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CompuServe v. Patterson: Creating Jurisdiction Through Internet Contacts

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I. Introduction

{1} Throughout American legal history the adequacy of traditional jurisprudence has been tested by

technological developments. [1] The creation and expanded use of the Internet is the latest of these advancements. There are, however, characteristics of the Internet that distinguish it from past technological breakthroughs. These features include the difficulty of defining the Internet in traditional terms, the plethora of the contacts taking place, and the speed at which the Internet is expanding.

{2} Does the Internet necessitate an evolution or a revolution in legal thinking? The legal community disagrees about whether the Internet is yet another breakthrough that can be incorporated into the classical legal principals or whether the medium is so inherently different from reality that an entirely new paradigm is necessary. The preceding notions of jurisdiction are based on a physical reality that does not exist in cyberspace. Actions in the virtual world of the Internet, however, have legal ramifications in the tangible world.[2] For that reason, and because of the undefined dangers involved in the wholesale creation of new legal principals, established norms should be used to regulate this new technology. Personal jurisdiction arising from Internet contacts presents the most difficult application of traditional law.

{3} An enormous amount of attention has been paid recently to jurisdictional issues arising from the maintenance of Websites. There are, however, other methods by which persons can cross jurisdictional lines via the Internet. Increasingly, business is being conducted via electronic means.[3] Contract formation may require a meeting of the minds, but it does not require an actual meeting of the parties involved. Parties may no longer rely on the "[p]hysical boundaries [that] typically have framed legal boundaries, in effect creating signposts that warn that [they] will be required after crossing to abide by different rules."[4]

{4} This note will discuss the impact of *CompuServe Inc. v. Patterson*[5] ("*CompuServe*"). Section II outlines the technological background of the Internet. Section III explores the appearance of jurisdictional law prior to the *CompuServe* decision. Next, section IV relates the facts in *CompuServe* and examines the court's reasoning and legal analysis. Section V analyzes some of the cases that have been decided since *CompuServe*. Finally, section VI analyzes alternate theories upon which to base personal jurisdiction.

II. Brief Introduction to the Technology

{5} In order to assess whether the traditional legal doctrines can adequately cover changes in technology, it is necessary to understand the nature of the technology.[6] The Internet began, as ARPANET, in 1969 at the Advanced Research Project Agency. It was developed as a way to connect the military, defense contractors, and educational institutions conducting defense research.[7] The goal was to create a network of computers for which there would be no central operating computer in order to reduce the risk that vital information and communications would be lost if a computer on the network was damaged.[8]

{6} Decentralization was achieved through a series of redundant computer links. If a message cannot reach its target through one path, it automatically re-routes itself and attempts to make the connection through a different set of computers and networks.[9] Using "packet-switching" communications protocols, individual messages are subdivided into segments that can also travel along different paths when a route becomes overloaded. The message is reconstructed when it reaches its destination.[10]

{7} The network spread from government agencies and universities to corporations and individuals as other networks formed and connected to ARPANET.[11] A common "language" was developed which allowed different operating systems, such as Windows, Macintosh and UNIX, to speak to each other.[12]

{8} The Internet has no controlling body. It exists only by virtue of the numerous computers and networks that are linked to it. There is no "centralized storage location, control point, or communications channel for the Internet" and it would not be technologically practicable to create or assign one.[13]

III. State of Law of Jurisdiction

A. *Traditional Exercise of Jurisdiction*

{9} Personal jurisdiction is the right of a court to call a person before it to answer allegations made by another party. The plaintiff, by virtue of filing suit, chooses the jurisdiction in which it elects to have the dispute heard. The defendant then has the option of accepting the forum or filing a motion to dismiss in order to escape the judgment of that jurisdiction on the substantive issue of the case.[14]

{10} Traditionally, a court could only exercise personal jurisdiction over persons present in the state in which the action was brought.[15] This was a bright line rule that became less effective as interactions increased between persons who are geographically distant.

B. *Expansion of Jurisdiction by the Supreme Court*

{11} The law has had to adapt to the development of faster modes of transportation and methods of communication that lessen or negate a party's physical contact with the forum state.[16] The Supreme Court determined that relaxation of the due process [17] limits on personal jurisdiction is appropriate because "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity."[18]

{12} The Court took a substantial step in this direction in *International Shoe Co. v. Washington*.[19] The Court created the "minimum contacts" test that allows for jurisdiction over a nonresident when such contacts exist between the defendant and the forum State such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[20] The Court's "minimum contacts" test for specific jurisdiction[21]

> abandon[s] more formalistic tests that focus on a defendant's 'presence' within a state in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our Federal system of government, to require it to defend the suit in that state.[22]

{13} Through *International Shoe* and its progeny,[23] the Court set out basic guidelines under which the States must operate. The language in the Court opinions allowed for flexibility and a measure of fairness under the law, but it has removed the certainty and uniformity that can only exist under a bright line rule.

C. *Application of "Minimum Contacts"*

{14} Constitutional due process provides the upper limit for state jurisdiction; it does not define it. State law determines state court jurisdiction within the Constitutional boundaries. In response to the relaxed requirements for jurisdiction, many States rewrote their laws. Some state long-arm statutes have defined jurisdiction as that which is allowed under the Constitution,[24] while others are more specific.[25] Courts located in states that describe personal jurisdiction with more specificity may not exercise jurisdiction over a person, even though jurisdiction would not violate due process, unless the acts giving rise to the claim fall within one of the statutory categories. For the purpose of this note, personal jurisdiction is defined as that

which is allowed by the U.S. Constitution.

{15} Typically, Federal courts may exercise personal jurisdiction only to the extent a state court, in the state in which the Federal court sits, may exercise jurisdiction under its long-arm statute.[26] There are few statutory exceptions.[27] As a result, Federal courts also rely on the "minimum contacts" analysis to establish personal jurisdiction.[28]

{16} The circuit courts have not been consistent in their application of the "minimum contacts" test. There has, however, been movement toward uniformity with the development of a three-prong test:[29] (1) the claim underlying the litigation "aris[es] out of or relate[s] to the defendant's contacts with the forum;"[30] (2) the defendant "purposefully avail itself of the privilege of conducting activities within the forum State;"[31] and (3) "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[32]

1. Claim Must Arise Out of or Relate to the Defendant's Contacts

{17} The court must determine whether the claim arises out of or relates to the defendant's contacts in order to establish specific, as opposed to general, jurisdiction.[33] The test analyzes the connection between the defendant's contacts and the suit. It is, therefore, a separate inquiry from the second prong, purposeful availment, which analyzes the defendant's contacts as they relate to the forum state.

{18} Although the Court has twice had the opportunity to delineate the requirements of this prong of due process analysis, it has failed to do so.[34] In the absence of any delineated test, the lower courts have applied various tests that examine the relationship between the defendant's activities and the cause of action, including the "but for" test and the substantive relevance-proximate cause test.[35]

{19} Also called the "made possible by" or the "lie in wake of" test, the "but for" test is satisfied when "the plaintiff can trace the chain of events leading up to the cause of action and find that the defendant's activities contribute to this chain."[36] Under the substantive relevance-proximate cause test, the defendant's contacts must be substantively relevant to the cause of action.[37] This test would prevent jurisdiction in some cases where the "but for" test would allow it.

