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The monumental expansion of the Internet[1] over the past ten years has revolutionized the mainstream means of communications and interpersonal relations throughout the world. Through this global network of interconnected computers, all manner of data, communications, commerce, and imagery—from the most obscure scintilla of trivia, to the darkest manifestation of evil, to the most sublime works of art, literature, and science—are suddenly and immediately accessible everywhere, to everyone, all at once. In terms of the human ability to interact globally and instantaneously, this is a whole new world.[2] For those charged with enforcing state law,

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1. The Internet has been defined as "the largest computer network in the world," VALERIE QUERCIA, INTERNET IN A NUTSHELL 4 (1997), and also as "a global network of computers, interconnected so they can exchange information," NED SNELL, INTERNET CHEAT SHEET 2 (1999). For a more descriptive definition, Peter J. Denning has explained:

> The Internet has become an information superhighway, an enormous digital library, a nervous system connecting scientists and their instruments worldwide, an electronic marketplace for commerce, a worldwide corporate and individual identity projector, a nurturing ground for relationships, a multimedia entertainment center, a virtual university, a breeding ground for conspiracies, and a challenge to the power of governments. It is evolving at the intersection of science, engineering, business, libraries, art, entertainment, education, and politics. It is a space where the best and worst of humanity appear.

Peter J. Denning, *The Internet After Thirty Years, in* INTERNET BESIEGED 15, 15 (Dorothy E. Denning & Peter J. Denning eds., 1998).

2. United States Attorney Janet Reno stated:

whether civil or criminal, this new world of cyberspace has sometimes been compared to the "wild, wild west" without a sheriff.[3] The metaphor is apt in the sense that, like the American frontier, the expanse of the Internet is immense and the reach of law enforcement in cyberspace is uncertain. This article will explore several significant ways in which the advent of the World Wide Web and the mainstreaming of the Internet have impacted the ability of the states to carry out their obligations to protect their citizens by enforcing their laws. In particular, this article will address three areas in which the states' law enforcement function faces new challenges as a result of the increasing use of the Internet by society.

First, by greatly increasing the ease by which a state's consumers may interact with out-of-state residents in commercial and personal transactions, the Internet increases the likelihood that states will need to bring civil enforcement actions against nonresidents. Bringing civil actions against nonresidents raises issues of *in personam* jurisdiction. Consequently, the first, and most extensive, topic that will be discussed is the impact of the Internet on a state's ability to exercise personal jurisdiction over nonresidents in civil enforcement actions. Part I will review the Supreme Court's jurisprudence on personal jurisdiction, discuss the federal and state cases which have

> [W]e are facing a moment in history where the decisions we make to confront the challenges of high technology and law enforcement are absolutely critical. These decisions will decisively shape our abilities to cope with crime for all time. The Internet and the revolution in information technology have transformed the world. The monumental advances in computer software technology over the last ten years, combined with the explosive growth of the Internet, have changed the world forever.

Attorney General Janet Reno, *Remarks to the National Association of Attorneys General, at the Dinkelspiel Auditorium on Stanford University* (Jan. 10, 2000) <http://www.cybercrime.gov/agnaag.htm> [hereinafter "Reno Remarks of January 10, 2000"].

3. The analogy is a common one, as mentioned by Professor Denning in her Preface to *Internet Besieged*:

> Yet the Internet is a risky place to conduct business or store assets. . . . Analogies to the Old American West, populated by unruly cowboys and a shoot-first-and-ask-later mentality are more appropriate than the coiners of the phrase "electronic frontier" ever imagined. Many law-abiding citizens, who simply want to conduct their business in peace, are demanding that the marshal come to cyberspace.

Dorothy E. Denning, *Preface* to INTERNET BESIEGED, *supra* note 1, at vii, vii. The phrase was also recently used by the Chief of Police in Farmington, Michigan, who told a reporter asking him about a suspect who had purchased assault rifle parts over the Internet: "It is like the Old West, only with no sheriff in town. You've got sexual predators, violent people buying guns. We need to come up with some safeguards." *See Felon's Gun Charges Show Net Loophole,* DET. FREE PRESS (Feb. 23, 2000) <http://www.freepress.com>.

addressed personal jurisdiction in the context of the Internet, and suggest that the impact of the Internet on society will eventually cause some loosening of the standards necessary to establish personal jurisdiction.[4]

Second, the Internet also offers criminals a huge and easy-to-reach pool of potential victims; so state law enforcement authorities will increasingly need to respond to cybercrimes that are perpetrated and located outside the boundaries of territorial jurisdiction. To respond to these crimes, state prosecutors will either need to pursue cases against out-of-state residents or secure the assistance of sister states in prosecuting the offenders. Part II of the article will consider some of the case law relating to criminal prosecutions involving extraterritorial conduct and will apply the rules of these cases in the context of Internet-related crimes.

Third, in addition to presenting challenges to state law enforcement in the context of both civil and criminal jurisdiction, the Internet also creates new investigative challenges for state authorities. For example, the Internet can offer wrongdoers a veil of anonymity due to difficulties in tracing the source of electronic connections. Moreover, the architecture of the Internet permits Internet Service Providers ("ISPs") to provide services and store electronic data for persons located anywhere in the world. To conduct investigations in this environment, state investigators need to gather electronic evidence located in other jurisdictions. Thus, Part III will discuss a state's authority to pursue transborder investigations, identify the problems faced by states in this area, and suggest several solutions.

In each of these three categories, this article will suggest a number of proposals to enhance the state's ability to continue its traditional role of protecting its citizens in the online world.

4. To "cut to the quick" on the question of personal jurisdiction in the context of commerce over the Internet, the emerging majority rule favors a "sliding scale" approach, according to which mere passive advertising over the Internet will not be considered sufficient minimum contacts to confer jurisdiction, advertising plus interactivity of a web site will fall in a middle ground, and advertising plus interactivity, plus other real world commercial contacts with the forum state will be found to be sufficient contacts to support personal jurisdiction. *See* GTE New Media Servs., Inc. v. BellSouth Corp., 199 F.3d 1343 (D.C. Cir. 2000); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). This article will attempt to trace the development of this standard from the classic Supreme Court personal jurisdiction cases through the more recent Internet cases.

## I. PERSONAL JURISDICTION OVER NON-RESIDENTS IN STATE CIVIL ENFORCEMENT ACTIONS

As in civil actions brought by private parties, the plaintiff in state enforcement actions bears the burden of pleading and proving that the court has the power to exercise jurisdiction over the person of the defendant. In the cases in which the defendant is an operator of a web site hosted on a server connected to the Internet,[5] the odds are that the defendant will be physically located in another jurisdiction. For this reason, states considering an activist approach to enforcement actions that involve Internet targets will need to review the basic Supreme Court jurisprudence pertaining to *in personam* jurisdiction. Reported decisions involving the Internet, which will be discussed in the following section, cast a look back at the seminal Supreme Court decisions of *International Shoe v. Washington*,[6] *Shaffer v. Heitner*,[7] *World-Wide Volkswagen v. Woodson*,[8] *Helicopteros Nacionales de Colombia v. Hall*,[9] *Burger King v. Rudzewicz*,[10] and several other important cases,[11] in order to define the standards to apply in cases in which the nonresident being sued has Internet-related connections to the forum state.

5. The World Wide Web is a set of Internet computers and services that provides an easy-to-use system for finding information and moving among resources. A server is a networked computer that serves a particular type of information or performs a particular function. A web site is a collection of World Wide Web documents, typically all on the same server, usually consisting of a home page (the main, or top, page that is displayed at the web site) and several related pages accessed from it. A site may contain any number of pages, from one page to thousands of interlinked pages and other files. A web page is a document stored on a web server, typically in the file format HTML (.htm or .html). Web pages are retrieved from servers and displayed by web browsers. A web browser is a software tool that is used to interact with a web server. SNELL, *supra* note 1, at 341–47 (adapted from glossary of terms).

6. International Shoe v. Washington, 326 U.S. 310 (1945).

7. Shaffer v. Heitner, 433 U.S. 186 (1977).

8. World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980).

9. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984).

10. Burger King v. Rudzewicz, 471 U.S. 462 (1985).

11. Some of the other key Supreme Court cases are *McGee v. International Life Insurance*, 355 U.S. 220 (1957); *Hanson v. Denckla*, 357 U.S. 235 (1958); *Kulko v. Superior Court*, 436 U.S. 84, (1978); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); and *Burnham v. Superior Court*, 495 U.S. 604 (1990).

### *A. United States Supreme Court Jurisprudence on Personal Jurisdiction*

In *International Shoe v. Washington,* the Supreme Court considered a suit by Washington State to recover unpaid contributions to the State unemployment compensation fund from the International Shoe Corporation based on three years' worth of shoe sales within the State. International Shoe had no office located in the State but it had paid salesmen working in the State.[12] The Court noted that, historically, a person's physical presence within the territorial jurisdiction of a court was a prerequisite to the court's ability to render judgments binding on that person.[13] Recognizing this was no longer the law, the Court explained that

> due process requires only that in order to subject a defendant to a judgment *in personam*, *if he be not present within the territory of the forum*, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[14]

Because the "minimum contacts" standard of *International Shoe*, adopted in 1945, remains the law today, it is useful to examine carefully the contours of this standard. By minimum contacts, the *International Shoe* Court referred to the

> activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. . . . [S]uch contacts of the corporation with the state of the forum as make it *reasonable*, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.[15]

After laying out this standard, the *International Shoe* Court then distinguished three different factual scenarios that could allow an assertion of jurisdiction over a nonresident. In the first scenario, which the Court described almost as a constructive form of physical pres-

12. *International Shoe,* 326 U.S. at 313.

13. *Id.* at 316 (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)).

