* Reno v. ACLU, 117 S. Ct. 2329, 2343 (1997) (noting that Internet communications do not appear on users' screens unbidden); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 299 (S.D.N.Y. 1996) (describing several affirmative steps required to access defendant's World Wide Web advertisement), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

247. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (describing minimum contacts test's foreseeability requirement).

248. *See id.* at 297 (describing methods of avoiding burdens associated with personal jurisdiction in particular forums when placing goods into stream of commerce), *cited in Asahi*, 480 U.S. at 118-19 (Brennan, J., concurring). *World-Wide Volkswagen* provided the doctrinal foundation for Justice Brennan's opinion in *Asahi*. *See Asahi*, 480 U.S. at 118-20 (Brennan, J., concurring) (discussing *World-Wide Volkswagen*); Stephens, *supra* note 76, at 120-21 (discussing Justice Brennan's opinion in *Asahi*). In *World-Wide Volkswagen*, the Court explained the purpose of the purposeful availment requirement. *World-Wide Volkswagen*, 444 U.S. at 297. The requirement gives the defendant "clear notice that it is subject to suit there, and [it] can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State." *Id.*

uct's distribution by entering into contracts that restrict the product's distribution and sale in unfavorable forums.[249] On the World Wide Web, the same option is not available because the Internet's geographical insensitivity combined with technological limits on screening devices render attempts to control access to World Wide Web advertisements ineffectual or self-defeating.[250]

World Wide Web advertisers have two choices if courts continue to apply the mere placement test in World Wide Web advertising cases. First, they can leave their advertisements on the World Wide Web and subject themselves to findings of minimum contacts in every forum that applies the mere placement test.[251] Second, they can remove their advertisement from the World Wide Web if they wish to avoid jurisdiction in forums that apply the mere placement test. Justice Brennan's mere awareness approach does not require an all-or-nothing choice by participants in the stream of commerce.[252] A mere awareness approach should not be used to force such an all-or-nothing choice by World Wide Web advertisers.[253] Courts need a better standard for finding minimum contacts.[254]

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249. *See World-Wide Volkswagen*, 444 U.S. at 297 (describing actions manufacturer or retailer can take to avoid purposefully availing itself of undesirable forums).

250. *See* ACLU v. Reno, 929 F. Supp. 824, 844-49 (E.D. Pa. 1996) (explaining difficulty of restricting access to sexually explicit content on Internet and other computer networks), *aff'd*, 117 S. Ct. 2329 (1997); American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 171, 183 (noting World Wide Web page owners cannot effectively restrict access to their pages from particular forums); *supra* notes 133, 136 (discussing *American Libraries Ass'n*).

251. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333-34 (E.D. Mo. 1996) (applying mere placement test to exercise personal jurisdiction over World Wide Web advertiser); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 163-65 (D. Conn. 1996) (same); State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *10 (Minn. Dist. Ct. Dec. 11, 1996) (same), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997).

252. *See* Burk, *supra* note 23, at 1117 (arguing that Supreme Court's minimum contacts jurisprudence does not support "all or nothing" approach to Internet-related exercises of personal jurisdiction).

253. *Cf. American Libraries Ass'n*, 969 F. Supp. at 183 (declaring New York statute restricting computer communications unconstitutional on Commerce Clause grounds). The *American Libraries Ass'n* court explained that if the New York law were upheld "[t]he user must thus comply with the regulation imposed by the state with the most stringent standard or forego Internet communication of the message that might or might not subject her to prosecution." *Id.* The court cautioned: "Further development of the Internet requires that users be able to predict the results of their Internet use with some degree of assurance." *Id.* The court concluded: "The need for uniformity in this unique sphere of commerce requires that New York's law be stricken as a violation of the Commerce Clause." *Id.*

254. *See infra* Part IV.C (suggesting flexible two-step approach for analyzing World

### 2. *The Additional Conduct Approach to World Wide Web Advertising Contacts*

Not all courts agree that the simple act of placing an advertisement on the World Wide Web establishes minimum contacts wherever the World Wide Web reaches.[255] In *Bensusan Restaurant Corporation v. King*,[256] the United States District Court for the Southern District of New York refused to exercise personal jurisdiction over a nonresident World Wide Web advertiser.[257] The *Bensusan* court adopted a minimum contacts approach that requires additional conduct by the defendant aimed at the forum before a court may exercise personal jurisdiction.[258] Although the court found it

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Wide Web advertising contacts).

255. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (finding that placement of advertisement on World Wide Web does not demonstrate purposeful availment of forum), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997); *see also* Weber v. Jolly Hotels, No. CIV. A. 96-2582, 1997 WL 574950, at *5-6 (D.N.J. Sept. 12, 1997) (finding Internet advertising does not establish purposeful availment); Graphic Controls Corp. v. Utah Medical Prods., Inc., No. 96-CV-0459E(F), 1997 WL 276232, at *3-4 (W.D.N.Y. May 21, 1997) (finding toll-free telephone number and information available on Internet do not demonstrate purposeful availment of New York); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (exercising personal jurisdiction over defendant, but noting passive World Wide Web advertisement alone does not establish purposeful availment of forum). In *Hearst Corp. v. Goldberger*, a magistrate judge recommended that the United States District Court for the Southern District of New York refuse to exercise jurisdiction over a New Jersey defendant who maintained a World Wide Web site that was accessible in the forum. Hearst Corp. v. Goldberger, No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097, at *20-21 (S.D.N.Y. Feb. 26, 1997) (mag. j. report and recommendation). The magistrate expressly refused to follow the *Inset*, *CyberGold*, and *Heroes* courts. *See id.* (discussing *Inset*, *CyberGold*, and *Heroes*); *see also* Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 5 (D.D.C. 1996) (weighing defendant's World Wide Web advertising contacts in favor of minimum contacts finding, but basing exercise of personal jurisdiction on other grounds); *CyberGold*, 947 F. Supp. at 1333-34 (exercising personal jurisdiction over nonresident World Wide Web advertiser); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (same). The magistrate cautioned against exercising "national (or even worldwide) jurisdiction" based on World Wide Web advertising contacts absent "Congressional enactment of Internet specific trademark infringement personal jurisdiction legislation"). *Hearst*, 1997 WL 97097, at *20.

256. 937 F. Supp. 295 (S.D.N.Y. 1996).

257. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (refusing to exercise personal jurisdiction over World Wide Web advertiser based on mere placement of advertisement on World Wide Web), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

258. *See id.* at 300 (adopting additional conduct approach). In *Bensusan*, the plaintiff brought several trademark related claims against the nonresident World Wide Web advertiser, including trademark infringement, trademark dilution, and unfair competition. *Id.* at 298. The court first determined that the defendant's World Wide Web advertising activities did not

could not exercise personal jurisdiction under state law, it nevertheless discussed due process limitations on its ability to reach the nonresident World Wide Web advertiser.[259] The *Bensusan* court's approach to weighing World Wide Web advertising contacts bears a remarkable resemblance to the additional conduct approach applied by Justice O'Connor in *Asahi*.[260]

This Section begins with a discussion of the facts and minimum contacts analysis in *Bensusan*.[261] It then explains Justice O'Connor's additional conduct standard.[262] This Section concludes by arguing that the additional conduct approach, like the mere placement approach applied in *Inset*, *CyberGold*, and *Granite Gate*, is too rigid for constitutional application to World Wide Web advertising contacts.[263]

### *a. The Additional Conduct Approach in Practice:* Bensusan Restaurant Corp. v. King

*Bensusan* involved a trademark dispute between a New York nightclub owner and a Missouri nightclub owner.[264] The Missouri defendant created and maintained a World Wide Web site that advertised its club "The Blue Note," and that contained references and links to the World Wide Web site of the New York plaintiff's jazz club, also called "The Blue Note."[265] The

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satisfy the requirements of New York's long-arm statute. *Id.* at 299-300. The court then found that the exercise of jurisdiction would violate the requirements of the Due Process Clause because the mere act of creating a World Wide Web 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 at the forum state." *Id.* at 301 (citing Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion)).

