BENSUSAN RESTAURANT CORP. V. KING

By Colleen Reilly

Since its inception over 25 years ago, the Internet has been largely a self-governed institution.[1] Legislative forays into cyberspace[2] have demonstrated the difficulty of effective state governance of a medium of communication and, more recently, commerce,[3] that continues to evolve at breakneck speed. That pace has only increased with the advent of the World Wide Web (web).[4]

The judiciary has also struggled to tailor traditional legal frameworks to this new technology. Conflicting results in Internet personal jurisdiction cases[5] have made it difficult for Internet actors to structure their be-

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1. *See generally* Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413 (discussing the relation between the Internet and regulation and arguing that self-governance is the desirable result).

2. *See, e.g.*, Communications Decency Act, 47 U.S.C.A. §§ 151-614 (West Supp. 1997). Several months after its passage, the Supreme Court held that several provisions of the Act violated the First Amendment. *See* Reno v. American Civil Liberties Union, __ U.S. __, 117 S. Ct. 2329 (1997).

3. *See* Dale M. Cendali & James D. Arbogast, *'Net Use Raises Issues of Jurisdiction*, NAT'L L.J., Oct. 28, 1996, at C7, C11 (stating that "already brisk commerce over the Internet is expected to increase exponentially as secure credit card transactions and other forms of electronic payment are perfected").

4. *See What Are You Doing on the Web?*, INC., June 1996, at 124 (citing a recent study that indicates that half of the people in the United States and Canada who use the World Wide Web do so for business purposes).

5. *See, e.g.*, Cybersell v. Cybersell, 130 F.3d 414 (9th Cir. 1997) (finding no personal jurisdiction); Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997) (finding no personal jurisdiction); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (asserting personal jurisdiction); Gary Scott Int'l Inc. v. Baroudi, 981 F. Supp. 714 (D. Mass. 1997) (asserting personal jurisdiction); American Network, Inc. v. Access America/Connect Atlanta, Inc., 975 F. Supp. 494 (S.D.N.Y. 1997) (asserting personal jurisdiction); Telco Communications v. An Apple A Day, 977 F. Supp. 404 (E.D. Va. 1997) (asserting personal jurisdiction); Weber v. Jolly Hotels, 977 F. Supp. 327 (D.N.J. 1997) (finding no personal jurisdiction); Hobby Lobby Stores, Inc. v. Boto Co., 968 F. Supp. 1356 (W.D. Ark. 1997) (finding no personal jurisdiction); Digital Equip. Corp. v. AltaVista Technology, Inc., 960 F. Supp. 456 (D. Mass. 1997) (asserting personal jurisdiction); IDS Life Ins. Co. v. SunAmerica, Inc., 958 F. Supp 1258 (N.D. Ill. 1997) (finding no personal jurisdiction); Heroes, Inc. v. Heroes Foundation, 958 F. Supp. 1 (D.D.C. 1996) (asserting personal jurisdiction); Cody v. Ward, 954 F. Supp. 43 (D. Conn. 1997) (asserting personal jurisdiction); Zippo Mfg. v. Zippo Dot Com, Inc., 952 F. Supp. 1119

havior. The issue is complicated by the laissez-faire approach that these actors have come to expect as an integral part of the Internet culture.

That era seems to be coming to a close, however, as merchants of all kinds rush to the Internet to display their wares.[6] With widespread web advertising and commerce come claims of trademark infringement[7] and breach of contract.[8] Among the threshold issues that a court must consider in many of these cases is whether it can exert personal jurisdiction over a defendant that merely maintains a web presence in the forum while conducting its business from a distant forum.[9]

If it is considered to be good economic policy to encourage entrepreneurs to use the Internet as a marketing and sales channel, an approach must be developed that will allow them to analyze effectively the risk of doing so. If courts continue to engage in the speculative application of

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(W.D. Penn. 1997) (asserting personal jurisdiction); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328 (E.D. Mo.), *reconsideration denied*, 947 F. Supp. 1338 (1996) (asserting personal jurisdiction); EDIAS Software Int'l, L.L.C. v. Basis Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996) (asserting personal jurisdiction); Playboy Enterprises v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996) (asserting personal jurisdiction); Panavision Int'l L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996) (asserting personal jurisdiction); Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (asserting personal jurisdiction); SF Hotel Co., L.P. v. Energy Investments, 45 U.S.P.Q.2d 1308 (D. Kan. Nov. 19, 1997) (finding no personal jurisdiction); Transcraft Corp. v. Doonan Trailer Corp., 45 U.S.P.Q.2d (BNA) 1097 (N.D. Ill. Nov. 17, 1997) (finding no personal jurisdiction); Hasbro, Inc. v. Clue Computing, Inc., No. 97-10065-DPW, 1997 U.S. Dist. LEXIS 18857 (D. Mass. Sept. 30, 1997) (asserting personal jurisdiction); Expert Pages v. Buckalew, No. C-97-2109-VRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997) (finding no personal jurisdiction); Agar Corp. v. Multi-Fluid, Inc., 44 U.S.P.Q.2d 1158 (S.D. Tex. July 30, 1997) (finding no personal jurisdiction); Resuscitation Technologies, Inc. v. Continental Health Care Corp., No. IP 96-1457-C-M/S, 1997 WL 148567 (S.D. Ind. Mar. 24, 1997) (asserting personal jurisdiction); Hearst Corp. v. Goldberger, No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997) (finding no personal jurisdiction); McDonough v. Fallon McElligott, Inc., 40 U.S.P.Q.2d 1826 (S.D. Cal. Aug. 5, 1996) (finding no personal jurisdiction); Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. App. 1997) (asserting personal jurisdiction). For a discussion of a number of these cases, see David G. Post & Dawn C. Nunziato, *Personal Jurisdiction on the Internet* (last modified October, 1997) <http://www.cli.org/DPost/jcases.html>.