2. Purposeful Availment

{20} Chief Justice Warren created the "purposeful availment" requirement in *Hanson v. Denckla*,[38] but the Court did not articulate what "purposeful availment" required. The Court did, however, address the concept in its decision in *World Wide Volkswagen v. Woodson*,[39] finding that purposefulness rests upon the reasonable expectations of the defendant.

{21} Again, the Court again sought to define "purposeful availment" in *Burger King v. Rudzewicz*.[40] "Purposeful availment" requires that the *defendant* create a "substantial connection" between himself and the forum state.[41] The Court determined that "where the defendant 'deliberately' has engaged in significant activities within a State . . ., or has created 'continuing obligations' between himself and the residents of the forum, . . . he manifestly has availed himself of the privilege of conducting business there . . .."[42] The Court considered a number of factors: "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing."[43] The Court also made it clear that those contacts need not be direct.[44]

{22} In *Asahi Metal*, the Court was presented with the issue of whether placing something in the stream of commerce is "purposeful availment."[45] Although the Court had already addressed this issue in *World-Wide Volkswagen*,[46] application of this decision by the lower courts had resulted in confused and contradictory rulings. In *World-Wide Volkswagen*, the issue focused on whether an automobile maker and distributor was subject to the personal jurisdiction of a state into which the consumer drove the car after purchase.[47] In that

case, it was the unilateral actions of the consumer that brought the item into the jurisdiction. The Court rejected the notion that actions by the consumer could create jurisdiction for the maker or distributor because the "foreseeability" that the item would cross into another jurisdiction was not sufficient contact with that jurisdiction.[48] Confusion resulted in the lower courts in cases where the actions of the defendant put the item into the stream of commerce.[49] Some courts determined that the act of putting the item into the stream satisfied the due process requirements, while other courts required activities "more purposefully directed at the forum State."[50]

{23} In *Asahi*, the O'Connor plurality rejected the stream of commerce theory.[51] There is no purposeful availment when the item is simply placed in the stream of commerce because the defendant did not "create, control or employ" the distribution network and did not design its product for the forum state's market,[52] although it was arguably aware that a significant amount of product would go to that State.[53] Awareness does not equate with an act of purposeful availment; there must be some "intent or purpose to serve the market in the forum state."[54] The Court gave examples of additional conduct that would prove that intent or purpose: "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."[55]

{24} The Brennan plurality favored stream of commerce as a method of purposeful availment[56] because of the benefit received by the defendant and because the defendant was, or should have been, aware that its products were going to the forum state.[57] Brennan determined that additional contacts were not necessary because "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow from manufacture to distribution to retail sale."[58] As long as the defendant was aware that the product was being marketed in the forum state, it could not be surprised that it might have to defend itself there.[59]

{25} Few courts had adopted O'Connor's restrictive interpretation of the due process requirements at the time *Asahi Metal* was decided,[60] and there are some jurisdictions that still follow the bare stream of commerce test supported by Brennan. The Fifth Circuit has specifically refused to require additional contacts.[61] Other courts have found jurisdiction based on the "stream of commerce plus," finding additional contacts which are less concrete that those listed by O'Connor. These include: substantial sales in the forum state,[62] a significant role in the industry,[63] or when the court determined that the defendant created the stream of commerce.[64]

3. Reasonableness

{26} The Court engages in a "flexible inquiry" of whether "a defendant's contacts with the forum State made it reasonable, in the context of the Federal system of government, to require it to defend the suit in that State."[65] In *World-Wide Volkswagen v. Woodson*, the Court outlined five relevant factors:

> (1) the defendant's burden in defending in the foreign forum,
>
> (2) the interest of the forum state in adjudicating the dispute,
>
> (3) the plaintiff's interest in securing "convenient and effective" relief,
>
> (4) the interest of the judicial system in "obtaining the most effective resolution of controversies," and
>
> (5) "the shared interest of the several States in furthering fundamental substantive social policies."[66]

Most of the circuit courts adhere to these factors.[67]

{27} As applied by many circuits, the reasonableness requirement is presumptively met when minimum contacts have been established.[68] According to the Supreme Court, however, the purposeful availment and reasonableness requirements are separate inquiries.[69]

{28} The end result of *International Shoe*, and the line of cases that follow it, is a flexible doctrine, focused on the actions of the party threatened with the greatest burden. The result of this flexibility is a certain amount of uncertainty, particularly when a court is faced with stream of commerce issues. The shared characteristics of Internet commerce and interstate commerce, such as the lack of particular territoriality during transmission and the awareness of, and expectation that, products placed in these streams will cross numerous jurisdictional borders, lay at the heart of the doctrinal difficulties.

{29} While there is no doubt that the law of jurisdiction is flexible enough to fit around the Internet, the particular reach of the law was uncertain. It is with those issues in mind that the Sixth Circuit decided *CompuServe v. Patterson*.

IV. CompuServe, Inc. v. Patterson[70]

A. *Factual Background*

{30} Defendant Patterson, a Texas resident, subscribed to CompuServe, Inc., an Internet Service Provider (ISP) headquartered in Ohio. Patterson had never visited Ohio when he entered into a Shareware Registration Agreement (SRA) with CompuServe.[71] The SRA allowed Patterson to transmit shareware files to CompuServe to be displayed and downloaded by other CompuServe subscribers.[72] Subscribers who used the shareware beyond a specified period of time voluntarily paid CompuServe, who deducted a 15% fee and transferred the balance to Patterson.[73] Under the agreement, Patterson also advertised his shareware on the CompuServe service.[74]

{31} Between 1991 and 1994, Patterson transmitted thirty-two shareware files to CompuServe, which were then stored on the company's system in Ohio.[75] According to Patterson, only twelve CompuServe subscribers who downloaded and purchased software were Ohio residents and the revenue totaled less than $650 from subsequent sales to those persons.[76]

{32} A dispute arose between Patterson and CompuServe regarding possible trademark infringement by CompuServe when it marketed a product similar to that provided by Patterson. CompuServe filed suit in Ohio District Court seeking a declaratory judgment in the matter.[77] CompuServe claimed it would suffer approximately $10.8 million in loss of sales revenues if Patterson were successful.[78]

{33} The District Court, without holding an evidentiary hearing, granted Patterson's motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2).[79] The Sixth Circuit, in this case, reversed the District Court decision.

