

William & Mary Law Review

Volume 39 (1997-1998)
Issue 2 Symposium: 1997 W. M. Keck
Foundation Forum on the Teaching of Legal
Ethics

Article 12

February 1998

Internet Contacts and Forum Notice: A Formula for Personal Jurisdiction

Darren L. McCarty

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Science and Technology Law Commons](#)

Repository Citation

Darren L. McCarty, *Internet Contacts and Forum Notice: A Formula for Personal Jurisdiction*, 39 Wm. & Mary L. Rev. 557 (1998), <https://scholarship.law.wm.edu/wmlr/vol39/iss2/12>

Copyright c 1998 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

INTERNET CONTACTS AND FORUM NOTICE: A FORMULA FOR PERSONAL JURISDICTION

A federal judge in Massachusetts recently referred to the Internet as the "Wild West."¹ Instead of wide open land with little law and few persons to enforce it, the Internet is a figment of electronic invention that pervades American life but physically exists in no particular place.² The vigilante justice imposed by some Internet user groups and new legal doctrines proposed by others makes the court's Wild West analogy fitting.³ But self-governance and novel, untested legal doctrines will not adequately support this important new segment of society.

Recent research indicates that eighty-two million computers are linked to the Internet.⁴ Like many new territories, the driving force behind the Internet's popularity may be its commercial potential. American businesses are investing large sums of money in the Internet,⁵ in return for access to a marketplace expected to grow to \$220 billion by the year 2001.⁶

1. See *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456, 463 (D. Mass. 1997).

2. See *id.* at 462.

3. See William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 219 (1995) (commenting on the jurisdictional autonomy of cyberspace and the resulting quasi-governmental attributes of on-line communities). Other commentators have suggested that the new world of cyberspace should create its own law and legal institutions. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

4. See *The Internet Census*, PC MAG., Oct. 21, 1997, at 10. This number may grow to 268 million by 2022. See *id.*

5. See Brian Washburn, *The Web Gold Rush: New Applications and Techniques*, TELECOMMUNICATIONS, June 1996, at 35, 42 (estimating that businesses are investing from \$300,000 to \$1,000,000 for large scale promotional web sites).

6. See John Evan Frook, *IDC Sees Commerce Boom*, COMMUNICATIONS WEEK, July 28, 1997, at 8, available in 1997 WL 12652811 (reporting a company's estimation that the dollar volume of Internet transactions will grow from \$2.6 billion in 1996 to \$220 billion by 2001); see also Nick Wreden, *E-Commerce Goes From EDI to Extranets: VAR 500 Companies are Wiring Themselves and Their Customers Together*, VARBUSINESS, Aug. 15, 1997, at 110, available in 1997 WL 7700029 (reporting an

With the increase in Internet activity, courts now must apply existing law to the unique aspects of Internet-based disputes. Defendants that challenge a court's exercise of personal jurisdiction based on Internet or computer contacts present some of the most intriguing legal issues.⁷ The law governing this issue is, however, in its infancy.⁸

In 1996 the Sixth Circuit overturned a lower court's ruling and allowed Ohio to assert personal jurisdiction over a Texas defendant.⁹ In two other cases, separate district courts issued conflicting opinions on the reach of a state's jurisdiction based on Internet contacts.¹⁰ Frustration with the ambiguous state of the law led one judge to appeal for a legislative solution.¹¹ Ab-

estimate by a market research organization that roughly 17% of commercial transactions will occur over the Internet by 1998 and that 42% of companies will implement Internet commerce systems).

7. See, e.g., *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir.), *reh'g denied* 1996 U.S. App. LEXIS 24796 (6th Cir. Sept. 19, 1996) (involving a trademark dispute between a Texas resident and an Ohio-based Internet service provider resulting from agreements accomplished through the Internet); *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996) (involving a trademark infringement suit between a California-based corporation and an Illinois resident over an Internet domain name); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 1997 WL 560048 (2d Cir. Sept. 10, 1997) (deciding a personal jurisdiction dispute between a Missouri night club and a New York jazz club over an alleged trademark infringement occurring on the Internet); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (involving a trademark infringement suit over Internet "domain names" between a Massachusetts corporation and a Connecticut corporation); *PLUS Sys., Inc. v. New England Network, Inc.*, 804 F. Supp. 111 (D. Colo. 1992) (involving a contract dispute between a Colorado ATM network and a regional ATM service provider incorporated in Connecticut); *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994) (finding a lack of personal jurisdiction in a breach of contract suit between a New York travel agency and a Florida-based computer reservation system despite the significant computer-based contacts between the two parties).

8. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123 (W.D. Pa. 1997).

9. See *CompuServe*, 89 F.3d at 1257.

10. Compare *Bensusan*, 937 F. Supp. at 301 (holding that creating an Internet site is not an act purposefully directed towards a forum state and is not enough on its own to justify the exercise of jurisdiction), with *Inset Systems*, 937 F. Supp. at 165 (holding that an Internet site used for advertisements is directed towards all fora and is enough to subject the site provider to jurisdiction in any state).

11. See *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997) (noting the call for legislation from various commentators and expressing concern about attempting to analogize non-Internet case law in the

sent a bright-line solution such as legislation, the danger of ambiguity lies in the over-expansion of state jurisdiction that could shatter the long-standing limits on state judicial power.¹²

For more than fifty years, the judiciary has attempted to define the reach of personal jurisdiction to accommodate an increasingly national and mobile society.¹³ With the advent of planes, trains, and automobiles, the significance of state lines faded. Now, these boundaries are even less relevant with the increased use of telephones, fax machines, and the Internet for routine personal and business activities. But reduced practical significance does not necessarily lead to decreased legal significance.¹⁴

Without further definition, doctrines of personal jurisdiction that seemed appropriate for a more mobile society may not be appropriate for a society that often interacts in complete ignorance of territorial boundaries. The lack of definition in these doctrines threatens unbounded state jurisdiction over anyone using the Internet.¹⁵ In other words, an Internet explosion could destroy the long-standing boundaries of personal jurisdiction and the wisdom that maintained them.

This Note demonstrates that an expansive interpretation of state jurisdictional power based on Internet contacts threatens

absence of legislation).

12. See Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 611-12 (1988) (complaining that hybrid personal jurisdiction analysis is inconsistent with the original usage of specific and general jurisdiction doctrines and results in unacceptable ambiguity).

13. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. . . .

[I]ncreasing nationalization of commerce has [brought] a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a [foreign] State.

Id. at 222-23.

14. Both personal jurisdiction of a state's courts and state law impact the legal ramifications of these routine activities. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE §§ 3.4, 3.5, 3.7, at 100-06, 108-11 (1993) (discussing the development, by state courts, of jurisdictional fictions as a means of preserving their jurisdiction as activities become increasingly national in scale).

15. See *Inset Systems*, 937 F. Supp. at 165 (concluding that Internet advertising activities are directed toward all states and give rise to personal jurisdiction under a minimum contacts analysis).

the historical purpose of personal jurisdiction. The method of defeating this threat lies not in a judicial or even legislative overhaul of the doctrine of personal jurisdiction, but in a simple refinement to a single element in the specific jurisdiction analyses. The Note first summarizes the relevant aspects of personal jurisdiction development and then analyzes the role of forum notice in the "purposeful" element of specific jurisdiction. A description of the Internet's unique qualities will highlight the challenges it presents to personal jurisdiction. This Note will then compare Internet contacts with other geographically undefined contacts already addressed by the judiciary. Next the Note presents an in-depth analysis of emerging judicial opinions as they relate to personal jurisdiction based on Internet contacts. Finally, the Note explains why forum notice must be an explicit element in the judicial analysis of challenges to personal jurisdiction based on geographically blind contacts.

HISTORICAL DEVELOPMENT OF PERSONAL JURISDICTION

The power that one state held over a sister state's citizen within the same federal union was an issue uniquely created with the United States.¹⁶ Prior to the birth of the United States, the Law of Nations governed judicial relations between sovereignties and their respective citizens.¹⁷ Completely independent sovereignties composed that model to meet their needs but not those of a federal union.

The Framers of the Constitution were aware of this gap in the common law and inserted the Full Faith and Credit Clause to ensure a closer relationship between state judiciaries in order to reflect the tighter bond existing between states.¹⁸ A plain meaning interpretation of that clause requires every state to give full effect to any sister state's judgment.¹⁹ But courts never

16. See Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 850 (1989) (discussing the original problem of state power over another state's citizens).

17. See *id.* at 858 (stating that the Law of Nations was in part, an outgrowth of natural law and not positive law enacted by a sovereign).

18. U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State." *Id.*

19. See Transgrud, *supra* note 16, at 859.

fully accepted this interpretation.²⁰ Despite the recognition of federal authority over personal jurisdiction, early courts construed a limitation upon the Full Faith and Credit Clause that the Constitution did not plainly express.²¹

Historically, courts granted full faith and credit only to judgments rendered pursuant to the proper exercise of personal jurisdiction.²² Both state and federal courts recognized this limitation.²³ Because federal courts interpreted the Full Faith and Credit Clause to be limited in this manner, establishment of personal jurisdiction seemed to be a common law exception to the Full Faith and Credit Clause with its foundation in earliest America.²⁴ This exception preserved state sovereignty and the coincident individual rights.

