
Yvonne A. Tamayo
Who? What? When? Where?
Personal Jurisdiction and the World Wide Web

Yvonne A. Tamayo


I. Introduction

"I have a Web site I'm working on."[2]

{1} Almost everyone, it sometimes seems, is "working on a Web site." The Internet, a seamless web of
communication, has broken down barriers of distance and time among people. At the same time it has made
increasingly porous the conventional boundaries between the tangible and the abstract. Many business
entities have created their own World Wide Web pages on the Internet, in order to deliver their advertising
messages instantaneously to potential customers anywhere in the world.[5] Increasingly, lawsuits are being
filed against these businesses engaged in electronic commerce.[6]

{2} The Internet's indifference to physical borders is challenging and rapidly reshaping traditional notions of
"presence" within geographical boundaries.[7] As a result, novel questions have begun to arise regarding
personal jurisdiction over defendants in Internet-related cases.

{3} Recent court decisions have demonstrated confusion and division in the judiciary's grappling with
plaintiffs' attempts to establish personal jurisdiction over a defendant whose contacts with the forum state
exist primarily, or exclusively, through the defendant's Internet webpage.[9]

{4} Additionally, a website's status as "passive"[10] or "interactive"[11] also presents issues of first
impression in a jurisdictional analysis. However, not all courts give meaningful attention to the difference
between "passive" and "interactive" webpages and their differing capacities to "contact" persons in a
This article will examine those cases, focusing primarily on two federal district court decisions considering "passive" webpages -- Inset v. Instruction Set, Inc. and Bensusan Restaurant Corp. v. King.

Inset involved a defendant whose only "contacts" with the forum state were the defendant's maintenance, for advertising purposes, of a World Wide Web site accessible to persons residing in Connecticut and to people throughout the world, along with a toll-free telephone number. The Inset court found that the defendant's website was a sufficient contact to establish personal jurisdiction over the defendant in Connecticut. As in Inset, the defendant in Bensusan also maintained a "1-800" telephone number along with a website advertising its jazz club. The court in Bensusan, however, decided that maintenance of a webpage available to New York residents, without additional activity by the defendant in the forum, did not rise to the level of "minimum contacts" necessary for a finding of personal jurisdiction comporting with due process.

The cases of Inset and Bensusan contain strikingly similar factual scenarios, but the courts deciding those cases nevertheless arrived at different conclusions regarding whether a World Wide Web page is sufficient to establish "minimum contacts" in a forum. These opinions from the Connecticut and New York Federal District Courts demonstrate the lack of consistency within the judiciary as it struggles with this factually new area of the law.

To determine whether personal jurisdiction exists over a defendant, federal courts apply the law of the forum state, subject to the limits of the Due Process Clause of the Fourteenth Amendment. Due process requires that a defendant have minimum contacts with the forum state so that a court's assertion of personal jurisdiction over a defendant is fair and just. Personal jurisdiction, which limits the forum in which a plaintiff may sue a defendant on a particular claim, requires that a non-resident defendant have established a relationship with the forum state sufficient that the defendant may reasonably anticipate being sued there.

A nonresident defendant may be subject to personal jurisdiction under either general jurisdiction or specific jurisdiction. General jurisdiction may be established over a party, regardless of the connection between the underlying controversy and the forum state, if that party's contacts with the state are sufficiently "significant" or "systematic and continuous." Specific jurisdiction, however, requires a fact-specific inquiry as to whether a court's assertion of personal jurisdiction over a nonresident defendant comports with due process requirements mandating the defendant's "minimum contacts" with the forum state.

The U.S. Supreme Court in International Shoe Co. v. Washington set forth a flexible test for determining specific personal jurisdiction over a defendant: the defendant must have "minimum contacts" with the forum state such that the assertion of personal jurisdiction comports with traditional notions of fair play and substantial justice. In order to reduce the vagueness inherent in the International Shoe standard, the Supreme Court has since developed a three-part test to help courts apply the "minimum contacts" criteria. In determining that the assertion of specific personal jurisdiction comports with due process, a court must find that the defendant purposefully availed himself of the privilege of conducting business in the forum; that the cause of action arose out of the defendant's activities in the forum; and that the exercise of jurisdiction is fundamentally fair. To determine the fundamental fairness of asserting jurisdiction the Court has established the following five criteria: (1) the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interests the several states have in furthering fundamental substantive social policies.

Parts II and III of this article will analyze the conflicting holdings and rationales in Inset and Bensusan and the courts' treatment of the Internet as a uniquely interactive vehicle for companies and individuals to
transcend traditional notions of physical "presence." Part IV concludes that, in spite of this electronic medium's novel mode of communication, the existing legal framework established by the Supreme Court for personal jurisdiction analyses, when applied by a judiciary knowledgeable as to the Internet's abilities and limitations, is adequate to address the issues presented in this emerging area of the law.

II. Inset v. Instruction Set, Inc.[31]:
An Expansive View of Jurisdiction

{11} The Inset court's expansive view of Internet-based personal jurisdiction affirms the recognition that advertising, combined with electronic communications, is able to reach human targets with unprecedented ease and speed, without the need for traditional physical methods of delivery.[32] This general and incontrovertible recognition led the court to examine critical questions regarding what constitutes an Internet advertiser's legal "presence" in a forum when that party's only contact with the forum state involves the maintenance of a website.[33]

{12} In Inset, the plaintiff Inset Systems Inc. ("Inset") filed a lawsuit against Instruction Set, Inc. ("ISI") in the Connecticut Federal District Court.[34] A Connecticut corporation with its only office in Brookfield, Connecticut, Inset develops and sells computer software services around the world.[35] ISI, a Massachusetts corporation, markets computer technology and support to companies worldwide, and maintains its sole office in Natick, Massachusetts.[36] ISI has neither employees nor offices in Connecticut, and does not conduct business in Connecticut on a regular basis.[37]