B. *Standard of Review*

{34} When the defendant raises the issue of personal jurisdiction, the court has the power to hold an evidentiary hearing. If the court chooses not to hold such a hearing, the plaintiff need only show a prima facie case of personal jurisdiction to withstand the defendant's motion to dismiss.[80]

C. *Jurisdictional Analysis*

{35} The Sixth Circuit relied on the Ohio long-arm statute and due process requirements to establish specific jurisdiction over the defendant. Under the Ohio long-arm statute, "[a] court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's . . . Transacting any business in this state. . ."[81] The "transacting business" clause of the Ohio long-arm statute is limited only by Constitutional notions of due process.[82] The Sixth Circuit employs a three-prong test to determine the due process limits of jurisdiction: (1) whether the defendant's activities gave rise to the cause of action, (2) whether the defendant purposefully availed itself of the privileges of conducting business in the forum state, and (3) whether jurisdiction would be reasonable.[83]

1. Defendant's Activities Gave Rise to the Cause of Action

{36} The Sixth Circuit has rejected the substantive relevance-proximate cause test, as well as the less restrictive "but for" test.[84] Instead, the first prong of the test is met as long as the activities are not unrelated to the cause of action.[85]

{37} Patterson placed his software with CompuServe. The Sixth Circuit rejected the District Court's determination that the placement of software in Ohio was insufficient to establish activities giving rise to the cause of action.[86] The fact that the software could have been placed with a different ISP, and the infringing activity would have nevertheless occurred, did not negate the court's determination. The possibility of another factual situation was irrelevant because the actual facts showed activity in the forum state.[87]

{38} The court also determined that Patterson's threats of legal action were relevant contacts with Ohio. Patterson contacted CompuServe through regular and electronic mail threatening to seek an injunction against CompuServe.[88] Those threats resulted in the action seeking declaratory judgement.[89]

{39} The court's broad definition of a cause of action arising from the defendant's actions is disturbing. The court determined that the threat of suit made by the defendant was an activity in the forum state related to the cause of action.[90] While this is factually correct, it may have adverse effects. According to this standard, someone who has purposefully availed himself of the benefits of a state should be wary about seeking settlement before filing suit. When a dispute arises between two parties, both should rush to the nearest court and promptly file suit. It is unlikely that the court intended to promote a race to the courthouse.

{40} That court's broad language is tempered, however, by other considerations upon which it relied. The court did not hold that the threats alone would have been sufficient to satisfy the first prong of the test. Further, as noted, the court also relied on the presence of Patterson's software in the Ohio system.

2. Purposeful Availment

{41} In the Sixth Circuit, purposeful availment requires that "the defendant's contacts with the forum State "proximately result from actions by the defendant himself that create a "substantial connection" with the forum State, 'and [that] the defendant's conduct and connection with the forum are such that he 'should reasonably anticipate being haled into court there.'"[91] The court further noted that physical presence is not essential to establish personal jurisdiction.[92]

{42} The Sixth Circuit found that the defendant "created a connection" between himself and the forum state.[93] He subscribed to CompuServe and entered into a Shareware Registration Agreement.[94] The Shareware Registration Agreement and the CompuServe Service Agreement, which was incorporated by reference, designated Ohio as the forum state. Further, the CompuServe Service Agreement specifically provided that it was governed by Ohio law.[95] According to the court, Patterson was on notice that Ohio law would govern.[96] Defendant's connection with Ohio was further demonstrated by the continuous flow of software from the defendant to the forum over a three year period, his advertisement of the software on the CompuServe

system, and his financial demands on the company that led to the suit.[97]

{43} The court then determined that those contacts were "substantial" enough to find purposeful availment. The court compared this case to *Burger King* v. *Rudzewicz*.[98] In *Burger King*, the defendant negotiated with an out-of-state corporation and entered into a twenty-year franchise contract that included a choice-of-law provision.[99] The defendant also perpetuated a relationship by agreeing to supervision by the corporate headquarters, located in the forum state, and by sending all notices and payments to the forum state headquarters.[100] The Court concluded that the choice-of-law provision, although not dispositive, was a factor to be considered.[101] The actions by the defendant before, during, and after the contract was signed established a substantial connection between him and the forum state.[102]

{44} The Sixth Circuit took note of the ongoing nature of the relationship between Patterson and CompuServe.[103] Just as the defendants in *Burger King* reached out to the Florida corporation to create a long-term contract, Patterson deliberately created and maintained a relationship with CompuServe. Also like the defendant in *Burger King*, the contacts between Patterson and the forum state did not end after he signed the contract.[104] The combination of the contract, the introduction of Patterson's software into the stream of commerce, the transmission of the software to CompuServe, and the advertisement and sale of the software through the CompuServe system created a substantial connection between the defendant and the forum state.[105]

{45} The court did not find that the small number of sales from the defendant to purchasers in the forum state was insufficient to establish jurisdiction, contrary to the District Court's reliance on the de minimis amount of software sales.[106] The court looked at the quality rather than the quantity of the contacts, which were "deliberate and repeated," and refused to ignore the sales made to residents of other jurisdictions through the CompuServe system.[107]

{46} The court distinguished *Reynolds v. Intn'l Amateur Athletic Fed'n*[108] and *Health Communications, Inc. v. Mariner Corp.*,[109] cases relied upon by the District Court in determining the contacts were not substantial. Patterson differed from the defendant in *Reynolds* in that he signed a written contract which included a choice-of-law provision, and he "perpetuated" the relationship through his contacts with the Ohio system.[110] The court also found that, unlike the defendant in *Health Communications*, Patterson was more than a mere purchaser of services. As a third-party provider of a product, his business required Internet access in order to operate.

3. Reasonableness of Jurisdiction

{47} The final requirement is that a court's personal jurisdiction over a defendant "must comport with 'traditional notions of fair play and substantial justice.'"[111] Note, however, that after the Sixth Circuit has found purposeful availment and a cause of action arising from the activities in the forum state, there is a presumption that making a defendant amenable to the court's jurisdiction will be reasonable.[112]

{48} The factors used to determine reasonableness include: "the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, and the interest of the other states in securing the most efficient resolution of controversies."[113] The court found that jurisdiction was reasonable for the following reasons: (1) the defendant knew of the burden of defending himself in Ohio when he entered into the Shareware Registration Agreement and chose to accept that burden; (2) the forum state had an interest in settling a dispute that involves a company within its jurisdiction; and (3) CompuServe had a large amount of money at stake if it lost the trademark infringement suit and the decision would affect its relationship with other shareware providers.[114]

{49} The Sixth Circuit had the opportunity, as the first appellate court to hear an Internet jurisdiction case, to

find that Internet cases are so unusual that the lack of reasonableness overcomes the existence of the first two prongs of the test. The court did not feel that this case merited "ferreting out."[115]

V. Decisions Subsequent to *CompuServe*

{50} Although the Sixth Circuit limited the holding to *CompuServe* to the facts of the case, other courts have followed its analysis. The following is a description of major Internet commercial activity cases that have come before the bench since *CompuServe*. It does not, however, include cases involving only website activity on the Internet, which include: *Bensusan v. King*,[116] *Hearst Corp. v. Goldberger*,[117] *Inset System v. Instruction Set*,[118] *Maritz v. Cybergold*,[119] *Cybersell v. Cybersell*.[120]