Personal jurisdiction prevailed as a prerequisite to the grant of full faith and credit because of the important state and individual interests in limiting the reach of judicial authority. Justice Johnson's dissent in *Mills v. Duryee*²⁵ captured early concerns about state power over foreign citizens:

Instead of promoting then the object of the constitution by removing all cause for state jealousies, nothing could tend more to enforce [state rivalry over judicial power] But if the states are at liberty to pass the most absurd laws . . . and we admit of a course of pleading which puts it out of our power to prevent the execution of judgments obtained under those laws, certainly an effect will be given to [the Full Faith and Credit Clause] in direct hostility with the object of it.²⁶

20. *See id.*

21. *See id.* at 861.

22. *See id.* at 862.

23. *See id.* (stating that "[v]irtually all state and federal courts agreed before and after *Mills v. Duryee* that . . . state and federal courts had to give effect to the judgments of sister states *only* when those judgments had been rendered by courts with jurisdiction over the defendant").

24. *See generally id.* at 853-54 ("Under English common law during the American colonial period, foreign judgments were given effect by English courts only if rendered with jurisdiction over the parties as defined by the English view of proper rules of international jurisdiction.").

25. 11 U.S. (7 Cranch) 481 (1813).

26. *Id.* at 486-87.

Concerns about overextensions of state judicial power did not end with suspicions of a state's legislature passing absurd laws. Early courts also expressed concern regarding the potential for fraud and oppression of nonresident defendants.²⁷

In the landmark case *Pennoyer v. Neff*,²⁸ Oregon exercised personal jurisdiction over a nonresident defendant via a statute allowing service by publication.²⁹ Mr. Neff never saw the notice, and the court entered a default judgment against him and in favor of his former attorney who claimed unpaid attorney's fees.³⁰ Unfortunately for Mr. Neff, he held title to a valuable piece of real estate in Oregon.³¹ His former attorney executed the judgment against the property and purchased it at a sheriff's sale.³² The attorney later sold it to Mr. Pennoyer, presumably at a hefty profit.³³ The attorney thus received payment for his fees with money left over to compensate him for his troubles. This legal manipulation prompted the Supreme Court to decree that overly liberal means of acquiring jurisdiction over absent defendants could not be tolerated because they "would be the constant instruments of fraud and oppression."³⁴

The potential for fraud and oppression through the abuse of personal jurisdiction continues to concern the courts.³⁵ Potential abuse taints even personal jurisdiction obtained through the time honored means of serving process while in the jurisdiction.³⁶ Courts more recently have refuted a state's exercise of personal jurisdiction based on personal service that was predi-

27. See generally *Pennoyer v. Neff*, 95 U.S. 714, 726 (1877) (expressing concern about protecting absent defendants from potential fraud and oppression).

28. *Id.*

29. See *id.* at 720.

30. See *id.* at 719-20.

31. See *id.* at 715-16.

32. See *id.* at 716.

33. See *id.* at 719 (stating that the judgment against Neff was less than \$300 although the value of the land was alleged to be \$15,000).

34. *Id.* at 726.

35. See generally *Burnham v. Superior Court*, 495 U.S. 604 (1990) (applying a jurisdictional standard that subjects nonresident defendants to personal jurisdiction due to their physical presence within the forum during service of process).

36. See *id.* at 610 (stating that "[a]mong the most firmly established principles of personal jurisdiction in American tradition is that the courts of a [s]tate have jurisdiction over nonresidents who are physically present in the [s]tate").

cated upon sham inducements into a state.³⁷ By reducing the fear of interjurisdictional travel, the law increases the opportunity for face-to-face settlement of potential litigation.³⁸ The plight of unwary defendants and increased judicial efficiency thus supports the judicial stand against sham inducements.

Any comfort provided by a few bright-line rules such as those proscribing fraudulent inducement into a forum, however, fails to overcome the confusing nature of today's doctrine of personal jurisdiction. Many states have limited legislatively the reach of their jurisdiction through long-arm statutes, but this Note addresses only the federal limitations that apply to all courts.³⁹ The federal doctrine is tangled between the Constitution, historical common law practices, notions of traditional fairness, and modern attempts to accommodate technological advances.⁴⁰ The result aimed by the Supreme Court is a primarily

37. See, e.g., *Wyman v. Newhouse*, 93 F.2d 313 (2d Cir. 1937) (invalidating service upon a defendant because the plaintiff, a jilted lover, fraudulently induced the defendant into the jurisdiction to facilitate personal service); *E/M Lubricants, Inc. v. Microfral, S.A.R.L.*, 91 F.R.D. 235 (N.D. Ill. 1981) (finding grounds for dismissal when a sham invitation to negotiate a settlement to a long-running dispute induced the defendant into the jurisdiction to facilitate personal service).

38. See *E/M Lubricants*, 91 F.R.D. at 238.

39. These statutes are often the determining factor in personal jurisdiction disputes as demonstrated by the Second Circuit's 1997 decision resolving personal jurisdiction dispute based on Internet contacts. See *Bensusan Restaurant Corp. v. King*, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

40. See, e.g., U.S. CONST., art. IV, § 1 (requiring that each state give full faith and credit to the judgments of other states); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 & n.10 (1982) (determining that personal jurisdiction is grounded in the Due Process Clause and is exclusively an individual liberty interest); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (noting the common law practice of refusing to grant full faith and credit to another state's judgment if the state violated due process, including the improper exercise of personal jurisdiction); *id.* at 308-09 (Brennan, J., dissenting) (discussing that the increased mobility of society changed earlier models of personal jurisdiction and arguing for a more expansive reach of the forum state's jurisdiction); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (stating that the maintenance of a suit must not offend "traditional notions of fair play and substantial justice" (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))). Scholars still argue about the origins of the requirement. See, e.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990); John B. Oakley, *The Pitfalls of "Hit and Run" History: A Critique of Professor Borchers's "Limited View" of Pennoyer v. Neff*, 28 U.C. DAVIS L. REV. 591 (1995); Wendy Collins Perdue, *Sin, Scandal, and*

two-pronged approach—general jurisdiction analysis and specific jurisdictional analysis.⁴¹

The analysis required under both prongs evidences historical concerns about boundless state authority and potential oppression of defendants. Specific jurisdiction, first introduced in *International Shoe Co. v. Washington*,⁴² requires an evaluation of a party's contacts with the forum state to determine whether the exercise of jurisdiction would violate the individual's due process rights.⁴³ "Traditional notions of fair play and substantial justice"⁴⁴ applied in specific jurisdiction analysis, mandate that a court consider the defendant's burden before granting jurisdiction.⁴⁵ Specific jurisdiction thus appears most closely to reflect a defendant's personal interests.

General jurisdiction finds its justification in a state's territorial power triggered by constructive presence that is evidenced through the maintenance of continuous and systematic contacts with the jurisdiction.⁴⁶ The recent reaffirmation of transient jurisdiction also embraces territorial power accepted at the time of the Constitution's ratification.⁴⁷ General and transient jurisdiction thus continue to protect an individual state's interest in controlling persons within their borders.

The debate over the constitutional basis for these jurisdictional tests, and whether one even exists, are topics beyond the scope of this Note. Instead, this Note will analyze briefly the legitimate purposes supporting personal jurisdiction in order to

Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered, 62 WASH. L. REV. 479 (1987); Twitchell, *supra* note 12, at 610. See generally Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257 (1990) (tracing the development of the personal jurisdiction doctrine as interpreted by the Supreme Court throughout the nation's history).

41. See FRIEDENTHAL ET AL., *supra* note 14, § 3.10, at 123-24.

42. 326 U.S. 310 (1945).

43. See *id.*

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

45. See generally *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (finding a valid exercise of personal jurisdiction over a nonresident defendant pursuant to Florida's long-arm statute and due to the defendant's contacts with Florida).

46. See *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

47. See generally *Burnham v. Superior Court*, 495 U.S. 604 (1990) (holding that personal jurisdiction is consistent with due process if the nonresident defendant is physically in the forum when served process).

evaluate how these doctrines can best fulfill the reasons for limiting personal jurisdiction in the Internet context.

Specific Jurisdiction

Specific jurisdiction relies on an analysis of the contacts between a party and a particular forum.⁴⁸ The contacts must be sufficient to ensure that the exercise of jurisdiction would not violate the "fair and orderly administration of the laws" under the Due Process Clause.⁴⁹ The cornerstone of the due process analysis is that the defendant party must maintain contacts, ties, or relations with the state sufficient to exercise personal jurisdiction fairly.⁵⁰ The presumption that the party enjoying the benefits and protections of a given state should bear obligations arising from access to those benefits and protections justifies the minimum contacts analysis.⁵¹ A state therefore cannot impose upon the liberty of an individual without his implicit consent. Further reinforcing these interests, courts may not allow the exercise of jurisdiction if the burden on the defendant outweighs the state's interest.⁵²

Maintaining the proper balance between the right of states to assert jurisdiction and the integrity of individual rights is a delicate task. In order to strike a proper balance, courts have restricted the reach of specific jurisdiction to defendants having minimal, purposeful contacts with the forum that result in the cause of action.⁵³ Requiring the contacts to be purposeful preserves the right to be free from exorbitant theories of jurisdiction while accommodating a mobile society.⁵⁴

48. See *International Shoe*, 326 U.S. at 316.

49. *Id.* at 316.

50. See *id.* at 317.

51. See *id.* at 318.

52. See generally *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (asserting that the burdens on the foreign defendant outweighed the interests of the plaintiff and forum state invalidating personal jurisdiction over the defendant).