6. According to Ziff Davis, the amount of revenue generated from Internet commerce totaled $2.6 billion in 1996; that number is expected to climb to $220 billion by the year 2002. *See Cyberstats for November 1997* (viewed January 29, 1998) <http://www.zdnet.com/icom/cyberstats/1997/11/>.

7. *See, e.g.*, *AltaVista*, 960 F. Supp. at 461; *Zippo Dot Com*, 952 F. Supp. at 1121.

8. *See, e.g.*, *AltaVista*, 960 F. Supp. at 461.

9. *See, e.g.*, *Bensusan*, 126 F.3d at 27 [hereinafter *Bensusan II*].

personal jurisdiction analysis, businesses may be driven off the Internet or, worse yet, discouraged from hopping aboard in the first place.

In *Bensusan v. King*,[10] the United States Court of Appeals for the Second Circuit affirmed the holding of a district court in the Southern District of New York that the state could not assert personal jurisdiction over a defendant whose only contacts with New York consisted of a passive web presence.[11] Reasoning that the defendant had not purposefully availed himself of the laws of New York, the three-judge panel dismissed the case with little discussion.[12]

Although the case is not particularly controversial—most commentators agree that the court reached the appropriate conclusion[13]—the result is nevertheless critical because it was the first decision reached on such facts at the circuit court level.[14] It stands in direct opposition to a case involving similar facts that was decided in the Eastern District of Missouri.[15]

This comment first discusses the merits of the *Bensusan* decisions. It then compares and contrasts some of the other cases that have grappled with the jurisdictional issue.[16] Finally, it formulates a test that can be used by courts, Internet actors, and potential Internet actors to determine whether personal jurisdiction exists on a given set of facts.[17]

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10. 126 F.3d 25 (2d Cir. 1997).

11. *See id.* at 27.

12. *See id.* at 27-29.

13. *See, e.g.*, Gwenn M. Kalow, *From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 65 FORDHAM L. REV. 2241, 2264-65 (1997) (approving of the *Bensusan II* decision). *But cf.* Bryce A. Lenox, *Personal Jurisdiction in Cyberspace: Teaching the Stream of Commerce Dog New Internet Tricks:* CompuServe, Inc. v. Patterson, *89 F.3d 1257 (6th Cir. 1996)*, 22 DAYTON L. REV. 331, 342 n.109 (1997) (disagreeing with the test used by the court in *Bensusan II*, and implicitly disagreeing with the result).

14. Since the case was decided in September 1997, the Ninth Circuit has reached a similar result in a case with a relatively similar level of Internet activity. *See* Cybersell v. Cybersell, 130 F.3d 414 (9th Cir. 1997).

15. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328 (E.D. Mo.), *reconsideration denied*, 947 F. Supp. 1338 (1996). Some commentators distinguish *Maritz* on the grounds that visitors to the site were encouraged to add their address to a mailing list. *See, e.g.*, Sean M. Flower, Note, *When Does Internet Activity Establish the Necessary Minimum Contact Necessary to Confer Personal Jurisdiction?:* Maritz, Inc. v. CyberGold, Inc., 62 MO. L. REV. 845, 847 (1997).

16. *See* cases and holdings cited *supra* note 5.

17. It should be noted, however, that these cases are necessarily fact-intensive—especially considering the rate of change in the technology and how it is exploited—and that any test(s) developed must be periodically evaluated and adjusted according to such changes.

I. *BENSUSAN V. KING*

Plaintiff Bensusan Restaurant Corp. (Bensusan) owns a successful jazz club in Manhattan called "The Blue Note."[18] In May 1985, Bensusan registered "The Blue Note" as a federal trademark for "cabaret services."[19] Defendant Richard B. King (King) owns a small jazz club of the same name in Columbia, Missouri, which he has operated there since 1980.[20]

In April 1996, King created and began to maintain a web page in Missouri, which resided on a server in Missouri.[21] The site was not password or otherwise protected and could therefore be viewed by anyone with an Internet connection.[22] The site contained information about the club, including its address and telephone number; a schedule of upcoming events; and a toll-free number to call for tickets.[23]

Bensusan sued soon thereafter, asserting claims for trademark infringement, trademark dilution, and unfair competition.[24] King moved to dismiss for lack of personal jurisdiction.[25]

The district court granted the motion after considering two provisions of the New York long-arm statute and undertaking a due process analysis. The two relevant provisions of the long-arm statute were section 302(a)(2) and section 302(a)(3).[26] Section 302(a)(2) permits a court to exercise personal jurisdiction over any non-domiciliary who "commits a tortious act within the state" as long as the cause of action asserted "arises from the tortious act."[27] Section 302(a)(3) permits a court to exercise personal jurisdiction over any non-domiciliary for tortious acts committed outside the state that cause injury in the state if the non-domiciliary "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."[28]

Section 302(a)(2) is notoriously favorable to distant defendants. Most courts in the state have interpreted the statute to cover only those who are

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18. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 297 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997) [hereinafter *Bensusan I*].

