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A Nice Place to Visit, But I Wouldn't Want to Litigate There: The Effects of *Cybersell v. Cybersell* on the Law of Personal Jurisdiction

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I. Introduction

{1} In a world divided by barriers of language and culture, the Internet is the nexus that connects the most rural outposts of technology to the global business centers. The Internet's most popular user interface, the World Wide Web, is an interwoven network of computers through which news and information can traverse international barriers in a matter of seconds. Using an Internet Service Provider ("ISP") and a personal computer, the average user can access the World Wide Web and enter the largest repository of public information on the planet. The boundaries are virtually limitless, and the general absence of content restrictions promotes the Internet as a realm where information costs approach zero.

{2} The proliferation of the Internet in the 1990s has given rise to numerous legal issues that have emerged regarding the content of World Wide Web sites. Many of these issues concern businesses that promote or sell their products and services online. The potentially high visibility of a website contribute to the problems of copyright and trademark infringement. Lawsuits over copyright infringement will naturally raise the issue of

personal jurisdiction. But since cyberspace is a relatively new concept, the law regarding jurisdiction on the Internet is vague. What kind of contact over the Internet will satisfy the requirements of personal jurisdiction?

{3} The law of personal jurisdiction has evolved greatly since the Supreme Court's 1877 ruling in *Pennoyer v. Neff*.^[1] In that historic decision, the Court found that personal jurisdiction was acquired by personal service inside the territory of the forum state or by the voluntary appearance of the defendant within the state.^[2] Over the next hundred years, the requirements for personal jurisdiction have relaxed considerably, as reflected in the Court's 1980 ruling in *Worldwide Volkswagen Corp v. Woodson*.^[3] In that decision, the United States Supreme Court held that the introduction of goods into a stream of commerce, with repetitive actions directed towards a particular state, may satisfy the requirements for personal jurisdiction in that state.^[4] The Supreme Court has yet to address the matter of personal jurisdiction with respect to commerce on the Internet, where state borders have been blurred by the World Wide Web.

{4} Many scholars fear that the World Wide Web's anonymous nature may create a vehicle by which infringers may prosper.^[5] Their belief is grounded on the principle that the requirements of personal jurisdiction as crafted by the Supreme Court cannot possibly be applied to a realm as tenuous and intangible as cyberspace.^[6] Those who would extend the boundaries of personal jurisdiction to include the Internet argue that it often is more important to analyze the effects of an individual's actions rather the specific geographic location where those actions took place.^[7] In *Cybersell, Inc. v. Cybersell, Inc.*,^[8] the Ninth Circuit dealt with the relatively novel issue of personal jurisdiction on the Internet and issued a decision that may someday constitute the basis of cyberspace law.

{5} This paper will analyze the effect of *Cybersell* on the law of personal jurisdiction on the Internet. Section II examines the law of personal jurisdiction as affected by *Compuserve* and *Bensusan*, the predecessors of *Cybersell*. Section III evaluates the court's decision in *Cybersell*. Lastly, Section IV examines developments since the *Cybersell* decision and how they may affect that ruling.

II. The State Of The Law Prior To *Cybersell v. Cybersell*

{6} Before the Ninth Circuit's ruling in the *Cybersell* case, there were only a handful of court cases dealing with the issue of personal jurisdiction on the Internet.^[9] The holdings in these cases have ranged from strict adherence to the doctrines of minimum contacts and purposeful availment to a relaxation of the jurisdictional requirements with respect to online communications.^[10] Two cases &SHY; *Bensusan Restaurant Corp. v. King* and *Compuserve, Inc. v. Patterson* &SHY; played a key role in the Ninth Circuit's decision.^[11]

1. Compuserve, Inc. v. Patterson

{7} The Sixth Circuit handed down *Compuserve, Inc. v. Patterson* in July 1996. The defendant, Richard Patterson, was an attorney and an author of shareware computer software.^[12] He subscribed to the Compuserve computer information service provider, which at the time was the second largest provider of Internet access.^[13] Patterson entered into a Shareware Registration Agreement ("SRA"), whereby Compuserve would advertise his software on its network for other subscribers to purchase and download to their home computer.^[14] As part of the SRA, a subscriber pays Compuserve for the software; the payment is then credited to the shareware author less a 15 percent fee for Compuserve's services.^[15] From 1991 to 1994 he uploaded 32 software files to the Compuserve network.^[16]

{8} In December 1993, Patterson notified Compuserve via email that a similar Compuserve software product bore markings which resembled his own company trademarks.^[17] Compuserve changed the name of its

product, but Patterson insisted that Compuserve's product and marketing infringed upon his trademarks.^[18] Compuserve filed a declaratory judgment action in the U. S. District Court for the Southern District of Ohio, seeking a ruling that it had not violated Patterson's trademark and that it was not guilty of unfair or deceptive trade practices.^[19] Patterson moved to dismiss for lack of personal jurisdiction and filed a supporting affidavit denying numerous jurisdictional facts.^[20] The court granted Patterson's motion to dismiss on grounds of lack of personal jurisdiction and denied Compuserve's motion for rehearing.^[21] Compuserve appealed. Patterson did not file an appellate brief and did not appear at oral argument.^[22]