259. *See id.* at 300 (noting that New York long-arm statute not authorize exercise of jurisdiction and explaining Due Process Clause forbade exercise of jurisdiction).

260. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion) (requiring "additional conduct" directed at forum before placement of goods into stream of commerce can establish minimum contacts), *cited in Bensusan*, 937 F. Supp. at 301.

261. *See infra* Part IV.B.2.a (discussing *Bensusan* additional conduct approach).

262. *See infra* Part IV.B.2.b (describing Justice O'Connor's additional conduct approach in *Asahi*).

263. *See infra* Part IV.B.2.c (arguing additional conduct approach is too inflexible for consistently constitutional application of minimum contacts test).

264. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 298 (S.D.N.Y. 1996) (explaining plaintiff's claims against defendant), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997). The plaintiff asserted claims of trademark infringement, trademark dilution, and unfair competition. *Id.*

265. *See id.* at 297-98 (describing defendant's World Wide Web site and plaintiff's and defendant's nightclubs).

owner of the New York club, who also owned the rights to the "Blue Note" mark, brought suit.[266]

The *Bensusan* court began its minimum contacts analysis by noting that the defendant's World Wide Web site constituted its only contact with New York.[267] The plaintiff presented no evidence that the defendant encouraged New Yorkers to access his site, nor any evidence that the defendant conducted or solicited business in New York.[268] Indeed, the evidence showed that ninety-nine percent of the defendant's business was derived from the area in and around Columbia, Missouri.[269]

The *Bensusan* court implicitly rejected the mere placement approach.[270] It found that the mere foreseeability that a defendant's World Wide Web site might be accessed in the forum was insufficient to satisfy due process.[271] The court cited Justice O'Connor's opinion in *Asahi* to support its contention that "[c]reating 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."[272] The court also noted that it takes several affirmative steps on the part of a World Wide Web user to access a particular World Wide Web site.[273] The *Bensusan* court would require additional evidence that a defendant targeted the forum through the World Wide Web before it would find minimum contacts.[274]

The United States Court of Appeals for the Second Circuit recently affirmed the district court's decision in *Bensusan*.[275] Describing the district court's opinion as "scholarly," the court of appeals noted the difficulty courts

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266. *See id.* (describing plaintiff's suit).

267. *See id.* at 300-01 (describing defendant's contacts with forum).

268. *Id.*

269. *Id.* at 300 (describing defendant's affidavit).

270. *Compare* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300-01 (S.D.N.Y. 1996), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997) (refusing to find purposeful availment of forum via World Wide Web advertisement), *with* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (finding purposeful availment based in part on defendant's World Wide Web advertisement).

271. *See Bensusan*, 937 F. Supp. at 301 (explaining plaintiff's argument that foreseeability of access creates minimum contacts falls short of due process requirements).

272. *Id.* (citing Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion)).

273. *Id.* at 299.

274. *See id.* (discussing absence of additional contacts between defendant and forum); *see also* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125-27 (W.D. Pa. 1997) (noting defendant's contacts above and beyond World Wide Web advertising contacts).

275. Bensusan Restaurant Corp. v. King, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997), *aff'g*, 937 F. Supp. 295 (S.D.N.Y. 1996).

encounter when attempting to apply traditional legal rules to the Internet.[276] Despite this difficulty, the court of appeals agreed with the district court that New York law did not allow the exercise of jurisdiction over the defendant.[277] Because the court of appeals found New York law prohibited the exercise of jurisdiction, the court found it unnecessary to consider whether the exercise of jurisdiction would offend due process.[278] This decision left the district court's due process analysis intact.[279]

### *b. Evolution From Justice O'Connor's Approach in Stream of Commerce Cases*

In *Asahi*, Justice O'Connor argued that a defendant's awareness that a product it placed into the stream of commerce might or would enter the forum was insufficient to demonstrate purposeful availment of that forum.[280]

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276. *See id.* at *2 (realizing that "attempting to apply established trademark law in the fast-developing world of the internet is somewhat like trying to board a moving bus").

277. *Id.* The court of appeals noted that the plaintiff claimed "somewhat inconsistently" that the district court could exercise jurisdiction under two provisions of New York's long-arm statute. *Id.* The first long-arm provision invoked by the plaintiff allows courts to exercise personal jurisdiction over any person who commits a tortious act within the state. *Id.* The court of appeals noted that all of the defendant's acts, including creation of the World Wide Web site, use of the disputed marks, and creation of a link to the plaintiff's World Wide Web site, were performed in Missouri. *Id.* at *4. The court explained that acts performed in Missouri could not be used to prove a tortious act in New York. *Id.*

The second long-arm provision invoked by the plaintiff allows courts to exercise personal jurisdiction in cases where a defendant commits a tortious act outside the state that causes injury to persons or property in the state. *Id.* However, the court noted that the New York legislature restricted this provision to those persons who "derive substantial revenue from interstate commerce." *Id.* The court rejected plaintiff's arguments that the defendant's hiring of nationally known bands and patronage by out-of-state students at the local university satisfied this substantial revenue requirement. *Id.* Instead, the court of appeals found that "King's 'Blue Note' cafe was unquestionably a local operation." *Id.*

278. *Id.* at *2.

279. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300-01 (S.D.N.Y. 1996) (finding due process prohibited exercise of personal jurisdiction), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997); *supra* notes 270-74 and accompanying text (discussing district court's minimum contacts analysis). The Second Circuit's failure to reach the due process issue leaves a split among the district courts within the Second Circuit concerning whether a World Wide Web advertisement can establish purposeful availment. *Compare Bensusan*, 937 F. Supp. at 300-01 (refusing to find purposeful availment) *and* Graphic Controls Corp. v. Utah Medical Prods., Inc., No. 96-CV-0459E(F), 1997 WL 276232, at *3 (W.D.N.Y. May 21, 1997) (same), *with* Inset Sys., Inc., v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (concluding defendant purposefully availed itself of Connecticut).

280. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. at 102, 112 (1987) (O'Connor, J., plurality opinion) (explaining that mere awareness is not enough to demonstrate purposeful availment).