19. *See Bensusan II*, 126 F.3d at 26.

20. *See id.*

21. *See Bensusan I*, 937 F. Supp. at 297.

22. *See id.*

23. *See id.*

24. *See Bensusan II*, 126 F.3d at 27.

25. *See Bensusan I*, 937 F. Supp. at 297; *see also* FED. R. CIV. P. 12(b)(2).

26. *See Bensusan I* at 299.

27. *Bensusan I*, 937 F. Supp. at 299 (quoting N.Y. C.P.L.R. § 302(a) (McKinney 1996)). For a discussion of New York's long-arm statute, see generally DAVID D. SIEGEL, NEW YORK PRACTICE §§ 84-94 (2d ed. 1991).

28. *Id.* (quoting N.Y. C.P.L.R. § 302(a)(3)(ii) (McKinney 1996)).

actually present and commit the tortious act within the physical boundaries of the state.[29] The district court in *Bensusan I* refrained from taking such an expansive view but did come to the conclusion that King was beyond this section of the long-arm statute. The court analogized the case to an offering for sale, in which case "an offering for sale of even one copy of an infringing product in New York, even if no sale results, is sufficient to vest a court with jurisdiction over the alleged infringer."[30] However, the court found that the mere creation and maintenance of a web site—even though it may be accessible in New York or worldwide—which included a telephone number to order the allegedly infringing product did not constitute an offer to sell the product in New York.[31] Most importantly, the court stated that "even assuming that the user was confused about the relationship of the Missouri club to the one in New York, such an act of infringement would have occurred in Missouri, *not* New York."[32]

The court further found that section 302(a)(3) did not reach King either. To "expect[] or ... reasonably expect" his act to have consequences in New York, the court found that King would have had to make "a discernable [*sic*] effort ... to serve, directly or indirectly, a market in the forum state."[33] The court did not find that King had made such an effort, nor did it find that he derived a substantial amount of his revenue from interstate commerce.[34] In its final evaluation of the long-arm statute, the court also failed to find that Bensusan had sustained a "significant eco-

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29. *See* Carlson v. Cuevas, 932 F. Supp. 76, 80 (S.D.N.Y. 1996) (applying New York law); Platt Corp. v. Platt, 17 N.Y.2d 234, 237 (Sup. Ct. 1966); Kramer v. Vogl, 17 N.Y.2d 27, 31 (Sup. Ct. 1966); Feathers v. McLucas, 15 N.Y.2d 443, 460-62 (Sup. Ct. 1965). The official Practice Commentary to N.Y. C.P.L.R. explains the reach of the statute as follows:

> [I]f a New Jersey domiciliary were to lob a bazooka shell across the Hudson River at Grant's tomb, *Feathers* would appear to bar the New York courts from asserting personal jurisdiction over the New Jersey domiciliary in an action by an injured New York plaintiff .... As construed by the *Feathers* decision, jurisdiction cannot be asserted over a nonresident under this provision unless the nonresident commits an act in this state. This is tantamount to a requirement that the defendant or his agent be physically present in New York ....

N.Y. C.P.L.R. § 302, cmt. 17 (McKinney 1996).

30. *Bensusan I*, 937 F. Supp. at 299.

31. *See id.*

32. *Id.* (emphasis added). The court noted that an affirmative effort to market a product is distinct from supplying accessible information. *See id.*

33. *Bensusan I*, 937 F. Supp. at 300 (quoting Darienzo v. Wise Shoe Stores, Inc., 74 A.D.2d 342, 346 (2d Dep't 1980)).

34. *See Bensusan I*, 937 F. Supp. at 300.

nomic injury," which also would have been necessary to assert jurisdiction over King.[35]

In addition to evaluating the validity of asserting jurisdiction under the New York long-arm statute, the court also analyzed the case from a due process perspective.[36] Here, the court held that even if the long-arm statute could reach King, asserting personal jurisdiction over him would violate the principles of due process:

> King has done nothing to purposefully avail himself of the benefits of New York. King, like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, *without more, it is not an act purposefully directed towards the forum state.* [Citations omitted.] There are no allegations that King actively sought to encourage New Yorkers to access his site, or that he conducted any business—let alone a continuous and systematic part of its business—in New York. There is in fact no suggestion that King has *any presence of any kind* in New York other than the Web site that can be accessed worldwide.[37]

The Second Circuit affirmed the decision of the district court and denied personal jurisdiction over King. In evaluating the possibility of jurisdiction under the New York long-arm statute, the court applied an even blunter test, one that advocated that section 302 could reach only tortious acts performed by a defendant who was physically present in New York when he performed the wrongful act.[38] Consequently, the court concluded that "[e]ven if Bensusan suffered injury in New York, that does not establish a tortious act in the state of New York within the meaning of § 302(a)(2)."[39]

In its discussion of section 302(a)(3)(ii), the court noted that Bensusan had not established that King derived substantial revenues from interstate

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35. *See id.*

36. The due process clause of the Fourteenth Amendment of the United States Constitution also constrains a court's ability to assert personal jurisdiction over a distant defendant. *See, e.g.*, Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 113-15 (1987) (plurality); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée, 456 U.S. 694, 702 n.10 (1982); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

37. *Bensusan I*, 937 F. Supp. at 301 (citing Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987)) (emphasis added).