14. *Id.* (emphasis added) (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

15. *Id.* at 317 (emphasis added). The Court made it clear that, in determining whether it would be "reasonable" to require the nonresident corporation to defend the lawsuit, it would be relevant to consider an "estimate of inconveniences" resulting from a trial away from home. *Id.* at 316–17.

ence, "the activities of the [nonresident] corporation [in the forum state] have not only been *continuous and systematic*, but also give rise to the liabilities sued on."[16] In this fact pattern, in which (1) the nonresident has continuous and systematic activities in the forum state, and (2) the activities themselves give rise to the lawsuit, the Court concludes that it would be reasonable to permit the exercise of personal jurisdiction over the nonresident.[17] The second scenario discussed is one in which the "continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[18] The third factual situation highlighted by the Court was where the nonresident corporation commits "some single or occasional acts" imposing liability on it which, "because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit."[19]

Having sketched out the possible factual scenarios, (1) continuous and systematic contacts if the suit arises out of those contacts (specific jurisdiction), (2) substantial contacts if the suit does not arise out of those contacts (general jurisdiction), and (3) occasional contact if the suit arises out of that contact (specific jurisdiction), Chief Justice Stone then explained that whether a particular exercise of personal jurisdiction will meet the requirements of due process would depend on a number of factors that are not "mechanical nor

16. *Id.* at 317 (emphasis added).

17. The Supreme Court later used the term "specific jurisdiction" to describe the situation where "a state exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contact to the forum . . . ." *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 n.8 (1984).

18. *International Shoe*, 326 U.S. at 318. This second scenario, involving the exercise of personal jurisdiction over a nonresident who has substantial contacts with a forum, but who is being sued on a cause of action that does not arise from or relate to the activities of the nonresident in the forum, is referred to in subsequent Supreme Court opinions as "general jurisdiction." *See Helicopteros Nacionales*, 466 U.S. at 415 n.9. In *Helicopteros Nacionales*, the Supreme Court did not approve of an attempt by the Texas courts to assert general jurisdiction over a Colombian corporation where the lawsuit pertained to an accident that occurred outside the United States and the company did not have significant contacts with Texas. *Id.* at 418. An example of the Supreme Court's finding appropriate a state's exercise of such general jurisdiction is *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) (allowing exercise of Ohio personal jurisdiction over a Philippine company which had substantial contacts with Ohio, although the lawsuit related to stock ownership and damages issues that did not relate to any of the activities conducted in Ohio).

19. *International Shoe*, 326 U.S. at 318.

quantitative."[20] In particular, the Court indicated that the "quality and nature of the activity in relation to the fair and orderly administration of the laws" needed to be considered, along with the extent to which the nonresident corporation exercised the privilege of doing business within the forum and enjoyed the benefits and protections of the laws of the forum.[21]

In reaching its holding, the *International Shoe* Court summarized the kinds of contacts that the nonresident corporation had with Washington State, then concluded that such contacts were sufficient "to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which the appellant has incurred there."[22] Since *International Shoe*, the Supreme Court has continued to apply the "minimum contacts" standard and has fleshed out the meaning of the terms "reasonableness" and "traditional notions of fair play and substantial justice."[23]

A review of the Supreme Court jurisprudence following *International Shoe* reveals several additional factors that have been considered significant in determining whether an exercise of personal jurisdiction is reasonable and consistent with traditional notions of fair play and substantial justice. In *McGee v. International Life Insurance Co.*, the Court found several contacts between the nonresident insurance company and the forum state of California: the insurance contract was delivered there and the premiums were mailed from there. The Court, however, focused on the facts that the lawsuit

20. *Id.* at 319.

21. *Id.*

22. *Id.* at 320.

23. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1951). In fleshing out these standards since 1945, the Supreme Court has several times noted that historical changes in the nation's economy were responsible for an expanding notion of personal jurisdiction. Just six years after *International Shoe*, Justice Black observed in *McGee*:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more states and may involve parties separated by the full continent. With this increasing nationalization of commerce has come 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 State where he engages in economic activity.

*Id.* at 222–23.

arose out of the contacts and that the forum state had passed a law that specifically provided procedures intended to allow state citizens to sue nonresident insurance companies. The Court gave considerable weight to the fact that California had "a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[24]

Faced with a claim which did *not* arise out of any contact with the forum in *Hanson v. Denckla,* and a record which showed very few contacts between a Delaware trust and trustee and the State of Florida, Chief Justice Warren found invalid an exercise of personal jurisdiction over the trustee.[25] In particular, in *Hanson* the Court emphasized that although the application of the minimum contacts rule would vary with the quality and nature of each defendant's activity, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[26]

Similarly, in *Shaffer v. Heitner*,[27] although the Court held that all assertions of state court jurisdiction should be evaluated under the *International Shoe* minimum contacts test, it nevertheless found that the test was not met when the plaintiffs sequestered stock belonging to nonresident defendants, but the property at issue was not the subject matter of the litigation and the cause of action was not related to the property.[28] The Court found insufficient contacts between the defendants and Delaware and no proof that the defendants had "purposefully avail[ed themselves] of the privilege of conducting activities within the forum state" where the defendants simply "had nothing to do with the State of Delaware [and] . . . no reason to expect to be haled before a Delaware court."[29] In *Hanson* and *Shaffer*, the Supreme Court made it clear that if a nonresident defendant by

24. *Id.* at 223.

25. 357 U.S. 235, 252–54 (1958). The Court again noted in *Hanson* the role of "technological progress . . . [which] increased the flow of commerce between the States . . . [and] progress in communications and transportation" in causing an evolution away from the "rigid rule of *Pennoyer v. Neff*," but also warned that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." *Id.* at 250–51.

26. *Id.* at 253.

27. 433 U.S. 186 (1977).

28. *See id.* at 212–13.

29. *Id.* at 216 (citing *Hanson*, 357 U.S. at 253).

his conduct in connection with the forum state, "purposely avails himself" of the privileges and protections of the forum, and if the lawsuit arises out of or relates to the conduct in the forum, then requiring the defendant to defend an action in the forum would be "reasonable," and would not offend "traditional notions of fair play and substantial justice" as required under *International Shoe*.[30]

The Supreme Court further refined the "purposeful availment" factor in the key decision of *World-Wide Volkswagen Corp. v. Woodson*.[31] Finding that the defendants conducted "no activity whatsoever in Oklahoma . . . no sales and . . . no services," and that "[t]hey avail[ed] themselves of none of the privileges and benefits of Oklahoma law[,]" soliciting "no business there either through salespersons or through advertising reasonably calculated to reach the State[,]" the Court concluded that jurisdiction was being sought based on "one, isolated occurrence, and whatever inferences can be drawn therefrom."[32] Significantly, the Court distinguished between "foreseeability" alone that a party *could* be sued in a foreign jurisdiction and a party's "conduct and connection with the forum state" such that he should "reasonably anticipate being haled into court there."[33] "[A] corporation [that] 'purposefully avails itself of the privilege of conducting activities within the forum state'" should reasonably anticipate being sued there.[34] A corporation's efforts to "directly or indirectly" serve markets in other states and to deliver its goods into the stream of commerce with the expectation that they will be purchased by consumers in the forum state, would be sufficient proof of purposeful availment to allow jurisdiction.

30. The "purposeful availment" factor was again considered significant by the Supreme Court in *Kulko v. Superior Court,* 436 U.S. 84, 94 (1978) (denying personal jurisdiction where a nonresident divorced father had few contacts with California other than two short visits 18 years earlier, agreeing in a separation agreement to allow his children to live part-time with their mother there, and later permitting his children to move there). The Court weighed California's argument of its substantial state interest in protecting resident children and facilitating child support actions on behalf of those children, but those interests did not outweigh the defendant's lack of contacts with the forum. *Id*. at 100–01.

31. 444 U.S. 286 (1980). The case involved a products-liability action for damages arising from an auto accident in Oklahoma. Plaintiff sought to recover for personal injuries against the New York auto dealership and the regional distributor (World-Wide Volkswagen), as well as the manufacturers of the vehicle. The dealership and the regional distributor objected claiming a lack of minimum contacts with Oklahoma. *Id*. at 288–89.

32. *Id*. at 295.

33. *Id*. at 297.

34. *Id*. at 297–98 (citing *Hanson*, 357 U.S. at 253).

In addition to developing the purposeful availment standard, the Court in *World-Wide Volkswagen* catalogued a number of factors that can be considered in determining whether the personal jurisdiction would be consistent with "reasonableness," "fairness," and "substantial justice."[35] The factors relevant to a determination of reasonableness include: the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.[36] The Court also recognized that, independent of the convenience of the parties and the interests of the forum, "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest a State of its power to render a valid judgment."[37]

*World-Wide Volkswagen* involved an attempt to exercise "specific jurisdiction;" that is, jurisdiction asserted in a case in which the claims (product liability/personal injury) arose out of the contact with the forum state (the auto accident occurring in Oklahoma). The lack of minimum contacts prevented jurisdiction. In *Helicopteros Nacionales de Colombia v. Hall*, the Supreme Court addressed a case involving "general jurisdiction," where the claim (wrongful death action) did not arise out of or relate to any contact with the forum; rather the claim was related to a helicopter crash that occurred in Peru.[38] The Court made it clear in *Helicopteros Nacionales* that in order for a state court to exercise general jurisdiction over a nonresident (that is, jurisdiction on a claim which does not arise from or relate to any contact with the forum), there must be a showing that the defendant had "continuous and systematic general business contacts" with the forum.[39] Even though the nonresident defendant had some continuing contacts with Texas, including the purchase of four million dollars worth of helicopters from Bell Helicopter over a seven-year period, such contacts were not found to be sufficiently

35. *Id.* at 292.

36. *Id.*

37. *Id.* at 294 (citing *Hanson*, 357 U.S. at 251).

38. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984). The Court defined "specific jurisdiction" and "general jurisdiction" in the footnotes. *See id.* at 414 n.8, 415 n.9.

39. *Id.* at 416.