A. *Agency Rent-A-Car Sys., Inc. v. Grand Rent-A-Car Corp*.[121]

{51} The Avis rental company, headquartered in New York, brought suit against various licensees to determine whether it could enter the replacement car rental market in the areas in which its licensees were located. The District Court dismissed the suit against the licensees for lack of personal jurisdiction, noting that the defendants made few trips to the forum state.[122] The Second Circuit found jurisdiction based upon the licensees' use of Avis's computerized reservation system, located in New York. The court found that the licensees were transacting business under the New York long-arm statute.[123] Notably, the court also questioned whether physical contacts with a state were of any "critical consequence" in the modern era.[124]

B. *Digital Equipment Corp. v. AltaVista Tech., Inc*.[125]

{52} This case involved a dispute between two corporations that operated electronic services and distributed software over the Internet. Digital brought suit against AltaVista for breach of a trademark licensing agreement, trademark and servicemark infringement, unfair competition, and trademark dilution. Digital purchased AltaVista's rights to its trademark and then licensed it back to AltaVista to use in certain prescribed ways. AltaVista allegedly violated that licensing agreement by using the name for its search engine.[126]

{53} The Massachusetts District Court took note of the need to re-evaluate the traditional territory-based concepts of jurisdiction as dictated by *CompuServe*,[127] and found that traditional concepts were adequate.[128] The court held that the fact that the subject matter of the suit was technological did not necessitate any shift in the analysis. The court was able to set aside the uniqueness of the technology and found that the heart of the matter was a typical contract dispute.[129]

C. *People v. Lipsitz*[130]

{54} The New York Attorney General sought to enforce consumer fraud and false advertising laws against several related companies, physically present in the State, based on the claim that the defendants targeted the fraudulent conduct and false advertisements at a nationwide audience using e-mail.[131] Respondents claimed that the court did not have jurisdiction over the Internet activity.[132]

{55} The court held that traditional standards for jurisdiction were adequate to cover the novel litigation.[133] The court found that the defendants were physically located in the state because the companies conducted business "within the forum state by being a subscriber to a local Internet service provider and [sold] a product through that provider."[134] The court also held that the defendants' acts were sufficiently connected with the forum because the acts physically occurred in the forum, even though the impact may have been felt in another jurisdiction.[135]

D. *Edias Software Intn'l, L.L.C. v. Basis Intn'l, Ltd.*[136]

{56} Edias and Basis entered into a contract under which Edias would distribute Basis's software products.[137] Edias had one office in Arizona and two overseas.[138] Basis's office was located in New Mexico; the contracts were signed in New Mexico; and the contracts stated that they would be governed by New Mexico law.[139] Basis terminated the contract, sending personal e-mail messages to its customers and employees and posting a press release on a webpage and on an online forum.[140] Edias filed suit in Arizona, alleging breach of contract and "covenant of good faith and fair dealing," and violation of the Lanham Act because of the online activity by Basis after the breach.[141] Basis sought to dismiss for lack of personal jurisdiction.[142]

{57} The court examined whether the contract and the events surrounding it showed that the defendant purposefully availed itself of the protections and benefits of the forum state. The court found that the plaintiff made a prima facie case for jurisdiction because the defendant, Basis, "contacted EDIAS employees via telephone, fax, and e-mail communications, sold thousands of dollars worth of products to EDIAS for distribution, sent invoices to EDIAS in Arizona, BASIS employees . . . visited Arizona, and . . . BASIS disseminated allegedly defamatory statements about EDIAS that were both directed at and caused harm in Arizona."[143]

E. *Panavision Intn'l, L.P. v. Toeppen*[144]

{58} Panavision, a California company, sued Toeppen, an Illinois resident, for trademark infringement resulting from the defendant's alleged "cybersqatting."[145] The court found that California had jurisdiction over the defendant, but made it clear that *CompuServe, Inc. v. Patterson* was distinguishable because the defendant's actions could not be defined as "doing business."[146] Instead of broadening the analysis of *CompuServe* to cover circumstances not envisioned by the Sixth Circuit, the court applied tort analysis and found jurisdiction under the "effects" test created in *Calder v. Jones*.[147]

F. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*[148]

{59} Zippo Manufacturing, a Pennsylvania corporation, brought suit against Zippo Dot Com, a California corporation, for trademark infringement arising from the use of domain names, such as "zippo.com" and "zippo.net" for its news business. The defendant's contacts, in addition to the sales through its Internet website, included contracting with seven ISPs in Pennsylvania through which subscribers could access the news. The court found jurisdiction proper because the defendant was "doing business" in Pennsylvania and refused to find jurisdiction based on the website activity.[149]

VI. The Future of the Law of Internet

{60} The decisions following *CompuServe* suggest a number of truths. First, the importance of physical presence is gone. Although the Court determined, in *International Shoe*,[150] that physical presence was not necessary in order to exercise jurisdiction, the Court did not hold that physical presence was irrelevant. Only in recent years has physical contact with the forum state been viewed as a co-equal with the other factors that the courts consider.[151] Given the nature of the modern world, this change is reasonable and necessary. Physical presence was important at a point in time when people had very little ability to affect anyone from a distance. Modern technology has allowed the average person to travel farther and more often. Greater mobility has increased the likelihood that a person's legal rights can be affected by someone who resides a

great distance away. Current technology allows a person to diminish another's legal interests without ever stepping foot in the same jurisdiction. Because there are so many ways to harm a person without physical presence, it has very little value when deciding jurisdiction.

{61} Second, other courts agree with the proposition that traditional legal principles are adequate to govern this untraditional medium.[152] The best way to do this is by application of the law only to the extent necessary to cover the facts of the individual case. The Sixth Circuit limited its opinion to the facts of the case and other courts have followed this wise example. They have limited their holdings as well and refused to apply the *CompuServe* framework to inappropriate cases.[153]

{62} Lastly, contacts made through Internet contacts, different from those made through websites, are conceptually easier to deal with than trying to find jurisdiction based solely on website activity.[154] For that reason, the courts have separated the two types of cases and applied differing analysis. When the court looks at Internet contacts arising from more than the maintenance of a website, the facts can easily fit within the traditional jurisdiction analysis. Because of the unique nature of the Internet, some commentators are suggesting an entirely new standard for all Internet cases without regard to the two distinct classes. Due to the flexible nature of jurisdictional analysis, it is possible that some of the suggested changes will be adopted by the courts. Such a move would be unwise.

A. *Creating an Autonomous Jurisdiction*

{63} Although it seems like science fiction, a member of the Illinois Bar has suggested that the virtual community is sufficiently organized to create its own "customs, norms, and rules."[155] He points to troubling examples, including the application of physical community standards to online obscenity, as illustrations of how the application of local law does not adequately or efficiently settle disputes.[156] He also further argues that those who built cyberspace have a claim to it.[157] The courts should either refuse to extend their laws or defer to the judgment of the informal community.[158]

{64} The impossibility of these suggestions is obvious. The autonomy and anonymity with which people are able move through the virtual world prevents any legitimate chance of effective self-governance. People interacting online do so through "screen" or e-mail names which often have no relation to their actual identity. Although people who violate the informal norms established in the cyberspace community may be electronically banished, there is nothing to prevent them from wreaking havoc under a new identity.[159]

{65} Even if it were possible to virtually govern on-line activity, such governance ignores the impact that virtual activity has on the physical world. Jurisdiction is the area of the law that deals most directly with that contact between the two "worlds." Jurisdiction creates the right to find satisfaction for harm. If this area of the law is unsettled, the rights of citizens are undetermined. That is a proposition that cannot and should not be made a reality. It is an area of the law for which "it is more important that the applicable rule of law be settled than that it be settled right."[160] The question then becomes how to settle this point of law within the bounds of the traditional legal framework.