{9} In reviewing the district court's decision, the Sixth Circuit analyzed the United States Supreme Court's trend of relaxing Due Process limits on personal jurisdiction in light of developing communications technology.^[23] The court found that "there is less perceived need today for the federal constitution to protect defendants from 'inconvenient litigation' because all but the most remote forums are easily accessible for the pursuit of both business and litigation."^[24] The court examined the terms of the SRA, which provided that the Agreement was "to be governed by and construed in accordance with Ohio law."^[25] In addition, the court reasoned that Patterson purposefully availed himself of the privilege of doing business in Ohio when he transferred software files from his computer in Texas to the Ohio Compuserve network.^[26] Essentially, Patterson knew when he sent these files to Compuserve that Compuserve intended to post them on their server, where they could be seen, downloaded and purchased by Ohio subscribers.^[27] On the basis of these findings, the Sixth Circuit reversed the district court ruling and found the district court had personal jurisdiction over Patterson in Ohio.^[28]

2. *Bensusan Restaurant Corp. v. King*

{10} On September 9, 1996, the District Court for the Southern District of New York decided the case of *Bensusan Restaurant Corp. v. King*.^[29] The defendant, Richard King, owned and operated a small jazz club in the city of Columbia, Missouri, known as the Blue Note.^[30] The plaintiff, Bensusan Restaurant Corp. ("Bensusan"), created the New York jazz club, the Blue Note, and also operated other clubs worldwide.^[31] Bensusan holds rights, title and interest to the federally registered mark, "The Blue Note."^[32]

{11} In April 1996, King posted a web site promoting his club. The site bore a logo which was similar to the one used by Bensusan.^[33] The site also contained information about the Missouri club, including a schedule of performances and ticket information.^[34] The first page of the web site bore a disclaimer distinguishing the Missouri Blue Note from the New York Blue Note, and contained a hypertext link to Bensusan's web page.^[35]

{12} Bensusan brought suit in federal district court, claiming trademark infringement, trademark dilution and unfair competition.^[36] King moved to dismiss for lack of personal jurisdiction.^[37] The court granted King's motion to dismiss.^[38] The Second Circuit affirmed the decision in September 1997.^[39]

{13} The district court in *Bensusan* examined the facts in the *Compuserve* case, decided only two weeks earlier, and determined that this case was distinguishable.^[40] Unlike the Sixth Circuit in *Compuserve*, the *Bensusan* court did not believe that the defendant had satisfied the purposeful availment test.^[41] Unlike Patterson, King was not deriving substantial revenue from interstate commerce.^[42] Although his website advertisement directed nationwide, 99 percent of his club's patronage consisted of Columbia, Missouri residents.^[43]

{14} The court also rejected Bensusan's argument that King should have foreseen the possibility of the web site being viewed in New York and confused with Bensusan's club.^[44] The court found that "mere foreseeability of an in-state consequence and a failure to avert that consequence is not sufficient to establish personal jurisdiction."^[45] The court concluded that the assertion of personal jurisdiction over King in New York would violate the protections of the Due Process clause, largely because the creation of a web site

intended to publicize his club did not rise to the level required to satisfy the minimum contacts requirement of personal jurisdiction.[46]

III. Cybersell, Inc. V. Cybersell, Inc.

1. Factual Background

{15} Cybersell, Inc. in Arizona ("Cybersell AZ") was incorporated in 1994 as a company designed to provide Internet and web advertising consulting services.[47] The principals behind Cybersell were Laurence Canter and Martha Siegel, both of whom became leading figures in the commercialization of the Internet.[48] Cybersell AZ applied to register the name "Cybersell" as a service mark in 1994 and the application was approved on October 30, 1995.[49] Cybersell AZ posted a web site using the "Cybersell" mark from August 1994 through February 1995, when the site was removed.[50]

{16} During the summer of 1995, Matt Certo and his father, Dr. Samuel Certo, residents of Florida, formed Cybersell Inc. of Florida ("Cybersell FL").[51] This venture was designed to provide consulting services for strategic management and marketing on the Internet.[52] When Cybersell FL was created, the Cybersell AZ web page was not yet operational and the Cybersell AZ service mark had not yet been granted.[53]

{17} The Certos posted their own web page at <http://www.cybsell.com/cybersell/index.htm>. [54] The site displayed the Cybersell FL logo over a globe, and it solicited "Professional Services for the World Wide Web." [55] It also advertised a Florida phone number and a mail link to request more information about the company.[56]

{18} On November 27, 1995, Laurence Canter sent an email to Dr. Certo informing him that "Cybersell" was a service mark of Cybersell AZ.[57] The Certos changed the name of Cybersell to WebHorizons, Inc. on December 27, 1995.[58] By early January 1996, the Certos had also replaced the CyberSell logo on their webpage with a WebHorizons logo.[59] However, the page still said "Welcome to Cybersell!" [60]