{13} On August 23, 1985, Inset filed for registration of the federal trademark "INSET."[38] Some time thereafter, ISI began to use the designation "INSET" as part of its webpage domain name, "INSET.COM", having created that "passive" webpage in order to advertise its products through the Internet.[39] On June 30, 1995, Inset sued ISI, alleging that ISI's use of "INSET.COM" as its Internet domain name, and its use of the toll-free number "1-800-US-INSET", infringed upon Inset's federally registered trademark.[40] ISI moved to dismiss the complaint, arguing that the court lacked personal jurisdiction under the Connecticut long-arm statute and pursuant to the "minimum contacts" requirements of the Due Process Clause.[41]

{14} In examining the jurisdictional issue in Inset, District Court Judge Covello first addressed whether Connecticut law established the state's personal jurisdiction over ISI.[42] Connecticut's long-arm statute provides that a foreign corporation is subject to suit within the state on a cause of action arising out of any business solicited in the state, if the corporation repeatedly solicits business within the forum state.[43] Considering whether ISI solicited business repeatedly within Connecticut, the court relied on two Connecticut Federal District Court decisions in which a "repetitious pattern of business" was found sufficient to satisfy the requirements of the long-arm statute, permitting jurisdiction over non-resident defendants.[44] In one of the cases, the defendant, during a six-month period, had placed at least six advertisements in a newspaper whose circulation included Connecticut.[45] The statute had similarly been held to be satisfied where a party had advertised in thirty periodicals with circulation in Connecticut during eighteen months, and where thirty catalogs were delivered to Connecticut residents and two sales of the allegedly infringing products to Connecticut residents had occurred, even though the sales may not have been the results of the solicitation activities.[46]

{15} In comparing ISI's advertising on the Internet to the hard-copy promotional materials utilized by the defendants in the two instances above, Judge Covello pointed out the relentless nature of electronic advertising and distinguished it from other kinds of advertising:

[S]ince March, 1995, ISI has been continuously advertising over the Internet, which includes at least 10,000 access sites in Connecticut. Further, unlike hard-copy advertisements noted in the
above two cases, which are often quickly disposed of and reach a limited number of potential consumers, Internet advertisements are in electronic printed form so that they can be accessed again and again by many more potential consumers.[47]

This ISI activity, the court found, clearly constituted solicitation of Connecticut residents of a sufficiently repetitive nature to confer jurisdiction over ISI under Connecticut's long-arm statute.[48]

{16} Having determined that ISI was subject to Connecticut's long-arm jurisdiction, the court next considered whether a finding of personal jurisdiction over ISI would violate ISI's due process rights. In asserting personal jurisdiction over a defendant, a court will find due process requirements satisfied only if the nonresident corporate defendant's "minimum contacts" with the forum state are sufficient that having "purposefully availed" itself of the benefit of conducting business in the state, the defendant should have reasonably anticipated being haled into the forum state's court.[49] Additionally, the maintenance of a lawsuit in the forum state must not offend traditional notions of fair play and substantial justice.[50]

{17} Regarding the question of whether ISI had sufficient "minimum contacts" with Connecticut to satisfy the constitutional requirements of due process, ISI argued that it lacked sufficient contacts with Connecticut because it did not conduct business in the state on a regular basis and because it had no offices or employees in the state.[51] Inset, however, asserted that ISI's webpage and toll-free-number sufficiently established ISI's conducting of business within Connecticut.[52]

{18} In addressing the crux of the "minimum contacts" test, Judge Covello considered whether ISI acted in such a manner as to "purposefully avail" itself of the benefits and protections of Connecticut by conducting business activities within that state.[53] In Connecticut, the court pointed out, the "purposeful availment" test has been satisfied when a corporation has displayed a pattern of product promotion and sales in Connecticut by supplying potential customers with catalogs advertised in periodicals circulated in Connecticut, by providing products ordered by Connecticut residents, and by demonstrating a readiness to solicit Connecticut customers through telephone communications.[54] Comparing that kind of promotional activity to ISI's electronic advertising on its Internet webpage, Judge Covello once again focused on the pervasive nature of ISI's advertising measures and emphasized the differences between website advertisement and other modes of advertisement:

In the present case, (ISI) has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states. The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user.[55]

{20} According to Judge Covello, the difference between the Internet and other forms of media advertising is the Internet's ability to reach customers with advertising information, unconstrained by traditional limitations of time or space. This difference put the defendant on notice that it could reasonably anticipate being sued in Connecticut, and thus clearly mandated a finding that ISI "purposefully availed" itself of the benefits of conducting business in Connecticut.[56] Finally, the court addressed whether a finding of personal jurisdiction over ISI complied with requirements of fair play and substantial justice.[57] In so doing it considered the relative burdens on the parties of litigating in each forum, the forum state's interest in adjudicating the dispute, and the interstate judicial system's interest in efficiently resolving controversies.[58] Because the defendant's place of business was less than two hours from the Hartford, Connecticut federal courthouse and the defendant had retained Connecticut counsel the burden on the defendant in litigating the matter in Hartford was minimal. Connecticut, the court found, had an interest in adjudicating issues involving common and statutory law, and adjudication in Connecticut would resolve the matter efficiently.
Thereafter, the court ruled that its exercise of personal jurisdiction over ISI comport with notions of fair play and substantial justice. Accordingly, the court determined that ISI's advertising on the Internet, through its webpage, established the repeated solicitation of business in Connecticut required by Connecticut's long-arm statute and also complied with constitutional due process requirements.

In determining that the Internet webpage constituted a sufficiently strong contact with Connecticut to establish personal jurisdiction over the defendant, Judge Covello manifested an understanding of the world as a place in which physical presence -- and in many instances personal experience and individual thought -- are being replaced by a reality determined by potent advertising messages and electronically-natured systems such as the Internet. In its analysis of whether ISI was subject to personal jurisdiction in Connecticut, the court in Inset noted that ISI's Internet webpage differed from traditional methods of advertising such as television, radio and newspapers. Judge Covello found particular relevance in two inherent physical limitations of non-Internet advertising media.