"continuous and systematic" to allow the exercise of jurisdiction over a non-forum-related claim.[40]

The Court next addressed a case of specific jurisdiction in *Burger King Corp. v. Rudzewicz*, which involved Burger King's suit for trademark infringement and enforcement of the terms of a franchise agreement against a Michigan franchisee.[41] Florida's long-arm statute permitted state jurisdiction over a nonresident if the cause of action arose from breach of a contract to be performed in Florida. The *Burger King* Court found that since the defendant franchisee had "'purposefully directed' his activities at residents of the forum" state, and since the litigation arose out of or related to those activities, the exercise of jurisdiction over the nonresident was proper.[42] However, Justice Brennan also noted that the existence of minimum contacts and "purposeful availment" would still need to be "considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice,'" and concluded that "minimum 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."[43] In that case, however, the Court concluded that the defendant had availed himself of Florida's laws, and had *not* shown that the exercise of jurisdiction would be unreasonable.[44]

The most recent examples of Supreme Court jurisprudence in the area of personal jurisdiction evince a divided Court. Both *Asahi Metal Industry Co. v. Superior Court*,[45] and *Burnham v. Superior Court*,[46] are opinions in which no majority could agree on all the segments of a single opinion. In *Asahi Metal Industry*, the Court ad-

40. *Id.* at 420 (Brennan, J., dissenting). In dissent, Justice Brennan pointed out that the majority opinion did not address the issue of whether by its conduct, the defendant Helicol had "purposefully availed itself of the benefits and obligations of the forum." *Id.* (Brennan, J., dissenting).

41. 471 U.S. 462 (1985).

42. *Id.* at 472. The franchisee had never actually been physically present in Florida. Nevertheless, the Court found that the negotiations with the Florida corporation, the contract itself, and the fact that the defendant's breach of the contract caused "foreseeable injuries to the corporation in Florida" were sufficient contacts to make it reasonable that the franchisee should be called to account in Florida. *Id.* at 479–80.

43. *Id.* at 476–78 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

44. *Id.* at 487.

45. 480 U.S. 102 (1987).

46. 495 U.S. 604 (1990).

dressed the question of whether "mere awareness" on the part of the nonresident corporation that its manufactured component would reach the forum state through the stream of commerce constituted adequate "minimum contacts."[47] The Court was divided over whether a corporation's placing of its goods in the stream of commerce with the knowledge that its products would eventually arrive in the forum was sufficient to meet the "purposeful availment" test. However, eight Justices agreed that under the facts of that case the exercise of jurisdiction over a Japanese corporation which had indirect contacts with California would be unreasonable when its contacts with the forum were weighed against the burden on the defendant to defend in such a distant forum and the inconvenience of a foreign legal system.[48]

In *Burnham v. Superior Court*, a divorce case, all nine Justices agreed, but in four separate opinions, that personal service of process on a nonresident who is temporarily physically present in the forum will be sufficient to allow an exercise of personal jurisdiction.[49] The holding of *Burnham* makes it clear that, even for suits which do not arise out of contacts with the forum, and in which the defendant has no minimum contacts with the forum, personal jurisdiction may nevertheless be asserted if the defendant is physically within the territory of the forum and is personally served with process. Because *Burnham* is a general jurisdiction case, but one in which the Court allowed jurisdiction in the absence of any "continuous and systematic" contacts with the forum state, it differs from the Court's other general jurisdiction decisions which have insisted on such contacts.[50] Although this review of Supreme Court jurisprudence does not presage any

47. *Asahi*, 480 U.S. at 105. The Court explained: "Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair." *Id.* at 116.

48. *Id.* at 113.

49. *Burnham,* 495 U.S. at 622. Justice Scalia's plurality opinion concluded that personal service of process within the territory of the forum was part of the "traditional notions of fair play and substantial justice" which existed at the time of the adoption of the Fourteenth Amendment, and consequently it met that standard. Justice Brennan's concurrence agreed with the conclusion that personal service within the forum was consistent with due process, but for the reason that a person's visiting a state is a form of purposeful availment, not because the practice of personal service was in existence at the time of the adoption of the Fourteenth Amendment.

50. *See, e.g.*, Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

particular approach that might apply in Internet-related cases, it does show that the Court's understanding of "fairness" in the context of jurisdiction has evolved in response to economic and sociological changes.[51] A table provided as an appendix at the end of the article attempts to categorize the Supreme Court's jurisprudence regarding the Fourteenth Amendment's limitations on state courts' exercise of personal jurisdiction.

### *B. Federal Cases Applying Personal Jurisdiction Jurisprudence to Internet-Related Conduct*

Federal Circuit Courts of Appeal have already issued eight opinions attempting to apply the standards of personal jurisdiction set out in *International Shoe* and its progeny in litigation arising in the context of business relationships conducted through the Internet. Of the eight Circuit opinions, five have dismissed the complaints for lack of personal jurisdiction,[52] while three have found personal jurisdiction in Internet-related disputes.[53]

51. *See supra* note 23; *see infra* note 206.

52. S*ee* GTE New Media Servs., Inc. v. BellSouth Corp., 199 F.3d 1343 (D.C. Cir. 2000) (finding that mere accessibility of web site in forum was insufficient for minimum contacts, but allowing additional discovery); Mink v. AAAA Dev., L.L.C., 190 F.3d 333, 336–37 (5th Cir. 1999) (finding the accessibility of defendant's web site in forum state insufficient where there was no evidence defendant conducted business over the Internet with forum residents when the web site did not allow online purchases); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292 (10th Cir. 1999) (denying jurisdiction where British bank had passive web site that did little more than provide information, contacts were limited to managing plaintiff's account, and there was no evidence of purposeful availment); Bensusan Restaurant Corp. v. King, 126 F.3d 25, 29 (2d Cir. 1997) (holding that a web site for an out-of-state restaurant with the same name as a restaurant in the forum was not sufficient under the state long-arm statutes because the out-of-state defendant should not have reasonably expected to have consequences in forum); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419–20 (9th Cir. 1997) (denying personal jurisdiction in infringement case where a web page of an out-of-state company using same name as plaintiff was "passive," and there was no evidence defendant "deliberately directed his merchandising activity toward" forum residents or that any forum resident other than the plaintiff had even "hit" defendant's site).

53. *See* Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244, 1248–49 (10th Cir. 2000) (finding that nonresident phone company's use of an Oklahoma Internet Service Provider's mail servers for phone company's customers constituted purposeful availment of the forum); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998) (defendant's conduct directing his activities toward the plaintiff and the forum state, resulting in harmful effects in the forum state, found sufficient for jurisdiction); CompuServe v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996) (sufficient contacts found where defendant entered into contracts governed by forum law with plaintiff, who was based in the forum state, and where defendant sent software to defendant's network located in the forum, and advertised on the plaintiff's system). All three of these cases were "specific jurisdiction" cases, in that the

The D.C. Circuit recently reviewed the holdings of some of the other circuits in *GTE New Media Services, Inc. v. BellSouth Corp.*[54] In *GTE*, the D.C. Circuit considered an antitrust case in which GTE New Media Services ("GTE") contended that BellSouth Corp. and other companies were engaged in a conspiracy to dominate the Internet directories market in the Washington, D.C., metropolitan area by diverting Internet users from GTE's website to the defendants' websites instead. The court of appeals held that, because BellSouth's only proven contacts with the District of Columbia were based on the fact that its residents could access defendants' Internet Yellow Pages from within the city, there were insufficient minimum contacts to allow an exercise of personal jurisdiction.[55] Although "mere accessibility" of a web site was not found sufficient, the appellate court did rule that GTE could conduct additional discovery in order to seek proof of sufficient contacts.[56]

The *GTE* Court was concerned that plaintiff had only presented "bare allegations" and "conclusory statements" to the effect that the defendants' activities had caused harm within the forum as a result of the defendants' activities directed there.[57] Because no purchases or sales or other exchange of money were taking place, the Court did not accept plaintiff's argument that defendants were "transacting business" in the forum just because its residents were accessing the defendants' Yellow Pages web sites.[58]

Significantly, although the D.C. Circuit found that the plaintiff had failed to establish sufficient contacts to support an exercise of personal jurisdiction, it held that plaintiff was entitled to conduct "jurisdictional discovery" in order to supplement the record.[59] In particular, the Court pointed out that the record did not show "for

claim sued on arose out of the conduct that was directed at the forum.

54. 199 F.3d 1343 (D.C. Cir. 2000).

55. *Id.* at 1350. The provision of the District of Columbia's long-arm statute, D.C. Code Ann. § 13-423(a) (1981), which plaintiffs relied upon, allowed for jurisdiction where a defendant's acts outside the forum caused a tortious injury inside the forum. *Id.* at 1347.

56. *Id.* at 1351.

57. *Id.* at 1349.

58. *Id.* at 1350. The D.C. Circuit disapproved of treating a case involving the Internet any differently from any other jurisdictional case, saying: "We do not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction." *Id.*

59. The Court cited to *Crane v. Carr*, 814 F.2d 758, 762 (D.C. Cir. 1987), as authority for the allowance of jurisdictional discovery.

certain which defendants own and operate which web sites," and that the plaintiff "may be able to present new facts to bolster the . . . theory of 'substantial effects.'"[60]

From the perspective of an enforcer of state laws, the federal cases that have found jurisdiction to be permissible are the most relevant and useful. The following discussion analyzes the categories of factual predicates that have been found sufficient in the federal cases to allow the exercise of *in personam* jurisdiction in cases involving Internet-related contacts with a forum state.

*1. Internet contacts plus business transactions*

Because sufficient "real-world" minimum contacts with the forum by a nonresident can obviously occur in the absence of any web site or Internet-related contacts, cases which involve not only an Internet-based connection to the forum but also physical world contacts have been held to permit the exercise of jurisdiction. The district court in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, articulated a well-reasoned and often-followed analysis of Internet-based jurisdiction cases. The *Zippo* court adopted a "sliding scale" approach under which "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."[61]

The district court identified a spectrum stretching from the case in which "a defendant clearly does business over the Internet"—involving, for example, contracts with residents of the foreign jurisdiction and the knowing and repeated transmission of computer files over the Internet—to the case in which the defendant has merely posted the equivalent of advertising on the Internet—a "passive" web site that may be accessible to users in foreign jurisdictions. The "middle ground" was identified as cases containing an "interactive" web site, capable of allowing users to exchange information and data with the host computer. In this category of cases, the exercise of jurisdiction would depend on "examining the level of interactivity and commercial nature of the exchange of information that occurs on the web site."[62] In the third category, which does not provide grounds

60. *GTE New Media Servs.*, 199 F.3d at 1352.