53. See generally FRIEDENTHAL ET AL., *supra* note 14, §§ 3.10-11, at 120-38 (discussing the rule of *International Shoe* and analysis under that rule). There must be some purposeful act by the defendant to support jurisdiction under the minimum contacts test. See *id.* § 3.11, at 129. Even sporadic contacts with the forum may give rise to specific jurisdiction if the cause of action arises from the contact. See *id.* § 3.10, at 124.

54. See generally Twitchell, *supra* note 12, at 615 (asserting that pre-nineteenth

Because purposeful contacts are the touchstone of specific jurisdiction, any analysis must define "purposeful." Foreseeability is a significant part of the formula that the courts use to define purposeful contacts, but the courts require a specific type of foreseeability.⁵⁵ It is the defendant's ability to foresee being haled into court within the jurisdiction, not the mere foresight of possible contact. The defendant who purposefully avails himself of a forum state must be on *notice* that he is subject to suit in that state.⁵⁶ This standard is distinguished from the mere foreseeability of possible contact with a forum state that was described in *World-Wide Volkswagen Corp. v. Woodson*.⁵⁷

In *World-Wide Volkswagen*, the Supreme Court rejected jurisdiction over an automobile retailer and wholesaler based in a foreign state.⁵⁸ The plaintiffs purchased the automobile in New York, later suffered injuries due to an automobile accident in Oklahoma, and instituted a tort action against the seller in Oklahoma.⁵⁹ The Court conceded that the seller might have foreseen a purchaser driving an automobile into the State of Oklahoma.⁶⁰ The Court concluded, however, that the unilateral activity of a plaintiff claiming a relationship with a defendant is insufficient to constitute a purposeful contact with the foreign state.⁶¹ Such an attenuated relationship does not put the defendant on *adequate notice* that he may be haled into court there.

Expanding on this theme, the Court ruled that deliberately placing products into the stream of commerce that later entered a forum, even if the entry was foreseeable, did not constitute a sufficient contact.⁶² Requiring purposeful action by a party re-

century courts found territorial jurisdiction generally adequate because parties could usually be found where the dispute arose).

55. "[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980).

56. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

57. 444 U.S. 286, 287 (1980).

58. See *id.*

59. See *id.* at 286.

60. See *id.* at 287.

61. See *id.* at 298 (citing *Hanson*, 357 U.S. at 253).

62. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987). Justice O'Connor stated that the contact must be "an action of the defendant purpose-

stricts the forum from asserting jurisdiction over hapless defendants that do not deliberately benefit from the jurisdiction.

From the Court's analysis of purposeful contacts, it is evident that the defendant must be aware of his contact with the forum. The benchmark of awareness is not the mere foreseeability of potential contact, but the real possibility of being haled into court in the particular forum. Merely entering products into the stream of commerce or a plaintiff's unilateral action, absent deliberate contact by the defendant, does not put the defendant on sufficient notice.⁶³ These limits can be characterized, therefore, as requirements that defendants undertake sufficient, *knowing*, affirmative acts resulting in the contact with the state.

Unsatisfied with these structural limits on specific jurisdiction, the Supreme Court in *Burger King Corp. v. Rudzewicz*⁶⁴ required additionally an analysis of the fundamental fairness of the jurisdictional exercise.⁶⁵ The purpose of this analysis is to prevent grave inconvenience to a party despite the purposeful availment of the forum.⁶⁶ This limitation prevents undue burden on the defendant. The decision in *Burger King* represented the first time that the Court considered the defendant's interests despite otherwise legitimate affiliation with the forum, thus introducing an additional limitation on the exercise of personal jurisdiction. Unlike the label "traditional notions of fair play and substantial justice"⁶⁷ implies, this test does not have historical roots as deep as territorial power-based theories.⁶⁸ Its purpose does not relate to the integrity of the sovereign.⁶⁹ The reason for this limitation is

fully directed toward the forum State" and not merely foreseeable. *Id.* (emphasis omitted).

63. *See id.*

64. 471 U.S. 462 (1985).

65. *See id.* 477-78 (stating that "requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities").

66. *See id.* at 478.

67. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

68. *See id.* at 325 (Black, J., concurring). "There is a strong emotional appeal in the words 'fair play,' 'justice,' and 'reasonableness.' But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment" *Id.*

69. *See FRIEDENTHAL ET AL.*, *supra* note 14, § 3.11, at 129-30. The Supreme Court has deemphasized the interests of the forum state and plaintiff in the due process

purely the interest of the defendant party, which is now firmly established as a required consideration prior to the exercise of jurisdiction.⁷⁰ Consideration of the defendant's interests raises the hurdle required for jurisdictional exercise, while only slightly undercutting state interests in territorial power.

Specific jurisdiction and the minimum contacts analysis was introduced first in the 1940s.⁷¹ In contrast to territorial-based power, specific jurisdiction has provided courts with flexibility to resolve some of the more ambiguous questions presented in personal jurisdiction controversies.⁷² Courts are able to focus their inquiry on the individual's *actions* related to the forum rather than the increasingly elusive concept of *presence*. These abilities make the doctrine well-suited for Internet-related controversies.

General Jurisdiction

General jurisdiction, a relatively new term in the jurisdictional debate, boasts a heritage as old as any doctrine of personal jurisdiction—territorial power based on presence.⁷³ Unlike specific jurisdiction, which requires that the dispute arise out of the forum contact, general jurisdiction is blind to the contacts giving rise to the dispute.⁷⁴ The exercise of general jurisdiction necessitates only presence in the state that is defined as continuous and systematic contacts.⁷⁵

The Supreme Court employed the general jurisdiction analysis explicitly for the first and only time in a 1984 decision: *Helicopteros Nacionales De Columbia, S.A. v. Hall*.⁷⁶ The plaintiffs attempted to assert jurisdiction over a foreign corporation

analysis that underlies specific jurisdiction. *See id.* at 129. Convenience to the defendant, although a consideration, is, however, secondary to the minimum contacts analysis. *See id.* at 129-30.

70. *See id.* at 129.

71. *See supra* notes 42-45 and accompanying text.

72. *See infra* notes 120-25 and accompanying text.

73. *See generally* Twitchell, *supra* note 12, at 615 (stating that pre-twentieth century courts "justified jurisdiction solely upon general jurisdiction criteria").

74. *See generally id.* at 627 (stating that specific jurisdiction is "dispute specific" and general jurisdiction is "dispute blind").

75. *See Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984).

76. *See id.* at 414.

based on significant contractual affiliations including helicopter purchases, personnel training, executive level negotiations, and financial transactions occurring within the state of Texas.⁷⁷ The Court's opinion referenced an earlier case, *Perkins v. Benguet Consolidated Mining Co.*,⁷⁸ in which it stated that the defendant satisfied the requirements of general jurisdiction.⁷⁹ In *Perkins*, extensive contacts existed between the defendant and the state including: holding board meetings in the state; maintaining corporate files in the state; maintaining accounts at state banks; and supervising corporate policies within the forum.⁸⁰ In other words, the defendant maintained substantial, continuous, and systematic business activities in the state. Despite the significant contacts demonstrated in *Helicopteros*, the Court rejected Texas's exercise of jurisdiction.⁸¹ The Court defined the elements requisite for the exercise of general jurisdiction—*continuous* and *systematic* contacts—and emphasized the difficulty of proving this standard.⁸²

Excepting the inconsistent and unpredictable approach to general jurisdiction outlined by some critics,⁸³ the judiciary has remained true, by accident or design, to the original purposes of general or territorial jurisdiction: endowing a state with adequate power to control parties within its borders while preventing encroachment into another state's jurisdiction.⁸⁴

77. See *id.* at 411.

78. 342 U.S. 437 (1952).

79. See *Helicopteros*, 466 U.S. at 414.

80. See *Perkins*, 342 U.S. at 447-48.

81. See *Helicopteros*, 466 U.S. at 418-19.

82. See *id.* at 415.

83. See Twitchell, *supra* note 12, at 636-37 (stating that these courts often do not discuss "whether the defendant's contacts are such that the exercise would be fair for most causes of action brought by the plaintiff"). General jurisdiction's foremost goal should be precision in application so that plaintiffs and defendants can determine fairly whether jurisdiction is available. See *id.* at 676.

84. See generally Transgrud, *supra* note 16, at 863 (stating that the courts instituted limits on personal jurisdiction to protect against the danger of nonreciprocal, exorbitant theories of state judicial authority).

Summarizing Specific and General Jurisdiction

As applied, general jurisdiction provides the state with the authority necessary to control parties that are for all practical purposes operating within the state, regardless of the cause of action. This doctrine derives directly from the historical basis of personal jurisdiction—the power of a state over persons within its borders. General jurisdiction can thus be viewed as promoting orderly enforcement of a state's laws.

Specific jurisdiction moves beyond presence to analyze whether the defendant engaged in activity related to the dispute sufficient to overcome his interest in being free from the jurisdiction of a foreign state's courts. The elements of specific jurisdiction—minimum, purposeful contacts giving rise to the dispute—focus the analysis not on the continuing geographical location of the parties, but on the conduct of the defendant.⁸⁵ Even if the court determines that the dispute arose within the state's borders, traditional notions of fair play and substantial justice⁸⁶ require that the court consider the defendant's due process right.⁸⁷ Specific jurisdiction does not reject the original basis for personal jurisdiction—territorial sovereignty—but it combines that concept with a due process evaluation focusing on fairness to the individual.