{19} On January 9, 1996, Cybersell AZ filed suit in the United States District Court for the District of Arizona, claiming trademark infringement, unfair competition, fraud and RICO violations.[61] On the same day, Cybersell FL filed suit in the U. S. District Court for the Middle District of Florida for declaratory relief with regard to the use of the name "Cybersell." That action was transferred to the district of Arizona and consolidated with the Cybersell AZ action.[62] Cybersell FL moved to dismiss for lack of personal jurisdiction.[63]

2. The Ruling of the Courts

{20} The Arizona district court denied Cybersell AZ's request for preliminary injunction and granted Cybersell FL's motion to dismiss for lack of personal jurisdiction.[64] Cybersell AZ appealed, and the United States Court of Appeals for the Ninth Circuit affirmed the ruling of the district court.[65]

3. Personal Jurisdiction

{21} The Ninth Circuit in *Cybersell* employed a three-part test to determine whether a district court can assert jurisdiction over a defendant.[66] The first part of the test states that "the nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking its benefits and protections." [67] The second part of the test states that the claim must be one which arises out of or results

from the defendant's forum-related activities.[68] The last part of the test maintains that the exercise of jurisdiction must be reasonable.[69] The Ninth Circuit never reached the second and third prongs of the test, and found that Cybersell FL never purposefully availed itself of the privilege of conducting activities within Arizona.[70]

{22} Cybersell AZ argued that the test for jurisdiction was met because the trademark infringement occurred as soon as Cybersell FL began using the name "Cybersell" on the Internet. In contrast, Cybersell FL argued that a party should not be exposed to potential global jurisdiction simply for advertising on the Internet.[71]

{23} In its analysis, the Ninth Circuit examined the Supreme Court's ruling in *Hanson v. Denckla*, which emphasized the "purposeful availment requirement." [72] The Ninth Circuit further clarified that a person did not need to be physically present or have physical contacts with a state to satisfy the jurisdictional test, so long as his efforts were purposefully directed towards residents of the forum.[73]

{24} The court found that the accessibility of Cybersell FL's web page did not reflect an intent to direct their business efforts toward residents of Arizona.[74] In its analysis of the case, the court expressed its concern with the possibility of a slippery slope problem, where the acquisition of jurisdiction over an Internet defendant could subject most web users to suit in nearly any court in the country.[75] This is a valid concern. The user-friendly World Wide Web has made it easier than ever for first-time browsers to communicate with persons in other parts of the country. Web design software allows even the most inexperienced users to create web pages which are then accessible to anyone in the world with Internet access. The mere fact that a web page may be viewed by anyone in the United States, however, cannot lead to the conclusion that the creator is subject to jurisdiction in any forum. In the case of *Smith v. Hobby Lobby Stores*, the court held that Internet advertisement alone was insufficient to subject the advertiser to jurisdiction in the plaintiff's home state.[76] The Ninth Circuit agreed, holding that the plaintiff must show more than mere advertisement in order to indicate that the defendant directed his business activity towards the forum state.[77]

{25} How much more must be shown to constitute "purposeful availment"? In the case of *Inset Systems v. Instruction Set, Inc.*, Inset owned the trademark "Inset" while ISI used the Internet domain name "Inset.com" for advertising its goods and services.[78] When Inset tried to obtain the same domain name, it learned that it was being used by ISI and filed suit in the United States District Court for the District of Connecticut. The court found that "ISI had purposefully availed itself of doing business in Connecticut because it directed its advertising activities via the Internet and its toll-free number toward the state of Connecticut." [79]

{26} Similarly, in *Heroes, Inc. v. Heroes Foundation* the court held that a web page that requested contributions and provided a toll-free number, along with the use of the allegedly infringing logo and other contacts, provided sustained contact with the District.[80] In this case, the court placed a special emphasis on the accessibility of a web page by residents in the forum state.[81] The court reasoned that if residents in the forum state were visiting the page repeatedly, the page was being repeatedly visited by residents in the forum state, this could lead to a finding of jurisdiction based on sufficient contacts.[82]

{27} This analysis is seriously flawed. First, the *Heroes* court did not elaborate upon its justification of this argument because there were other factors by which personal jurisdiction could be found. Second, this case and others considering the number of hits to a web page as indicative of its effects on a particular forum fail to consider other factors which may create "hits".[83] Often, the number of hits to a particular page is measured by the site's ISP, and this information is tabulated to determine the amount of bandwidth, or space on the network server, which must be reserved for users' pages. These hits can also be measured by rudimentary counters on the page itself that calculate the number of times a page is loaded and display the amount in graphical format. Both of these methods, however, have a high margin of error. First, a first-time hit is indistinguishable from a secondary hit which results from a server update or a page reload. Thus, a user who hits the Reload button at any time while viewing the page will force the server to update the page data

and consequently generate another hit.[84]

{28} Another factor to consider is the existence of automated site testers, such as the one used by CNET at such sites as <http://www.download.com>. [85] These computers test random web sites for accessibility, thus generating hits for these pages. As with page counters, many ISPs use automated site testers and link checkers, often to pinpoint areas of inaccessibility. If a court were to rely on this type of access data to determine the effects of the page on a particular forum, their conclusions could be based on miscalculation.