She cited *Keeton v. Hustler Magazine, Inc.*[281] and *Burger King Corp. v. Rudzewicz*[282] to support her contention that mere placement of a product into

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281. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984) (finding personal jurisdiction over defendant that regularly circulated magazines in forum). In *Hustler*, a New York plaintiff brought a libel suit against an Ohio publisher in New Hampshire based on the contents of the defendant's magazine. *Id.* at 772. The statute of limitations had run in every forum except New Hampshire and the plaintiff moved to dismiss for lack of personal jurisdiction. *Id.* The district court and the court of appeals refused to find sufficient minimum contacts to establish personal jurisdiction. *Id.* The Supreme Court reversed. *Id.* The Court noted that the defendant sold ten thousand to fifteen thousand copies of *Hustler* in New Hampshire each month. *Id.* The Court found that such contacts could not "by any stretch of the imagination be characterized as random, isolated, or fortuitous." *Id.* at 774. The Court also found that the defendant's continuous and deliberate exploitation of New Hampshire led to a reasonable anticipation of "a libel action based on the contents of its magazine." *Id.* at 781. The Court rejected the need for minimum contacts between the plaintiff and the forum. *Id.* at 779. Finally, the Court found that the defendant faced no unfairness in defending a suit in a state where a substantial number of its magazines were sold and distributed. *Id.* at 781.

Justice Brennan concurred in the Court's judgment. *Id.* at 782 (Brennan, J., concurring). He argued that the regular circulation of magazines in the forum supported the exercise of personal jurisdiction regardless of the forum's interest and its unique statute of limitations. *Id.* Justice Brennan explained that the state's interests should only be considered as they bear upon a defendant's Fourteenth Amendment liberty interests. *Id.* (citing Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982)).

282. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1985) (concluding exercise of personal jurisdiction over defendant satisfied due process). In *Burger King*, two Michigan residents contracted with Florida restaurant-franchiser Burger King to open a restaurant in Michigan. *Id.* at 466. The defendants applied to Burger King's district office, located in Michigan, for the franchise and negotiated with both the district office and the home office over the terms of the agreement. *Id.* at 466-67. When the deal soured, Burger King brought suit in Florida on breach of contract and trademark infringement claims. *Id.* at 468-69. The district court exercised personal jurisdiction; however, the court of appeals reversed. *Id.* at 469-70. Burger King appealed, and the Supreme Court found that the district court's exercise of jurisdiction satisfied due process. *Id.* at 478. The Court noted that Rudzewicz deliberately reached out beyond Michigan and entered into a long-term agreement with Burger King's Florida headquarters. *Id.* at 479-80. The Court also noted that Rudzewicz accepted direction and regulation from Burger King in Florida. *Id.* at 480. The Court dismissed the court of appeals's reliance on Rudzewicz's dealings with Burger King's district office, noting a "substantial record . . . indicating that Rudzewicz most certainly knew that he was affiliating himself with an enterprise based primarily in Florida." *Id.* at 480. The court also relied on a choice of law clause in the franchise documents that designated Florida law as the governing law of the agreement. *Id.* at 481. Finally, the Court found no evidence of substantial unfairness or unreasonableness in the exercise of personal jurisdiction. *Id.* at 482. The Court concluded that the exercise of jurisdiction satisfied due process because the defendant established a substantial and continuing relationship with the Florida plaintiff, received fair notice of the possibility of suit, and failed to show unfairness in the exercise of jurisdiction. *Id.* at 487.

Justice Stevens dissented. *Id.* (Stevens, J., dissenting). Justice Stevens argued that the exercise of personal jurisdiction over the defendant was unfair. *Id.* He noted that the defendant's business was confined to Michigan and that most of his dealings were with the plaintiff's Mich-

the stream of commerce without more does not create a "substantial connection" between the defendant and the forum.[283] Justice O'Connor argued that purposeful availment in stream of commerce cases requires additional conduct that demonstrates the defendant's intention to serve the forum market.[284] Sufficient additional conduct might include: "designing the product for market in the forum State, advertising in the forum State, establishing channels for providing regular advice to consumers in the forum State, or marketing the product through a distributor who has agreed to serve as a sales agent in the forum State."[285] Under Justice O'Connor's standard, the absence of additional conduct prevents findings of purposeful availment in stream of commerce cases.[286]

### *c. Difficulties in Applying the Additional Conduct Approach*

The additional conduct approach certainly raises the level of contacts required to show purposeful availment in World Wide Web advertising cases.[287] It removes the danger to advertisers that by simply placing an advertisement on the World Wide Web they will create purposeful minimum contacts with every forum the World Wide Web reaches.[288] However, the *Bensusan* court's approach also creates constitutional problems because it prevents the exercise of jurisdiction over advertisers who intend to reach multiple forums, but who fail to target any forum in particular.[289]

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igan office. *Id.* Justice Stevens criticized the majority for relying on "standard boilerplate language contained in various documents" to find purposeful availment. *Id.* at 487-88. He also quoted extensive portions of the court of appeals's opinion which had found that the exercise of jurisdiction over the defendant would offend fundamental fairness. *Id.* at 488-90.

283. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion) (explaining need for substantial connection between defendant and forum) (citing *Hustler*, 465 U.S. at 774 and *Burger King*, 471 U.S. at 476).

284. *Id.*

285. *Id.*

286. *See id.* (refusing to find purposeful availment in stream of commerce case absent additional contacts by defendant).

287. *Compare* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300-01 (S.D.N.Y. 1996) (requiring additional conduct between defendant and forum), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997), *with* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (finding purposeful availment based on mere placement of advertisement on Internet).

288. *See* Kalow, *supra* note 19, at 2269-74 (discussing effect of additional conduct requirement on application of minimum contacts test to World Wide Web advertising contacts).

289. *Cf.* Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 532-33 (1995) (criticizing Justice O'Connor's *Asahi* opinion as reducing stream of commerce "to a pathetic dribble").

The *Bensusan* court's application of the additional conduct approach prevents courts from finding minimum contacts between a World Wide Web advertiser and a forum unless the plaintiff can present evidence that the defendant "actively sought to encourage" forum residents to access its site or otherwise derived measurable benefits from the forum through its World Wide Web advertisement.[290] Some advertisers intend to avail themselves of every forum the World Wide Web reaches though they specifically target none.[291] Courts need an approach that allows the exercise of jurisdiction whenever a World Wide Web advertiser intends to receive the benefits and protections of a forum, regardless of whether the defendant sought benefits from other forums at the same time.[292]

### *C. A Flexible Approach to Weighing World Wide Web Advertising Contacts*

The problems raised by both the mere placement standard and the additional conduct standard demonstrate the critical need for a fresh approach to World Wide Web advertising contacts.[293] This fresh approach must recognize that some World Wide Web advertisers place advertisements on the World Wide Web hoping to reach only a local audience.[294] It must

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290. *See Bensusan*, 937 F. Supp. at 301 (explaining additional conduct standard in World Wide Web advertising context).

291. *See* Silverman, *supra* note 62, at C1 (describing businesses with World Wide Web "gold fever").

292. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (allowing the exercise of personal jurisdiction when "the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities" (citations omitted)).