Because specific jurisdiction looks beyond state borders to the nature of a dispute and the individual circumstances of a defendant, this doctrine is more easily applied in the context of Internet contacts, a context often devoid of geographical boundaries. On the contrary, general jurisdiction's focus on constructive presence within a state's borders does not readily yield itself to analysis of Internet contacts. Barring an unusual case, courts should employ a specific jurisdiction framework to evaluate jurisdictional disputes based on Internet contacts. The greater flexibility of specific jurisdictional analysis does not solve the underlying problem of state boundaries, but the focus on defendant conduct allows courts to address the issue directly.

85. See *supra* note 43 and accompanying text.

86. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

87. See *supra* notes 56-61 and accompanying text.

Forum Notice

Presumably, early personal jurisdiction decisions did not address whether defendants had to be aware of the forum, because, much like general jurisdiction, the basis for jurisdiction was territorial presence. Surely a defendant could be presumed to know his physical location. If the defendant was unaware, then it made little difference because the state had absolute judicial authority over parties within its borders.⁸⁸ This source of jurisdiction gave small quarter to the unwary defendant, but maintained the absolute legal integrity of a state's boundaries.

Instead of physical location, specific jurisdiction places more emphasis on the defendant's state of mind. This emphasis is evident in the analysis: did the defendant have minimum, *purposeful* contacts with the forum state, and would exercise of jurisdiction over the defendant comport with traditional notions of fair play and substantial justice?⁸⁹ Both of these requirements look to the defendant—the degree of *purpose* in making the contact and the fairness of exercising jurisdiction over a party in the defendant's circumstances.⁹⁰ The defendant is the master of his destiny. Implicit in the term "purposeful" is a prior awareness of the forum exercising personal jurisdiction. "Purpose" connotes a conscious intent. A conscious intent to establish contact with a geographically defined territory demands that the party establishing contact know of his entry⁹¹ into the forum. Awareness of the geographic forum is thus a prerequisite to the defendant having "connection with the forum State . . . such that he . . . reasonably anticipate[s] being haled into court there."⁹²

88. See *Burnham v. Superior Court*, 495 U.S. 604, 610-11 (1990) ("[T]he view developed early that each State had the power to hale before its courts any individual who could be found within its borders . . . no matter how fleeting his visit.").

89. See *supra* notes 55-56 and accompanying text (discussing the elements required to assert specific jurisdiction).

90. See generally *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985) ("Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957))).

91. Whether the entry is physical, electronic, or constructive.

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

Emphasis on whether the defendant was aware of the forum was evident in the Supreme Court's recitation of a defendant's affidavit in *Asahi Metal Industry Co. v. Superior Court*.⁹³ A corporate officer stated that the defendant company "*never contemplated* that its limited sales of tire valves [to a Taiwanese company] would subject it to lawsuits in California."⁹⁴ The defendant merely sold component parts to another manufacturer or entered the parts into the "stream of commerce."⁹⁵ Regardless of whether the defendant corporation foresaw the possibility of the eventual contact with California, the Court determined that the defendant's actions still would not meet the requirements of *purposeful* contact because the foreseeability of being haled into a California court was not present.⁹⁶ The Court thus dismissed California's claim to jurisdiction over the defendant.⁹⁷

A 1985 case defined the type of awareness that the defendant must possess before exercising personal jurisdiction. In *Burger King Corp. v. Rudzewicz*,⁹⁸ the Court upheld Florida's jurisdiction over Rudzewicz, a Michigan resident. The Court relied on its belief that the defendant "*knew* that he was affiliating himself with an enterprise based primarily in Florida."⁹⁹ Because Rudzewicz knew that the plaintiff, Burger King, was a Florida-based corporation, this satisfied the prerequisite step in establishing the "purposeful" requirement—forum awareness.¹⁰⁰ The opinion went to great lengths to establish Rudzewicz's forum awareness noting that he sent all official notices and payments to Florida, that the contract included a Florida choice of law provision, and that direct negotiations occurred continuously be-

93. 480 U.S. 102 (1987).

94. *Id.* at 107 (quoting the affidavit of the president of the defendant, Asahi) (emphasis added).

95. *Id.* at 105.

96. *See id.* at 112 (stating that "*a defendant's awareness* that the stream of commerce may or will sweep the product *into the forum State* does not convert the mere act of placing the product into the stream [of commerce] into an act purposefully directed toward the forum State") (emphasis added).

97. *See id.* at 116.

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

99. *Id.* at 480 (emphasis added).

100. *See id.* at 482.

tween Rudzewicz and Burger King's Florida headquarters.¹⁰¹ After establishing that Rudzewicz was aware of the connection with the Florida forum, the Court completed its analysis and concluded that he could be subject to Florida jurisdiction.¹⁰² Without evidence that Rudzewicz knew of the significant connection to Florida, the Court likely would have dismissed the state's jurisdiction just as it did in *Asahi*.¹⁰³

In these two noteworthy personal jurisdiction decisions, *Burger King* and *Asahi*, the presence or lack of forum notice determined the Court's outcome. In both cases the defendant undertook an affirmative act: in *Asahi* by entering a product into the stream of commerce and in *Burger King* by maintaining business and contractual relationships through various conduct.¹⁰⁴ Because of the affirmative act, a contact with the forum occurred. Yet, it was still unclear whether the defendant undertook the affirmative act with the understanding that the act would result in contact with the forum attempting to exercise jurisdiction. The answer to this question hinged on forum notice—whether the defendant was sufficiently aware of the place where the consequences of the affirmative act would manifest. If so, the affirmative act resulting in the contact could be fairly characterized as purposeful, giving rise to the requisite minimum contacts. If not, then the contact would be merely incidental, not purposeful, and could not be described as a minimum contact. Although implicit, the Supreme Court recognized forum notice as an integral part of the analysis to determine whether contacts were purposeful. The analysis focused on evidence of the defendant's knowledge. Regarding Internet contacts, evidence of forum notice is often difficult to obtain, and very well may not exist.

101. See *id.* at 480-81.

102. See *id.* at 487.

103. See *supra* text accompanying notes 96-97.

104. See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 108 (1987); *Burger King*, 471 U.S. at 479-81.

A DESCRIPTION OF THE INTERNET

The Internet challenges geographic, territorial-based thinking because it does not adhere to geographical boundaries.¹⁰⁵ Geographical ambiguity stems from the removal of time and space constraints on the user's ability to interact in both personal and business relationships.¹⁰⁶ With a personal computer and a modem, anyone can access this territorially unbounded region and thereby access a vast amount of information.¹⁰⁷

Internet users often connect to the Internet through service providers that facilitate connections with the vast array of other computers linked to the Internet.¹⁰⁸ Once connected via these servers, communications are converted into new data formats and segmented into packets.¹⁰⁹ These packets, collectively making up a single communication, are then transmitted over various routes to reach their destination.¹¹⁰ Fundamentally, there are two parties to every communication, one who initiates and another who responds.

Although Internet communications often employ telephone links, unlike a phone call that uses a static, continuous data link, the Internet employs constantly varying communication links.¹¹¹ The wide dispersion and rapidly varying communication links make geographic definition of Internet communications practically impossible absent deliberate definition by Internet communicators.¹¹²

The explosion of this new interactive forum coupled with a comparatively low level of governance¹¹³ produces an unusual

105. See Byassee, *supra* note 3, at 198-99 (comparing the geography of the United States with the indistinct boundaries of cyberspace).

106. See *id.* at 198.

107. See PAUL GILSLER, *THE INTERNET NAVIGATOR* 2, 22 (1993).

108. See *id.* at 113.

109. See *id.* at 15.

110. See *id.*

111. See Mark Dziatkiewicz, *Protocols Take Center Stage as Internet Gains Importance*, AM. NETWORK, Apr. 1, 1996, at 6.

112. See Robert C. Cumbo & Gregory J. Wrenn, *Reputation on (the) Line: Defamation and the Internet*, CORP. LEGAL TIMES, Feb. 1996, at 13 (noting that "[o]n line, anyone can be anywhere").

113. See *MTV Networks v. Curry*, 867 F. Supp. 202, 203 n.1 (S.D.N.Y. 1994) (noting that no agency now governs the technical operation of the Internet, but rather, a

frontier of activity with newly emerging but highly debated legal guidelines.¹¹⁴ The legal debates center primarily on the application of particular laws to cyberspace.¹¹⁵ One of the most basic and potentially important issues—personal jurisdiction based on Internet contacts—only recently began receiving substantial attention.¹¹⁶ This sudden flurry of attention is due in part to recent judicial decisions maintaining that jurisdiction may be based on Internet contacts.¹¹⁷ The legal press is sounding the alarm bells properly, but the jurisdictional decisions are by no means consistent in their outcome or logic.¹¹⁸

GEOGRAPHICALLY UNDEFINED CONTACTS AND PERSONAL JURISDICTION

Determining whether to exercise personal jurisdiction over a party based on geographically undefined contacts is an understandably difficult legal chore. Those wishing to expand the reach of state courts could use the Internet to expand personal jurisdiction to new limits, but a more cautious and traditional

consensus of several groups leads rather than commands).

114. See Richard S. Zembeck, Note, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 341 (1996) (observing the public debate over how legal doctrines do and should apply to cyberspace).