First, television and radio advertising is time-specific because the contact between the medium and the recipient is not continuous, and thus must occur during pre-scheduled moments. Second, in order to be received, the hard-copy newspaper or magazine containing the advertisement must be present within the same physical space as the reader, and must be read before its disposal occurs.

To a degree, the position that the Internet is different from other advertising media, in that it is not constrained by the physical time and space limitations of traditional vehicles such as newspaper or television, may seem persuasive.

Indeed, some Internet commentators have gone far beyond Judge Covello in emphasizing the newness and singularity of this medium. It has been argued that the Internet alters not only the physical aspects of traditional methods of communication, but more importantly that its interactive capability allows and encourages individuals to adopt new online identities. This feature results in the creation of multiple "selves," unconstrained by the geographical boundaries of a single, corporeal existence.

In Life On The Screen, Sherry Turkle argues that the Internet encourages us to re-construct the "self." In describing this "cultural work in progress" Turkle identifies an emerging sense of "decentered and multiple" identities as one crosses the boundary from the human to the technological. Consider Turkle's recounting of how one woman re-creates her identity: the woman forges a personal relationship with a man she "met" on the Internet, and she is in a state of confused anxiety as she plans her first meeting with him.

An interior designer nervously admits in my interview with her that she is not at her best because she is about to have a face-to-face meeting with a man with whom she has shared months of virtual intimacy in chat sessions on America Online. She says she is "pretty sure" that her electronic lover is actually a man (rather than a woman pretending to be a man) because she does not think "he" would have suggested meeting if it were otherwise, but she worries that neither of them will turn out to be close enough to their very desirable cyberselves: "I" didn't exactly lie to him about anything specific, but I feel very different online. I am a lot more outgoing, less inhibited. I would say I feel more like myself. But that's a contradiction. I feel more like who I wish I was. I'm just hoping that face-to-face I can find a way to spend some time being the [o]nline me.

The woman has developed an online self that is very real to her. When she is faced with a choice of which identity to adopt in her actual meeting with the other person, she expresses a preference towards, and perceives as plausible, her new "self."
Another commentator's account supports the theory that the Internet fosters not only the fragmentation and multiplicity of identity, but also allows for the emergence of a non-physical self, the Internet creates a seemingly complete "presence" without the need for a physical component. The following is a description of a "real life" introduction of persons who had only previously "met" on the Internet:

I remember the first time I walked into a room full of people [in real life] who knew many intimate details of my history and whose own stories I knew very well. Three months after I joined, I went to my first WELL party at the home of one of the WELL's [o]nline moderators. I looked around at the room full of strangers when I walked in. It was one of the oddest sensations of my life. I had contended with these people, shot the invisible breeze around the electronic watercooler [sic], shared alliances and formed bonds, fallen off my chair laughing with them, become livid with anger at some of them. But there wasn't a recognizable face in the house. I had never seen them before.

These illustrations expose the undeniable power of the Internet to create and deliver a powerful, albeit non-physical "presence" to anyone, anywhere, at any time. It is this unique aspect of the Internet which appears to have influenced Judge Covello's assessment of the nature of ISI's "contacts" to Connecticut and its subsequent establishment of the court's personal jurisdiction over ISI.

Claims that the Internet is totally different from traditional media--that it is changing the meaning of physical "presence"-- may be too global and overblown. Engaging in a close analysis of the issues presented in each particular case involving use of an Internet website is important. Such a closer and more satisfactory examination occurred in Bensusan Restaurant Corp. v. King.

III. Bensusan Restaurant Corp. v. King:
Limitations on Personal Jurisdiction

Bensusan Restaurant Corporation operated "The Blue Note," a New York jazz club. Bensusan sued Richard King, a Missouri resident and owner of a Missouri jazz club, also known as "The Blue Note." Bensusan claimed that King's website on the Internet infringed on Bensusan's right in its trademark "The Blue Note," and asserted claims for trademark infringement, trademark dilution and unfair competition.

Bensusan filed the action in the Federal Court for the Southern District of New York. King moved to dismiss the complaint, asserting that his site on the World Wide Web was insufficient for the New York court to establish personal jurisdiction over him under the New York long-arm statute and the Due Process Clause of the United States Constitution.

To advertise his club, King established a passive Internet website in April 1996. The website allegedly contained "a fanciful logo" which Bensusan asserted was substantially similar to his New York Blue Note logo. King's website contains general information about the club in Missouri, a calendar of events, and ticket information, including the names and addresses of ticket outlets in Columbia, Missouri for The Blue Note Club. The site also contains a telephone number for charge-by-phone ticket orders, which are available for pick-up on the night of the show at The Blue Note box office in Columbia.

Federal District Court Judge Stein first addressed whether personal jurisdiction over King was proper under Section 302(a)(2) of the New York long-arm statute, which permits a New York court to exercise personal jurisdiction over a non-resident defendant who commits a tortious act within New York.