61. 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

62. *Id.* at 1124. The district court pointed to *CompuServe v. Patterson*, 89 F.3d 1257

for jurisdiction, the defendant has "simply posted information on an Internet web site which is accessible to users in foreign jurisdictions."[63] In *Zippo*, the Court found sufficient contacts and purposeful availment because the defendant had contracts with seven service providers in Pennsylvania, had also sold 3000 passwords to Pennsylvania residents, and had accepted their payments for its services.[64]

At the district court level, a host of decisions have attempted to define the extent personal jurisdiction may be predicated on a defendant's web-site-related contacts with the forum. Numerous courts have held, consistent with *Zippo*, that a mere passive web site, even those that include a "1-800" number, which functions primarily as a world-wide form of continuous advertising, will *not* satisfy the due process minimum contacts scrutiny required for the exercise of personal jurisdiction.[65] Such cases thus far outnumber those in which the exercise of personal jurisdiction has been found proper based on Internet contacts.[66]

(6th Cir. 1996), as an example of the "doing business over the Internet" case, to *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), as an example of a "passive" web site where jurisdiction was improper, and to *Maritz v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996), as a case in the "middle ground," where the interactivity and the commercial nature of the exchange of information would have to be weighed.

63. *Zippo Mfg. Corp.*, 952 F. Supp. at 1124.

64. *Id.* at 1126.

65. The majority rule is clearly that a "passive web site equals no jurisdiction." *See, e.g.*, Morantz v. Hang & Shine Ultrasonics, 79 F. Supp. 2d 537, 539 (E.D. Pa. 1999) (collecting cases). *But see* Inset Sys., Inc. v. Instruction Set Inc., 937 F. Supp. 161 (D. Conn. 1996). The *Morantz* Court also discusses the "middle ground" cases where the interactivity of the web site combined with some commercial activity is considered, and found that the mildly interactive web site at issue before the Court (toll free number, e-mail link, order forms that could be printed out) was not sufficient to permit the exercise of jurisdiction. *Morantz*, 79 F. Supp. 2d at 540. Factors that could have made the difference in favor of jurisdiction, according to the *Morantz* Court, were (1) proof that the web site directed its activity toward the forum state or (2) proof that significant commercial contacts had developed with forum residents as a result of the web site (one sale of a machine, four video sales, and five e-mail contacts were not enough). *Id.* at 542.

66. An illustrative but non-exhaustive list of cases finding no jurisdiction based on a passive or mildly interactive web site includes the following: *People Solutions, Inc. v. People Solutions, Inc.*, 2000 WL 1030619 (N.D. Tex., July 25, 2000) (website with several interactive pages, downloadable product demos, and other features not sufficient where no proof of products or services sold to the forum through the site); *Butler v. Beer Across America*, 83 F. Supp. 2d 1261 (N.D. Ala. 2000) (finding insufficient contacts and transferring the case to defendant's home state where one order of beer sent by defendant to son of plaintiff, even though defendant did less than $100,000 of business with other Alabama residents, and there was a "limited degree of interactivity on defendant's web site"); *Minge v. Cohen*, No. CIV.A.98-2352, 2000 WL 45873 (E.D. La. Jan. 18, 2000) (finding that where plaintiff initiated most of

At the same time district courts have had little difficulty finding jurisdiction appropriate when the contacts are based on an accessible web site *plus* significant commercial activity with the forum. In the context of specific jurisdiction analysis, where the litigation arises out of or relates to the defendant's contacts with the forum, the plaintiff must show either (1) a significant commercial relationship with the forum (whether over the Internet or through conventional contacts)[67] or (2) a purposeful availment or direction of the defendant's contact toward the forum.[68] The second prong is discussed below.

the contacts with Canadian company, maintenance of a web site was not sufficient to show purposeful availment); *JB Oxford Holdings Inc. v. Net Trade*, 76 F. Supp. 2d 1363 (S.D. Fla. 1999) (three web sites, "800" number, plus application to do business in forum not enough to find jurisdiction); *Harbuck v. Aramco, Inc.*, No. CIV.A.99-1971, 1999 WL 999431 (E.D. Pa. Oct. 21, 1999) (passive advertising web site not sufficient for jurisdiction); *Molnlycke Health Care AB v. Cumex Medical Surgical Products*, 64 F. Supp. 2d 448 (E.D. Pa. 1999) (finding no jurisdiction over a web site that can be used to order products unless targeted at forum); *Millennium Enterprises, Inc. v. Millennium Music, L.P.*, 33 F. Supp. 2d 907 (D. Or. 1999) (the sale of one compact disc, purchase of inventory from a forum resident, and a web site were insufficient contacts to find jurisdiction); *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104 (D. Conn. 1998) (finding no jurisdiction over a web site allowing online ordering of merchandise, an e-mail link, and a toll-free number); *Patriot Systems, Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318 (D. Utah 1998); SF Hotel Company v. Energy Investments, 985 F. Supp. 1032 (D. Kan. 1997); and *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997) (finding advertising web site insufficient, but transferring the case).

67. Examples of cases where the business relationship with the forum state, when taken together with the web site, was sufficient to find jurisdiction, in addition to *Zippo Mfg. Co.*, 925 F. Supp. 1119 (W.D. Pa. 1997), and *CompuServe*, 89 F.3d 1257 (6th Cir. 1996), are *Maritz v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996) (likening the fact that defendant's web site received 131 "hits" from the forum state, not including the plaintiff's hits, to sending advertising into the forum that many times); *Mieczkowski v. Masco Corp.*, 997 F. Supp. 782, 788 (E.D. Tex. 1998) (traditional business contacts together with interactive web site sufficient to show general jurisdiction); *Colt Studio, Inc. v. Badpuppy*, 75 F. Supp. 2d 1104 (C.D. Cal. 1999) (defendant's sales of 2100 subscriptions to California residents through web site); and *Wise v. Lindamood*, 89 F. Supp. 2d 1187 (D. Colo. 1999) (moderately interactive web site plus real world contacts, such as mailing solicitations to residents and contracts with three Colorado school districts sufficient for jurisdiction). In two cases, the district courts made the point that, although the web site was *not* a basis for jurisdiction, the defendant's real world business contacts with the forum nevertheless created sufficient minimum contacts. *See* Westcode, Inc. v. RBE Electronics, No. CIV.A.99-3004, 2000 WL 124566 (E.D. Pa. Feb. 1, 2000); Loudon Plastics v. Brenner Tool & Die, 74 F. Supp.2d 182 (N.D.N.Y. 1999).

68. In one of the few recent district court opinions to find jurisdiction based solely on an interactive web site which conducted online sales, but in which there was very little proof of direct sales to the forum, the district court in *Stomp, Inc. v. NeatO, L.L.C.*, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1999), found that operating a web site that advertised and sold products constituted placing its products into the stream of commerce intending that they would be purchased by consumers with access to the web, including California citizens. This was considered purposeful availment of the forum.

*2. Purposeful cyber-availment: directing activities toward the forum state*

All three of the Internet appellate decisions in which the courts found that they could exercise personal jurisdiction are examples in which the defendant directed his activities toward the forum state; even though it was by electronic means, and even though the in-state commercial activity was not great.[69] In addition, many of the district court cases cited above also discuss as significant the factor of whether a defendant has intentionally directed his activities toward the forum state.

For example, in *Intercon, Inc. v. Bell Atlantic Internet Solutions*,[70] the United States Court of Appeals for the Tenth Circuit reversed the district court and found jurisdiction over a nonresident Internet company, Bell Atlantic Internet Solutions ("Bell Atlantic"). According to the plaintiff, Bell Atlantic had been allowing its customers to use mail servers that belonged to the plaintiff, Intercon, an Oklahoma service provider, even after Intercon had notified Bell Atlantic of the mix-up. The contacts with the forum were purely digital: Bell Atlantic initially inadvertently routed its customers' e-mail messages through Intercon's server and then continued to route the e-mail traffic over Intercon's server for four months after being notified of the problem. The Court of Appeals found that the "defendant purposefully availed itself of the Oklahoma server for almost four months after being notified of the erroneous address."[71] The court also weighed the other factors discussed in *Burger King* (the burden on the defendant, the interest of the forum state in resolving the dispute, the plaintiff's interest in obtaining effective relief, the interstate judicial system's interest in resolving disputes, and the shared interest of the several states in furthering substantive social policies), and concluded that the exercise of jurisdiction was reasonable.[72]

Similarly, in *CompuServe v. Patterson*, the United States Court of Appeals for the Sixth Circuit found personal jurisdiction where CompuServe, a computer information service, sued Patterson, one of its subscribers, seeking a declaratory judgment that CompuServe had not infringed on Patterson's copyright and had not otherwise en-

69. *See supra* note 53.

70. 205 F.3d 1244 (10th Cir. 2000).

71. *Id.* at 1248.