{29} The court in *Cybersell* avoided this pitfall by concluding that Cybersell FL's web page was passive in nature. [86] The *Heroes* court described that web page as interactive, one which solicited contributions and provided a toll-free phone number. [87] Likewise, in the *Inset* case, ISI used its web page and a toll-free number to market its computer technology. [88] In contrast, Cybersell FL's page did not contain a toll-free number, but only a local Florida phone number. [89] The court characterized the Cybersell FL page as passive because it did not allow the user to exchange information with the host computer. [90] Instead, the Cybersell FL page was an advertisement, providing information about the company, but not rising to the same level of commercial activity as the pages in the *Heroes* and *Inset* cases. The court's distinction between active and passive web pages appears to turn on the presence of solicitation as well as the existence of electronic commerce. As neither of these existed on Cybersell FL's page, the court was correct in concluding that there was no purposeful activity invoking the benefits and protections of Arizona, and thus, no basis for personal jurisdiction.

4. *The Calder Effects test*

{30} The Ninth Circuit also addressed Cybersell AZ's argument that the "effects test" from *Calder v. Jones* [91] should apply due to the tortious acts of Cybersell FL which were directed toward the state of Arizona. As in its earlier decision in *Core-Vent Corp. v. Nobel Industries*, [92] the court applied and rejected the *Calder v. Jones* contention that A personal jurisdiction can be predicated on 1) intentional actions 2) expressly aimed at the forum state 3) causing harm, the brunt of which is suffered--and which the defendant knows is likely to be suffered--in the forum state." [93]

{31} In the *Calder* case, Shirley Jones, a famous entertainer who lived and worked in California, sued the National Enquirer for libel in California. The court found that jurisdiction in California was proper, based on the effects of the defendant's conduct in Florida. [94] The *Calder* case, however, involved a nationwide publication with substantial circulation in California. Conceivably, any person in California could walk into a local supermarket and pick up a copy of the National Enquirer. The same was not true of the Cybersell FL website, which could only be viewed by persons with access to the Internet who happened to browse across the site or locate it using a search engine. The Cybersell FL website was no more expressly directed towards Arizona than it was towards any other state or country in the world. The Certos could not anticipate how many, if any, Internet users in Arizona would view the site. This differs from the *Calder* case, where the National Enquirer could estimate how many California readers it had and was determined by the Court to have known that the story was likely to have effects in that state. [95]

{32} Lastly, the court suggested that the *Calder* test should not apply equally to corporations and individuals. [96] The reason given for this conclusion is that a corporation "does not suffer harm in a particular geographic location in the same sense that an individual does." [97] This finding is somewhat ambiguous. In the *Core-Vent* case, the court determined that the effects of libel are not necessarily suffered in the place of incorporation, but it did not reach the issue of whether a corporation suffers the effects of other torts in its state of incorporation. [98] The court's argument that the potential effects of a tortious action will have a greater impact on an individual living and working in a specific geographic area than on a corporation whose scope of operations is nationwide leads to the conclusion that Cybersell AZ is not entitled to apply the *Calder* effects test.

IV. The Aftermath Of Cybersell v. Cybersell

1. Legal Considerations

1. Other Jurisdictions

{33} On December 27, 1997, the U.S. District Court for the Northern District of Ohio decided the case of *Quality Solutions, Inc. v. Zupanc*.^[99] This case involved a trademark infringement action brought against the defendant, who had posted a web site using the plaintiff's trademark.^[100] The court held that the use of the web site to promote the defendant's business, coupled with the use of the trademark in a printed trade journal, constituted sufficient contacts for the purposes of personal jurisdiction.^[101] This decision is consistent with the Sixth Circuit's holding in *Compuserve*, although the fact that the court also considered the publication of the trademark in an industry journal serves to distinguish it from *Cybersell*. In addition, this case fell within the purview of Ohio's longarm statute, which the court also considered in its determination of jurisdiction.^[102]

{34} In *Mallinckrodt Medical, Inc. v. Sonus Pharmaceuticals, Inc.*,^[103] decided in January 1998, the U.S. District Court for the District of Columbia considered a similar issue and found that the posting of an email message to an America Online bulletin board did not constitute sufficient contacts for personal jurisdiction.^[104] This case briefly explores the realm of restricted online access and proposes that information transmitted via private subscriber services should be treated along the same lines as a "passive" web page.^[105] The *Mallinckrodt* court held that such a transmission could not constitute a business transaction in the District of Columbia.^[106]

{35} In February 1998, the U.S. District Court for the Southern District of Georgia decided the case of *Shapiro v. Santa Fe Gaming Corp.*^[107] In this case, the court refused to find personal jurisdiction based on a passive website and a toll-free phone number, because to do so would impermissibly subject millions of people to personal jurisdiction merely because they had a website, e-mail address or toll-free telephone number.^[108] The court examined and rejected the holdings in *Heroes* and *Inset*, stating that it was "well-settled that the operation of a toll-free telephone number and a passive, non-advertising website, without more, is insufficient to satisfy jurisdiction or venue."^[109] This ruling appears to create a third tier of contacts, a toll-free number coupled with a passive web page, which exists above the passive web page and local number of *Cybersell* but still well below the toll-free number and interactive web page of *Inset*.