293. Several commentators have suggested a variety of approaches for analyzing World Wide Web and Internet contacts ranging from endorsement of Justice O'Connor's additional conduct approach to proposals for fundamentally reworking or abandoning the *International Shoe* minimum contacts test. *See* Burk, *supra* note 23, at 1118-20 (suggesting adoption of minimum contacts analysis modeled after Judge Learned Hand's *Carroll Towing* analysis for determining foreseeable consequences); Kalow, *supra* note 19, at 2269-74 (arguing courts should adopt Justice O'Connor's approach in *Asahi*); Stott, *supra* note 19, at 854 (endorsing application of Justice O'Connor's approach to World Wide Web advertising contacts); Swedlow, *supra* note 19, at 384 (proposing "Model Rule for Internet Contact Determination"); Thatch, *supra* note 19, at 174-77 (suggesting application of Justice Stevens's approach in *Asahi*); Zembek, *supra* note 146, at 367-80 (suggesting adoption of analogies to minimum contacts analysis in advertising, telephone, and environmental cases).

294. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (describing World Wide Web advertisement for nightclub that drew ninety-nine percent of its business from surrounding community), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

also recognize that other World Wide Web advertisers place advertisements on the World Wide Web hoping to reach distant forums.[295] This fresh approach must account for the fact that some advertisements are generic with no specific target.[296] It must also account for the fact that some advertisements are specific and targeted.[297] Flexibility is the key to a minimum contacts analysis of World Wide Web advertising contacts that satisfies due process.[298]

At least one court understands the complexities involved in applying the minimum contacts test to contacts made through the World Wide Web.[299] This Section begins with a discussion of *Zippo Manufacturing Co. v. Zippo Dot Com*,[300] where the United States District Court for the Western District of Pennsylvania developed a sliding scale for measuring the quality of contacts made through the Internet, the World Wide Web, and other electronic forms of communication.[301] This Section continues with a discussion of the foundational principles for development of a flexible analysis of World Wide Web advertising contacts. It concludes with an analysis of *CyberGold*, *Bensusan*, and *Granite Gate* under a proposed two-step minimum contacts analysis.

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295. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (describing World Wide Web advertiser who sought customers across World Wide Web).

296. *See supra* Part II.B (describing basic World Wide Web advertisement).

297. *See supra* Part II.B.1 (describing targeted World Wide Web advertisement).

298. *See* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (finding due process depends "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the process of the due process clause to insure"). The Court explained "that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." *Id.*

299. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123-25 (W.D. Pa. 1997) (explaining various levels of Internet and World Wide Web contacts).

300. 952 F. Supp. 1119 (W.D. Pa. 1997).

301. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (exercising personal jurisdiction over nonresident Internet news service after weighing contacts on sliding scale); *see infra* Part IV.C.1 (discussing *Zippo*). In *Zippo*, the court exercised jurisdiction under the provision of the Pennsylvania long-arm statute that authorizes the exercise of jurisdiction over defendants who contract "to supply services or things in this state." *Zippo*, 947 F. Supp. at 1122. The court also noted that the state's long-arm statute allowed the court to exercise personal jurisdiction to the full extent allowed by the Constitution. *Id.* The court determined that the defendant's activities, which included entering into contracts with forum residents through the Internet, established the propriety of exercising personal jurisdiction. *Id.* at 1125-26. The court also found that the cause of action arose from the defendant's conduct because "a cause of action for trademark infringement occurs where the passing off occurs." *Id.* at 1127 (quoting Cottman Transmission Systems, Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994)). Finally, the court determined that the exercise of jurisdiction was not unreasonable. *Id.*

### *1.* Zippo Manufacturing Co. v. Zippo Dot Com, Inc.: *A Recognition of the World Wide Web's Diversity*

*Zippo* involved trademark infringement claims brought by the manufacturer of Zippo brand lighters against an Internet news service.[302] The defendant maintained a World Wide Web site which advertised its news service.[303] In addition to its advertising contacts, the defendant had contracts with three thousand subscribers in Pennsylvania and with seven Internet access providers in Pennsylvania.[304] The district court exercised personal jurisdiction and explained that the propriety of exercising personal jurisdiction over nonresident commercial Internet users is "directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet."[305] Unsurprisingly, the court found the more commercial activity a defendant conducts, the greater the ability of a court to exercise personal jurisdiction.[306] The *Zippo* court properly recognized that the key to a constitutionally sound analysis of Internet-related contacts depends on the quality and nature of the defendant's Internet-related activities.[307]

The *Zippo* court divided commercial Internet use into three categories: passive World Wide Web sites, interactive World Wide Web sites, and electronic contracts between residents of different forums.[308] The court explained that "passive" World Wide Web sites that simply display information do not establish minimum contacts between the defendant and the forum.[309] On the opposite end of the sliding scale, the court found that defendants who reach out into other forums and knowingly enter into contracts with residents in these forums subject themselves to the possibility of suits in those forums.[310] Finally, the court noted that a grey area exists between the

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302. *See Zippo*, 947 F. Supp. at 1121 (describing parties to suit).

303. *See id.* (describing defendant's news service).

304. *See id.* (discussing defendant's customer base and contractual arrangements with Pennsylvania residents).

305. *Id.* at 1124.

306. *See id.* (adopting sliding scale for measuring Internet contacts).

307. *See id.* at 1127 (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

308. *See id.* (describing three categories of Internet contacts).

309. *See id.* (describing passive World Wide Web site as insufficient basis for exercising personal jurisdiction). The *Zippo* court described the defendant's World Wide Web site in *Bensusan* as a passive World Wide Web site. *Id.* (citing Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996)).

310. *See id.* (explaining effect of electronic contacts between contracting parties); *see also* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263-67 (6th Cir. 1996) (describing defendant's purposeful availment based in part on online contracts).

passive World Wide Web site and the electronic contract.[311] In this middle ground the court explained that the constitutionality of an exercise of jurisdiction "is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[312]

The *Zippo* court took a step in the right direction when it recognized that a constitutional analysis of Internet contacts depends on the quality and nature of the defendant's Internet activities.[313] However, *Zippo* did not step far enough. This Note has focused on World Wide Web sites that provide advertising information to consumers. According to the *Zippo* court, these kind of World Wide Web sites are passive sites that do not support the exercise of personal jurisdiction, unless they possess special features which make them "interactive."[314] However, just as the Internet hosts different levels of commercial activity, passive World Wide Web advertisements can create different levels of contacts that, in some cases, support the exercise of personal jurisdiction.

### 2. *Foundational Principles for a Flexible Analysis of World Wide Web Advertising Contacts*

The World Wide Web's flexibility, low cost of entry, and ease of use encourages advertisers from a variety of businesses to advertise on the World Wide Web.[315] The types of businesses range from software development[316] to legal services[317] to cults.[318] The size of the businesses range from Mid-

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311. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (describing middle ground where user can interact with host computer). The *Zippo* court described defendant's World Wide Web site in *CyberGold* which requested information from users as an interactive World Wide Web site. *Id.*; *see* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (describing defendant's World Wide Web advertising activities).

312. *Zippo*, 952 F. Supp. at 1124.

313. *Id.* at 1127 (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

314. *See id.* at 1124 (explaining that passive World Wide Web sites do not support exercise of personal jurisdiction).

315. *See* ACLU v. Reno, 929 F. Supp. 824, 836-38 (E.D. Pa. 1996) (describing World Wide Web's flexibility, ease of use, and low cost of entry), *aff'd*, 117 S. Ct. 2329 (1997); Ziegler, *supra* note 55, at B1 (describing early commercial World Wide Web sites).

316. *Welcome to Microsoft* (visited Sept. 8, 1997) <http://www.microsoft.com>.