B. *Adopting Brennan's Interpretation of the Stream of Commerce*

{66} Commentators have argued that although the *CompuServe* analysis works well in this case, it causes more problems than it solves.[161] Requiring more than placement in the stream of commerce necessitates a deeper evidentiary assessment of the contacts between the defendant and the forum state. For example, the court must find that the defendant has purposefully contacted the forum,[162] which the court arguably did not do in *CompuServe*. The court never addressed whether Patterson knew that he was contacting Ohio when he dialed in, nor did they show that he was even aware that CompuServe was located in Ohio. The court seemed to rely on the choice-of-law provision, which did not reveal the location of the CompuServe

computer system, to establish Patterson's knowledge.[163]

{67} The alternative approach would be to adopt the Brennan plurality opinion in *Asahi Metal*. The burden on the courts would certainly be lighter. The court would not have to determine purposeful direction at the forum state under Brennan's stream of commerce analysis because the defendant would be held to the awareness that the software and the contacts could reach any forum.[164] Unlike O'Connor, Brennan does not ignore the fact that "a regular course of sales represents the most basic commercial manifestation of purposefulness."[165]

{68} Brennan's analysis also seems to note that the exercise of jurisdiction will not be overly broad because it requires the "regular and anticipated flow of products."[166] The basis of the theory is that it would not be unfair to subject such a person to jurisdiction because it is that person's actions that gave rise to jurisdiction.[167]

{69} In *CompuServe*, Justice O'Connor's interpretation of purposeful availment and the stream of commerce triumphed over that of Justice Brennan. Although the court required more than mere placement in the stream to exercise jurisdiction, the Sixth Circuit had no problem finding that jurisdiction was proper. The additional contacts required under the "stream of commerce plus" doctrine protect state sovereignty without restricting the court's access to parties that have had substantial contacts with its jurisdiction. Applying Brennan's version of stream of commerce analysis, Patterson could have conceivably been hailed into court in any jurisdiction where Patterson's software landed. On the Internet, there is virtually no part of the world where Patterson's shareware could not be expected to go.

{70} Although requiring additional contacts may or may not have been sound policy when the defendant was physically marketing in the stream of commerce, it is an absolute necessity in the virtual stream. First, the defendant who places something into the virtual stream does so instantaneously, leaving no time to reconsider before it enters the market. Second, the marketing is omnipresent. There is no way for the defendant to refrain from marketing in a particular jurisdiction.[168]

VII. Conclusion

{71} Incremental and conservative change in jurisdiction law is right, not only because it is the only choice, but because it is the best choice. This means that the parameters of the law have been defined, and the courts will have to apply it to new factual situations as needed. For example, what constitutes additional contacts may well change as the ability to reach out through technology expands. What the court must avoid is throwing out the existing law in favor of a legal panacea, such as Internet self-regulation, or adopting the broadest version of the stream of commerce test that will create national and international jurisdiction over anyone who conducts business over the Internet.

{72} The short-term result of piecemeal "redefinition" of the law of personal jurisdiction may well be contradiction and confusion, but this is a necessary evil. Any law that presumes to be all-inclusive risks unjust results. The long-term gain from this "organized confusion" is that the lower courts will act as a testing ground for new twists on the traditional jurisprudence. The limited lack of uniformity can be justified based upon the theory that a multitude of possible answers is better than one mediocre answer. A compromise between competing interests has the best chance of producing the most effective, least rigid result.

{73} The use of the Internet to conduct business is constantly expanding. It gives parties an opportunity to

transfer information quickly and inexpensively. Business that once required face-to-face contact can now be accomplished between persons who have never set foot in the jurisdiction of the party with which they are contracting. *CompuServe v. Patterson* dealt with a business that operated exclusively on the Internet, but many businesses for whom computers are merely useful tools are beginning to use the Internet to conduct normal business transactions, such as placing work orders and signing contracts.

{74} While the impact of the Internet on society has been drastic, its impact on the law need not be as extreme. The Supreme Court recognized in 1945 that the law needed to balance the flexibility required for technological change with the certainty required for the efficient conduct of business. Although the lower courts have differed as to the minutia of the law, they have all sought to establish guidelines that fit within the present legal scheme.

[**] **NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

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[1] *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (discussing video home recorders); United States v. White, 401 U.S. 745 (1971) (regarding electronic monitoring); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (describing the Federal government's decision to regulate the radio spectrum in 1925); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) (discussing CATV systems); United States v. Causby, 328 U.S. 256 (1946) (regarding airplanes); Hess v. Pawloski, 274 U.S. 352 (1927) (concerning automobiles); Mutual Films Corp. v. Industrial Comm. of Ohio, 236 U.S. 230 (1915) (discussing motion picture films), *overrruled by* Burstyn v. Wilson, 343 U.S. 495 (1952).

[2]*See,* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 199 (1995).

[3]It is estimated that 120 businesses sign up for Internet addresses each day. *See,* Saba Ashraf, *Virtual Taxation of Internet and On-Line Sales*, 24 FLA. ST. U.L. REV. 605, 609 (1997).

[4] DEC v. AltaVista Tech., Inc., 960 F. Supp. 456, 463 (D. Mass. 1997) (citing David R. Johnson & David Post, *Law and Borders-The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996)).

[5] 89 F.3d 1257 (6th Cir. 1996).

[6] The Third Circuit Court of Appeals took note of this in their opinion in *ACLU v. Reno* and dedicated more than a third of its Finding of Fact to the history of the technology. 929 F. Supp. 824, 830-39 (E.D. Pa. 1996).

[7] *See id*. at 831.

[8] *See id*.

[9] *See id*. at 831-32.

[10] *See id*. at 832.

[11] *See id*.

[12] The language is called Transfer Control Protocol/Internet Protocol (TCP/IP).

[13] ACLU v. Reno, 929 F. Supp. 824, 832 (E.D. Pa. 1996).

[14] *See* FED. R. CIV. P. 12(b)(2).

[15] *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

[16] *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927) (applying personal jurisdiction to the invention of the automobile). *See also,* Hanson v. Denckla, 357 U.S. 235, 250-51 (1958) ("As technological progress has increased the flow of commerce between the states, the need for jurisdiction over nonresidents has undergone a similar increase.").

[17] *See* U.S. CONST. amend. XIV.

[18] McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

[19] 326 U.S. 310 (1945).