In addressing whether copyright infringement, the alleged tortious act, occurred in New York, Judge Stein examined the process involved in providing the website information to New York consumers. The court noted that in order for the site visitor to utilize the information advertised on King's website, a visitor had to actively engage in several procedures. A person had to access the website, then telephone the
Missouri box office to order performance tickets, and finally pick up the tickets in Missouri since King did not mail tickets to purchasers. Accordingly, the alleged trademark infringement would occur in Missouri, not New York, since any "confusion" as to the two Blue Note clubs would arise as a result of the acts of the user in New York. In concluding that the alleged tortious act was not committed in New York, the court found that King had not actively directed any "infringing activity" towards New York: "The mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York."{36}

Bensusan next attempted to establish that King had transacted business in New York, and thus satisfied Section 302 (a)(3) of the New York long-arm statute. In order to subject a defendant to personal jurisdiction under that statutory provision, a plaintiff must show that the defendant derived substantial profits from its participation in interstate business and that the defendant reasonably expected its tortious act to have consequences in New York. Bensusan alleged that King participated in interstate commerce by hiring nationally-known bands and that he could reasonably have foreseen the occurrence of confusion in New York of the two Blue Note clubs, because King knew that Bensusan's club was located in New York. The court rejected this argument for two reasons. First, ninety-nine percent of King's revenue came from local residents of Columbia, Missouri, and the statute required not mere participation by the defendant in interstate commerce, but that the defendant derive "substantial" revenue from interstate commerce. Additionally, King's website did not constitute "a discernable effort . . . to serve, directly or indirectly, a market in the forum state," and thus it was not foreseeable that King's webpage advertising would have consequences in New York. Lastly, the court did not find that Bensusan had suffered any significant economic injury as a result of King's webpage activities. Accordingly, Judge Stein found that King's website did not support the exercise of personal jurisdiction over King under the New York long-arm statute.

Although the court found that jurisdiction was not proper under New York law, it nonetheless addressed whether asserting personal jurisdiction over King would violate due process. Judge Stein first acknowledged that due process requires that the non-resident defendant purposefully establish "minimum contacts" with the forum state such that the "maintenance of the suit does not offend traditional notions of fair play and substantial justice." In determining whether a defendant has "minimum contacts" with a forum state, the court considered the following factors: 1) whether the defendant purposefully availed himself of the benefits of the forum state; 2) whether the defendant carried on a continuous and systematic part of its general business within the forum state; and 3) whether the defendant's conduct and connection with the forum state are such that he should have reasonably anticipated being haled into court there.

The court found that King had done nothing to "purposefully avail" himself of the benefits of New York. In support of the court's position, Judge Stein pointed to the passive nature of King's website:

King, like numerous others, simply created a website and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide- or even worldwide- but, without more, it is not an act purposefully directed toward the forum state (emphasis added).

Further, since the maintenance of the website did not establish that King actively sought to encourage New Yorkers to access this site, the court found that King could not have conducted a "continuous and systematic" part of its business in New York.

Again, Judge Stein recognized the website's limitations in its ability to establish a "presence" in New York: "There is in fact no suggestion that King has any presence of any kind in New York other than the website that can be accessed worldwide." Finally, the court held that even if it was foreseeable to King that users could access his webpage in New York, and could thus be confused as to the two jazz clubs' relationship, that by itself was insufficient to satisfy due process. This reasoning led to a finding that the
assertion of personal jurisdiction over King violated due process, and the court granted King's Motion to Dismiss for lack of personal jurisdiction.\[106\]

\[41\] The Bensusan court's analysis differs markedly from that of the Inset court. Unlike Judge Covello, in Bensusan, Judge Stein decided that King's creation of a "passive" website, without more, did not establish that King had purposefully availed himself of the benefits of conducting business in New York.\[107\] The remainder of this article will be devoted to examination of the conflicting rationales of Inset and Bensusan.

IV. "Presence" Through the Internet

\[42\] The effect of the "presence," which may be established by the "interactivity" possible between the user and the Internet, should not be underestimated either in legal analysis or in a broader social construction. Bill Gates, founder and C.E.O. of Microsoft, has enthusiastically acknowledged the "intimate and ongoing" relationship between individuals made possible through the interactive qualities of the Internet.\[108\] Mr. Gates recently expressed his intent to develop a much "deeper" relationship with consumers through the Internet:

Our relationship to date has been if the people buy a product, which historically was a box, they'd take it home and use it, and then a few years later they'd get another one. That will change to where you're connected up to the Internet. We'll ask you to register and . . . we'll upload a few profile bits about how you're using the applications and what your hardware is . . . And with the interactive content you go from contacting us every two years down to contacting us \textit{two or three times a day}, where you're saying, 'What are the top stories that I care about . . . ?'[109]

Mr. Gates has additionally described his vision of the future:

The information highway will extend the electronic marketplace and make it the ultimate go-between, the universal middleman. Often the only humans involved in a transaction will be the actual buyer and seller . . . .When you want to buy something you'll be able to tell your computer to find it for you at the best price offered by any acceptable source or ask your computer to 'haggle' with the computers of various sellers . . . .Servers distributed worldwide will accept bids, resolve offers into completed transactions, control authentication and security, and handle all other aspects of the marketplace, including the transfer of funds. \textit{This will carry us into a new world of low-friction . . . stores and services that until now have profited just because they are 'there'- in a particular geographic location- may find they have lost that advantage.}[110]

\[43\] Bill Gates' scenarios describe an Internet containing interactive qualities representing a boundary-less force establishing a "presence" so significant that each day, it will inform us repeatedly of what is "important" to us, and can actually purchase for us all of the products that we wish to buy. The "deepness" of the relationship between an interactive Internet and humans thus results in its increased role in our decision-making as well as in a reduction in the "friction" generally present in our daily lived experience.

\[44\] It is the notion of a continuous presence created by electronic-based media that seemed to influence Judge Covello in rendering a finding of personal jurisdiction, based only on a defendant's maintenance of a "passive" Internet website.\[111\] In Inset, ISI's webpage had no interactive capabilities.\[112\] Other than posting advertising material, ISI could not conduct any additional activity on its website such as transmitting computer files to consumers, utilizing e-mail to communicate with webpage visitors, or entering into contracts with customers for the sale of goods or services.\[113\] The Inset court, however, failed to take into account the difference between a "passive" and an "interactive" website in its jurisdictional analysis.

\[45\] The "interactive" website differs substantially from a "passive" website in that it can engage in
communication with potential consumers who are situated in a particular geographic location, and can establish a pattern of geographically-specific activity through its contacts with those persons.\[114\] This scenario allows for the formation of "relationships" between users and the webpage advertiser, with the potential of establishing the type of conduct which may ultimately constitute sufficient "minimum contacts" with the forum state.