317. *Proskauer Rose LLP* (visited Sept. 8, 1997) <http://www.proskauer.com>.

318. *Heaven's Gate — How and When It May Be Entered* (visited Sept. 8, 1997) <http://www.washingtonpost.com/wp-srv/digest/daily/march/27/cultsite>; *see* Silverman, *supra* note 62, at C1 (describing wide variety of World Wide Web advertisers and advertisements).

western farm markets to multinational corporations.[319] Some of the businesses operate entirely on the World Wide Web and the Internet.[320] Others advertise on the World Wide Web and encourage the viewer to come to the advertiser's local outlet, store, or nightclub.[321] The markets World Wide Web advertisers intend to reach range from the surrounding neighborhood to the neighborhood of the World Wide Web itself.[322] The minimum contacts analysis must account for these variations.[323]

### *a. Critical Factors that Demonstrate a World Wide Web Advertiser's Intent and Reasonable Expectations*

A variety of factors can help courts determine whether an advertiser availed itself of a particular forum through the use of the World Wide Web.[324] Because all advertisements are directed at an audience, the content of an advertisement gives some indication of the audience the advertiser has attempted to reach.[325] For example, a neighborhood bookstore that posts a World Wide Wide advertisement that advertises an upcoming book signing by a local author probably does not intend or expect to reach other

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319. *See* James Morris-Lee, *Farmers Grow Customers on the World Wide Web*, DIRECT MKTG., July 1, 1996, at 14, 15 (describing World Wide Web fresh produce advertisement); Taylor, *supra* note 55, at 9 (describing Coca-Cola's World Wide Web site).

320. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (describing defendant's World Wide Web advertisement which advertised its World Wide Web advertising service).

321. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (describing defendant's advertisement of Missouri nightclub), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997). The Second Circuit described the defendant's business as "unquestionably a local operation." Bensusan Restaurant Corp. v. King, No. 1383, 1997 WL 560048, at *4 (2d Cir. Sept. 10, 1997).

322. *Compare Bensusan*, 937 F. Supp. at 300-01 (finding no purposeful availment of foreign forum), *with CyberGold*, 947 F. Supp. at 1334 (finding purposeful availment of foreign forum).

323. *See* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (explaining whether due process is satisfied depends on quality and nature of defendant's contacts with forum).

324. *See* Zbaracki, *supra* note 68, at 230-34 (arguing that general advertising methods and practices provide evidence of forums advertisers intend or expect to reach); Edward Brodsky, *Solicitation Via the Internet*, N.Y.L.J., June 11, 1997, at 3 (discussing factors including content of World Wide Web advertisement, disclaimers, and attempts to restrict access that should influence personal jurisdiction analysis).

325. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 112 (1987) (O'Connor, J., plurality opinion) (explaining that advertisements directed at forum can support finding of purposeful availment in stream of commerce cases). *But see* Zbaracki, *supra* note 68, at 234 (noting courts often fail to consider which forums advertisers actually target).

forums.[326] In contrast, an online book store with no physical retail outlets that advertises a variety of books that it will ship across the United States probably intends and should reasonably expect to reach every forum its advertisement reaches.[327] The content of the two advertisements suggests that one advertiser is using a worldwide medium to reach a local audience while the other advertiser is using a worldwide medium to reach customers worldwide. A defendant advertiser could overcome a finding of purposeful availment based on the content of its advertisement by providing specific evidence that indicated it was not attempting to avail itself of a particular forum.[328] Likewise, a plaintiff could overcome a finding of no purposeful availment by providing additional evidence that indicated the advertiser was actually attempting to avail itself of the benefits and protections of the forum.[329]

The structure and location of a World Wide Web advertisement provide additional clues concerning the advertiser's intent and reasonable expectations. World Wide Web advertisers have a variety of tools at their disposal for crafting unique World Wide Web advertisements.[330] Some advertisers craft basic World Wide Web pages without a specific target.[331] Other advertisers target specific markets and tailor advertisements to appeal to certain market segments.[332] For example, a national advertiser who places banner advertisements (linked to its World Wide Web site) for snow blowers on a weather map of Michigan in January provides a clear indication that it is attempting to reach Michigan residents.[333] Finally, while the content and

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326. *Cf. Bensusan*, 937 F. Supp. at 300 (describing defendant's advertisement of local nightclub).

327. *Cf.* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (describing defendant's World Wide Web advertisement which advertised its World Wide Web advertising service).

328. *Cf.* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300-01 (S.D.N.Y. 1996) (describing defendant's affidavit). The defendant submitted an affidavit which indicated that ninety-nine percent of his business was derived within the forum and that most of his interstate income derived from customers who had a pre-existing connection to the area. *Id.* at 300. Evidence of this kind is helpful in showing that the defendant was not attempting to reach every forum reached by the World Wide Web.

329. *See* Zbaracki, *supra* note 68, at 230-34 (encouraging plaintiffs to examine defendant's efforts to examine marketing, demographics, reach, coverage, and target of advertising); *supra* Part II.B (discussing World Wide Web advertising practices and methods).

330. *See supra* Part II.B (describing variety of tools at advertisers' disposal).

331. *See supra* Part II.B (describing basic World Wide Web advertisements).

332. *See supra* Parts II.B.1 & 2 (describing targeting and tailoring of World Wide Web advertisements).

333. *See* Quittner, *supra* note 72, at 34 (discussing *Time*'s Pathfinder online service's use

structure of World Wide Web advertisements provide important evidence for the minimum contacts analysis, additional evidence including business and marketing plans, public statements and disclosures, and information concerning the defendant's traditional markets can provide clues to the advertiser's intent and reasonable expectations.[334]

*b. Standards for Measuring a World Wide Web Advertiser's Contacts*

The variety of possible contacts between an advertiser and a forum requires courts to analyze each case on its own facts.[335] Unfortunately, the prophylactic rules of the mere placement test and of the additional conduct test are too inflexible for consistent constitutional application.[336] Strict application of the mere placement approach could allow the exercise of jurisdiction over an advertiser who derived ninety-nine percent of its business from within its home state.[337] Strict application of the *Bensusan* approach could prevent the exercise of jurisdiction over an advertiser who used the World Wide Web in the hopes of reaching customers located throughout the United States unless the advertiser directed its activities at particular forums.[338] Constitutional application of the minimum contacts test demands

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of targeted advertisements from third-party companies).

334. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 297 (S.D.N.Y. 1996) (observing limited extent of defendant's market), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997); Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40, 43 (8th Cir. 1988) (finding advertising in nationally circulated trade magazine insufficient to establish personal jurisdiction). In *Lake Havasu*, the court noted that the defendant concentrated its sales in Arizona and California and advertised in a nationally circulated trade magazine to promote those forum-specific sales. *Id.* at 42-43. The court found the mere act of advertising in a national trade journal did not establish purposeful availment of Minnesota. *Id.* at 43; *see also* Zbaracki, *supra* note 68, at 230-34 (describing how marketing, demographic analysis, and reach of advertising can help courts determine whether defendant directed advertising at forum).

335. *See* Silverman, *supra* note 62, at C1 (describing variety of potential World Wide Web advertising contacts).

336. *See supra* Parts IV.B.1.c & 2.c (describing inflexibility of additional conduct and mere placement approaches).