38. *See* Feathers v. McLucas, 15 N.Y.2d 443 (Sup. Ct. 1965).

39. *Bensusan II*, 126 F.3d at 29.

commerce, a requirement it stated "is intended to exclude non-domiciliaries whose business operations are of a local character."[40] The court opined that King "unquestionably" fell into this category.[41]

Having found that application of the New York long-arm statute precluded the possibility of asserting jurisdiction over King, the circuit court did not undertake a due process analysis before affirming the decision of the district court.

II. DISCUSSION

Courts have tended to evaluate personal jurisdiction cases in the Internet context according to several different tests. The popularity of a particular standard varies from jurisdiction to jurisdiction, and some courts also combine them. Some of the more prominent tests that have been used are the solicitation or sales test, the effects-based test, and the "passive presence only" test.

A. Solicitation/Sales Test

Several courts have based their decisions regarding the propriety of personal jurisdiction over a defendant upon whether the defendant had solicited or actually made sales in a distant forum via Internet contacts.[42] In *CompuServe, Inc. v. Patterson*,[43] the Sixth Circuit found that a Texas Internet user and subscriber to CompuServe, an on-line service located and incorporated in Ohio, was subject to personal jurisdiction in Ohio. In its interpretation, the court focused on the fact that Patterson, who had no physical contacts with Ohio, had nonetheless specifically targeted Ohio by not only subscribing to the service, but also by entering into a separate contract—also via the Internet—with CompuServe to distribute shareware via their network.[44]

In *Inset Systems, Inc. v. Instruction Set, Inc.*,[45] a district court in Connecticut exercised jurisdiction over a defendant whose only contacts with Connecticut were a web site and a toll-free telephone number, both of

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40. *Id.* (quoting Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial Year July 1, 1965 through June 30, 1966, Legislative Document (1967) No. 90).

41. *Bensusan II*, 126 F.3d at 29.

42. *See, e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Zippo Mfg. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997); Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996).

43. 89 F.3d 1257 (6th Cir. 1996).

44. *Id.* at 1264-65.

45. 937 F. Supp. 161 (D. Conn. 1996).

which advertised its services. The court in *Inset Systems* held that the mere existence of the defendant's web site meant that the defendant had "purposefully availed itself of the privilege of doing business in Connecticut."[46]

In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[47] the subject of the following comment, plaintiff Zippo, a cigarette lighter manufacturer, sued defendant Dot Com, an Internet news service, for trademark infringement and dilution. The Pennsylvania district court asserted jurisdiction over the defendant, a California corporation, based on the fact that Dot Com had posted information about its services on its web site and entered into on-line subscription contracts with approximately 3,000 Pennsylvania residents as well as several service contracts with Internet service providers in Pennsylvania.[48]

The major problem with the solicitation and sales test is that courts apply varying standards of what exactly constitutes a solicitation or a sale. One interpretation would be that simply having a web site could constitute a solicitation, if not a sale. If only large companies that were national in scope were using the Internet as a marketing and sales channel, this might well be a sound position. However, this simply is not the case. One of the most beneficial features of the Internet is that one can distribute large amounts of information to a great number of people very quickly, at a marginal cost approaching zero. Someone like the proprietor of a small-town jazz club, however, does not use the Internet to advertise to or solicit sales from persons in distant states. One is still reaping the benefits of the low cost of information distribution—the difference is simply that his or her pool of targeted consumers is smaller. One does not anticipate that he or she will be subject to suit in a distant forum; nor can one easily prevent New Yorkers from viewing his or her web site if they choose to do so.[49]

In this context, the Connecticut court's decision in *Inset Systems* is the most suspect. If it is true that there are 190,000 businesses currently connected to the Internet,[50] it pushes the bounds of reason to assume that all 190,000 have purposefully availed themselves of the privilege of doing

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46. *Id.* at 165.

47. 952 F. Supp. 1119 (W.D. Pa. 1997).

48. *See id.* at 1121, 1128.

49. It is nearly impossible to "screen" viewers out of a web site according to their geographic locations, because a domain name is only a useful indicator of where a particular machine is located on its network, not of geographic location. *See* WILLIAM J. MITCHELL, CITY OF BITS 8-9 (1995).

50. *See* Craig W. Harding, *Selected Issues in Electronic Commerce: New Technologies and Legal Paradigms*, 491 PLI/PAT 7, 9 (1997).

business in Connecticut merely by having an Internet presence. It is not feasible to limit one's web presence to physical state boundaries.