[20] *Id*. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[21] Specific jurisdiction is the exercise of personal jurisdiction over a nonresident when the case stems directly from the contacts the party has with the forum state. *See* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984). The Court also created a test for general jurisdiction in instances where there is no connection between the case and the contacts used to establish jurisdiction. The Court requires that the party have "systematic and continuous" contacts with the forum state and that the party would expect to have to defend himself in that state for any type of claim brought against him. *See id*. at 414-16. This note is limited to the discussion of specific jurisdiction, and it should be noted that the Supreme Court has found general jurisdiction only once. *See id*.

[22] Quill Corp. v. North Dakota, 504 U.S. 298, 307 (1992).

[23] *See, e.g., McGee*, 355 U.S. 220 (holding that full faith and credit must be given to the decisions made by states who exercise jurisdiction under a long-arm statute within the bounds of the Due Process Clause and that a single contact may be enough to create jurisdiction); Hanson v. Denckla, 357 U.S. 235 (1958) (requiring that a defendant "purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id*. at 253); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) ("[T]he 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*. at 297. The Court also delineated a five factor test to assess the fairness or reasonableness of exercising jurisdiction.); Burger King v. Rudzewicz, 471 U.S. 462, 477 (1985) (requiring a lesser showing of minimum contacts when the exercise of jurisdiction is reasonable); Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal., 480 U.S. 102 (1987) (rejecting the argument that merely placing an item in the stream of commerce was enough to establish personal jurisdiction).

[24] *See, e.g.*, CAL. CIV. PROC. ' 410.10 (West 1973) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.").

[25] *See, e.g.*, N.Y. C.P.L.R. 302 (Consol. 1978):

(a) 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, or his executor or administrator, who in person or through an agent:

(1) transact any business within the state or contracts anywhere to supply goods or services in the state; or

(2) commits a tortious act within the state causing injury to person or property within the state, except as to an action of cause for defamation of character arising from an act;

(3) commits a tortious act without the state causing injury to person or property within the state, except as to an action of cause for defamation of character arising from an act that, 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 reasonably should expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

(4) owns, uses or possesses any real property situated within the state

(b) Personal jurisdiction over non-resident defendant in matrimonial action or family court proceedings ...

(c) Effect of appearance ...

[26] *See* FED. R. CIV. P. 4(k)(1)(A). *See also* Volk Corp. v. Art-Pak Clip Art Service, 432 F. Supp. 1179, 1180 n.2 (S.D.N.Y. 1977) (Federal courts must use state court processes in the absence of a contrary statute.).

[27] Those exceptions include: the Securities Exchange Act, 15 U.S.C. ' 78aa; the Clayton Act, 15 U.S.C. ' 22; RICO, 18 U.S.C. ' 1965; ERISA, 29 U.S.C. ' 1451(d); and statutory interpleader, 28 U.S.C. ' 2361.

[28] Problems that arise under a more limited long-arm statute are the same in federal and state court and are, as noted above, beyond the scope of this note.

[29] This issue has been addressed by each U.S. Court of Appeals, *see, e.g.*, Noonan v. Winston Co., 135 F.3d 85, 90 (1st Cir. 1998) (citing United Elec. Radio and Mach. Workers of Am. v. 163 Pleasant St. Corp., 987 F.2d 39, 43 (1st Cir. 1993); An v. Chun, No. 96-35971, 1998 WL 31494, *1 (9th Cir. Jan. 28, 1998) (unpublished disposition); Chaiken v. W. Publ'g, 119 F.3d 1018, 1028 (2d Cir. 1997);Celotex Corp. v. Rapid Am. Corp., 124 F.3d 619, 628 (4th Cir.1997) (citing Burger King v. Rudzewicz, 471 U.S. 462, 474 (1985)) (citing Plant Genetic Systems, N.V. v. CIBA Seedes, 933 F. Supp 519, 523 (M.D.N.C. 1996); CompuServe Inc. v. Patterson, 89 F.3d 1257, 1263-67 (6th Cir. 1996); Logan Prod., Inc. v. Optibase, Inc., 103 F.3d 49, 52 (7th Cir. 1996); Kuenzlev v. HTM Sport-Und Freizeitgerate AG, 102 F.3d 453, 455 (10th Cir. 1996); Sculptchair, Inc. v. Century Arts, Ltd., 94 F.3d 623, 631 (11th Cir. 1996); Verotex Certainteed Corp. v. Consolidated Fiber Glass Product Co., 75 F.3d 147, 150 (3rd Cir. 1995); Wilson v. Belin, 20 F.3d 644, 647 (5th. Cir. 1994); Koteen v. Bermuda Cablevision, Ltd., 913 F.2d 973, 975 (D.C. Cir. 1990).

Note, however, that the Eighth Circuit applies a five-prong test:

(1) the nature and quality of the contacts with the forum state;

(2) the quantity of the contacts with the forum state;

(3) the relation of the cause of action with those contacts;

(4) the interest of the state in providing a forum for its residents; and

(5) the convenience of the parties.

See Land-O-Nod Co. v. Bassett Furniture Indus. Inc., 708 F.2d 1338, 1340 (8th Cir. 1983) (citing Aaron Ferer & Sons Co. v. Diversified Metals Corp., 564 F.2d 1211, 1210, 1215 (8th Cir. 1977)). Once the court determines that the contacts are sufficient under the preceding factors, reasonableness is also satisfied. *Id*.

[30] Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984).

[31] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[32] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[33] *See* Burger King v. Rudzewicz, 471 U.S. 462, n.15; *see supra*, note 28.

[34] *See* Carnival Cruise Lines v. Shute, 499 U.S. 585, 588 (1991) (holding that the "forum selection clause" issue was dispositive and that it was unnecessary to address the Constitutional question); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 415-16 (1984) (addressing general jurisdiction after both parties conceded that the cause of action did not arise out of or relate to the defendant's activities).

[35] *See generally* Mark M. Maloney, *Specific Personal Jurisdiction and the "Arise From or Relate to" Requirements . . . What Does it Mean?*, 50 WASH. & LEE L. REV. 1265 (1993).

[36] *See id*. at 1277.

[37] *See id*. at 1282.

[38] 357 U.S. 235, 253 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting business within the forum State, thus invoking the benefits and protections of its laws.").

[39] 444 U.S. 286 (1980).

[40] 471 U.S. 462, 475 (1985).

[41] *See id*. at 475.

[42] *Id*. at 475-76.

[43] *Id*. at 478.

[44] *See id*. at 476-77.

[45] Asahi Metal Indus. Corp., Ltd. v. Superior Court of Cal., 480 U.S. 102 (1987) (placing an item in the stream of commerce means placing the item into interstate or international commerce with the awareness that it will eventually land in a territorial jurisdiction).

[46] 444 U.S. 286 (1980).

[47] *See id*.

[48] *See id*. at 295-96.

[49] *See Asahi Metal*, 480 U.S. at 110.

[50] *See id*.

[51] *See id*. at 112.

[52] *Id*.

[53] *See id*.

[54] *Id*.