115. See *id.*

116. Only recently has the press and legal commentary focused on this issue. See also Zembeck, *supra* note 114, at 341 (noting that as late as 1996 the issue of Internet jurisdiction was ignored widely). See generally Cumbow & Wrenn, *supra* note 112 (discussing defamation and the Internet); Mark Epstein, *Dealing with Jurisdictional Issues Presented by the Internet*, MULTIMEDIA STRATEGIST, Aug. 1996, at 1; David E. Rovella, *Internet Use Can Confer Jurisdiction*, NAT'L L.J., Aug. 12, 1996 (reporting the Sixth Circuit's decision in *CompuServe v. Patterson*).

117. See generally *CompuServe v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (allowing personal jurisdiction over a defendant in a copyright dispute involving agreements accomplished through the Internet); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (permitting personal jurisdiction over a corporation on the basis of its Internet and toll-free number advertising that were viewed as directed to all states).

118. Compare *CompuServe*, 89 F.3d at 1257 (asserting jurisdiction); *Inset Sys.*, 937 F. Supp. at 161 (same); *PLUS Sys., Inc. v. New England Network, Inc.*, 804 F. Supp. 111 (D. Colo. 1992) (same), with *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (rejecting jurisdiction); *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994) (same).

approach to the Internet and personal jurisdiction would limit technology's impact on judicial relationships. The historical purposes of limitations on personal jurisdiction—to regulate exorbitant, nonreciprocal exercises of jurisdiction and protect individual interests—are well represented in today's jurisdictional doctrine.¹¹⁹ Adherence to current doctrines, if clearly defined, should produce a tenable result allowing the reasonable exercise of jurisdiction, without turning interstate judicial relationships on their head. Overly expansive jurisdictional theories that allow forums to reach through the Internet, however, could bring the newly emerging technological society to the brink of unbridled state judicial power. If so, this type of jurisprudence would represent an abrupt departure from the general trend of courts when addressing the impact of vehicles that allow broad, geographically indistinct contacts between interstate actors.

Geographically Undefined Contacts in Non-Internet Contexts

Courts often have rejected personal jurisdiction over activities that are themselves geographically undefined when analyzing assertions of specific jurisdiction.¹²⁰ Providing "1-800" numbers to individuals was not considered purposeful availment of a jurisdiction.¹²¹ Courts also have rejected personal jurisdiction based solely on national magazine advertising because the advertiser has no control over geographical destination of the magazine.¹²² Likewise, other nationally distributed advertisements

119. The Court considers the Due Process Clause to be the basis for specific jurisdiction, but federalism concerns are still relevant and an important part of the specific jurisdiction analysis. *See* FRIEDENTHAL ET AL., *supra* note 14, § 3.11, at 133. The minimum contacts test thus protects both the defendant's liberty interests and the coequal sovereignty of sister states. *See id.*

120. For a more complete discussion of courts' treatments of geographically blind contacts and comparison to Internet contacts, see Zembeck, *supra* note 114, at 367-80. Citing Mr. Zembeck, a recent decision analogized an Internet site to a national magazine and declined to assert jurisdiction based on the clear precedent established in cases dealing with personal jurisdiction based on contacts with the forum state through national magazines. *See* Hearst Corp. v. Goldberger, 1997 WL 97097, at *10 (S.D.N.Y. Feb. 26, 1997).

121. *See* Dart Int'l, Inc. v. Interactive Target Sys., Inc., 877 F. Supp. 541, 543-44 (D. Colo. 1995).

122. *See id.* at 544.

do not rise to the constitutionally required level of purposeful contact necessary for a forum to exercise personal jurisdiction.¹²³

Nationally distributed materials may, however, become "purposeful" if actions are directed toward the forum. For example, courts consider tortious activity conducted through an otherwise geographically undefined vehicle, such as a national magazine, to be an activity directed towards a forum where the damaged party resides.¹²⁴ The courts also consider mail-order catalog distribution to be forum-directed because it can be geographically controlled by the seller.¹²⁵ Because courts attribute geographic awareness and control to these activities, the courts have permitted the exercise of personal jurisdiction over parties engaged in these activities.

Internet Contacts

The Internet presents a new form of geographically indistinct contacts. In the abstract, specific jurisdiction is better suited than general jurisdiction to analyze the exercise of personal jurisdiction related to Internet contacts. Courts developed specific jurisdiction precisely to accommodate nationalized commerce because the focus centers on the dispute rather than physical presence in a forum.¹²⁶ In disputes arising because of Internet contacts, the location of the parties is unclear and may be of no real consequence. Instead, the question of what state's laws and protections were accessed by the parties when the contacts giving rise to the dispute took place is determinative. Specific jurisdiction accommodates that inquiry by asking whether there was a purposeful contact giving rise to the dispute.¹²⁷ The same analysis that aided courts in resolving jurisdictional questions

123. See *Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop.*, 17 F.3d 1302, 1305 (10th Cir. 1994).

124. See *generally* *Calder v. Jones*, 465 U.S. 783 (1984) (discussing liberalized jurisdictional analysis invoked by the presence of tortious activity).

125. See *Sollinger v. Nasco Int'l, Inc.*, 655 F. Supp. 1385 (D. Vt. 1987).

126. See *Twitchell*, *supra* note 12, at 618-19 (stating that as "interstate commercial relations grew more extensive in the mid-nineteenth century, the nature of the dispute began to play a more prominent role in both English and American jurisdiction decisions").

127. See *supra* note 53 and accompanying text.

involving the international stream of commerce,¹²⁸ national advertising,¹²⁹ and national telecommunications¹³⁰—specific jurisdiction—is the logical choice for analyzing Internet-based contacts.

General jurisdiction, because it is such a close relative of territorial-based jurisdiction, does not reconcile with geographically undefined Internet contacts. Based on *Helicopteros*, a party would need more substantial transactions in, and visits to, the forum than those presented in that decision—major helicopter purchases with continuous training in the state—to create general jurisdiction.¹³¹ To be continuous and systematic, the contacts must constitute the maintenance of some portion of the general business within the forum.¹³² Applying this standard to Internet contacts, both the communications initiator and the responder should be considered. For practicality's sake, the responder will be assumed to be an Internet site provider, although this could be another individual communicating through a site, and the contact initiator will be assumed to be an individual.

A casual Internet user presumably would not have the type of continuous and systematic contacts with the forum required under general jurisdiction. Accessing an Internet site on an infrequent basis does not give rise to the type of continuous contact required. Nor would these contacts be arranged orderly and systematically. Only a case of frequent and ordered Internet access to a site could give rise to a claim under general jurisdiction. Although not impossible, this type of relationship presumably would have to be quite substantial to be worthy of analysis under general jurisdiction. No court has yet attempted to assert general jurisdiction in this context.

Looking at the other side of an Internet communication, the

128. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

129. See *Dart Int'l, Inc. v. Interactive Target Sys., Inc.*, 877 F. Supp. 541, 543-44 (D. Colo. 1995).

130. See *Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop.*, 17 F.3d 1302, 1305 (10th Cir. 1994).

131. See *id.* (referring to *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), as a case in which the court properly exercised general jurisdiction because the defendant carried on "a continuous and systematic, but limited, part of its general business").

132. See *id.*

responder, presumed to be an Internet site provider, is also unlikely to maintain the type of contacts with a state to constitute an exercise of general jurisdiction. Individual accessors must undertake affirmative action to initiate contact with an Internet site.¹³³ An Internet site stands by passively until it responds to an outside contact. The Internet site, although continuously accessible, only sends material into a forum state if accessed by an individual within the state.¹³⁴ Contact with the forum, therefore, occurs as an automatic, involuntary, responsive action. Intuitively, an Internet site does not have continuous contacts with the forum.

The requirement that the contacts be systematic cuts deeper against the exercise of general jurisdiction over an Internet site provider. In order to be systematic, the contacts must be in some sort of orderly arrangement.¹³⁵ Maintaining a portion of a business within a forum satisfies this element because there is an organized, directed activity within the forum. Possessing Internet sites that are accessed whimsically through the unilateral action of an Internet user in a particular state does not constitute orderly arranged contacts on the part of the site provider.

If an Internet site provider responded to a user who unilaterally initiated interstate access, then that response could hardly be characterized as continuous and systematic. General jurisdiction, therefore, should not be exercised over a foreign Internet site provider without a significantly more substantial relationship with the state. That is not to say that such a relationship is outside of the realm of possibility. Such a relationship might consist of the presence of facilities or personnel within the state or other continuing and systematic activities within the state. The mere maintenance of an Internet site, however, should not reach this level.

133. *See* *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 299 (S.D.N.Y. 1996), *aff'd*, 1997 WL 560048 (2d Cir. Sept. 10, 1997); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996).

134. Unless, of course, the physical hardware containing the site is itself in the jurisdiction.

135. *See* BLACK'S LAW DICTIONARY 1450 (6th ed. 1990) (defining the root word "system" as requiring an "[o]rderly combination or arrangement . . . especially such combination according to some rational principle").

Courts are not likely to end the ritualistic practice of beginning every personal jurisdiction analysis with a recitation of the general and specific jurisdiction dichotomy when addressing Internet-based disputes.¹³⁶ Nor should they, but that is as far as the general jurisdiction analysis should proceed in this context. As the above discussion demonstrated, general jurisdiction is at best ill-suited for Internet contact analysis.