\{46\} Judge Covello's opinion in Inset is further flawed as its due process analysis consisted of a conclusory finding that ISI purposefully availed itself of doing business in Connecticut. This finding was based on ISI's "continuous" advertisement on its "passive" Internet webpage, without any additional contacts specifically with Connecticut.\[115\] As a result, the court concluded, ISI could reasonably have anticipated being haled into court in Connecticut.\[116\] The Inset opinion reflects a broad-stroked jurisdictional test applied in a manner exhibiting an overreaction to the novel factual scenario before the court. The opinion lacked the type of sensitive fact-based analysis which is necessary in Internet-related jurisdictional issues.

\{47\} In Bensusan, the court's reliance on Justice O'Connor's plurality opinion in Asahi Metal Indus. Co., Ltd. v. Superior Ct. of California\[117\] utilized a jurisdictional analysis well-suited to the determination of whether Internet-based activities constitute "minimum contacts" with a forum state. In Asahi, a California resident was injured while riding as a motorcycle passenger, when the vehicle's tire suddenly exploded.\[118\] The plaintiff sued Chen Shin Rubber Industrial Co., ("Chen Shin"), a Taiwan manufacturer of components in tire tubes, and filed the lawsuit in California Superior Court.\[119\] Chen Shin distributed its product world-wide.\[120\] Chen Shin then sought indemnification from Asahi, a Japanese manufacturer of tire tube valve assemblies who sold the assemblies to Chen Shin.\[121\]

\{48\} In Asahi, the Court addressed the issue of whether a non-resident foreign defendant's awareness that the product it manufactured, sold and delivered outside the United States might reach California in the "stream of commerce"\[122\] constituted "minimum contacts" so that exercising personal jurisdiction over that defendant would be reasonable.\[123\] The Supreme Court set forth a two-prong analysis which it developed to determine whether a finding of personal jurisdiction comports with due process: 1) whether the defendant purposefully availed himself of the laws of the forum state, and 2) whether the assertion of personal jurisdiction over the defendant would be fair and reasonable.\[124\]

\{49\} Justice O'Connor's plurality opinion in Asahi held that a non-resident defendant's placement of a product into the "stream of commerce,"\[125\] without additional conduct\[126\] in the forum state, did not satisfy the "purposeful availment" prong of the "minimum contacts" analysis.\[127\] The Court also found that the assertion of jurisdiction over Asahi would be unreasonable because of the heavy burden on the Japanese defendant, Asahi, to litigate in a California court.\[128\] Additionally, the Court considered the slight interests of the Taiwan corporation, Cheng Shin, and the State of California in resolving an indemnification claim between two foreign parties in a California court.\[129\]

\{50\} By employing the jurisdictional analysis set forth by O'Connor in Asahi, the Bensusan opinion illustrates that a sufficiently flexible legal framework exists and should be applied in Internet cases raising questions of personal jurisdiction.\[130\] The "additional conduct" requirement to the "stream of commerce" test, along with a determination of reasonableness, supplies a suitable jurisdictional analysis that asserts personal jurisdiction over defendants whose Internet activity establishes intentional contacts with forum residents, and not over conduct providing merely "passive" advertising messages\[131\] worldwide. One method of determining whether personal jurisdiction over a defendant who maintains a webpage is proper is by the examination of the level of interactivity occurring within the website.\[132\] Two writers on this subject have suggested an examination of the "hits"\[133\] to a website, assigning importance or weight to hits according to their nature or "quality".\[134\] Application of this test enables a court to find personal jurisdiction solely based on maintenance of an Internet webpage if those contacts with forum state residents are sufficiently robust.
In addition to the application of existing jurisdictional analyses to personal jurisdiction issues, it is important that judges become educated regarding an Internet webpage's interactive capabilities. This knowledge will aid in minimizing judicial overreaction to Internet-related cases such as that exhibited by Judge Covello in Inset. One example of a judiciary's education of Internet concepts may be found in the court's opinion in ACLU v. Reno. In ACLU v. Reno, various organizations brought a constitutional challenge against the Communications Decency Act of 1996. That Federal Law attempted to regulate the transmission of indecent or obscene material to children over the Internet. During a preliminary hearing, Judges Sloviter, Buckwalter and Dalzell obtained familiarity with the Internet through demonstrations conducted on computers in the courtroom, and learned, among other things, of differences between Internet communications and those received by radio or television.

The Supreme Court has acknowledged that a personal jurisdiction analysis is an imprecise inquiry, and that the "minimum contacts" test is not susceptible to "mechanical application." As a result, the analytical framework provided by the Court in International Shoe, and subsequent Court opinions, along with Justice O'Connor's "additional contacts" requirement to the "stream of commerce" test in a "minimum contacts" analysis, is easily adaptable to questions of personal jurisdiction in Internet-related cases. Thus, courts' application of a jurisdictional framework established by the Court, along with a working knowledge of what type of "presence" the Internet can, and cannot, establish in a forum state, will ensure consistent judicial opinions in Internet cases, and foster the development of a uniform and coherent body of law.

V. Conclusion

As more individuals and businesses develop webpages to advertise their products on the Internet, the amount of Internet-related litigation will increase proportionately. The Internet's indifference to boundaries, however, presents novel issues of what constitutes "presence" by a non-resident defendant in a forum state within the context of a personal jurisdiction analysis. Recent opinions illustrate courts' disagreement and confusion regarding the interactive capabilities of an Internet webpage to establish "minimum contacts" by the defendant in a forum state. Increased judicial familiarity with the nature of the Internet, together with the application of existing yet flexible legal precedent to Internet-related jurisdictional questions will encourage well-reasoned opinions in this emerging area of the law.