[55] *Id*.

[56] The decision rejected jurisdiction on other grounds. The Brennan plurality found that although "minimum contacts" had been satisfied, jurisdiction was not proper because of the serious burden placed on the defendant. *See id*. at 116.

[57] *See id*. at 116-17.

[58] *Id*. at 117.

[59] *See id*.

[60] *See id*. at 118 n.2.

[61] *See* Ruston Gas Turbines, Inc. v. Donaldson Co., Inc., 9 F.3d 415, 419-21 (5th Cir. 1993).

[62] *See* Hewitt v. Eichelman's Subaru, Inc., 492 A.2d 23, 25 (Pa. Super. Ct. 1985) ("If the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those State . . .").

[63] *See* Felty v. Conaway Processing Equip. Co., 738 F. Supp. 917, 919 (E.D. Pa. 1990) (finding personal jurisdiction over a Dutch poultry machine distributor because the "significant role [the distributor played] in the poultry processing industry" constituted more than mere placement in the stream of commerce).

[64] *See* Seltzer Sister Bottling Co. v. Source Perrier, S.A., Civ. A. No. C-90-1468 MHP, 1991 WL 279273, at *7 (N.D. Cal. May 1, 1991) ("Source Perrier has created a sophisticated inter-corporate structure to distribute and market its mineral water. As such, it has not merely placed its product in the stream of commerce; instead, Source Perrier has created this particular stream of commerce.").

[65] Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (citing Shaffer v. Heitner, 433 U.S. 186, 212 (1977)).

[66] 444 U.S. 286, 292 (1980).

[67] *See, e.g.*, Chaiken v. W. Publ'g, 119 F.3d 1018, 1028 (2d Cir. 1997); CompuServe Inc. v. Patterson, 89

F.3d 1257, 1268 (6th Cir. 1996); Mid-America Tablewares, Inc. v. Mogi Trading, 100 F.3d 1353, 1361 (7th Cir. 1996); Trierweiler v. Croxton Trench Holding Corp., 19 F.3d 1523, 1533 (10th Cir. 1996) (citing *World Wide Volkswagen*, 444 U.S. at 292); Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 946 (4th Cir.1994); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1551 (11th Cir. 1993) (focusing on the first three *World Wide* factors relied upon in Asahi Metal Indus. Corp., Ltd. v. Superior Court of Cal., 480 U.S. 102, 113 (1987)); United Elec. Radio and Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1088 (1st Cir. 1992) (describing it as a "gestalt" test); Mellon Bank (East) PSFS, Nat'l Assoc. v. Farino, 960 F.2d 1217, 1222-23 (3rd Cir. 1992); Bullion v. Gillespie, 895 F.2d 213, 216 n.5 (5th Cir. 1990).

Note that the Ninth Circuit employs a seven-factor reasonableness test:

(1) the extent of the defendant's purposeful injection into the forum state's affairs;

(2) the burden on the defendant;

(3) conflicts between the forum and the defendant's home jurisdiction;

(4) the forum state's interest in adjudicating the dispute;

(5) the most efficient judicial resolution of the dispute;

(6) the plaintiff's interest in convenient and effective relief; and

(7) the existence of an alternative forum.

Roth v. Garcia Marquez, 942 F.2d 617, 623 (9th Cir. 1991) (citing Insurance Co. of North America Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir. 1981)).

[68] *See, e.g.*, Alexander v. Circus Circus Enter., Inc., 939 F.2d 847, 854 (9th Cir. 1991); First Nat'l Bank v. J.W. Brewer Tire Co., 680 F.2d 1123, 1126 (6th Cir. 1982).

[69] *See* Asahi Metal Indus. Corp., Ltd. v. Superior Court of Cal., 480 U.S. 102, 116 (1987) (Brennan, J., concurring); Burger King v. Rudzewicz, 471 U.S. 462, 474-77 (1985) (establishing a separate two-part analysis).

[70] 89 F.3d 1257 (6th Cir. 1996).

[71] *See id*. at 1260.

[72] *See id*.

[73] *See id*.

[74] *See id*. at 1261.

[75] *See id*.

[76] *See id*.

[77] *See id*.

[78] *See id*.

[79] *See id*.

[80] *See id*. at 1262 (citing Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991)).

[81] OHIO REV. CODE ANN. ' 2307.382(A)(1) (Anderson 1995).

[82] *See CompuServe*, 89 F.3d at 1262-63 (citing Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110, 1116 (6th Cir. 1994) (quoting Creech v. Roberts, 908 F.2d 75, 79 (6th Cir. 1990)).

[83] *See CompuServe*, 89 F.3d at 1263 (citing Southern Mach. Co. v. Mahasco Indus., 401 F.2d 374, 381 (6th Cir. 1968)).

[84] *See, Creech*, 908 F.2d at 80 (citing Third Nat'l Bank v. Wedge Group, Inc., 882 F.2d 1087, 1091 (6th Cir. 1989), which rejected the application of the "but for" test, also known as the "made possible by" or "lies in wake" test by the Sixth Circuit in Lanier v. American Board of Endodontics, 843 F.2d 901, 909 (6th Cir. 1988)).

[85] *See CompuServe*, 89 F.3d at 1267 (quoting Creech v. Roberts, 908 F.2d 75, 80 (6th Cir. 1990).

[86] *See CompuServe*, 89 F.3d at 1267.

[87] *See id*.

[88] *See id*.

[89] *See id*.

[90] *See id*.

[91] *Id*. at 1263 (citing Burger King v. Rudzewicz, 471 U.S. 462, 474-75 (1985) (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297(1980)).

[92] *See CompuServe*, 89 F.3d at 1264 (citing *Burger King*, 471 U.S. at 476).

[93] *See CompuServe*, 89 F.3d. at 1264.

[94] *See id*. at 1260.

[95] *See id*. at 1260-61.

[96] *See id*. at 1264.

[97] *See id*.

[98] 471 U.S. 462 (1985).

[99] *See id*. at 465-66.

[100] *See id*. at 466.

[101] *See id*. at 481-82.

[102] *See id*. at 478-82.

[103] *See CompuServe*, 89 F.3d at 1265-66.

[104] The contract, without more, would not have been enough to establish purposeful availment. *See id*. at 1265 (citing *Burger King*, 471 U.S. at 478).

[105] *See CompuServe*, 89 F.3d at 1264-65.

[106] *See id* at 1265.

[107] *See id*. at 1265-66.

[108] 23 F.3d 1110 (6th Cir. 1994). Reynolds tested positive for drugs after a meet in Monaco and was banned from competition for two years by the International Amateur Athletic Federation ("IAAF"). After exhausting his administrative remedies, Reynolds brought suit in the Southern District of Ohio seeking monetary damages and a restraining order. IAAF refused to appear at the preliminary injunction hearing, but The Athletic Congress of the United States (TAC) intervened to oppose the injunction. A default judgment was rendered in favor of Reynolds. The IAAF refused to allow him to compete in the Olympics. Reynolds filed a supplemental complaint. The IAAF did not appear and TAC did not intervene. The District Court determined that jurisdiction was proper because the IAAF conducted business with Reynolds in Ohio and because the announcement of the positive drug test had affect Reynolds in Ohio. *See, id*. at 1114. The Sixth Circuit reversed. The court found that there were no prior negotiations, a minimal course of dealing, and no expected future consequences arising from the contract between Reynolds and IAAF. *Id*. at 1118.