A Judicial Quagmire

In *Inset Systems, Inc. v. Instruction Set, Inc.*, a Connecticut court demonstrated the potential danger of an overly expansive doctrine when it addressed the question of whether a foreign court could exercise control over an Internet site provider.¹³⁷ The court answered with an emphatic "yes."¹³⁸ Unfortunately, the court committed the all too common error explained by Professor Twitchell.¹³⁹ Rather than basing jurisdiction either on general or specific jurisdiction, the court analyzed the issue under an unacceptable hybrid of the two.¹⁴⁰ For purposes of this discussion it will be termed a general jurisdiction analysis because the court never specifically addressed whether any harm giving rise to the action resulted from the alleged contacts.¹⁴¹

The Massachusetts defendant advertised its business over an Internet site using a domain address that contained the plaintiff's trademark name.¹⁴² Because of the apparent trademark in-

136. See Twitchell, *supra* note 12, at 610 (stating that "lower court judges routinely begin personal jurisdiction analysis with the incantation that there are two kinds of jurisdiction, 'general' and 'specific'").

137. See *Inset Sys.*, 937 F. Supp. at 165 (describing its review as one of specific jurisdiction; but as explained in the text that follows, the analysis appeared to straddle the general and specific jurisdiction fence).

138. *Id.*

139. See Twitchell, *supra* note 12, at 611-12.

140. See *Inset Sys.*, 937 F. Supp. at 163-66.

141. The court stated that the defendant directed its "advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states." *Inset Sys.*, 937 F. Supp. at 165. The defendant "therefore, purposefully availed itself of the privilege of doing business within Connecticut." *Id.* The court did not establish any relationship between the alleged harm from the trademark infringement and the forum resulting from the Internet contacts. See *id.*

142. See *id.* at 163. "Domain addresses are similar to street addresses, in that it is through this domain address that Internet users find one another." *Id.*

fringement, the plaintiff brought suit.¹⁴³ Despite a lack of any significant business activity in Connecticut,¹⁴⁴ the court determined that the defendant's Internet site was enough to assert jurisdiction not only in Connecticut, but in every state in the Union, assuming Internet users resided in the state.¹⁴⁵ The ominous conclusion derived from what the court described as purposefully directed advertising activities, occurring on a continuing basis, that gave rise to a reasonable anticipation of being haled into the state's courts.¹⁴⁶ In one sense, this terminology sounded suspiciously like a specific jurisdiction analysis—*purposefully* directed contacts and *foreseeability*—but it omitted any discussion of the contact giving rise to the harm. In another sense, the terminology sounded like an analysis of general jurisdiction—advertising activities occurring on a *continuous* basis—but it omitted any discussion of the systematic nature of the contacts.¹⁴⁷ These inconsistencies produced an unfortunate blending of the two jurisdictional theories resulting in the court's conclusion that because a Massachusetts defendant, and presumably any defendant, maintained an Internet presence it could be subject to jurisdiction in any state with Internet users.¹⁴⁸

The Internet multiplies the threat of not adhering strictly to the specific jurisdiction analysis. As demonstrated by the *Inset Systems* opinion, presence on the Internet would allow any state to assert jurisdiction over an otherwise unconnected party. This danger is a classic example of the exception swallowing the whole. The "exception" is an extension of jurisdiction-based Internet contacts that are neither continuous and systematic nor give rise to the dispute. The "whole" is represented by the estimated forty million persons worldwide that can access the Internet, a number that is expected to grow to 200 million by the year 1999.¹⁴⁹ Under the *Inset Systems* analysis, any party

143. See *id.*

144. See *id.* at 162.

145. See *id.* at 165.

146. See *id.*

147. See *id.*

148. See *supra* text accompanying notes 143-49.

149. See *Hearst Corp. v. Goldberger*, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997).

maintaining an Internet presence could be sued in any forum.

To date, no personal jurisdiction decision involving Internet contacts has resolved questions of judicial authority solely under an analysis of general jurisdiction. Most courts instead have resolved the issue of personal jurisdiction through a purely specific jurisdiction analysis.

Several Internet site accessors have challenged the assertion of specific jurisdiction by the corresponding site providers. The most notable case involved an Ohio site provider attempting to bring suit against a Texas Internet user, Richard Patterson, in an Ohio federal court.¹⁵⁰ This case represented the first step into the foray by a United States Court of Appeals. The Ohio plaintiff, CompuServe, a computer information service, filed a declaratory judgment action against a Texas subscriber and shareware provider who claimed that CompuServe was engaged in tradework infringement.¹⁵¹ The Sixth Circuit found that Ohio courts properly could exercise jurisdiction after engaging in a specific jurisdiction analysis.¹⁵²

Early in the opinion, the court recited the elements necessary to assert personal jurisdiction: purposeful availment of the forum state by the defendant; a cause of action arising from forum activities; and substantial contact making the exercise of jurisdiction over the defendant reasonable.¹⁵³ Based on Internet contacts alone, the court determined that Patterson's course of conduct met these requirements.¹⁵⁴

Patterson purposefully availed himself of the jurisdiction by entering a written electronic agreement with CompuServe and later transmitting software via the Internet to the plaintiff.¹⁵⁵ Viewed alone, these contacts seemed removed from Ohio. The court, however, was careful to characterize the contacts using terms abundant with Ohio connections. First, the contract contained an Ohio choice-of-law clause.¹⁵⁶ Second, Patterson pur-

150. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).

151. *See id.* at 1260-61.

152. *See id.* at 1268-69.

153. *See id.* at 1263.

154. *See id.* at 1264-69.

155. *See id.* at 1264.

156. *See id.*

posefully agreed to market his software through Ohio-based CompuServe and transmitted that software to the State.¹⁵⁷ As the court stated, "[o]nce Patterson had [subscribed to CompuServe and entered a 'Shareware Registration Agreement'], he was on *notice* that he had made contracts, to be governed by Ohio law, with an Ohio-based company."¹⁵⁸ All of Patterson's later contacts were therefore couched in the *knowledge* that Ohio was the *place* where the Internet contacts occurred. Once the court established the defendant's prerequisite forum awareness, the court quickly concluded that Patterson was subject to Ohio's jurisdiction.

After defining the activities as Ohio based, the court faced no difficulty justifying the activities giving rise to the dispute as substantial enough to assert jurisdiction. The contract was not a "one-shot affair," but rather a continuing marketing relationship that the plaintiff perpetuated by transmitting numerous software programs.¹⁵⁹ The contract agreement itself evidenced a relationship with the forum, although that was not enough standing alone.¹⁶⁰ But, taken together, these contacts exceeded the amount necessary to exercise jurisdiction.¹⁶¹ Finally, the court noted that the contacts resulted in CompuServe's filing of the action to preserve its multimillion dollar software marketing business and thus the contact gave rise to the cause of action.¹⁶² The satisfaction of this element rounded out the constitutional requirements for asserting personal jurisdiction. The court concluded, therefore, that the plaintiff could be haled fairly into court in Ohio.¹⁶³

Emphasizing the narrowness of the holding, the court reserved judgment as to whether Internet software sales, the

157. *See id.*

158. *Id.* (emphasis added).

159. *See id.* at 1265.

160. *See id.*

161. *See id.* at 1265-66 (comparing these contacts to a single insurance contract, *see* *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), and making phone calls to Ohio combined with shipping goods to the state and maintaining distribution facilities in the state, *see* *U.S. Sprint Communications Co. v. Mr. K's Foods, Inc.*, 624 N.E.2d 1048 (Ohio 1994)).

162. *See id.* at 1267.

163. *See id.* at 1268.

spread of a computer virus, or nonpayment of subscriber fees would subject a defendant to personal jurisdiction in the relevant forum.¹⁶⁴ The limited holding, especially in the context of geographical notice, provides evidence of the Sixth Circuit's unwillingness to spread personal jurisdiction as wide as the Internet's web. To its credit, the Sixth Circuit realized the implication of such a ruling.

The linchpin of the Sixth Circuit's analysis was Patterson's knowledge, constructive or imputed, of the Ohio forum. Without this knowledge, the court would have had difficulty asserting that the substance of the contacts amounted to purposeful availment of the jurisdiction. Instead, the court would have been forced to declare the contacts nonpurposeful and reject jurisdiction just as the Supreme Court did in *Asahi*.¹⁶⁵

The comparisons between the *CompuServe* decision and *Asahi* are unmistakable. Both decisions revolved around the purposeful element.¹⁶⁶ In each case, the question was one of whether the defendant was on notice of the geographic affiliation. In *Asahi* the *stream of commerce insulated* the defendant corporation from knowledge.¹⁶⁷ In *CompuServe*, the *Internet would have served the same insulative function*, but the defendant's forum notice was established through substantial evidence.¹⁶⁸ If the defendant in *Asahi* had signed an agreement establishing California law as governing disputes between the parties and had shipped products directly to California, then the Court, in all likelihood, would have found that the defendant purposefully availed itself of the forum and was subject to its jurisdiction. The single difference between the cases was the evidence of forum notice present in *CompuServe* and absent in *Asahi*.

In another recent decision, a New York court refused to assert jurisdiction over a Missouri defendant that maintained an

164. See *id.*

165. See *supra* text accompanying notes 93-97.

166. See *supra* notes 93-97 & 157 and accompanying text. For an application of the *Asahi* holding to Internet contacts, see Gwenn M. Kalow, *From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 67 FORDHAM L. REV. 2241 (1997).