2. The Ninth Circuit's Ruling in *Panavision International, L.P. v. Toeppen*^[110]

{36} The Ninth Circuit revisited many of the issues litigated in the *Cybersell* decision when it decided the case of *Panavision International, L.P. v. Toeppen* in April 1998. Although the case appears factually similar to *Cybersell*, the court emphasized the legal distinctions between the two.

{37} The *Toeppen* case involved an individual engaging in activity known as "cybersquatting," which consists of registering an Internet domain name with Network Solutions, Inc. ("NSI") and then selling that name to a particular company.^[111] Typically, a shrewd cybersquatter would register domain names which represented products, services, or marks of a company which had not already registered them. In this situation, Toeppen had established a web site using the name "panavision.com."^[112] When Panavision attempted to register its own web site, it discovered that it could not because Toeppen had already done so.^[113] When Panavision requested that Toeppen stop using the name Panavision, which was itself a Panavision trademark, Toeppen declined to do so.^[114] He then offered to sell the domain name to

Panavision for \$13,000. When Panavision refused his offer, Toeppen proceeded to register another Panavision trademark, Panaflex.com, as a domain name.^[115] Panavision filed suit against Toeppen in the U.S. District Court for the Central District of California. The court determined that it had personal jurisdiction over Toeppen because he had satisfied the purposeful availment requirement through the "effects" of Toeppen's conduct on Panavision's home state of California.^[116]

{38} In *Cybersell*, the Ninth Circuit rejected an effects test analysis because it was not reasonable to anticipate that Cybersell FL's web site would have effects in Arizona.^[117] In *Toeppen*, the court reasoned that the appropriation of the Panavision trademarks could conceivably have resulted in harm suffered in California, which was Panavision's principal place of business.^[118] The court also pointed out that Toeppen should have known the effects would be felt in California because the heart of the theatrical motion picture and television industry is located there.^[119] Thus, the court concluded that Toeppen's actions were a sufficient basis for a finding of personal jurisdiction based on the foreseeable injury they would cause.^[120]

{39} The court's analysis in this regard requires a supposition of facts which extends the law of personal jurisdiction to an unreasonable extreme. Although Toeppen's actions were clearly undertaken with the goal of extorting money from Panavision, it does not logically follow that his actions also contemplated an eventual injury to Panavision in California. As Toeppen argued before the court, all he did was register Panavision's trademarks on the Internet and post web sites using those marks.^[121] Any injury resulting from that activity was restricted to cyberspace. Because cyberspace is largely universal, Toeppen's actions could not be specifically directed towards California any more than they could be directed towards any other state. Although Toeppen's actions were specifically directed towards Panavision, Panavision is not legally or factually synonymous with California. The court's vague reference to Hollywood as the heart of the theatrical motion picture and television industry is irrelevant and appears to be an attempt to stretch the broad facts of the case to satisfy a narrow and specific law. With regard to the effects test, the differences between the *Toeppen* case and the *Cybersell* case are minimal, and the effects test should not form the basis for the finding of personal jurisdiction in *Toeppen*.

{40} The court also conducted a reasonableness analysis in determining whether personal jurisdiction is appropriate.^[122] Of the seven factors taken into consideration, only one is based on questionable legal reasoning. The court applied the first prong of the test established in *Burger King Corp. v. Rudzewicz*,^[123] which analyzes the defendant's purposeful interjection into the forum. Again, this analysis falls prey to the same flaws as the effects doctrine, because it assumes that the injury caused by the defendant was purposefully directed towards the state of California.

{41} The court relied on its prior decision in *Insurance Co. of North America v. Marina Salina Cruz* ^[124] and held that "the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction under the [reasonableness prong]."^[125] Although the court concluded that the degree of interjection into California was substantial, its analysis failed to take into account the Internet's global scope. The injury caused by Toeppen forming the basis of this cause of action was the acquisition of the Panavision domain name and the creation of the Panavision website. Both of these alleged injuries occurred on the Internet and were displayed in passive form on the World Wide Web. They could be viewed by any person, anywhere in the world, but were not specifically directed toward Panavision alone. Had another entity approached Toeppen about purchasing the Panavision domain name, it is likely that he would have entertained the offer. His intent was to make money from the sale of the domain name, not to target Panavision directly, and certainly not to injure them specifically in California.

{42} Toeppen did not engage in repetitive, wilful actions directed toward the forum state as characterized by the defendant in *Compuserve*.^[126] Nor did his site consist of interactive solicitation as in the *Heroes* case.^[127] The court's reliance on the letter sent to Panavision as evidence of purposeful interjection suggests it was heavily influenced by the negative characterization of Toeppen's actions and allowed these

considerations to affect their ruling with regard to personal jurisdiction. By finding that Toeppen was subject to personal jurisdiction in California, the Ninth Circuit not only has further clouded the issue of personal jurisdiction on the Internet but also weakened its holding in *Cybersell*. Although the court in *Cybersell* recognized the risk of a broad jurisdictional analysis which could ultimately subject Internet defendants to the jurisdiction of any forum,^[128] the court in *Toeppen* converted this risk into reality.