337. *See* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (exercising personal jurisdiction over nonresident defendant based on mere placement of advertisement on World Wide Web); Burk, *supra* note 23, at 1111 n.70 (noting that *Inset* opinion's logic could support proposition that all World Wide Web site owners have availed themselves of Connecticut "even if they have never heard of Connecticut"); *supra* Part IV.B.1.a.i (discussing *Inset*).

338. *See Bensusan*, 937 F. Supp. at 300-01 (refusing to exercise personal jurisdiction over nonresident defendant absent additional conduct targeting forum); *see supra* Part IV.B.2.a (discussing *Bensusan* approach).

that courts retain the flexibility to exercise personal jurisdiction over those defendants who purposefully avail themselves of the forum, while denying requests for jurisdiction over defendants whose advertisements fortuitously reach the forum.[339]

Courts should apply a flexible two-step approach for determining whether a World Wide Web advertiser has established purposeful contacts with a forum. The court should first determine whether the content of the World Wide Web advertisement indicates an intent to reach forum residents.[340] If the content of the advertisement indicates an intent to serve the forum, the court should determine whether other factors such as the traditional reach of the defendant's business mitigate or aggravate the intent demonstrated by the content of the advertisement.[341] Once the court applies this two-step minimum contacts approach and determines that the defendant intended or should have reasonably expected to reach the forum, it remains free to refuse to exercise jurisdiction on fairness and reasonableness grounds.[342]

### 3. *Reappraisal of* CyberGold, Granite Gate, *and* Bensusan *Under the Flexible Two-Step Minimum Contacts Approach*

Although the approaches adopted by the *Inset*, *CyberGold*, *Bensusan*, and *Granite Gate* courts are too inflexible for consistent application to World Wide Web advertising contacts, the inflexibility of their approaches does not necessarily invalidate their holdings. Unfortunately, the few facts provided by the *Inset* court prevents a final judgment on the constitutionality of its decision.[343] However, the facts as described in *CyberGold*, *Bensusan*, and

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339. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-75 (1985) (finding due process allows exercise of jurisdiction when defendant "purposefully directs" activities at forum, but forbids exercise of jurisdiction based on fortuitous contacts).

340. *See supra* Part IV.C.2.a (discussing importance of advertisement's content and structure in minimum contacts analysis).

341. *See supra* Part IV.C.2.a (describing factors beyond mere content and form of advertisement relevant to minimum contacts analysis of World Wide Web advertising contacts).

342. *See infra* Part V (discussing application of fairness and reasonableness considerations in World Wide Web advertising cases).

343. *See supra* Part IV.B.1.a.i (discussing *Inset*). The *Inset* court noted that the defendant, which provided computer technology and support to thousands of organizations around the world, used its advertisement to advertise its goods and services. Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 162-63 (D. Conn. 1996). These facts seem to indicate that step one of the flexible approach to World Wide Web advertising contacts is satisfied. However, the court provides no information on the content of the advertisement that would indicate which markets, if any, the defendant had targeted through its advertisement. This failure makes a final conclusion on the constitutionality of the court's decision inadvisable.

*Granite Gate* suggest that those courts reached constitutional minimum contacts conclusions.[344]

### *a. Step One: The Advertiser's Objective Intent*

The first step for any court evaluating the propriety of finding minimum contacts in World Wide Web advertising cases should be the objective evidence provided by the content of the advertisement itself.[345] The defendants in both *CyberGold* and *Granite Gate* created World Wide Web advertisements that appeared to be directed at a nationwide audience.[346] CyberGold's entire business depended on reaching across the World Wide Web to enroll participants in its World Wide Web advertising service.[347] Likewise, in *Granite Gate* the defendants' advertisement boasted that the defendants' gambling service allowed betting from anywhere around the world.[348] In contrast, the *Bensusan* court noted that the defendant's Missouri nightclub advertisement was a general access site, contained general information about the Missouri club, and provided information on obtaining tickets for the Missouri club's shows.[349] Although the content of the *CyberGold* and *Granite Gate* sites demonstrated the advertisers' intent to reach distant forums, the *Bensusan* site demonstrated the advertiser's intent to reach a local market.

### *b. Step Two: Mitigating and Aggravating Factors*

The second step in the flexible minimum contacts analysis allows courts to look behind the advertisement to determine an advertiser's intent and reasonable expectations.[350] Again, the facts from *CyberGold*, *Granite Gate*, and *Bensusan* indicate that those courts came to the constitutionally correct

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344. *See supra* Part IV.B.1.a.ii (discussing *CyberGold*); *supra* Part IV.B.1.a.iii (discussing *Granite Gate*); *supra* Part IV.B.2.a (discussing *Bensusan*).

345. *See supra* Part IV.C.2.a (discussing importance of advertisement's content and form in minimum contacts analysis).

346. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1330, 1333 (describing CyberGold's World Wide Web site); State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *4 (Minn. Dist. Ct. Dec. 11, 1996) (describing content of defendants' World Wide Web site), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997).

347. *CyberGold*, 947 F. Supp. at 1330.

348. *Granite Gate*, 1996 WL 767431, at *4.

349. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 297 (S.D.N.Y. 1996) (describing content of defendant's World Wide Web site), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

350. *See supra* Part IV.C.2 (describing factors beyond mere content and form of advertisement relevant to minimum contacts analysis).

conclusions. In *CyberGold* and *Granite Gate* the defendants were unable to overcome the objective evidence that they aimed their advertisement at every forum the World Wide Web reaches.[351] In *Bensusan*, the plaintiff was unable to demonstrate that the defendant was attempting to reach out beyond an essentially local market.[352]

In *CyberGold*, the defendant merely argued that it had established a World Wide Web site with which it intended to reach Internet users regardless of geographic location.[353] The defendant was unable to show that it did not intend to reach Missouri internet users. Demonstrating disinterest in where one's customers live is not equivalent to demonstrating one did not purposefully avail oneself of a particular forum.

In *Granite Gate*, the district court pointed to several factors, including mailing lists, site usage logs, and telephone conversations, which established that the defendants knew or should have known that they had established contacts with Minnesota.[354] As in *CyberGold*, the *Granite Gate* defendants also argued that they had not availed themselves of any forum in particular.[355] Neither the state district court nor the court of appeals allowed this argument to overcome ample evidence that the advertisers attempted to reach the forum with the expectation of receiving benefits from the forum.[356]

In *Bensusan*, the weight of the evidence certainly weighed against the plaintiff. The defendant provided ample evidence of the essentially local character of its business.[357] The plaintiff failed to overcome this evidence with evidence of its own that established the defendant had suddenly decided to reach out to potential customers in New York.[358] The court's refusal to find minimum contacts was constitutionally proper.

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351. *See supra* notes 347-48 and accompanying text (describing content of World Wide Web sites in *CyberGold* and *Granite Gate*).

352. *See supra* note 349 and accompanying text (describing content of World Wide Web site in *Bensusan*).

353. Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996).

354. *See* State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *2-6 (Minn. Dist. Ct. Dec. 6, 1996) (describing evidence of connection between defendants and forum), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997); State v. Granite Gate Resorts, Inc., No. C6-97-89, 1997 WL 557670, at *1-3 (Minn. Ct. App. Sept. 5, 1997) (same).