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[2] Charles Manson, reacting to news that he had been denied parole for the ninth time, commented: "That's cool. I'm involved in too many things. I have a Web site I'm working on," Perspectives, NEWSWEEK, April 7, 1997, at 25.

[3] The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. . . . The nature of the Internet is such that it is very
difficult, if not impossible, to determine its size at a given moment. It is indisputable, however, that the Internet has experienced extraordinary growth in recent years. In 1981, fewer than 300 computers were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, over 1,000,000 computers were linked.

Today, over 9,400,000 host computers worldwide, of which approximately 60 percent are located within the United States, are estimated to be linked to the Internet. . . . In all, reasonable estimates are that as many as 40 million people around the world can and do access the enormously flexible Internet communication medium. That figure is expected to grow to 200 million Internet users by the year 1999.

No single entity, academic, corporate, governmental, or non-profit, administers the Internet. 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 (which in turn exchange communications and information with still other computers). There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet.


[4] The World Wide Web provides a method of communication and information exchange on the Internet. It exists as a "platform" on the basis of which people and organizations can communicate through shared information. When information is made available, it is said to be "published" on the Web. The Web can be used to transmit text, data, computer programs, sound, visual images and moving video images. It is a series of documents stored in different computers all over the Internet.

A "Web site" or "Web page" is the equivalent of an individualized newsletter about a person or organization published on the World Wide Web and available to everyone on the Web. Web publishers have a choice to make their Web sites open to the general pool of all Internet users, or to close them, thus making the information accessible only to those with advance authorization. Many publishers choose to keep their sites open to all in order to give their information the widest potential audience. In the event that publishers choose to maintain restrictions on access, this may be accomplished by assigning specific user names and passwords as a prerequisite to access to the site. Or, in the case of Web sites maintained for internal use of one organization, access will be allowed only from other computers within that organization's local network.

See id. at 837.


Businesses are not the only entities to embrace the Internet in an effort to promote their products. Religious groups, for example, are flocking to cyberspace in large numbers. Consider the following spiritual websites:

Shoshana Zakar, Havenu L'Shalom (last modified Aug. 1998) <http://www.havienu.org> (Virtual Orthodox congregation)
First Church of Cyberspace (visited Sept. 6, 1998) <http://www.execpc.com/~chender> (Presbyterian webpage)
Engaged Buddhist-Dharma (visited Sept. 6, 1998) <http://www.mrtc.org/~lesslie> (Buddhist focus on human rights)
Hare Krishna-ISKCON (visited Sept. 6, 1998) <http://www.shamantaka.org> (Hindu site)


[7] In Pennoyer v. Neff, 95 U.S. 714 (1877), the United States Supreme Court established the requirement that personal jurisdiction be based on the physical presence of the defendant within the state, id. The Court, however, later relaxed the traditional "physical presence" standard by recognizing a corporate defendant's "non-physical" presence, see International Shoe Co. v. Washington, 326 U.S. 310 (1945). In International Shoe, the Court found that the activities of a corporation in a forum state could give rise to its "presence" there sufficient to establish personal jurisdiction over the defendant: "Since the corporate personality is a fiction . . . it is clear that unlike an individual its "presence" . . . can be manifested only by activities carried on in its behalf by those who are authorized to act for it," id. at 316.

[8] The term "forum state" will be used throughout this article to denote the state where the suit is filed, and where the plaintiff seeks to establish personal jurisdiction over the defendant.

A website was characterized as "passive" when it merely advertised or displayed information to Internet users, see Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

A website was said to be "interactive" when it allowed the user to exchange information with the host computer. An example of such a site would be one that permitted an Internet user to enter into a contract with the entity advertising its product through its website, see id.


Id.

937 F. Supp. 295 (S.D.N.Y. 1996). On September 10, 1997, the Second Circuit Court of Appeals affirmed the district court's dismissal of Bensusan's complaint for lack of personal jurisdiction, see Bensusan, 126 F.3d 25. The appeals court based its decision on a finding that New York law proscribed personal jurisdiction over King, see id. at 27.
The court first examined Section 302(A)(2) of the New York long-arm statute, which allows for personal jurisdiction over a non-domiciliary defendant who commits a tortious act within the state, see id. That statutory provision, the court found, requires that a defendant be "physically present" in New York when performing the wrongful act, see Bensusan, 126 F.3d at 28, (citing Feathers v. McLucas, 209 N.E. 2d 68 (N.Y. 1965)); OFFICIAL PRACTICE COMMENTARY TO N.Y.C.P.L.& R., Section 302:17; Platt Corp. v. Platt, 217 N.E.2d 134 (N.Y. 1966) (citation omitted). Applying this standard to the acts giving rise to Bensusan's action against King- the creation of King's webpage, the use of the words "Blue Note" and the Blue Note logo on the website, and the hyperlink to Bensusan's website, led to a finding that King was not "physically present" in New York to commit the alleged tortious acts, since that conduct was performed in Missouri, not New York, see Bensusan, 126 F.3d at 29.

The court next considered Section 302(A)(3) of the New York long-arm statute, which provides for personal jurisdiction where a defendant performs an act outside the state but reasonably should have expected that the tortious act would have consequences in the state, and the defendant derives substantial revenue from interstate commerce. Finding that King's Blue Note club was "unquestionably a local operation" which did not engage in interstate commerce, the court found the statute inapplicable to King, see id. (citing REPORT OF THE ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK FOR THE JUDICIAL YEAR JULY 1, 1965 THROUGH JUNE 30, 1966, Legis. Doc. No. 90 (1967) (provision "intended to exclude non-domiciliaries whose business operations are of a local character"). Accordingly, the court affirmed the district court's dismissal of Bensusan's complaint, see id.


[16] See id. at 165.


[18] See id. at 300.