72. *Id.* at 1249.

gaged in unfair competition.[73] Patterson was a creator of software products who subscribed to CompuServe's shareware distribution service. Patterson had entered into a contract with CompuServe which was governed by and construed according to Ohio law. Patterson assented to this contract electronically and transmitted the agreement to CompuServe over the Internet. Over a four-year business relationship, Patterson transmitted thirty-two different software files to CompuServe's system in Ohio. However, Patterson sold only six hundred fifty dollars worth of his software to twelve Ohio residents. After CompuServe marketed a web-browser type of product that Patterson considered too similar to his own, Patterson notified CompuServe (via e-mail) that he considered its products to have infringed on his trademarks and demanded one hundred thousand dollars to settle his claims. CompuServe brought an action in Ohio seeking a declaratory judgment of no infringement, and other relief.[74] Although Patterson's contacts with the forum had "been almost entirely electronic in nature," the Sixth Circuit found them sufficient under the due process clause because Patterson had purposefully directed his activities toward Ohio.[75] Physical presence was not required.[76]

Finally, in *Panavision International, L.P. v. Toeppen*, applying trademark law, the Ninth Circuit permitted jurisdiction over a nonresident who had registered "panavision.com" and several other domain names using Panavision company trademarks for his own use, and preventing Panavision International from using those names as addresses on the Internet unless it paid him thirteen thousand dollars.[77] The defendant, Toeppen, had few physical-world contacts with

73. 89 F.3d 1257, 1259 (6th Cir. 1996).

74. *Id.* at 1260–61.

75. *Id.* at 1262. The Sixth Circuit in *CompuServe* carefully applied and fully discussed a three-part test: (1) the defendant had purposefully availed himself of doing business in the forum; (2) the action arose from the defendant's activities in the forum; and (3) whether the acts of the defendant or consequences of the defendant had a substantial enough connection to the forum to make the exercise of jurisdiction reasonable. *Id.* at 1263.

76. *Id.* at 1264. The key facts for the Sixth Circuit were

> that Patterson chose to transmit his software from Texas to CompuServe's system in Ohio, that myriad others gained access to Patterson's software via that system, and that Patterson advertised and sold his product through that system. Though all this happened with a distinct paucity of tangible, physical evidence, there can be no doubt that Patterson purposefully transacted business in Ohio.

*Id.* at 1264–65.

77. 141 F.3d 1316, 1318 (9th Cir. 1998). The Ninth Circuit offered the following ex-

California. The Ninth Circuit applied the "purposeful availment" test.[78] The Court first excluded cases in which the only contact with the forum was a web site that was merely accessible to forum residents.[79] However, the Court went on to find purposeful availment to be present in this case because the defendant intentionally aimed his conduct at Panavision with the intent to harm Panavision, which had its principal place of business in California.[80] These circumstances were found to meet the purposeful availment test.[81] Congress has

planation of domain names and their significance at the time of the case:

> Every web site on the Internet has an identifier called a "domain name." The domain name often consists of a person's name or a company's name or trademark. For example, Pepsi has a web page with a web site domain name consisting of the company name, Pepsi and .com, the "top level" domain designation: Pepsi.com. The Internet is divided into several "top level" domains: .edu for education; .org for organizations; .gov for government entities; .net for networks; and .com for "commercial," which functions as a catchall domain for Internet users. Domain names with the .com designation must be registered with Network Solutions, Inc. (NSI). NSI registers names on a first-come, first-served basis for a $100 registration fee.

*Id*. The practice of registering a known trade name or corporation as one's own domain name became known as "cybersquatting."

78. *Id*. at 1320.

79. The Ninth Circuit had previously rejected the notion of finding jurisdiction in a case where the only contact was maintaining a web site accessible to anyone. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419–20 (9th Cir. 1997).

80. *Panavision,* 141 F.3d at 1321. The Ninth Circuit relied upon the "effects test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984) (holding that personal jurisdiction may be found where intentional conduct is aimed at the forum state and causes harm that the defendant knows will be suffered in the forum state). *See also* Blumenthal v. Drudge, 992 F. Supp. 44, 56–57 (D.D.C. 1998) (finding jurisdiction in defamation case where article posted on web site by nonresident was aimed at Washington, D.C., audience, and directly related to political world of D.C. users); TELCO Communications v. An Apple A Day, 977 F. Supp. 404, 405–08 (E.D. Va. 1997) (nonresident corporation's posting of two press releases on web site aimed at defaming a Virginia corporation subject to jurisdiction in Virginia); EDIAS Software Int'l, L.L.C. v BASIS Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996) (defamatory e-mail regarding resident corporation, and web site accessible in forum sufficient to find jurisdiction). *But see* Bailey v. Turbine Design, Inc., 86 F. Supp. 790, 795 (W.D. Tenn. 2000) (denying jurisdiction where plaintiffs brought defamation and other claims against defendants, plaintiffs' business competitors, who had a web site on which defendants referred to plaintiffs as "con men" and posted information pertaining to one plaintiff's prior arrest records, but where there was no evidence that defendants intended to reach out to forum state or that forum state citizens had visited the site). The district court in *Bailey* focused on the lack of any evidence that the defendants had "deliberately or knowingly targeted" the forum state.

81. Where the defendant aims to harm a plaintiff by infringing activity, and harmful effects result, courts may apply the *Panavision* approach and allow jurisdiction even where the contacts are few. *See*, *e.g.*, Online Partners.com, Inc. v. Atlanticnet Media Corp., No. CIV.A.C98-4146SIENE, 2000 WL 101242 (N.D. Cal. Jan. 20, 2000) (finding jurisdiction where defendant infringed on plaintiff's trademark, even though only one subscriber was in California); *see also* Nat'l Football League v. Miller, No. 99 CIV. 11846 JSM, 2000 WL

addressed the issue of "cyber-squatting" by passing the "Anticybersquatting Consumer Protection Act," effective November 29, 1999, which allows registered trademark owners to file *in rem* civil actions against domain names for trademark dilution under § 43(c) of the Lanham Act.[82]

*3. Web site interactivity and general jurisdiction*

As the discussion of Supreme Court personal jurisdiction shows, establishing the "continuous and systematic" contacts with a forum that will allow the exercise of personal jurisdiction in cases in which the litigation does not arise out of or relate to the forum can be difficult.[83] Because the World Wide Web allows a commercial enterprise to establish a round-the-clock "virtual presence" at every computer on the globe which has an Internet connection, the concept of "continuous and systematic" contacts, as opposed to specific minimum contacts based on individual transactions, appears to better fit the facts of most Internet-related attempts to establish jurisdiction.[84]

335566 (S.D.N.Y. Mar. 30, 2000) (finding jurisdiction where defendant used NFL trademarks to link users to sports gambling sites on ground that defendant "derived substantial income from interstate commerce" and plaintiffs alleged that the linking of NFL's trademarks to gambling caused damages to the NFL's image and marketing efforts in New York). Some of the language of the district court in *National Football League* is quite expansive, suggesting that the defendant "had to recognize" that because New York had two NFL teams, "his site would ultimately appear on thousands of computer screens in New York." This was not the basis for the finding of jurisdiction, however, because the court concluded that "since [the defendant] substantially profits from the activity that does damage to the plaintiffs in New York, it does not offend due process to require him to defend his actions in a New York courtroom." *Id*.

82. *See* Pub. L. No. 106-113, 113 Stat. 1501A-545 (1999); 15 U.S.C. § 1125(d)(2)(A) (2000). *See, e.g.,* Porsche Cars N. Am., Inc. v. Allporsche.com, Nos. 99-1804, 99-2152, 2000 WL 742185 (4th Cir. June 9, 2000) (remanding district court's denial of *in rem* jurisdiction against domain names, brought under 28 U.S.C. § 1655 (2000), for reconsideration under new anti-cybersquatting law).

83. *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984).

84. Several of the Internet district court cases have involved claims of general jurisdiction. *See*, *e.g.*, Westcode, Inc. v. RBE Elec., No. CIV.A.99-3004, 2000 WL 124566 (E.D. Pa. Feb. 1, 2000) (finding specific jurisdiction based on real world contacts, but using a general jurisdiction analysis in noting that a passive website's accessibility was not sufficient to establish continuous and systematic contacts); Molnlycke Health Care AB v. Cumex Med. Surgical Prods., 64 F. Supp. 2d 448 (E.D. Pa. 1999) (denying general jurisdiction); Mieczkowski v. Masco Corp., 997 F. Supp. 782, 788 (E.D. Tex. 1998) (finding general jurisdiction); Atlantech Distrib., Inc. v. Credit Gen. Ins. Co., 30 F. Supp. 2d 534, 536–37 (D. Md. 1998); Weber v. Jolly Hotels, 977 F. Supp. 327 (D.N.J. 1997); SF Hotel Co. v. Energy Inv., 985 F. Supp. 1032 (D. Kan. 1997).

In *Coastal Video Communications Corp. v. Staywell Corp.*,[85] the district court ultimately concluded that it needed more evidence to decide whether to allow an exercise of general jurisdiction, and permitted the plaintiff to conduct jurisdictional discovery.[86] Yet, the Court was sensitive to the fact that Internet technology in the market place presents a basis for exercising general jurisdiction much greater than "mere advertising and solicitation of products." The Court explained:

> The sites allow the on-line visitor to purchase all of [defendant's] products through the web site, without ever speaking to a [company] representative. In addition, if a customer did have questions, the site also provides a mechanism for those questions to be posed and answered through the exchange of e-mail. In essence, [defendant] has established an on-line storefront that is readily accessible to every person in Virginia with a computer, a modem, and access to the World Wide Web. Thus, instead of using physical assets such as sample-bearing salesmen, or traditional business offices to reach [the forum], and . . . customers, [defendant] is able to provide the same level of service via the Internet's instant connections.[87]

Although the defendant did have some traditional business contacts with the forum, the Court did not find the record sufficient to conclude that general jurisdiction was appropriate. In giving some guidance as to the kind of proof necessary to establish the "continuous and systematic" contacts necessary for general jurisdiction, the Court explained that it was not sufficient to "find that an interactive web site has the *potential* to reach a significant percentage of the forum state's population."[88] For "the contact to be continuous and systematic, there must be proof that the web site is actually reaching a portion of the state's population."[89] Information such as "the amount of sales generated in the state by or through the interactive web site" and the number of times a web site has been accessed by residents or businesses located in a specific state would be relevant to a determination of general jurisdiction.[90]

85. 59 F. Supp. 2d 562 (E.D. Va. 1999).

86. *Id.* at 572.