{43} Although the Ninth Circuit maintains that its holding in *Toeppen* is consistent with the law of *Cybersell*, the two cases are in fact substantially similar and the conflicting holdings operate to create a very narrow and impractical rule for the finding of personal jurisdiction. The *Cybersell* defendants wanted to make money. The creation of their passive webpage was intended to attract business, and their use of the *Cybersell* name created a trademark dispute with another entity. They did not use the *Cybersell* name with the intent to injure a specific party in a particular state. Similarly, Toeppen created a passive webpage with the intent to make money. His use of the Panavision name created a trademark dispute with another party. Although his intent was to sell the name to Panavision, as he had attempted to do with other companies in the past, he did not intend to injure Panavision in the state of California. Applying the court's own reasonableness analysis, it is simply unreasonable and thus a violation of Due Process to exercise personal jurisdiction over an Internet defendant under these circumstances.

3. Technological Considerations

{44} Perhaps the greatest threat to the *Cybersell* decision will come not from a legal challenge, but from the continued accelerated development of technology. In the *Mallinckrodt* case, the court held that a message posted on the America Online ("AOL") service did not rise to the level of an active website for purposes of defining a business transaction.^[129] This finding was important because it represented judicial examination of an Internet location with restricted access. This differs from the websites in *Bensusan*, *Inset*, and *Cybersell*, which were all unrestricted sites that could be viewed by anyone with Internet access. Subscriber services such as AOL and CompuServe, however, offer special restricted access to subscribers who pay a monthly fee. In addition to World Wide Web and email privileges, AOL subscribers may participate in chatrooms, use shopping forums and view electronic bulletin boards that can only be accessed using the AOL software. The number of AOL subscribers is far less than the total number of people with Internet access worldwide.^[130]

{45} The significance of special restricted access will be felt in the event of litigation concerning online advertising or solicitation via a service provider such as AOL. A court employing the *Cybersell* doctrine will analyze the nature of the solicitation, as well as the number of people who were likely to or actually did view the material. If the material could only be seen by AOL subscribers, and is not determined to be of an interactive nature, then it is likely that a court will make the same determination as the *Cybersell* court and find that this alone constitutes insufficient grounds for personal jurisdiction.

{46} A similar concern is general restricted access content. This includes password-protected websites, secure servers and newsgroups. Unlike AOL content, this information is available on the World Wide Web but may only be accessible to select users, such as university students or officers of a corporation. Newsgroups represent an electronic posting forum, where users can post and read messages based on a specified topic. However, it is often a single individual, like the network administrator, who determines which newsgroups can be viewed by the network's users. Thus, a user in California who posted a message to the 'misc.legal' newsgroup could not guarantee that his message would be viewed by an Internet user in Virginia, unless that user's network also had access to the 'misc.legal' group.^[131] Based on the decision of the *Mallinckrodt* court, it is likely that if such a posting were to be the basis for personal jurisdiction, it would not be able to stand on its own because of its passive nature and restricted visibility.

{47} Another new development that will undoubtedly have an impact on personal jurisdiction cases concerning protected domain names is the redirect service. Redirect services provide a "forwarding link"

from a null webpage location often chosen by the user. An example can be found at the URL (Uniform Resource Locator) <http://surf.to> which is run by V3 Redirect Services.^[132] For little or no fee, the user can choose a personal web address from the numerous choices provided by the service.^[133] Thus, a professor who runs a webpage about tax law on a university server could choose the URL <http://surf.to/taxlaw>, which itself is not a webpage, but only a location which would forward users to his own page.^[134]

{48} In *Toeppen*, the Ninth Circuit attaches great weight to the defendant's use of Panavision's trademark in his domain name as the basis for finding injury to the plaintiff in California.^[135] Will the court extend this ruling to include redirect URLs? If *Toeppen* had instead used a redirect service and set up a page at <http://come.to/Panavision> would the court have ruled similarly? The heavy reliance by the court on the lucrative nature of *Toeppen*'s actions suggests that it would not have found jurisdiction in California if he had used a redirect URL, because the benefit to him would have been minimal or non-existent. Another reason that the court is unlikely to expand its ruling to include redirect URLs is that the ease with which they can be obtained could potentially subject thousands of users to the jurisdictional preferences of unknown litigants. If a court applied the law of *Toeppen*, a person with the last name Disney who wanted to create a personal webpage about his family and friends could not use the URL <http://fullspeed.to/disney> without potentially subjecting himself to jurisdiction in California or Florida, both of which qualify as places of business for the Walt Disney Corporation.