[20] States may define personal jurisdiction over non-residents through legislatively-enacted long-arm statutes. Long-arm statutes are "(v)arious state legislative acts which provide for personal jurisdiction, via substituted service of process, over persons or corporations which are non-residents of the state and which voluntarily go into the state, directly or by agent, or communicate with persons in the state, for limited purposes, in actions which concern claims relating to the performance or execution of those purposes. . . .," BLACK'S LAW DICTIONARY 942 (6th ed.1990).


See Burger King, 471 U.S. at 472-73.


See Burger King, 471 U.S. at 475-76 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

See id. at 476-77 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).


See id.

See id.

See id. at 163.

See id. at 162.

See id.

See id. at 163. In fact, the Inset Court did not cite any instances of ISI conducting business in Connecticut during any period prior to the filing of or otherwise relevant to this lawsuit, see id.

See id.

See id. A domain name or address consists of three parts: the first part identifies the part of the Internet desired by the user such as World Wide Web (WWW); the second part is usually the name of the company or other identifying words; and the third part identifies the type of institution such as government (.gov) or commercial (.com), see id. at 163.


See id. The Motion to Dismiss also alleged improper venue under 28 U.S.C. § 1391(a) (1994), which provides in pertinent part: "(A) civil action . . . may . . . be brought only in a judicial district where any defendant resides, if all defendants reside in the same state . . . ." Further, 28 U.S.C. § 1391(c) (1994), states in pertinent part: " . . . (A) defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced . . . ." Having found that ISI was subject to personal jurisdiction in Connecticut, the court found that venue was properly established in Connecticut, see id. at 166.

See id. at 164-65.

See id. at 164-65. Conn. Gen .Stat. § 33-411(c) (1994) states, in pertinent part: "Every foreign corporation shall be subject to suit in this state, by a resident of this state or by a person having a usual place of business in this state, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it has engaged exclusively in interstate or foreign commerce, on any cause of action arising . . . (2) out of any business solicited in this state by mail or otherwise if the corporation has repeatedly so solicited business,
whether the orders or offers relating thereto were accepted within or without the state. . . ," see Inset, 937 F. Supp. at 164.


[47] Id. (emphasis added).


[49] See id. (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

[50] See id.

[51] See id.

[52] See id.

[53] See id.


[55] Id. (emphasis added).

[56] See id.

[57] See id.

[58] See id.

[59] See id.

[60] See id. at 164-65.

[61] See id.

[62] See id.

[63] See id.

[64] SHERRY TURKLE, LIFE ON THE SCREEN (Simon & Schuster 1995).

[65] See id.

[66] See id. at 178.

[67] Id. at 179.

[68] See HOWARD REINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER
WELL is an abbreviation for The Whole Earth 'Lectronic Link, "a computer conferencing system that enables people around the world to carry on public conversations and exchange private electronic mail (e-mail)," id. at 1.

Id. at 2.

Inset v. Instruction Set, Inc., 937 F. Supp. 161. In his Inset opinion, Judge Covello pointed out the ever-present nature of the Internet and its transcending of the physical constraints of time and space inherent in traditional forms of media advertising:

Unlike television and radio, in which advertisements are broadcast at certain times only, or newspapers in which advertisements are often disposed of quickly, advertisements over the Internet are available to Internet users continually, at the stroke of a few keys of a computer. At this time there are at least 10,000 Internet connected computer users in the state of Connecticut.

Id. at 163 (emphasis added); see also supra text corresponding to notes 47 and 55.


Id.

See id. at 297.

See id. at 295.

See id. at 298.

See id. at 295.

See id.


See id.

See id. At the time the lawsuit was filed, the first page of the website informed a "visitor" that "The Blue
Note's Cyberspot should not be confused with one of the world's finest jazz club[s] [the] Blue Note, located in the heart of New York's Greenwich Village. If you should find yourself in the big apple give them a visit, Bensusan, 937 F.Supp at 298-9. Also included was a "hyperlink" which permitted an Internet user to connect directly to the New York Blue Note's website by "clicking" on the link, see Bensusan, 937 F.Supp at 298-9.

After Bensusan objected to the website, King dropped the sentence "If you should find yourself in the big apple give them a visit" and removed the hyperlink, Bensusan, 937 F.Supp at 298-9.

"A 'hyperlink' is 'highlighted text or images that, when selected by the user, permit him to view another, related Web document . . .',' see id. at 298, n.2. (quoting Shea v. Reno, 930 F. Supp. 916, 929 (1996)). "With these links a user can move seamlessly between documents, regardless of their location; when a user viewing the document located on one server selects a link to a document located elsewhere, the browser will automatically contact the second server and display the document," id at 299.

[84] Id. at 299. Section 302(a)of the New York Civil Practice Laws and Rules states in pertinent part:

Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortuous act within the state ... ; or
3. commits a tortuous act without the state causing injury to person or property within the state ... if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the state, or
(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . .


[85] See Bensusan at 299.

[86] See id.

[87] See id. The court stated:

It takes several affirmative steps by the New York resident . . . to obtain access to the Web site and utilize the information there. First, the New York resident has to access the Web site using his or her computer hardware and software . . . [t]hen, if a user wished to attend a show in defendant's club, he or she would have to telephone the box office in Missouri and reserve tickets. Finally, that user would need to pick up the tickets in Missouri because King does not mail or otherwise transmit tickets to the user.

Id.

[88] Trademark infringement, the cause of action asserted in Bensusan, occurs, inter alia, when "the deceived customer buys the defendant's product in the belief that he is buying the plaintiff's," id. at 299 (quoting Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 639 (2d Cir. 1956)). Bensusan alleged that as a result of King's webpage, customers would be confused as to the relationship between the New York and Missouri jazz clubs, see id.
See id.

Id. (citing Hertz Sys., Inc. v. Hervis Corp., 549 F. Supp. 796, 797 (S.D.N.Y. 1982)).