B. Effects-Based Test

The effects-based test[51] concentrates on the aftermath of the out-of-state conduct that occurs, rather than "purposeful availment of the benefits of the laws" of the distant forum. An example of its application can be found in *Panavision International, L.P. v. Toeppen*.[52]

In *Panavision*, the arguably entrepreneurial defendant purchased a large number of trademarked Internet domain names[53] and essentially held them hostage until the companies with those names attempted to register the locations themselves, only to find that Toeppen was already the owner.[54] He then offered to sell them at a price which was much higher than what he had paid—he attempted to charge Panavision $13,000 for a site that cost him between fifty and one hundred dollars to register[55]—but probably lower than what the company would be willing to pay for consumers easily to locate it on the web, and definitely lower than the potential costs of litigation.[56] Toeppen, an Illinois resident, did not have any substantial contacts with California.[57] Nevertheless, the California district court held that personal jurisdiction over Toeppen was "proper because Toeppen's out of state conduct was intended to, and did, result in harmful effects in California."[58]

The effects-based test is most often invoked when the defendant is found to have caused damage to the plaintiff in the plaintiff's jurisdic-

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51. The effects-based test was established in *Calder v. Jones*, 465 U.S. 783 (1984), in which it was referred to as the "effects test." In that case, the Court held that a reporter and an editor, both Florida residents, were subject to personal jurisdiction in California for an allegedly defamatory article that they had written for publication in a national magazine. The Court held that jurisdiction in California was proper because California was "the focal point of both the story and of the harm suffered." *Id.* at 789.

52. 938 F. Supp. 616 (C.D. Cal. 1996).

53. A domain name is the "address" for the location at which a web site can be found by an Internet user. Toeppen, for example, purchased the domain names "panavision.com" and "panaflex.com," among others. *See id.* at 619. For an in-depth discussion of the *Panavision* case, see Ughetta Manzone, *Panavision International, L.P. v. Toeppen*, 13 BERKELEY TECH. L.J. 249 (1998).

54. *See Panavision*, 938 F. Supp. at 619.

55. *See id.*

56. *See* Daniel R. Pote, Note, *A Domain by Any Other Name: The Federal Trademark Dilution Act Applied to Internet Domain Names*, 37 JURIMETRICS J. 301, 308 (1997).

57. *See Panavision*, 938 F. Supp. at 620.

58. *Id.* at 622.

tion.[59] The court in Toeppen found that the defendant, although he had not actually used the trademark to solicit business, nevertheless knew or should have known that his actions would be damaging to Panavision, which conducted a major portion of its business in California.[60]

The effects-based test can be an effective tool, but its usefulness is limited to those cases in which an Internet presence has been found to have caused damage even though the defendant has not actually committed a tort. As such, it is inapplicable to most of the Internet personal jurisdiction cases decided to date. Nor does it provide a basis to conduct a due process analysis, as the defendant is effectively considered to have waived the right to have the court consider the burden that will be imposed on him or her by being forced to litigate in the distant forum.

C. "Passive Presence Only" Test

The "passive presence only" test appears to be the most clear-cut of the tests, at least from a due process standpoint. The test evaluates the extent of the defendant's web presence and attempts to determine if the proprietor is directing its marketing at a particular jurisdiction.[61] Difficulties do arise, however, particularly in situations in which a court launches a preemptive strike against a web merchant who is not yet conducting any business via the Internet.[62]

In *Hearst v. Goldberger*,[63] the district court in the Southern District of New York declined to assert jurisdiction over defendant Ari Goldberger, a resident of New Jersey who worked in Philadelphia. Goldberger had established a web site called "EsqWire.com," which Hearst claimed in-

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59. *See id.*; *see also* Digital Equip. Corp. v. AltaVista Technology, Inc., 960 F. Supp. 456 (D. Mass. 1997) (discussing the appropriateness of asserting personal jurisdiction over AltaVista based partially on the fact that it had been found to have infringed Digital's trademark); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328 (E.D. Mo.), *reconsideration denied*, 947 F. Supp. 1338 (E.D. Mo. 1996) (the fact that defendant CyberGold was found to have committed a tort against the plaintiff factored into the court's decision to find personal jurisdiction appropriate).

60. *See Panavision*, 938 F. Supp. at 621-22.

61. This type of test is commonly employed in many of the Internet jurisdiction cases in which the defendant maintains a non-interactive web site, although none of the cases have specifically referred to it as such.

62. *See Maritz*, 947 F. Supp. at 1333 (asserting personal jurisdiction over defendant CyberGold, which was advertising future services via its web site). *But cf.* Hearst v. Goldberger, No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997) (granting a motion to dismiss for lack of personal jurisdiction where a defendant was advertising future services via his web site).

63. No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

fringed on its trademark for *Esquire* magazine.[64] Again, the New York long-arm statute governed. The court reasoned that "[e]ven if Goldberger's Internet web site could be considered an 'offer for sale' where, as here, Goldberger has no produce [*sic*] or service yet available for sale, jurisdiction does not exist in New York based merely on his placing the offer on the Internet outside New York."[65]

A district court in the Eastern District of Missouri reached the opposite result in *Maritz, Inc. v. CyberGold, Inc.*[66] At the time the claim was filed, CyberGold was planning to roll out a web-based service that "paid" future members—in electronic cash—to view and interact with Internet advertisements.[67] The service was not yet operational as of the date of the court's opinion.[68] In finding personal jurisdiction appropriate, the court, placing emphasis on the fact that the site was available for viewing in Missouri and in fact had been visited by residents of the state,[69] reasoned not only that CyberGold could anticipate being subject to litigation in a Missouri court,[70] but also that subjecting the company to jurisdiction in Missouri did not offend traditional notions of fair play and substantial justice.[71]

The state of Minnesota has taken an aggressive stance against out-of-state Internet actors, particularly those it sees as attempting to promote on-line activities that allegedly are harmful to Minnesota residents.[72] For example, in *Minnesota v. Granite Gate Resorts, Inc.*,[73] the court found that asserting jurisdiction was reasonable because the defendants, who were advertising their on-line gambling service, had made a "clear effort to

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64. *See id.* at *1.