{49} One final issue which was not raised by the Ninth Circuit in either *Cybersell* or *Toeppen* was whether the trademark holder could suffer injury after his website already had been established and another person chooses a similar or related domain name. If this is the case, the court appears to have opened the door to unlimited litigation. What is to stop a company such as Panavision, or any multimillion dollar company, from registering URLs identifying all its various products and services and immediately launching hundreds of causes of action against all apparent infringers? The court fails to take into account that the very site which is responsible for registering and tracking over 3 million business and personal domain names allows and even encourages the registering of similar domain names. Network Solutions' website contains a simple search field which allows users to identify which domain names have already been assigned ^[136] The domain naming convention popularly used in the United States allows the selection of .com, .net, or .org to identify a website. By simply changing the domain to .org, NSI permits the registration of a name which was already reserved with .com. Unless modified, this system will inevitably cause many users to mistakenly reserve a domain name which infringes the trademark of another. Under the broad application of *Toeppen*, users who inadvertently infringe on a trademark in such a manner would potentially be subject to jurisdiction in the trademark holder's forum state.

V. Conclusion

{50} The Ninth Circuit in *Cybersell Inc. v. Cybersell Inc.* correctly determined that *Cybersell* FL was not subject to personal jurisdiction in Arizona, after considering the passive nature of the website and the inapplicability of the *Calder* "effects" test. The court distinguished the *Cybersell* action from the case of *Compuserve v. Patterson* and applied the legal reasoning of the case of *Bensusan Restaurant Corporation v. King*. In *Panavision International v. Toeppen*, the court faced a jurisdictional question similar to that of *Cybersell* but ruled differently, finding that the defendant's actions satisfied the *Calder* effects test and that in light of his profit-seeking actions, the exercise of personal jurisdiction was reasonable. The court maintained that this decision was consistent with its earlier holding in *Cybersell*. However, a careful comparison of the two cases suggests that the legal distinction between the two may be tenuous and temporary, particularly in light of changing technology and online innovation. Subsequent cases facing issues similar to that of *Cybersell* have used a comparable legal theory to determine a lack of personal jurisdiction, establishing the beginnings of a trend toward increasing the protection of Due Process rights on the Internet.

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[**]**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.

W. David Falcon, Jr., Note, A Nice Place to Visit, But I Wouldn't Want to Litigate There: The Effects of *Cybersell v. Cybersell* on the Law of Personal Jurisdiction, 5 RICH. J.L. & TECH. 11, (Spring 1999), at <http://www.richmond.edu/jolt/v5i3/falcon.html>.

[1] 95 U.S. (5 Otto) 714 (1877).

[2] *See id.* at 720.

[3] 444 U.S. 286 (1980).

[4] *See id.* at 287.

[5] *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996).

[6] *See id.*

[7] *Bensusan Restaurant Corp. v. King*, 937 F. Supp 295 (S.D.N.Y. 1996) *aff'd*, 126 F.3d 25 (2d Cir. 1997).

[8] 130 F.3d 414 (9th Cir. 1997).

[9] *See id.* at 417.

[10] *See id.*

[11] *See id.*

[12] *See Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1260 (6th Cir. 1996). Shareware is a freely distributable form of computer software with a "try before you buy" license. Typically a user may download and use shareware for a trial period, such as 30 days, at which point he must register the program (by paying the author a fee) or stop using the software. Some shareware programs become inoperative after the trial period and require a code or key from the author to resume operation.

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See id.* at 1261.

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See id.* at 1262.

[24] Stephen Maher, *Nothing Personal? Personal Jurisdiction and the Internet* (last modified Mar. 14, 1997) <<http://www.usual.com/article8.htm>> (quoting Compuserve at 1262).

[25] Compuserve, 89 F.3d at 1260.

[26] *See id.* at 1264.

[27] *See id.*

[28] *See id.* at 1265.

[29] 937 F. Supp. 295 (S.D.N.Y. 1996) *aff'd*, 126 F.3d 25 (2d Cir. 1997).

[30] *See id.* at 297.

[31] *See id.* at 297.

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See id.* at 297-98.

[36] *See id.* at 298.

[37] *See id.*

[38] *See id.*

[39] *See* 126 F.3d 25 (2d Cir. 1997).

[40] *See* Bensusan, 937 F. Supp. at 301 (S.D.N.Y. 1996).

[41] *See id.*

[42] *See id.* at 300.

[43] *See id.*

[44] *See id.*

[45] *Id.*

[46] *See id.*

[47] *See* Cybersell, Inc. v. Cybersell Inc., 130 F.3d 414, 417 (9th Cir. 1997).

[48] *See id.*

[49] *See id.*

[50] *See id.* at 415.

[51] *See id.*

[52] *See id.*

[53] *See id.*

[54] *See id.* Cybersell FL changed its name to WebHorizons and later WebSolvers. The Internet site is now located at <http://www.websolvers.com>.

[55] *Id.*

[56] *See id.* Unlike a hypertext link, which allows the user to move within a web document or to jump to another web page, a mail link is an embedded code which invokes the browser's email client and allows the user to send email to the specified recipient.

[57] *See id.* at 416.

[58] *See id.*

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See id.* at 420.

[66] *See id.* at 416.

[67] *Id.*

[68] *See id.*

[69] *See id.*

[70] *See id.* at 417.

[71] *See id.* at 416.

[72] *See* 357 U.S. 235, 253 (1958).