See id. at 299.

See id. (citing C.P.L.R. § 302(a)(3)(ii)).

See id. at 300.

See id. (stating that King's patronage consisted mostly of University of Missouri students. Further, most of its out-of-state customers, such as the University of Missouri's alumni, had an existing or prior connection to Missouri).

Id. (citing Darienzo v. Wise Shoe Stores, Inc., 427 N.Y.S.2d 831, 834 (N.Y. Sup. Ct. 1980)).

Id. (stating the court determined that Bensusan's "conclusory allegation" of a loss in New York merely amounted to an "indirect financial loss... resulting from the injured person's reside(nce) or domicile in New York" not amounting to "significant economic injury" required by Section 302(a)(3)).

Id.

Id.


Id. at 301 (citing Independent Nat'l Dist., Inc. v. Black Rain Communications, Inc., No. 94 Civ. 8464, 1995 WL 571449 at 5-6 (S.D.N.Y. Sept. 28, 1995)).

See id.

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

Id.

Id.

See id.

The court granted King's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction and dismissed Bensusan's complaint, see id.

See id. at 299.

Presently, over ninety percent of desktop computers utilize Microsoft software. Recently, Microsoft integrated its new Explorer Web browser into its Microsoft operating system. As a result, computer users now can automatically access the Internet by utilizing Microsoft applications, Steven Levy, The Microsoft Century, NEWSWEEK, Dec. 2, 1996, at 58.


Cf. id.


See CompuServe, Inc. v. Patterson, 89 F. 3d 1257, 1264-65 (6th Cir. 1996).

See Inset, 937 F. Supp. at 165.

See id.


See id. at 105-6.

See id. at 106.

See id.

See id.

See id.

The Court equated Chen Shin's world-wide product distribution to the placement of a product into the "stream of commerce," see id. at 111.

See id. at 112.

See id. at 112-114 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985); Keeton v. Hustler, 465 U.S. 770, 774 (1984); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The Court listed several factors to be considered in the "reasonableness" determination: the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in efficiently resolving controversies, and the shared interest of several states in furthering fundamental social policies, see id. at 113.

Id. at 112.

The "additional conduct" required in O'Connor's view is activity indicating an intent or purpose to serve the market in the forum state, thus putting the defendant on notice that the defendant may be susceptible to a particular forum's laws, see id. Examples include, "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State," id.

Justice O'Connor found that the awareness of the defendant that "the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state", and thus required a showing of additional conduct towards the forum state by the defendant, id.

See id. at 114.
The plaintiff ultimately settled his lawsuit, leaving only the indemnification claim between Cheng Shing and Asahi to be resolved.

The court in *Bensusan* added a third factor to the Asahi Court's due process analysis by considering whether the defendant conducted a systematic and continuous part of his general business within the forum state, *see* *Bensusan* Rest. Corp. v. King, 987 F.Supp. 295, 300-1 (S.D.N.Y. 1996).

The case of *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) established legal precedent in the Sixth Federal Circuit by requiring "additional activity" beyond a webpage to find personal jurisdiction in a forum state. In *CompuServe*, the court applied the Asahi "additional contacts" test to establish personal jurisdiction. Besides defendant's advertisement on the Internet through CompuServe, the court found the following "additional conduct" by the defendant in the forum state: defendant's contract with plaintiff was to be governed by forum state law; defendant electronically transmitted software to plaintiff's computer system in forum state; defendant advertised software through plaintiff's computer system in forum state; Internet users downloaded defendant's software from plaintiff's system in forum state; and defendant sent repeated regular and e-mail to plaintiff in Ohio regarding a dispute between the parties, *see CompuServe*, 89 F.3d. at 1264-1265.

*See also* *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1997) (establishing personal jurisdiction where defendant advertised services on webpage, sold passwords to 3,000 subscribers to defendant's Internet news service, and contracted with Internet access providers to furnish its services in forum state); *but see*, *Hearst Corp. v. Goldberger*, 1997 WL 97097 (S.D.N.Y. 1997) (finding that website advertising defendant's future services and e-mail sent to forum state residents after commencement of litigation not sufficient to establish "additional activity" for personal jurisdiction over defendant in forum state).

In *Hearst*, the court expressed its unwillingness to establish "worldwide" jurisdiction based on a "passive" website: "Upholding personal jurisdiction over (the defendant) in the present case would, in effect, create national (or even worldwide) jurisdiction, so that every plaintiff could sue in plaintiff's home court every out-of-state defendant who established an Internet website. The Court declines to reach such a far-reaching result. . .," *Hearst*, 1997 WL 97097, at *20.


A "hit" is the accessing or opening of a file on a website. *Newton's Telecom Dictionary* (1994). One proposed framework for evaluating "hits" on a website sets forth the following hierarchy:

First Level- "Business card" static site with no interactive qualities.
Second Level- Site allows viewer to browse and click on different parts of Web site, and to choose specific information to be downloaded.
Third Level- Web site solicits and obtains specific information about user, then provides site customized for viewer's interests.
Fourth Level- User purchases Web site information and provides credit card number by telephone or over Internet to Web publisher, then receives password enabling user to access Web site material.
Fifth Level- User purchases computer software through Web site then downloads software via the Internet to user's hard drive.
Sixth Level- User engages in financial transaction on Internet by transferring funds or buying or selling securities through Web site.

Eric Schneiderman & Ronald Kornreich, *Personal Jurisdiction and Internet Commerce*, 217 N.Y.L.J., June 4,


See ACLU v. Reno, 929 F. Supp. at 826.

Id. at 844. The court concluded: "Although content on the Internet is just a few clicks of a mouse away from the user, the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a (radio or television) dial", id.

Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (citing Hanson v. Denckla, 357 U.S. 235, 246). The Court has stated that the "minimum contacts" test "is one in which few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable," id. at 492.


Related Browsing