87. *Id.*

88. *Id.* at 571 (emphasis added).

89. *Id.*

90. *Id.* at 572. The court also noted that the *Zippo* sliding scale test was not as useful in analyzing general jurisdiction cases because it focuses more on the level of the web site's inter-

Given the ease with which a web server can log the number of "hits" which access a given web site—as shown by the tendency of some commercial web sites to require users to provide registration information, and the widespread use of "cookies"[91] by web sites to keep track of consumers who visit web sites—it is extremely plausible that litigants may have a treasure trove of information available to them demonstrating the number of times a web site has been visited by residents of a particular state. In view of this technological development, it is conceivable that general jurisdiction will become easier to show if parties, such as those in the *Coastal Video* case, are given the opportunity to conduct jurisdictional discovery.

### *C. State Cases Applying Personal Jurisdiction Jurisprudence to the Internet*

State courts have fewer reported (or otherwise available) opinions on the question of jurisdiction and the Internet, but there is relevant state decisional law in at least seventeen jurisdictions. In Arizona,[92] California,[93] Connecticut,[94] Delaware,[95] Florida,[96] Indiana,[97]

activity than on the "quantity and nature of the Internet-based contacts with the forum," factors which the court felt the *Zippo* test did not adequately reflect. *Id.* at 568–71. This critique was echoed by the court in *Winfield Collection, Ltd. v. McCauley*, which found the "interactive" category vague and suggested there is still a need for an "Internet-focused test for [minimum contacts]" with the forum state. 2000 WL 1034648 (E.D. Mich. July 24, 2000).

91. A cookie is a small data file which a webserver sends electronically to any user who accesses a web site. It is recorded on the user's hard drive. The user is assigned a number or other identifying code within the cookie, which is unique to that user. When the user returns to that web site, the web server reads the cookie it previously assigned the user, and recognizes the user as the person who visited the site previously. Web servers can also log the originating Internet protocol address of visiting users, and also track the time spent on the site, as well as what parts of the web page the viewer "clicked on." This address can then be associated with a particular geographical area, but may correspond to the location of the ISP rather than the individual user. E-commerce merchants are increasingly using such record keeping methods to track individual consumer preferences to "personalize their browsing experience," i.e., to "direct-market" to the individual person, and to survey and forecast consumer trends. Peter H. Lewis, *Battling Cookie Monsters,* N.Y. TIMES, Feb. 24, 2000, at G1.

92. Rollin v. William V. Frankel & Co., 996 P.2d 1254 (Ariz. Ct. App. 2000) (no jurisdiction allowed in suit by investors in worthless securities against non-resident "market makers" where defendants had no physical contacts with Arizona and purposeful availment of NASDAQ electronic quote system was not the same as purposeful availment of the privilege of conducting business in Arizona).

93. *See* Jewish Defense Org. v. Superior Court, 85 Cal. Rptr. 2d 611 (Cal. Ct. App. 1999) (applying *Zippo*-type analysis: passive web site insufficient basis for jurisdiction even where nonresident defendant contracted with in-state ISP's); Hall v. LaRonde, 66 Cal. Rptr. 2d 399 (Cal. Ct. App. 1997) (holding that repeated e-mails in commercial course of conduct

Massachusetts,[98] Michigan,[99] Minnesota,[100] Missouri,[101] Montana,[102] New Jersey,[103] New York,[104] North Carolina,[105] Texas,[106] Virginia,[107]

between two parties are sufficient contacts to allow jurisdiction).

94. *See* MacMullen v. Villa Roma Country Club, No. CV 970405070S, 1998 WL 867271 (Conn. Super. Ct. 1998) (finding that 450 direct mailings to forum out of 15,000 and running of advertising in magazines were not sufficient contacts to find jurisdiction in personal injury case, and post-injury web site irrelevant where no proof that any forum residents accessed it). *But see* Gates v. Royal Palace, No. CV 9866595S, 1998 WL 951002 (Conn. Super. Ct. 1998) (finding jurisdiction where defendant has some other contacts with the forum, including a web site).

95. *See* Clayton v. Farb, No. 97C-10-306-WTQ, 1998 WL 283468 (Del. Super. Ct. 1998) (finding no jurisdictional basis for suit by plaintiff resident of Maryland against web site that posted allegedly false statements about plaintiff where defendant had no business with forum, and statement was not aimed at the forum, but the web site was accessible in the forum and the statute of limitations of the forum was favorable to plaintiff).

96. *See* Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994) (allowing jurisdiction would offend traditional notions of fair play and substantial justice where plaintiff was a Florida-based computerized airlines reservation system suing a nonresident travel agency that had only dealt directly with plaintiff's New York office, had sent lease payments to Florida, and had regularly accessed the computer system in Florida, but did not have any reasonable expectation of being haled into court in Florida because almost all the physical world contacts occurred in New York).

97. *See* Conseco, Inc. v. Hickerson, 698 N.E.2d 816 (Ind. Ct. App. 1998) (holding that the mere mentioning of plaintiff on defendant's web site was not sufficient minimum contact to allow finding of jurisdiction and that proper test was not the "effects" test but the level of interactivity of the site and the commercial nature of the information exchange).

98. *See* Better Boating Assocs., Inc. v. BMG Chart Prods., Inc. 8 Mass. L. Rptr. 658, No. CIV.A.97-3738-E, 1998 WL 408976 (Mass. Super. Ct. 1998) (finding that, in partnership dispute, advertising over web site and national trade magazine, when directed toward forum, may be taken into account along with other business contacts in finding personal jurisdiction).

99. *See* Clapper et al. v. Freeman Marine Equip., Inc., No. 211139 (Mich. Ct. App. June 16, 2000) (unpublished) (finding no jurisdiction where real world contacts were insignificant and website played no role in transactions at issue and was only mildly interactive in that it permitted the ordering of a catalog online) (visited Dec. 9, 2000) <http://www.michbar.org/opinions/appeals/2000/061600/7378.html>.

100. *See* State v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. Ct. App. 1997), *aff'd*, 576 N.W.2d 747 (Minn. 1998) (holding that gambling web site's invitation to users to join mailing list, and providing of form, along with an "800" telephone number was sufficient in action for deceptive trade practices and fraud).

101. *See* State v. Beer Nuts, Ltd., No. ED 76192, 2000 WL 270671 (Mo. Ct. App. Mar. 14, 2000) (finding that delivery of thousands of bottles of beer to hundreds of Missouri residents was purposeful availment and sufficient minimum contacts).

102. *See* Bedrejo v. Triple E Canada, Ltd., 984 P.2d 739, 743 (Mont. 1999) (finding no jurisdiction where only contact is web site and auto accident by Canadian manufactured motor home).

103. *See* Blakey v. Continental Airlines, Inc., 751 A.2d 538 (N.J. 2000) (reversing appellate court finding of no jurisdiction and remanding to allow jurisdictional discovery where defendant co-workers posted allegedly defamatory comments about plaintiff on electronic bulle-

and Wisconsin[108] courts have all waded into the roiling waters of "e-jurisdiction." As we saw in our examination of the federal cases, the state courts dealing with this question have conducted careful, fact-based analyses to determine whether or not to exercise jurisdiction. Not surprisingly, because the question requires a Fourteenth Amendment analysis as set out in the Supreme Court's jurisprudence, the state cases follow the same analytical framework as the federal cases. Some state courts explicitly reference or implicitly follow the "sliding scale" approach articulated in the *Zippo* case or in

tin board located outside of forum state and where record was not sufficient to determine whether defendants knowingly and purposefully made statements in order to harm plaintiff's pursuit of civil rights in forum state).

104. *See* People v. World Interactive Gaming Corp., 1999 WL 591995 (N.Y. Sup. Ct. 1999) (finding that physical world business contacts between forum state, combined with Internet activity is sufficient for jurisdiction); People v. Lipsitz, 174 Misc. 2d 571, 663 N.Y.S.2d 468 (N.Y. App. Div. 1997) (finding sufficient contacts to exercise jurisdiction where magazine subscription business located in forum sent e-mails soliciting subscribers to forum residents, sold subscriptions to forum residents over the Internet).

105. *See* Replacements, Ltd. v. Midwesterling, 515 S.E.2d 46 (N.C. Ct. App. 1999) (allowing jurisdiction where advertising web site was a factor in minimum contacts analysis and other business contacts with plaintiff existed); Hiawassee Stables, Inc. v. Cunningham, 519 S.E.2d 317 (N.C. Ct. App. 1999) (holding that web site data base where defendants did not advertise or solicit business and had no communications over Internet with plaintiffs was not sufficient, in the absence of any other evidence that defendants had availed themselves of forum).

106. *See* Daimler-Benz v. Olson, No. 03-99-00114-CV, 2000 WL 766271 (Tex. Ct. App. June 15, 2000) (finding general jurisdiction over German parent company where advertising, corporate structure, distribution agreement, and somewhat interactive web site were factors showing systematic contacts); Jones v. Beech Aircraft Corp., 995 S.W.2d 767 (Tex. Ct. App. 1999) (using "sliding scale" analysis, Court found that when combined with evidence of other business contacts, a "somewhat interactive web site" was an appropriate factor, though insufficient by itself, to allow jurisdiction); Mayo Clinic v. Jackson, No. 05-98-00225-CV, 1998 WL 699385 (Tex. Ct. App. 1998) (holding Mayo clinic amenable to Texas jurisdiction where continuing real world contacts with forum were shown, and advertising web site treated like advertising in a nationally circulated magazine).

107. *See* Melvin v. Doe, No. 21942, 1999 WL 551335, 27 Media L. Rep. 2144 (Va. Cir. Ct. 1999) (finding that posting of defamatory material on AOL web site in Virginia was not sufficient contacts with Virginia where no evidence showed that it was directed to forum, solicited a response from the forum, or had any commercial purpose).