355. *Granite Gate*, 1997 WL 557670, at *4.

356. *Id.* at *4-5.

357. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (describing defendant's affidavit that claimed ninety-nine percent of defendant's business was derived locally), *aff'd*, No. 1383, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

358. *See id.* at 301 (noting absence of evidence plaintiff availed himself of benefits and protections of forum).

### *V. Fairness and Reasonableness Considerations in World Wide Web Advertising Cases*

The precise role of the fairness and reasonableness considerations in World Wide Web advertising cases remains uncertain. Although one court has recently refused to exercise personal jurisdiction based on fairness and reasonableness grounds,[359] the discussion of these considerations in other World Wide Web advertising cases has been limited.[360] The district court's finding of no minimum contacts in *Bensusan* made analysis of fairness and reasonableness considerations unnecessary.[361] In addition, none of the defendants in *CyberGold*, *Granite Gate*, or *Inset* presented compelling cases of unfairness or unreasonableness.[362]

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359. *See* Expert Pages v. Buckalew, No. C-97-2109-VRW, 1997 WL 488011, at *2-5 (N.D. Cal. Aug. 6, 1997) (finding minimum contacts between defendant and forum but refusing to exercise personal jurisdiction on fairness and reasonableness grounds). In *Expert Pages*, California plaintiffs asked the court to exercise personal jurisdiction over a Virginia defendant who allegedly copied and posted portions of the plaintiffs' World Wide Web site. *Id.* at *1. The plaintiffs maintained a World Wide Web advertising site that provided information on expert witnesses and consultants. *Id.* The defendant, whom the court described as a "young adult," allegedly copied the plaintiff's World Wide Web site. *Id.* The defendant also allegedly sent disparaging e-mail messages to advertisers on the plaintiffs' site for the purpose of promoting the defendant's own services. *Id.* The court found the act of copying the plaintiff's World Wide Web site constituted an act directed at the forum and calculated to cause injury in the forum. *Id.* at *3. The court found that this act established minimum contacts with forum. *Id.* However, the court refused to exercise jurisdiction because it found the burden on the defendant to be "very substantial" and because the contacts between the defendant and the forum were "barely greater than the constitutional threshold." *Id.* at *4-5.

360. *See Bensusan*, 937 F. Supp. at 300-01 (skipping discussion of fairness and reasonableness after finding no purposeful availment); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1334 (E.D. Mo. 1996) (discussing fairness and reasonableness briefly); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (discussing fair play and substantial justice briefly); State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *11 (Minn. Dist. Ct. Dec. 11, 1996) (describing exercise of personal jurisdiction as fair and reasonable), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997). *But see* Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456, 470-71 (D. Mass. 1997) (discussing fairness and reasonableness factors in case involving defendant who, *inter alia*, allegedly breached licensing agreement and infringed plaintiff's trademarks via defendant's World Wide Web site).

361. *See Bensusan*, 937 F. Supp. at 300-01 (discussing due process limits on exercise of jurisdiction over nonresident World Wide Web advertiser).

362. See *CyberGold*, 947 F. Supp. at 1334 (noting forum's strong interest in resolving trademark infringement matter affecting local corporation, plaintiff's strong interest in adjudicating dispute in forum, and California defendant's failure to show excessive burden); *Inset*, 937 F. Supp. at 165 (noting forum's interest in adjudicating dispute, forum's ability to dispose of matter efficiently, and close proximity between Massachusetts defendant and

Although detailed discussion of the impact of fairness and reasonableness considerations in World Wide Web advertising cases should wait for fuller development by the courts, the outlines of the likely arguments can be traced. Arguments concerning the burden on the defendant and the plaintiff's interest in convenient and effective relief will likely be substantially unchanged in World Wide Web advertising cases.[363] However, important differences should appear concerning the forum state's interest in adjudicating the dispute, the interstate judicial system's interest in providing convenient and effective relief, and the shared interests of the several states in furthering substantive social policies.[364]

Courts can expect defendants in World Wide Web advertising cases to argue that the exercise of jurisdiction in the forum presents an undue burden.[365] Plaintiffs will argue that they need the forum to exercise jurisdiction in order to obtain convenient and effective relief.[366] These arguments are likely to come with greater frequency because the World Wide Web eases interstate and international communication[367] without improving interstate transportation.[368] However, the arguments will not differ substantially from the same arguments in more traditional personal jurisdiction cases.[369]

Conflicts caused by competing attempts to control both the Internet and its users may give increased weight to the remaining fairness and reasonable-

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Connecticut forum); *Granite Gate*, 1996 WL 767431, at *11 (noting forum's interest in adjudicating dispute and lack of inconvenience to Nevada defendant).

363. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (listing fairness and reasonableness considerations); *Expert Pages*, 1997 WL 488011, at *3-4 (applying fairness and reasonableness considerations in World Wide Web advertising-related case).

364. *See World-Wide Volkswagen*, 444 U.S. at 292 (listing fairness and reasonableness considerations).

365. *Compare CyberGold*, 937 F. Supp. at 1334 (finding exercise of jurisdiction would not impose undue burden), *with Expert Pages*, 1997 WL 488011, at *5 (finding exercise of jurisdiction would impose undue burden).

366. *See* State v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *11 (describing attorney general's interest in enforcing state's consumer protection laws), *aff'd*, No. C6-97-89, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997).

367. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333-34 (E.D. Mo. 1996) (noting effect of Internet on communication).

368. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957) (explaining improvements in modern communications technology and transportation allow expansion of scope of personal jurisdiction). *But see* Hanson v. Denckla, 357 U.S. 235, 255-56 (1958) (noting that expansion of scope of personal jurisdiction based on convenience does not remove all restrictions on ability of courts to exercise personal jurisdiction under Due Process Clause).

369. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 113-16 (1987) (explaining and applying fairness and reasonableness considerations in stream of commerce case).

ness considerations.[370] Although each forum retains an interest in regulating conduct that affects the state and its citizens, the several states and nations also retain an interest in both the free flow of commerce on the Internet and its World Wide Web, and in the regulation of their own citizens' activities.[371] Striking a balance between the state's interest in regulating conduct that affects its citizens and the national and international interest in growth and expansion of the Internet and Internet commerce will be critical to future development of the Internet and its World Wide Web.[372]

If courts extend their long-arm too far, they may unduly restrict the World Wide Web's growth by discouraging advertisers from availing themselves of the World Wide Web's global commercial opportunities because of fears of litigation in distant jurisdictions.[373] Courts need an efficient and fair mechanism for resolution of disputes arising from commercial use of the Internet and World Wide Web[374] that does not unduly restrict commerce on the World Wide Web.[375] Thus, courts should carefully consider the balance between the forum's interest, national interests, and international interests in future cases involving allegations of personal jurisdiction arising from contacts made over the World Wide Web.[376]

## *VI. Conclusion*

Although disputes arising from World Wide Web advertising must be resolved somewhere, it is unnecessary and unwise for the courts to adopt an

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370. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (listing fairness and reasonableness considerations). The remaining considerations include the forum state's interest in adjudicating the dispute, the interstate judicial system's interest in the efficient resolution of controversies, and the shared interests of the several states in furthering fundamental substantive social policies. *Id.*

371. *See* Burk, *supra* note 23, at 1095-96 (discussing constitutional issues raised by local regulatory leakage); *supra* note 27 (discussing attempts to regulate Internet).