65. *See id.* at *13.

66. 947 F. Supp. 1328 (E.D. Mo. 1996).

67. Interview with Andre Marquis, Director of Marketing, CyberGold, in Berkeley, Cal. (July 1996).

68. *See Maritz*, 947 F. Supp. at 1330. If the service had, in fact, been operational at the time the suit was brought, and if CyberGold had purposefully solicited and gained customers in Missouri, the result reached by the district court might be easier to justify.

69. *See id.* at 1334.

70. *See id.*

71. *See id.* (citing Burger King v. Rudzewicz, 471 U.S. 462, 476-78 (1985)). *Maritz* is a good example of a court combining two or more tests—here, the "passive presence only" and the effects-based tests—as the court also concluded that jurisdiction was proper "because the allegedly infringing activities have produced an effect in Missouri ... [causing] Maritz economic injury." *Id.* at 1331.

72. *See* Bradley A. Slutsky, *Jurisdiction Over Commerce on the Internet* (last modified June 6, 1997) <http://www. kslaw.com/menu/jurisdic.htm>.

73. 568 N.W.2d 715 (Minn. App. 1997).

reach and seek potential profit from Minnesota consumers ...."[74] There was evidence that Minnesota residents had accessed the web site, but no evidence that any had actually initiated a transaction with defendants' service, WagerNet.[75]

The biggest problem with the "passive presence only" test is that courts often disagree about what constitutes a passive presence. Some, such as the district court in *Hearst*, decline to assert personal jurisdiction where the defendant is merely advertising future services he or she intends to offer via the Internet.[76] Others, such as the district court in *Maritz*, consider it proper to assert jurisdiction over a business doing much the same thing.[77] With such different interpretations of similar sets of facts, and considering the inherently borderless nature of the Internet, the test does not provide a standard by which Internet actors can structure their behavior.

D. Assessing the Tests

As noted earlier, the common law development of personal jurisdiction doctrine has historically been strongly influenced and perhaps even driven by advances in technology.[78] The doctrine's emphasis has evolved from concerns about the preservation of federalism to concerns about safeguarding the due process rights of distant defendants.[79] Several of the decisions regarding the applicability of personal jurisdiction in cases of Internet contacts, including *Bensusan*, discuss these matters in terms reminiscent of the landmark personal jurisdiction cases,[80] particularly *Asahi Metal Industry Co. v. Superior Court*.[81]

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74. *Id.* at 720.

75. *See id.* at 718-19. An employee from the Minnesota Attorney General's office had deliberately called the number posted on the WagerNet web site to see if the company would place him on its mailing list, which it did, but the service was not yet operational. *See On-Line Gambling Firm Subject to Minnesota Jurisdiction, District Court Rules*, 14 NO. 2 COMPUTER LAW. 23, 24 (1997).

76. *See* Hearst Corp. v. Goldberger, No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097 at *31, *37 (S.D.N.Y. Feb. 26, 1997).

77. *See Maritz*, 947 F. Supp. at 1333-34.

78. *See* cases cited *supra* note 12 of Brian Covotta, *Personal Jurisdiction and the Internet: An Introduction*, 13 BERKELEY TECH. L.J. 265 (1998).

79. *See supra* note 36.

80. *See, e.g.*, IDS Life Ins. Co. v. SunAmerica, Inc., 958 F. Supp. 1258, 1270 (N.D. Ill. 1997); Hobby Lobby Stores, Inc. v. Boto Co., 968 F. Supp. 1356, 1362 (W.D. Ark. 1997); Transcraft Corp. v. Doonan Trailer Corp., 45 U.S.P.Q.2d (BNA) 1097 (N.D. Ill. Nov. 17, 1997).

81. 480 U.S. 102 (1987) (plurality).

In *Bensusan I*, for example, the district court's minimum contacts analysis considered three factors: purposeful availment, reasonableness, and systematic and continuous conducting of business within the forum state.[82] Except for the additional third prong, this closely resembles the plurality approach in *Asahi*.[83] When the Second Circuit reviewed the case on appeal, the justices based their decision affirming the district court by concentrating solely on the New York long-arm statute, without conducting an additional minimum contacts/due process analysis.[84]

Several commentators who have reviewed the Internet personal jurisdiction jurisprudence have reached the conclusion that the purposeful availment and reasonableness requirements of the plurality opinion in *Asahi* should not be held to govern in Internet cases;[85] at least one suggests that the standard set out in Justice Brennan's concurrence should be the applicable test in these cases.[86]

Justice Brennan's concurrence in *Asahi*, which is nearly as well-known as the plurality opinion, reached the same result but under a very different standard. Instead of the purposeful availment and reasonableness standards advanced by Justice O'Connor in the plurality opinion, Brennan suggested a less restrictive "stream of commerce" test.[87] Brennan concluded, "[T]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale."[88] Stated simply, if products placed in the stream of commerce regularly move from manufacturer to distributor to consumer in an anticipated fashion, then the minimum contacts test is satisfied and no additional purposeful availment needs to be shown.