108. *See* Wisconsin v. Coeur d'Alene Tribe, No. 97-C-711-5 (W.D. Wis. Feb. 18, 1998) (unpublished) (finding jurisdiction over out-of-state Internet lottery operators where facts showed that Internet solicitation was expressly directed to Wisconsin residents and 180 residents registered to play); Catalytic Combustion Corp. v. Vapor Extraction Tech., No. 00-0450-FT, 2000 WL 1124245 n.5 (Wis. Ct. App. 2000) (allowing jurisdiction where contractual contacts were with a Wisconsin company and a passive website was considered along with other contacts).

other federal decisions.[109] The cases fall somewhat evenly on either side of the jurisdiction question, with about half of the courts finding jurisdiction and the other half rejecting it.

*1. The requirement of other business contacts or purposeful direction of conduct toward the forum state*

State courts have clearly required either strong real-world business contacts with the forum state, or clear purposeful direction of conduct toward the state, before the courts will exercise jurisdiction. In no case has the mere accessibility of a web site been found sufficient to support an exercise of jurisdiction. *Replacements, Ltd. v. Midwesterling* is a typical example of the application of the rule requiring real world contacts and/or purposeful availment.[110] The Court of Appeals of North Carolina reversed a trial court's grant of a motion to dismiss for lack of personal jurisdiction because the facts showed the defendant (1) directly solicited business in the state by mailing an advertisement to fifty North Carolina citizens, (2) had a continual supplier relationship with the plaintiff amounting to sixty-five thousand dollars in business, (3) made ten purchases from plaintiff, (4) telephoned plaintiff, (5) had other business relationships with plaintiff, *and* (6) had "a web site, which allows residents throughout the United States, including North Carolina, to place orders via Internet access."[111] In cases such as *Replacements*, in which the business contacts are clear, the existence of an Internet connection is just one more factor to add to the minimum contacts or purposeful availment analysis.[112]

109. *See, e.g.*, Jewish Defense Org. v. Superior Court, 85 Cal. Rptr. 2d 611, 620–21 (Cal. Ct. App. 1999) (citing *Zippo Mfg., Co. v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W.D. Pa. 1997)); Bedrejo v. Triple E Canada, Ltd., 984 P.2d 739, 743 (Mont. 1999) (citing *Millennium Enter. v. Millennium Music, L.P.*, 33 F. Supp. 2d 906 (D. Or. 1999)); Jones v. Beech Aircraft Corp., 995 S.W.2d 767, 772–73 (Tex. Ct. App. 1999) (citing *Mieczdowski v. Masco Corp.*, 997 F. Supp. 782 (E.D. Tex. 1998)).

110. 515 S.E.2d 46 (N.C. Ct. App. 1999).

111. *Id.* at 48–49. The Court of Appeals found both that the defendant had minimum contacts with the forum, and that it had purposefully directed its conduct toward the forum and availed itself of the privilege of conducting business in the state.

112. Falling into this category of cases granting jurisdiction are: *Hall v. Laurent*, 56 Cal. App. 4th 1342 (Cal. Ct. App. 1997); *Better Boating Associates, Inc. v. BMG Chart Products, Inc.*, 8 Mass. L. Rptr. 658, No. CIV.A.97-3738-E, 1998 WL 408976 (Mass. Super. Ct. 1998); *Daimler-Benz v. Olson*, No. 03-99-00114-CV, 2000 WL 766271 (Tex. Ct. App. June 15, 2000); *Jones v. Beech Aircraft Corp.*, 995 S.W.2d 767 (Tex. Ct. App. 1999); and *Mayo Clinic v. Jackson*, No. 05-98-00225-CV, 1998 WL 699385 (Tex. Ct. App. 1998).

In cases in which the facts showing real world business contacts are less compelling, courts have had more difficulty weighing the impact that should be given Internet-related contacts. In December 1998, on somewhat similar facts, the Superior Court of Connecticut issued two opinions with different results in personal injury cases against nonresident defendants.[113] Connecticut resident Nancy Gates sued a hotel associated with Disney World in Florida after being hit by a valet parking driver there.[114] The defendant hotel moved to dismiss, citing no minimum contacts with the forum.[115] The record disclosed that the hotel had advertised in various national print media; maintained its own interactive web site, through which a user could make reservations, book packages or request information; was listed on a travel brochure available in Connecticut and on a Disney-related web site as one of the "Seven Official Hotels of Walt Disney World in Disney Village"; and since 1995 had advertised in Connecticut publications forty times.[116] The court noted that the plaintiff would have to show "additional activity in this state" beyond mere advertising, to establish jurisdiction. For that additional activity, the Court looked to the fact that the hotel had provided some brochures "specifically" for distribution in Connecticut, had targeted its advertising in the forum forty times in what appeared to be a "rather intense advertising effort," and also operated a web site that allowed residents to make reservations and get information.[117] Having found

113. *See* MacMullen v. Villa Roma Country Club, No. CV 970405070S, 1998 WL 867271 (Conn. Super. Ct. 1998) (finding no jurisdiction under long-arm statute allowing jurisdiction when a foreign corporation has "repeatedly solicited business," where defendant had sent direct mailings into the state but had no active website); Gates v. Royal Palace, No. CV 9866595S, 1998 WL 951002 (Conn. Super. Ct. 1998) (allowing jurisdiction under a more stringent long-arm statute requiring "transacting business" in the state, where the defendant had both real world advertising, business contacts, and Internet contacts with the state).

114. *See Gates*, 1998 WL 951002, at *5.

115. Specifically, the hotel contended it had no place of business or telephone listing in Connecticut, did not advertise there or in publications circulated there, had no bank accounts or real estate there, had no agents there, was not owned by Walt Disney World Corporation, and did not purposefully direct any activities toward Connecticut and had no continuous and systematic business relationship with Connecticut. *Id.* at *1.

116. *Id.* at *1–2.

117. *Id.* at *4. The court found:

> [T]he combination of a concentrated advertising effort within this state, in combination with the active booking of reservations for Connecticut citizens through Connecticut travel agents, together with the invitation to Connecticut citizens to make reservations and other arrangements with the defendant directly through the Internet, constitutes the transaction of business within this state.

that the hotel "transacted business" within the forum for purposes of the long arm statute, the Court then concluded that it was foreseeable to the hotel that out-of-state residents might sue for injuries sustained at the hotel and that the suit did not offend traditional notions of fair play and substantial justice.

In *MacMullen v. Villa Roma Country Club*,[118] a slip and fall case, a New York resort had sent four hundred fifty direct mailings to recent and past guests and others requesting information in Connecticut, attended travel fairs in the state, placed advertisements in magazines, and maintained a toll-free number. Plaintiff also contended that the resort had specifically solicited her retirement group in three different mailings. These contacts were not found to be sufficient to allow jurisdiction under a separate long-arm statute allowing suit where a foreign corporation "repeatedly solicits" business in the forum state.[119] The Court took note of the fact that, *after* the plaintiff had sustained her injury at the resort, the resort had maintained a web site, but stated that there was "no factual showing that any Connecticut resident actually accessed the web site."[120]

Given the similarity in the facts between *Gates* and *MacMullen*, the prominent factual distinction between the cases is clearly the presence of an interactive web site in *Gates* (the web site was operational at the time of the injury and clearly allowed business transactions), and the lack of any proof of the relevance of the web site in *MacMullen* (the web site was not yet up when the accident happened, and there was no proof regarding its interactivity). Indeed, by suggesting that a factual showing that forum residents had accessed the web site would be a relevant consideration, even though the web site was not operational at the time of the injury, the Court in *MacMullen* appeared to indicate that such facts would be relevant to showing continuous and systematic contacts necessary for general jurisdiction. The different results in *Gates* and *MacMullen* support the notion that, in close factual cases, proof regarding a web site's interactivity, and particularly evidence of the number of "hits" it has received from forum residents, will be considered relevant to a finding of jurisdiction.[121]

*Id.*

118. No. CV 970405070S, 1998 WL 867271 (Conn. Super. Ct. Dec. 3, 1998).

119. *Id.* at 3–4.

120. *Id.* at 4.

121. The Montana Supreme Court suggested this fact would be relevant in *Bedrejo v.*

The "purposeful direction of conduct toward the forum" basis for finding jurisdiction is also prevalent in the state cases, particularly in defamation actions. In *Blakey v. Continental Airlines*,[122] the New Jersey Supreme Court reversed a court of appeals decision denying jurisdiction in a case in which an airline pilot claimed that certain comments by co-employees posted on an internal electronic bulletin board of Continental Airlines, which was not physically located in New Jersey, constituted defamation and harassment. The New Jersey Supreme Court recognized that it was treading in new territory, but it nevertheless relied on traditional principles.

The court essentially concluded that if a factual record could be created showing (1) that defendants' statements were defamatory and (2) that defendants made such statements with "the knowledge or purpose of causing harm to plaintiff in the pursuit of her civil rights claims in New Jersey, [then] those intentional contacts with the forum would satisfy the minimum contacts requirements of *International Shoe*."[123] Because the court could not determine from the record whether the defendants intended their statements to hinder plaintiff's New Jersey civil rights, the case was remanded so that jurisdictional discovery could be pursued by the plaintiff.

In some respects, the New Jersey Supreme Court combines the minimum contacts test with the purposeful availment test, suggesting that intentional defamation directed toward the forum state would be a *per se* form of minimum contact. Such an analysis may suggest that the purposeful availment factor, focusing on the defendant's intent, lends itself more readily to Internet-related cases than does a minimum contacts factor based on traditional real-world business or economic ties to the forum state.[124]

By contrast, the Indiana Court of Appeals declined to apply the "effects" test in a defamation case in which the target of the defama-

*Triple E Canada, Ltd.*, 984 P.2d 739 (Mont. 1999), when it found that minimum contacts were not sufficient by pointing out that "although [defendant's] web site is available for viewing in Montana, there was no evidence of any transactions with Montana residents through that web site." *Id.* at 743.

122. 751 A.2d 538 (N.J. 2000).

123. *Id.* at 556.