167. See *supra* notes 95-97 and accompanying text.

168. See *CompuServe*, 89 F.3d at 1264-67.

Internet site alleged to infringe on a New York party's trademark.¹⁶⁹ Noting the logic used by the Supreme Court in *Asahi*, this court concluded that maintaining an Internet site was like placing a product into the stream of commerce—the mere foreseeability of the product's entry into a forum did not constitute purposeful availment.¹⁷⁰ The court contrasted the *CompuServe* result by noting that the Texas defendant deliberately reached out, originated, and maintained contacts with a party that he knew resided in Ohio.¹⁷¹ The New York court recognized implicitly the foundation of deliberate or purposeful contact: that the defendant was required to be on notice of the forum attempting to assert jurisdiction.

In a 1992 decision, a Colorado court exercised personal jurisdiction over a computer services user based on electronic contacts in *PLUS System, Inc. v. New England Network, Inc.*¹⁷² This case involved an ATM network and one of its regional affiliates.¹⁷³ The Colorado-based plaintiff entered into a contract to provide computer processing services for the Connecticut-based defendant using electronic transmission of data.¹⁷⁴ The plaintiff, PLUS, sued in Colorado over royalty fees that it attempted to assess against certain transactions handled under the agreement.¹⁷⁵ The defendant, New England Network, initially challenged the personal jurisdiction of the Colorado court.¹⁷⁶

The logic employed by the court to resolve the personal jurisdiction dispute was strikingly similar to that of the Sixth Circuit in *CompuServe*—particularly in the characterization of the defendant's awareness of forum connections. As in *CompuServe*, the contract signed by the defendant contained a choice-of-law clause naming the forum.¹⁷⁷ In addition to this notice, the New England Network mailed payments to the forum, and its repre-

169. See *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff'd*, 1997 WL 560048 (2d Cir. Sept. 10, 1997).

170. See *id.*

171. See *id.*

172. 804 F. Supp. 111 (D. Colo. 1992).

173. See *id.* at 114.

174. See *id.* at 118-19.

175. See *id.* at 115.

176. See *id.* at 117.

177. See *id.* at 118.

sentative personally toured the computer facilities.¹⁷⁸ These factors combined to establish the prerequisite forum notice. After satisfying that prerequisite, the court faced no real difficulty in characterizing the contacts as purposeful and sufficient to constitute a valid exercise of personal jurisdiction.¹⁷⁹ Because New England Network *knew* where the computer contacts occurred, the contacts could be characterized as purposeful availment under the specific jurisdiction analysis.¹⁸⁰ Finally, the court's opinion noted that the dispute arose from the contractual relationship requiring the computer contacts.¹⁸¹ The requirements were satisfied, and the court upheld Colorado's exercise of personal jurisdiction.¹⁸²

Two other decisions that involved specific jurisdiction over computer service accessors rejected the state's authority.¹⁸³ In these cases, just as in those previously discussed, the courts' analyses keyed on whether the defendant had the requisite forum notice. Absent this notice, the courts were unwilling to assert jurisdiction over a defendant based on geographically blind computer contacts, regardless of the substantiality of the contacts.¹⁸⁴

The Florida District Court of Appeals rejected jurisdiction over a New York travel agency that used an airline reservation service's computer system based in Florida in *Pres-Kap, Inc. v. System One, Direct Access, Inc.*¹⁸⁵ The facts of the case were strikingly similar to those in the Colorado *PLUS System* case.¹⁸⁶ In both cases a computer services user accessed hardware located in a different state. In the *PLUS System* case, the court upheld jurisdiction, but the Florida court rejected it.¹⁸⁷

178. *See id.*

179. *See id.* at 119.

180. *See id.*

181. *See id.*

182. *See id.* at 120.

183. *See Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 1997 WL 560048 (2d Cir. Sept. 10, 1997); *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994).

184. *See Bensusan Restaurant*, 937 F. Supp. at 299-300; *Pres-Kap*, 636 So. 2d at 1353.

185. 636 So. 2d 1351.

186. *See supra* notes 172-82 and accompanying text.

187. *See supra* text accompanying note 172; *Pres-Kap*, 636 So. 2d at 1353-54.

The Florida court stated concisely its reason for the rejection: "There is *no showing on this record that the defendant was even aware of the exact electronic location* of the subject computer database, as this clearly would have been of little importance to it."¹⁸⁸ The court noted that the plaintiff managed the relationship from New York and deleted a forum selection clause previously contained in the contract.¹⁸⁹ In contrast to the abundant opportunities for forum notice in the Colorado *PLUS System* decision, the *Pres-Kap* case highlighted the distinctive lack of geographic awareness by the defendant party. Expressing the same caution exhibited by the Sixth Circuit, the Florida court noted that a contrary decision might improperly subject average users of on-line computer information to personal jurisdiction in previously unidentified states.¹⁹⁰

Misguided Attempts at Reconciliation

A federal district court in Pennsylvania attempted to reconcile the apparent disparities noted in many of the above described decisions in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*¹⁹¹ The court stated that a review of recent cases dealing with Internet-based jurisdiction revealed that the exercise of personal jurisdiction was related directly to the nature and quality of the commercial activity manifest in the contacts.¹⁹² The court described the situations in which this test was most applicable—cases of interactive web sites where a user can exchange information with the host computer.¹⁹³ The court stated that cases should be distinguished based upon whether the Internet contact is a simple informational posting or knowing and repeated transmission of information over the Internet.¹⁹⁴ The former are never grounds for the exercise of personal jurisdiction, and the latter are always grounds for the exercise of jurisdiction.¹⁹⁵

188. *Pres-Kap*, 636 So. 2d at 1353 (emphasis added).

189. *See id.* at 1352-53.

190. *See id.* at 1353.

191. 952 F. Supp. 1119 (W.D. Pa. 1997).

192. *See id.* at 1124.

193. *See id.*

194. *See id.*

195. *See id.*

Despite the lack of any historical precedent for such a test of commercial activity for the exercise of personal jurisdiction, the court's result at least seemed proper. The court noted that the defendant contracted with 3000 residents of the Pennsylvania forum and entered into contracts with seven Internet access providers to service Pennsylvania customers.¹⁹⁶ The court also stated that the defendant *knew* that these relationships would result in significant contacts with Pennsylvania, thus establishing the forum notice.¹⁹⁷ The court finished its specific jurisdiction analysis and asserted jurisdiction. Forum notice established the purposeful element of the analysis. The reason for the opinion's foray into the novel "commercial activities test" was unclear, but apparently harmless, at least until another court followed this reasoning under a set of facts that did not include evidence of forum notice.

In *Resuscitation Technologies, Inc. v. Continental Health Care Corp.*,¹⁹⁸ the contacts between the plaintiff and defendant consisted of an advertisement on an Internet site; eighty electronic mail messages, faxes, and conference calls; and two meetings, one in Michigan and one in New York.¹⁹⁹ An Indiana court evaluated its ability to exercise jurisdiction under a specific jurisdiction analysis.²⁰⁰ Despite the almost total lack of contact with Indiana, the court determined that the state could properly exercise jurisdiction based on the *Zippo* analysis of commercial activities.²⁰¹ The court grounded its analysis in terms of economic implications for the state of Indiana, the Indiana plaintiff's impaired financial condition, and policy concerns about future Indiana residents entering into similar relationships.²⁰² Notably absent was any assertion that the defendant knew that it had entered into a substantial enough relationship with Indiana to be haled into court there, or that it even knew the electronic contacts emanated from or were transmitted to

196. *See id.* at 1126.

197. *See id.*

198. No. IP 96-1457-C-M/S, 1997 WL 148567 (S.D. Ind. Mar. 24, 1997).

199. *See id.* at *1-2.

200. *See id.* at *3.

201. *See id.* at *4-5.

202. *See id.* at *5.

Indiana. There was no evidence of forum notice. The contacts, therefore, between the plaintiff and defendant could not be deemed a purposeful availing of Indiana by the defendant. Indiana should not have asserted jurisdiction over the dispute.

The problem with this result should be clear. The Indiana court allowed the provincial interests of the home state and its citizens to interfere with the premise that states are coequal sovereigns, that the courts of one state should not exceed their bounds to the detriment of another's citizens, and that a state's courts should not act to provide advantage to its citizens and interests over another's. Although not an individual, the defendant corporation's interests in being free from improper exercises of jurisdiction unfortunately were ignored. These concerns were the backbone of the personal jurisdiction exception to the Full Faith and Credit Clause.²⁰³

WITH SOME EXCEPTIONS, JUDICIAL DECISIONS COMPORT WITH THE HISTORICAL DEVELOPMENT OF PERSONAL JURISDICTION

These cases demonstrate the wisdom of many courts in refusing to apply an improperly liberal general jurisdictional analysis. The continuous and systematic contacts manifested by carrying on a portion of an on-going business within a state surpass any case of Internet activity yet litigated.²⁰⁴ Using the facts of the *Helicopteros* case as an example, none of these cases demonstrated Internet contacts that amounted to a closer relationship with a forum than major helicopter purchases initiated by in-state negotiations and followed up with large numbers of personnel being trained in the forum.²⁰⁵

By employing a specific jurisdiction analysis instead, courts, with some exceptions represented by the Connecticut federal district court in the *Inset Systems* decision and the Indiana court in *Resuscitation*, have avoided exorbitant applications of jurisdiction. Excepting those few, courts generally have determined that

203. See *supra* note 26 and accompanying text.

204. See *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984) (describing the threshold requirements to exercise general jurisdiction).