Applying this test to Internet advertising and transactions, however, proves problematic. Using the Brennan test, one would have to assume that placing a web site for view on the Internet, whether or not the information was specifically aimed at any particular forum, amounted to submitting oneself to jurisdiction in all fifty states. This is an unacceptable result for at least two reasons. First, it simply does not square with our

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82. *See Bensusan I*, 937 F. Supp. at 300-01 (quoting Independent Nat'l Distributors, Inc. v. Black Rain Communications, Inc., No. 94 Civ. 8464, 1995 WL 571449, at *5 (S.D.N.Y. Sept. 28, 1995)).

83. *See Asahi*, 480 U.S. at 108-13.

84. *See Bensusan II*, 126 F.3d at 27.

85. *See, e.g.*, Lenox, *supra* note 13, at 342-43; David Thatch, Note and Comment, *Personal Jurisdiction and the World-Wide Web: Bits (and Bytes) of Minimum Contacts*, 23 RUTGERS COMPUTER & TECH. L.J. 143, 160-61 (1997).

86. *See* Lenox, *supra* note 13, at 340-42.

87. *See Asahi*, 480 U.S. at 116-17.

88. *Id.* at 117.

traditional conception of due process. The factors which are usually reviewed when a defendant challenges the assertion of personal jurisdiction are "significant activities" in a particular jurisdiction,[89] a "substantial connection" with the forum,[90] or creation of "continuing obligations" with residents of the forum,[91] any of which can create a situation in which the defendant is "shielded by 'the benefits and protections' of the forum's laws."[92] Once a defendant qualifies for these benefits and protections, it has an obligation to respond to a suit brought against it in that particular jurisdiction.[93]

Viewed in this light, the results reached in the *Maritz* and the *Inset Systems* cases are troublesome. In *Maritz*, defendant CyberGold had not yet begun to offer services in Missouri or any other state,[94] so it is unclear how a court could have come to the conclusion that it had conducted "significant activities" or formed a "substantial connection" with the forum. Had CyberGold already initiated the service, it would have been obligated to make electronic payments to those people who viewed and interacted with Internet ads selected by the company.[95] This might have allowed a court to determine that it had created "continuing obligations" with residents of Missouri. But without such a justification on which to base its decision, it does not seem that the court reached a decision which comports with our "traditional notions of fair play and substantial justice."[96]

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89. *See* Burger King v. Rudzewicz, 471 U.S. 462, 475-76 (1985) (where a defendant has deliberately engaged in significant activities in a particular form, he has purposefully availed himself of the benefits of the protection of the laws of the forum state); *see also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984) (selling and distributing a substantial number of copies of a magazine in a particular forum is significant activity which renders the defendant subject to personal jurisdiction in the forum).

90. *See Burger King*, 471 U.S. at 475 (jurisdiction is proper where defendant's activities create a "substantial connection" with the forum state); *cf.* Kulko v. Superior Court, 436 U.S. 84, 97 (1978) (personal jurisdiction is improper when there is "virtually no connection with the forum State").

91. *See Burger King*, 471 U.S. at 475-76; *see also Keeton*, 465 U.S. at 781.

92. *See Burger King*, 471 U.S. at 476; *see also* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) ("to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state").

93. *See Burger King*, 471 U.S. at 476 (a defendant who purposefully avails himself of the benefits and protections of the laws of the forum state can fairly be made to "submit to the burdens of litigation in that forum as well").

94. *See* Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1330 (E.D. Mo. 1996).

95. *See supra* note 67.

96. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

In *Inset Systems*, the court seemed to think adequate its assumption that the defendant had established minimum contacts simply by virtue of the fact that any of the estimated 10,000 Connecticut residents who were connected to the Internet could have seen its web site, let alone done business with the company.[97] In fact, neither the *Inset Systems* nor the *Maritz* courts undertook any significant due process analysis. Contrast this with the approach of the district court in *Bensusan*, which found no jurisdiction under the New York long-arm statute but nevertheless proceeded to conduct a due process analysis, noting in dictum that "asserting personal jurisdiction over King in this forum would violate the Due Process Clause of the United States Constitution."[98]

Second, the inherent unpredictability and wide scope of this type of approach is likely to result in an artificial restriction of commerce on the Internet, which is undesirable from a public policy perspective. Existing companies who want to expand onto the Internet as a marketing or sales channel, as well as new companies looking to start up entirely web-based operations, will have to factor in the potential for litigation expenses in any of the fifty states when conducting the economic analysis necessary to make such a decision. An approach which, in effect, minimizes the minimum contacts test and risks running afoul of due process concerns will result in fewer businesses—especially small or newly formed businesses—that will be willing to run the risk of being subject to liability in any U.S. jurisdiction. If the Due Process Clause is intended to protect individuals' liberty interests and to guarantee "fair and orderly administration of the laws,"[99] it is unacceptable that the concepts of due process and minimum contacts can be de-emphasized simply because the Internet provides a way of doing business that is easier, less expensive, and more efficient.