[109] 860 F.2d 460 (D.C. Cir. 1988). HCI, headquartered in the District of Columbia, provided a service called TIPS ("Training for Prevention Procedures for Servers of Alcohol") to companies that provide and serve alcohol. Mariner, a hotel operator not located in the District of Columbia, negotiated for eight months via telephone and mail to purchase the service. The contract was signed in Texas and it did not include choice-of-law provision. HCI filed suit in the District of Columbia for failure to pay. Mariner argued that the D.C. court did not have personal jurisdiction over it. The D.C. Circuit found insufficient contacts to warrant jurisdiction. The contract was for a particularized service, which differs from a franchise contract under which the business lacks any identify except that which is provided through the contract. *See id*. at 463-64.

[110] *See CompuServe*, 89 F.3d at 1264.

[111] *See id* at 1268.

[112] *See id*. at 1268.

[113] *Id*. (quoting American Greetings Corp. v. Cohn, 839 F.2d 1164, 1169-70 (6th 1988) (citing Asahi Metal Indus. Corp., Ltd. v. Superior Court of Cal., 480 U.S. 102, 113 (1987)). Note that these are four of the *World-Wide Volkswagen* factors mentioned in *Asahi*, 480 U.S. at 113. *See also supra* n.59.

[114] *See CompuServe*, 83 F.3d at 1268.

[115] Southern Machine Co., Inc. v. Mohasco Indus., Inc., 401 F.2d 374, 384 (6th Cir.1968).

[116] 937 F. Supp. 295 (S.D.N.Y.1996) (holding that maintaining a website is like placing a product in the stream of commerce and that additional contacts are necessary to find personal jurisdiction).

[117] No. 96-C3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997) (holding that a website that solicited parties interested in the service provided did not create jurisdiction because it was directed at a nationwide audience and not at the forum state).

[118] 937 F. Supp. 161 (D. Conn. 1996) (finding personal jurisdiction in the case of a passive website because of the short geographic difference between Massachusetts and Connecticut). Although this case has been criticized by numerous commentators for violating the growing legal reliance on the distinction between passive and active websites, this case is arguably consistent with the attempts made by the Supreme Court in *International Shoe* and the cases that developed it, to allow for flexibility under the law.

[119] 947 F. Supp. 1328 (E.D. Mo. 1996) (holding that minimum contacts are satisfied by the existence of a website because the site actively solicited subscribers and advertisers).

[120] 130 F.3d 414 (9th Cir. 1997) (finding a lack of jurisdiction in a trademark infringement suit when the defendant maintained an interactive website but the browsers could not subscribe).

[121] 98 F.3d 25 (2d Cir. 1996).

[122] Agency Rent-A-Car Sys., Inc. v. Grand Rent-A-Car Corp., 916 F. Supp. 224, 232 (E.D.N.Y. 1996).

[123] *See Agency Rent-A-Car*, 98 F.3d at 30.

[124] *See id*. (citing to *CompuServe*, 89 F.3d at 1262, 1264).

[125] 960 F. Supp. 456 (D. Mass. 1997).

[126] *See id*. at 459.

[127] *See id*. at 463 (citing *CompuServe*, 89 F.3d at 1262).

[128] *See id*. at 463.

[129] *See id*. at 463.

[130] 663 N.Y.S.2d 468 (1997).

[131] *See id*. at 573.

[132] *See id*. at 577.

[133] *See id*. at 579.

[134] *Id*. at 578-79.

[135] *See id*. at 579.

[136] 947 F. Supp. 413 (D. Ariz. 1996).

[137] *See id* at 414.

[138] *See id*. at 414-15.

[139] *See id*. at 415.

[140] *See id*.

[141] *See id*.

[142] *See id*.

[143] *Id*. at 422.

[144] 938 F. Supp. 616 (C.D. Cal. 1996).

[145] Cybersquatting is the act of registering an Internet domain name solely for the purpose of selling it to a company that owns the name as a trademark. The defendant registered a number of different company names, including "panavision.com","panaflex.com," "americanstandard.com," "eddiebauer.com," etc. *See id*. at 619.

[146] *See id*. at 622.

[147] 465 U.S. 783 (1984).

[148] 952 F. Supp. 1119 (W.D. Pa. 1997).

[149] *See id*. at 1125-26.

[150] 326 U.S. 310 (1945).

[151] *See supra* note 121.

[152] *See, e.g.*, People v. Lipsitz, 663 N.Y.S.2d 468 (1997).

[153] *See* Panavision Intn'l. L.P. v. Toeppen, 938 F. Supp. 616, 622 (C.D. Cal. 1996).

[154] *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc, 952 F. Supp. 1119, 1125-26 (W.D. Pa. 1997).

[155] Todd H. Flaming, *The Rules of Cyberspace: Information Law in a New Jurisdiction*, 85 Ill. B.J. 174 (1997).

[156] *See id*. at 178 (citing United States v. Thomas, 74 F.3d 701 (6th Cir. 1996), where the court was faced with the possibility of applying restrictive Tennessee community standards to an online bulletin board service).

[157] *See id*. at 180.

[158] *See id*. at 180-81.

[159] The most organized segments of the cyberspace community are the MUD (Multiple User Dimension/Dungeon/Dialogue). Inside of one such MUD, called LambdaMOO, a member created a program called a "voodoo doll" which allowed him to "virtually rape" other on-line characters. Because other members felt that physical law could not be applied to this situation, the network administrator cancelled the member's account. He reappeared within a few days under a new name and was allowed to participate because no one was able to recognize him. *See* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 217-18 n.103 (1995).

[160] Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 447 (1932).

[161] *See, e.g.*, Bryce A. Lenox, *Personal Jurisdiction in Cyberspace: Teaching the Stream of Commerce Dog New Internet Tricks: CompuServe v. Patterson, 89 F.3d 1257 (6th Cir. 1996)*, 22 U. DAYTON L. REV. 331 (1997).

[162] *See CompuServe*, 89 F.3d at 1265.

[163] *See id*. at 1264.

[164] *See* Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal., 480 U.S. 102, 116-17 (1987).

[165] Erik T. Moe, *Asahi Metal Co. v. Superior Court: The Stream of Commerce, Barely Alive but Still Kicking*, 76 GEO L. J. 203, 222 (1987).

[166] *See Asahi*, 480 U.S. at 117.

[167] *See id*.

[168] *But see* Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996). In this case, the court ordered the defendant to refrain from marketing its product to customers in the United States and to refund purchases already made. This was possible only with respect to the segment of the website that required the user to subscribe in order to view the more explicit images. The court did not, and could not, order the defendant to limit the users access to the free images.

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