372. *See* Reno v. ACLU, 117 S. Ct. 2329, 2351 (1997) (finding government regulation of content of speech on Internet more likely to interfere with than to encourage future growth); *see also* Johnson & Post, *supra* note 27, at 1370-76 (striking balance in favor of creation of new jurisdiction — Cyberspace — with its own laws and governing bodies).

373. *See* Burk, *supra* note 23, at 1117 (describing all or nothing choice of World Wide Web users concerned about potential liability).

374. *See World-Wide Volkswagen*, 444 U.S. at 292 (noting interstate judicial system's interest in mechanism for efficient resolution of controversies).

375. *See* Burk, *supra* note 23, at 1117-23 (discussing need for sensible jurisdictional regime).

376. *Cf.* Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032, 1040 (S.D.N.Y. 1996) (noting that although "Internet deserves special protection as a place where public discourse may be conducted without regard to nationality, religion, sex, [or] age" protection "does not extend to ignoring court orders and injunctions").

inflexible approach to jurisdictional questions involving the World Wide Web.[377] The great changes brought by the Internet and the World Wide Web demand cautious handling by the courts.[378] The Clinton Administration has adopted a hands-off approach to the Internet to avoid stunting its natural growth,[379] and the Supreme Court has rebuffed early efforts to control Internet content.[380]

A flexible approach to analysis of World Wide Web advertising contacts will serve the courts well as the World Wide Web and World Wide Web advertising contacts change over time.[381] A flexible approach will allow courts to reach defendants who purposefully direct their activities toward the forum, while preventing courts from reaching defendants who fortuitously contact the forum.[382] In addition, a flexible approach will serve advertisers well by allowing them to structure their advertisements so as to avoid the exercise of jurisdiction in forums they do not wish to reach.[383] Finally, a flexible approach will ensure that the *International Shoe* minimum contacts test remains the constitutional measure of the weight and quality of World Wide Web advertising contacts.[384]

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377. *Cf.* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385 (1996) (Breyer, J., plurality opinion) (explaining changing state of telecommunications technology made adoption of inflexible analogies for First Amendment analysis of Cable Television Consumer Protection & Competition Act of 1992 "unwise and unnecessary").

378. *See* American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 183 (S.D.N.Y. 1997) (warning "[h]aphazard and uncoordinated state regulation can only frustrate the growth of cyberspace").

379. *See* Jube Shiver, Jr. & Greg Miller, *Clinton Vows No New Taxes on Internet*, L.A. TIMES, July 2, 1997, at D1 (describing Clinton Administration's "hands off" Internet policy).

380. *See* Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997) (declaring key provisions of Communication Decency Act of 1996 unconstitutional); see also *American Libraries Ass'n*, 969 F. Supp. at 183-84 (enjoining enforcement of New York statute — designed to regulate speech on Internet and other computer communications networks — on Commerce Clause grounds).

381. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 32 (1996) (noting wisdom of decisional minimalism in cases where rapid technological change may change nature of problem or provide new opportunities).

382. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (requiring purposeful direction of activities by plaintiff before exercise of jurisdiction is permissible).

383. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (explaining that corporation can sever connection with forum if risks of litigation arising from placement of products into stream of commerce prove too high).

384. *See* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (explaining the exercises of jurisdiction must meet "the standards set forth by *International Shoe* and its progeny").

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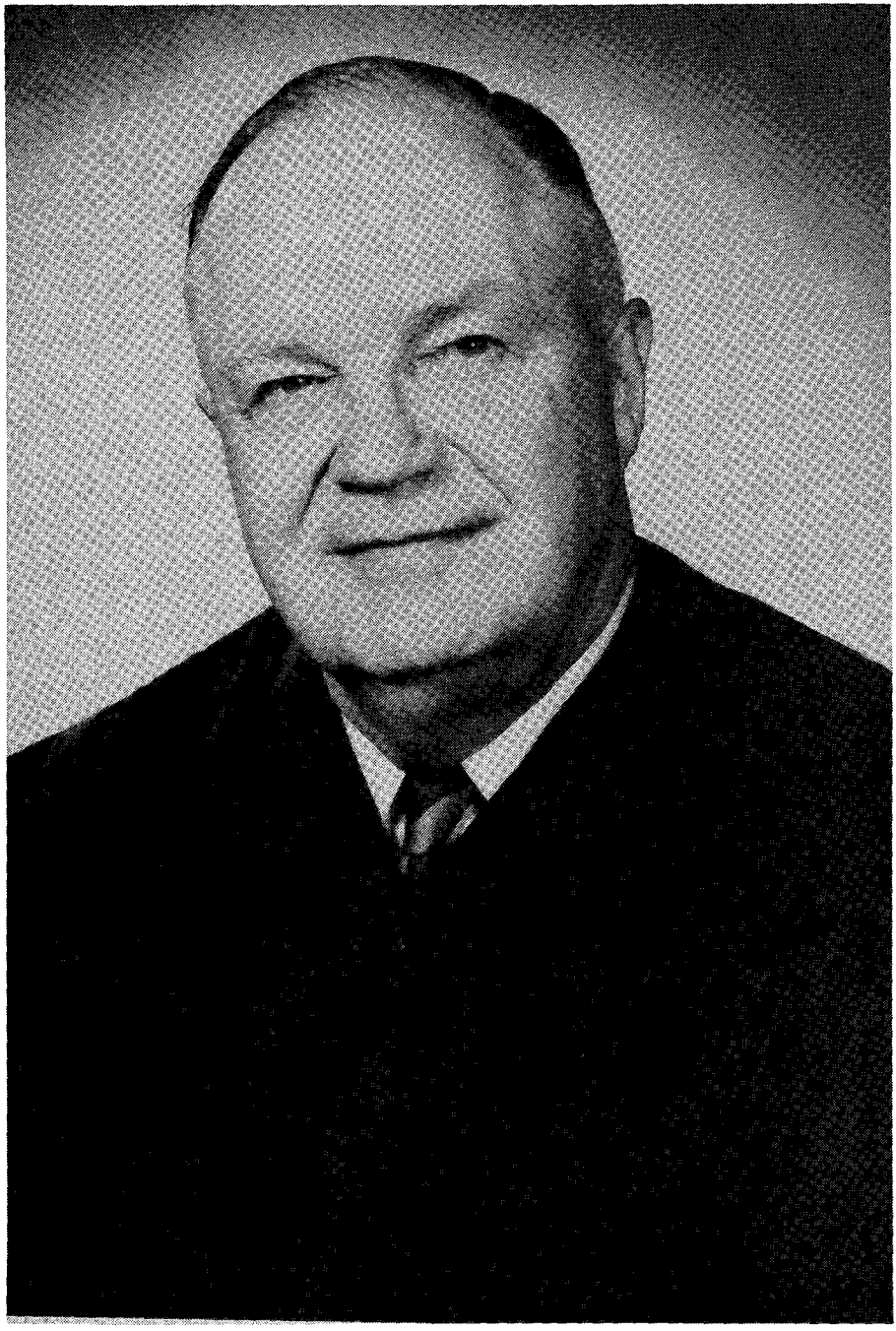

**Walter E. Hoffman**