As stated in part II.A., it is difficult for an entity with an Internet presence to control who will be able to view its information, solicitation, or sales material, whichever the case may be.[100] For this reason, some commentators suggest that courts should be able to assert jurisdiction over a person or entity that creates a web site only in his or her own state;[101] some, feeling a more expansive view is necessary, opine that the determi-

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97. *See* Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996).

98. *Bensusan I*, 937 F. Supp. 295, 300.

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

100. *See supra* note 49.

101. *See, e.g.*, Leif Swedlow, Note, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337, 385-86 (1997).

nation should depend on whether the defendant knew or should have known that it benefited somehow from its site's accessibility in the foreign jurisdiction.[102] This is an essential element of an Internet personal jurisdiction analysis, considering the problem of controlling who gains access to information once it is placed on a web site. When placed in the context of a particular set of facts, its importance becomes clear.

Consider the effects of this type of analysis on a slight variation of the facts in *Bensusan*.[103] Suppose that King not only offered a way to buy tickets to live shows via his web site, but also provided the service of mailing the tickets to the buyers. If Bensusan could have demonstrated that New Yorkers had purchased tickets over King's web site to be sent to them by mail—necessarily inputting their names and addresses—and that King had then mailed tickets to New York residents, it could have argued that the defendant knew or should have known that he had benefited from the foreign jurisdiction.[104]

A "knew or should have known" standard is essential in Internet personal jurisdiction cases because of the borderless nature of the medium. Because the creator of a web site may not predict nor easily control who will access the site, she cannot foresee litigation regarding its content in any particular forum other than her own.

E. A Proposed Test

Applying a test such as the one suggested by Justice Brennan in *Asahi* would result in overbroad exercise of jurisdiction by extending the reach of long-arm statutes without regard for traditional due process concerns. A better test is a variation of Justice O'Connor's articulation of the plurality approach in that case. Most importantly, however, courts may not be given leeway to downplay due process concerns, especially considering

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102. *See, e.g.*, Thatch, *supra* note 85. Thatch endorses the view of Justice Stevens' concurrence in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) (plurality). *See id.* at 174.

103. The district court alluded to King's lack of intent to market or sell to anyone other than local residents when it stated, "There are no allegations that King actively sought to encourage New Yorkers to access his site ...." *Bensusan I*, 937 F. Supp. at 301. The Second Circuit implicitly agreed: "King's 'Blue Note' cafe was unquestionably a local operation." *Bensusan II*, 126 F.3d at 29.

104. Of course, this would not in and of itself be dispositive to an assertion of personal jurisdiction; the court also would have considered a broader due process analysis in which it would consider the extent of King's contacts with New York. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-75 (1984). Furthermore, considering the restrictive nature of New York's long-arm statute, a finding of personal jurisdiction would probably still have been unlikely.

the newness and rapid pace of change of Internet technology. Until the understanding of the technology has resulted in a consistent body of jurisprudence, courts have a responsibility to undertake an in-depth due process analysis in these necessarily fact-intensive cases and must resist the temptation to extend the reach of a long-arm statute beyond the limits of due process.

In addition, courts must take into account the knowledge or intent of the web site proprietor. When this is taken into account, it will yield fairer results because it will ensure that non-resident defendants are subject to suit only in those jurisdictions with which they intended to, as well as actually did, communicate.

III. CONCLUSION

The most important consideration for any test by which one can judge the appropriateness of personal jurisdiction in a given situation is that the test must allow actors to structure their behavior. Under the proposed test outlined above, a court could never assert personal jurisdiction over a foreign defendant who had established only a passive Internet presence. Without intent to reach a certain audience, it is difficult to justify subjecting someone to personal jurisdiction in a distant forum. If a Missouri jazz club proprietor sets up a web site designed to appeal only to local patrons, he should not be subject to personal jurisdiction in New York or any other foreign jurisdiction.

In all other cases, the analysis will be necessarily fact-intensive. Courts might begin by asking if the defendant has contacts with the distant forum that are not Internet-based. If so, and if these are substantive enough to justify a finding of personal jurisdiction, the result is simple. Of course, the more difficult cases will be those in which no other contacts exist.

When there is no basis to assert personal jurisdiction except Internet contacts, the court must carefully investigate the nature of the contacts. If a company's web site, for instance, generated significant sales of products or services, or if it has facilitated the rise of continuing obligations from persons in a distant forum, a finding of personal jurisdiction will be appropriate.[105] Overall, the judiciary must be willing and committed to looking at the Internet as an unprecedented development in technology which not only warrants but demands a close investigation of the rationale

105. *See generally* Burger King v. Rudzewicz, 471 U.S. 462 (1985).

behind personal jurisdiction and how it applies to this new and unique medium.

Finally, until courts have made a more solid determination of what constitutes an appropriate standard for asserting personal jurisdiction based solely on Internet contacts, Internet actors would be well advised to place jurisdictionally-focused disclaimers on their sites. A typical disclaimer might read, "By accessing this file, you have entered a server located in the state of California. Disputes arising over the content herein will be governed exclusively by the laws of the state of California." At the present time, no disclaimer of this kind has yet been tested in court, but it would likely be of some value, especially in cases in which other evidence of minimum contacts is thin.