[73] *See* Cybersell, 130 F.3d at 417.

[74] *See id.* at 419.

[75] *See id.* at 420.

[76] *See* 968 F. Supp. 1356 (W.D. Ark 1997).

[77] *See* Cybersell, 130 F.3d at 419.

[78] *See* 937 F. Supp. 161 (D. Conn. 1996).

[79] *Id.* at 165.

[80] *See* 958 F. Supp. 1, 2 (D.D.C. 1996).

[81] *See id.* at 3.

[82] *See id.* at 4.

[83] Hits represent the number of times a page has been viewed (loaded) by a particular user.

[84] Some web pages, particularly those with current news or score updates, will automatically refresh their content periodically, regardless of whether or not the user manually reloads the page.

[85] *See also* <<http://www.shareware.com>>. These sites serve as a central location for shareware programs, providing a search engine and dedicated servers for downloading shareware programs. Both of these sites employ automated site testers which attempt to access the site in order to provide their users with information about the connection speed.

[86] *But see* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997). Hits are briefly mentioned with regard to the *Heroes* case.

[87] *See* Heroes, 958 F. Supp. at 5.

[88] *See* Inset Systems v. Instruction Set, Inc, 937 F. Supp. 161 (D. Conn. 1996).

[89] *See* Cybersell, 130 F.3d at 419.

[90] *See id.*

[91] 465 U.S. 783 (1984).

[92] 11 F.3d 1482 (9th Cir. 1993).

[93] *Id.* at 1486.

[94] *See* Calder, 465 U.S. at 789.

[95] *See id.* at 789-90.

[96] *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 420 (9th Cir. 1997).

[97] *Id.* (quoting Core-Vent, 11 F.3d at 1486).

[98] *See* Core-Vent, 11 F.3d at 1486.

[99] 993 F. Supp. 621 (N.D. Ohio 1997).

[100] *See id.*

[101] *See id.* at 623.

[102] *See id.* at 622.

[103] 989 F. Supp. 265 (D.D.C. 1998).

[104] *See id.* at 273.

[105] *See id.* at 272.

[106] *See id.* at 270-71.

[107] 1998 U.S. Dist. LEXIS 2488.

[108] *See id.* at *6.

[109] *See id.*

[110] 141 F.3d 1316 (9th Cir. 1998).

[111] Network Solutions handles the registration and compilation of domain names on the Internet. To date, over 3 million business and personal web addresses have been registered through their service. *See* <<http://www.networksolutions.com>> (visited Feb. 21, 1999) [hereinafter Network Solutions].

[112] *See* Toeppen, 141 F.3d at 1319.

[113] *See id.*

[114] *See id.*

[115] *See id.*

[116] *See id.* at 1322.

[117] *See* Cybersell, 130 F.3d at 420.

[118] *See* Toeppen, 141 F.3d at 1322.

[119] *See id.*

[120] *See id.*

[121] *See id.*

[122] *See id.*

[123] 471 U.S. 462 (1985).

[124] 649 F.2d 1266 (9th Cir. 1981).

[125] *See* Core-Vent Corp. v. Nobel Indus., 11 F.3d 1482, 1488 (9th Cir. 1993) (citing Insurance Co. of North America v. Marina Salina Cruz, 649 F.2d at 1271) (emphasis added) (alteration in original).

[126] *See* Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).

[127] *See* Heroes, 958 F. Supp. 1 (D.D.C. 1996).

[128] *See* Cybersell, 130 F.3d at 420.

[129] *See* Mallinckrodt Med., Inc. v. Sonus Pharm., Inc., 989 F. Supp. 265, 272 (D.D.C. 1998).

[130] *See* Finally, 20 to 30 Million Users on the Internet (visited Feb. 21, 1999) <<http://www.mids.org/press957.html>>. *See also* AOL NEWS (visited Feb. 21, 1999) <<http://www-db.aol.com/corp/news/press/view?release=310&>>. It is estimated that as many as 30 million persons worldwide have access to the Internet. America Online has reported that it has 11 million subscribers worldwide.

[131] Misc.legal is the unmoderated USENET group for legal issues.

[132] *Free URL Redirection by V3 Redirect Services* (visited Feb. 5, 1999) <<http://www.come.to>>.

[133] There is no charge to register a standard V3-URL, but the user is required to offset the cost of the service either by displaying a V3 banner, by implementing a delay page advertising the V3 services, or by permitting a small "pop-up" window to be displayed along with his web page. For \$1.50 per month, a user can upgrade to the gold package, which eliminates the advertising and also provides additional services including statistics tracking and a free email address. *See* <<http://www.come.to>>.

[134] The advantage of this service is that it provides a webpage operator with an inexpensive method of simplifying his webpage address. For example, many webpages on university servers will have a complex URL resembling this format: <http://www.schoolname.edu/department/username>. The use of a redirect service allows the user to reduce the URL to a shorter, simpler three word name (e.g. <http://come.to/lawschool>.) In essence, the location of the page has not changed, but the route used to get there is easier.

[135] *See* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998).

[136] *See* Network Solutions, *supra* note 50.