205. See *id.* at 416 (noting the defendant's various contacts with the forum and rejecting the exercise of general jurisdiction).

maintaining an Internet site does not constitute the purposeful availment of a jurisdiction absent some particular knowledge of the forum. The maintenance of an Internet site is not in itself sufficiently directed towards a geographic forum. Although not yet an area of much litigation, casual accessors of computer sites are presumably even less likely to be subjected to the authority of a forum based on computer contacts.

This trend is in line with the development of personal jurisdiction doctrine. Like many emerging means of communication and transportation, Internet contacts do not confer the actual or constructive presence of an individual within to constitute exercise of territorial-based jurisdiction. Courts, therefore, should, and for the most part do, analyze these contacts under the framework developed for a more mobile society—specific jurisdiction.

Under this analysis, geography is not forgotten, but its significance relates not to where a party is located physically, but instead whether the defendant purposefully submitted to the state's courts. The jurisdictional rub manifests when determining whether Internet contacts, which have no real geographic component, can be geographically defined. The only method of determining whether a party deliberately submitted is to evaluate the contacts between the opposing parties to determine first whether the defendant was aware of the forum. Specific jurisdiction asks the right question by inquiring about the defendant's purpose and whether that purpose was sufficient to affiliate with the state.

THE NEED TO EXPLICITLY RECOGNIZE FORUM NOTICE

In evaluating whether a defendant maintained purposeful contacts with a state in the context of the Internet, the most difficult hurdle to cross is forum notice. Notice of this kind has not received as much attention in previous cases of specific jurisdiction because contacts that were purposeful naturally engendered the notice of the jurisdiction. In cases of other geographic insulators such as the stream of commerce, "1-800" numbers, and national advertising, the general trend is to reject jurisdic-

tion because of the lack of forum notice.²⁰⁶ Without forum notice, the contacts cannot be considered the kind of purposeful availment necessary for the exercise of specific jurisdiction.

The concept of forum notice is not new. Because courts began to focus on the defendant, rather than solely on state borders, the specific jurisdiction analysis searched for purposeful contacts.²⁰⁷ Purposeful and its synonyms: intentional, deliberate, and willful, all imply a conscious decision on the part of the actor. In the case of specific jurisdiction, it is purposeful availment of a forum, the type that would make exercise of jurisdiction foreseeable, that is required to exercise personal jurisdiction.²⁰⁸

Knowledge of the geographic basis of the contact, therefore, is a prerequisite to establishing that a contact is purposeful. Purposeful action by the defendant is required before a contact can be evaluated under specific jurisdiction.²⁰⁹ In the context of geographically blind contacts, such as Internet contacts, establishing that the defendant was on notice of the forum must be an explicitly required element.

When courts address a personal jurisdiction dispute that arises through the Internet, a simple addition should be explicitly made in the requirements for exercising specific jurisdiction: *forum notice*. Rather than stating "the defendant must purposefully avail himself of the privilege of acting in the forum state,"²¹⁰ this component of specific jurisdiction could be restat-

206. See *supra* text accompanying notes 120-25 & 166-68.

207. This change in focus occurred in 1945 with the *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), decision by the Supreme Court. Later, in 1958 the Court announced that minimum contacts referred to purposeful availment of the forum state. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Before 1960, the doctrine of personal jurisdiction established the idea of minimum, purposeful contacts.

208. See *supra* text accompanying notes 55-56; see also Johnson & Post, *supra* note 3, at 1370 (describing territorial boundaries as serving a "signpost function," capable of providing notice). The authors also noted that these boundaries are one of the reasons that geographic borders make sense:

Notice. Physical boundaries are also appropriate for the delineation of "law space" in the physical world because they can give notice that the rules change when the boundaries are crossed. Proper boundaries have signposts that provide warning that we will be required, after crossing, to abide by different rules, and physical boundaries—lines on the geographical map—are generally well-equipped to serve this signpost function.

Id.

209. See *supra* notes 62-63 and accompanying text.

210. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996) (describing

ed as: The defendant must be on sufficient notice of the forum state when engaging in the contacts to constitute purposeful availment of the state. A simple amendment, but quite useful.

For most courts evaluating personal jurisdiction, addressing forum notice explicitly will require little change in their approach. Many courts already actively search for the defendant's awareness of the geographic forum.²¹¹ Adding forum notice as an element of the analysis will simply promote a bright-line rule in an area of much confusion.

Adding further definition to the specific jurisdiction rule will aid in accomplishing several useful goals. First, it will ensure that Internet-based jurisdiction is not the instrument of fraud and oppression. Second, it will maintain the balance of state judicial power. Third, the added certainty will reduce the fear associated with engaging in commercial and personal activities through the Internet.²¹² This rule will thus promote both state and individual interests. Internet-based jurisdiction is ripe for abuse in the same way that overly permissive notice laws were abused in *Pennoyer v. Neff*²¹³ and more recently sham inducements into the forum.²¹⁴

In 1877, the danger of overly expansive state jurisdiction arrived in the form of oppressive legislation.²¹⁵ The same fears of fraud and oppression support the limits on Internet-based jurisdiction. Today, the danger of fraud and oppression proceeds from the exorbitant reach of state courts based merely on an Internet presence.²¹⁶ The danger of this action was the same, in 1813,²¹⁷ as it was in 1877, and as it is today.

The policy behind prohibiting sham inducements into a jurisdiction also supports the requirement of forum notice. Both are bright-line rules and promote open communications between

the elements necessary for the exercise of specific jurisdiction).

211. See *supra* text accompanying notes 179-80 & 196-97.

212. See FRIEDENTHAL ET AL., *supra* note 14, § 3.11, at 134-35 (recognizing that the recent judicial trend is to inject predictability and certainty into the minimum contacts test).

213. See *supra* notes 28-34 and accompanying text.

214. See *supra* notes 37-38 and accompanying text.

215. See *supra* notes 28-29 and accompanying text.

216. See *supra* note 149 and accompanying text.

217. See *supra* note 26 and accompanying text.

parties. In the case of sham inducement, the fear of being fooled into entering a jurisdiction could lead to a reduction in settlement negotiations between feuding parties.²¹⁸ In the case of Internet communications, commerce faces one of its most promising vehicles in many years. Rather than putting users in fear of being haled into a state court where the user has no known contact, the judiciary should provide comfort by reassuring Internet site providers and accessors that they will not be subject to jurisdiction absent forum notice. This action will not only provide psychological comfort but will also reduce the costs of doing business, which are of special concern to Internet entrepreneurs.

Internet users that want to establish a basis for jurisdiction should ensure that the foundation is laid for establishing purposeful contacts. Courts have placed particular reliance on two methods of establishing proper forum notice: a forum selection clause or choice-of-law clause in a contractual relationship established on the Internet.²¹⁹ Although not previously used, possibly because Internet users remain unaware of the need to establish forum notice, parties using the Internet could prominently display their location, thus conveying specific forum notice. The accessor is then forced to submit to a state's jurisdiction by entering the forum electronically. Once the forum notice is established, and the Internet is reduced to a geographic reality, courts can follow a traditional specific jurisdiction test to determine if the contacts were purposeful, whether the contact gave rise to the dispute, and whether the exercise of jurisdiction would comport with traditional notions of fair play and substantial justice.

CONCLUSION

Through the exercise of judicial restraint, courts can comply with the historical purposes behind doctrines of personal juris-

218. See *supra* note 38 and accompanying text.

219. The United States Court of Appeals for the Sixth Circuit relied on two forum selection clauses. See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1260 (6th Cir. 1996). The United States District Court for the District of Colorado also relied in part on a forum selection clause. See *PLUS Sys., Inc. v. New England Network, Inc.*, 804 F. Supp. 111, 118 (D. Colo. 1992).

diction and provide states and individuals with a workable standard. Individuals lacking knowledge of the basis for jurisdictional contacts will be free from litigating in unanticipated foreign courts. This reduces the fear that the unrestrained exercise of personal jurisdiction by courts will be the instrument of fraud and oppression.²²⁰ The interests of the several states will be protected by endowing them with adequate judicial power and freeing them from foreign states interfering in domestic affairs, thus preserving one of the oldest purposes of limits on personal jurisdiction. As with any bright-line rule, requiring forum notice also will increase judicial efficiency.

Average Internet users should take comfort in a judiciary that adheres to doctrines of personal jurisdiction that comport with historical limits. Casual users of the Internet that access interstate Internet sites will almost certainly not risk foreign jurisdiction. Internet site providers should not be subjected to jurisdiction in other forums based solely on an Internet site accessible by users of other jurisdictions.

The historical rationale for limiting jurisdiction must be preserved even in the face of an onslaught of globe shrinking technology. Recognizing the trend of relaxing the limits on personal jurisdiction, Chief Justice Earl Warren warned:

[I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . [Those restrictions] are a consequence of the territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has 'minimum contacts'²²¹

This acknowledgment embraces the challenge that courts face today—ensuring that the states maintain adequate territorial power while freeing defendants from the exorbitant, unreciprocated reach of courts. In the face of an ever-expanding Internet, the threat to jurisdictional limitations and the need to

220. See *supra* text accompanying notes 35-36.

221. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

protect these limitations has never been greater. Internet contacts that could foreseeably touch every citizen could easily turn into the exception that swallows the doctrine. If courts allow the Internet to reverse 200 years of judicial precedent and legislation, then the Wild West of cyberspace instead of law will rule the relationships between states and individuals.

Darren L. McCarty