124. Interestingly, the New Jersey Supreme Court in *Blakey* discussed not only civil jurisdiction rules in reaching its decision, but criminal rules as well. The theme that emerges from the court's discussion is that for any exercise of state jurisdiction to meet the requirements of due process, there must be some intentional or knowingly caused *effect* that occurs in the forum state. *Id.* at 555.

tory comments posted online was a corporation. The Court found the test "not readily applicable in cases involving national or international corporations and the Internet" because harm to a corporation "is generally not located in a particular geographic location as an individual's harm would be."[125]

Another state case deserving attention is *Pres-Kap, Inc. v. System One, Direct Access, Inc.*,[126] a district court case from Florida. The case is significant because, unlike many cases, it treats the situation in which, effectively, the web site operator sues the user (instead of the reverse). In that case, the plaintiff operated a computerized hotel and airlines reservation system and the defendant was a travel agency that had contracted to use the system. Because the plaintiff database operator had branch offices in the defendant's state, and much of the business had been conducted between the plaintiff's branch office and the defendant in that state, the court did not find that the defendant's repeated use of the database in Florida, and sending of lease payments to Florida, was sufficient to allow an exercise of jurisdiction by the Florida courts. The court found it significant that there was no proof that the defendant was even aware that the database was located in Florida and would have reasonably expected to be haled into court there.[127]

Like the federal courts, the state courts hearing questions of civil jurisdiction involving Internet activity have found the traditional Supreme Court due process analysis to be helpful. The emerging rule is that the accessibility of a nonresident's web site in the forum will not, in and of itself, be considered a sufficient basis for due process. When combined with other traditional business contacts, proof of a web site's accessibility and interactivity, particularly if accompanied by proof that forum residents have accessed the site and conducted transactions over the site, is capable of meeting the minimum contacts standard. If there are not many traditional commercial contacts, then a defendant's intentional directing of his activities at the forum

125. Conseco, Inc. v. Hickerson, 698 N.E.2d 816, 819 (Ind. Ct. App. 1998).

126. 636 So. 2d 1351 (Fla. Ct. App. 1994).

127. *Id.* Citing Westlaw and LEXIS as examples of the data bases which customers from around the country use, the court believed it would be "wildly beyond the reasonable expectations of such computer-information users," that they would be haled into court in whatever state where the data base's billing office is located, regardless of whether the user is solicited, engaged, and serviced entirely in-state by the data company's local representatives. *Id.* at 1353 n.2.

may still provide a basis under the purposeful availment test. Proof relating to defendant's web site traffic may also be relevant to this determination.

*2. State civil enforcement actions involving Internet-related conduct*

The same standards of personal jurisdiction applicable in civil cases generally apply in civil enforcement actions brought by a state attorney general. The reported cases dealing with state enforcement actions involving Internet-related conduct are consistent with the rules discussed in private civil actions.

Both of the New York state cases dealing with attorney general enforcement actions concerning unlawful conduct on the Internet—an Internet gambling operation and an e-mail fraud scheme—were cases in which the defendants were physically located in New York and conducted a significant amount of real-world business in New York.[128] Nevertheless, language from these cases suggests some willingness on the part of the New York courts to consider exercising jurisdiction in Internet cases even when the defendant is not physically present. For example, in the *World Interactive Gaming Corp.* case, the Court stated: "even without physical presence in New York, WIGC's activities are sufficient to meet the minimum contact requirement."[129] The WIGC web site was used to conduct gambling with New York residents, and further used advertising to actively solicit New Yorkers.[130]

Similarly, although the defendant Lipsitz was physically present in New York, the Court used a broader standard, that "[t]he first jurisdictional consideration is whether the litigation target has established a physical presence *or a sufficiently close equivalent* in the jurisdiction."[131] Merely maintaining a web site accessible to residents of the forum would not constitute an equivalent physical presence, but

128. *See* People v. World Interactive Gaming Corp., 1999 WL 591995 (N.Y. Sup. Ct. 1999) (finding that defendant's corporate headquarters in forum, decision making and product development in forum, calls to investors made from forum, prospectuses sent from forum all showed defendants "clearly doing business in New York for purposes of acquiring personal jurisdiction"); People v. Lipsitz, 174 Misc. 2d 571 (N.Y. App. Div. 1997) (holding that defendant's operation based in Staten Island, New York, "acts complained of physically occurred in New York, even though impact may have been in another location," courts have "clear jurisdiction over persons actually present in New York").

129. *World Interactive Gaming Corp.*, 1999 WL 591995, at *4.

130. *Id.* at *4–5.

131. *Lipsitz*, 174 Misc. 2d at 578.

conducting business in the forum by subscribing to a local ISP and selling a product over the Internet would be sufficient for jurisdiction.[132] Because of their strong facts in support of real world contacts with the forum, both New York cases are of little assistance in resolving the "hard" cases in which physical contacts with the forum are not so clear.

The case of *Minnesota v. Granite Gate Resorts* offers an example in which the real world contacts with the forum were not extensive, but the Court nevertheless found jurisdiction in an enforcement action by the Attorney General of Minnesota.[133] In *Granite Gate*, the attorney general sued a Nevada resident and his corporation, which was offering online sports gambling through a web site sponsored by a company called WagerNet, located in Belize, Central America. After a preliminary investigation showed that the company was telling consumers that the betting was legal and would be operational by the football season in 1995, the attorney general filed a complaint alleging, among other claims, deceptive trade practices and consumer fraud. The defendant refused to comply with discovery requests for the company's mailing list; so the Court assumed for the purpose of the litigation that the mailing list contained at least one Minnesota resident.[134]

In analyzing personal jurisdiction, the Court of Appeals considered both the Minnesota long-arm statute and the Supreme Court jurisprudence on the minimum contacts necessary to meet due process standards. The defendant claimed that posting information on a web site did not amount to purposeful availment of the privileges of doing business in Minnesota. The Court applied a five-part test which considered "(1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the connection between the cause of action and the contacts; (4) the interests of the state in providing a forum; and (5) the convenience of the parties."[135]

As to the quantity of the contacts and the general accessibility of the web site the Court considered the number of times Minnesotans accessed the site and received information from the web site (248 contacts in a two-week period), the fact that Minnesotans as a group

132. *Id.* (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996)).

133. State v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. Ct. App. 1997).

134. *Id.* at 717–18.

135. *Id.* at 718.

were among the top five hundred most frequent visitors to the site, residents called the company at their advertised phone numbers, and at least one Minnesotan was on their mailing list. In considering the "nature and quality" of the contacts, the Court was not troubled by the fact that the advertising and information posted was not specifically targeted toward the forum. The Court inferred the defendant's intent to serve the market of the forum from the fact that the company was "inviting United States users to download these images" and relied upon Minnesota precedent holding that defendants who know their message will be broadcast in the state are subject to suit there.[136]

Because the suit and the web site pertained to a sports betting operation, the Court found the cause of action and the contacts with the forum to be connected and further held that the "state's interest in providing a forum to enforce its consumer protection laws weighs in favor of exerting jurisdiction."[137] The Court paid little attention to the issue of the convenience of the parties, finding that modern technology made defense of a suit in a foreign tribunal less burdensome. In sum, all the factors favored a finding of jurisdiction and the Court upheld the denial of defendant's motion to dismiss based on lack of personal jurisdiction.

In the area of alcohol distribution over the Internet, states have also pressed enforcement actions to prevent the unregulated sale of certain substances over the Internet, such as alcoholic beverages, particularly sales to minors. In *State v. Beer Nuts, Ltd*.,[138] the Missouri Attorney General sought a permanent injunction and fine against Beer Nuts, Ltd., a North Carolina micro-brewery beer-of-the-month membership club doing business as Hog's Head Beer Cellars, for selling beer in Missouri without complying with Missouri licensing, testing, and inspection laws, and without abiding by Missouri laws requiring alcohol retailers to seek proof of age to avoid sales to mi-

136. *Id*. at 719–20. The court compared Internet advertisements to broadcast and direct mail solicitation "in that advertisers distribute messages to Internet users, and users must take affirmative action to receive the advertised product." The Court cited the company's use of English-language advertising as proof of intent to reach the United States market and of a toll-free number as indicative of an intent to solicit responses from all jurisdictions within that market. *Id*. at 720.

137. *Id*. at 721. *See also* Wisconsin v. Coeur D'Alene Tribe, No. 97-C-711-5 (W.D. Wis. Feb. 18, 1998) (unpublished).

138. State v. Beer Nuts, Ltd., No. ED 76192, 2000 WL 270671 (Mo. Ct. App. Mar. 14, 2000).

nors. As part of the investigation, an 18-year-old state intern had accessed the Beer Nuts web site and ordered two six packs without being asked for any proof of age. Because, according to the record in the case, "Beer Nuts admittedly delivered thousands of bottles of beer into the State, pursuant to commercial relationships that Beer Nuts maintained with hundreds of Missouri residents," the Court of Appeals found both purposeful availment and sufficient minimum contacts.[139] In weighing traditional notions of fair play and substantial justice, the Court found "that the interest of the State of Missouri in regulating the sale and delivery of alcoholic beverages within its borders outweighs the burden that Beer Nuts bears in appearing as a party defendant in Missouri."[140]

From the standpoint of a state seeking to protect its citizens from impact of unlawful conduct on the Internet, the broad view of jurisdiction taken by the courts in *Granite Gate* and *Beer Nuts* is a positive development. In particular, the focus on the data showing the number of "hits" and responses between the web site and state residents, and the reliance on accumulation of prior e-contacts, sets a useful and quantifiable standard that could be helpful in cases where there are few other contacts between the forum and the web site.

### *D. Web Technology as a Source of Facts to Establish Personal Jurisdiction*

A review of the federal and state case law on personal jurisdiction has demonstrated that few courts are willing to permit the exercise of jurisdiction over nonresidents simply based on the fact that the nonresident has posted a web site which is accessible to the forum. Courts have almost universally required some additional proof of either traditional commercial contacts or intentional direction of the activity toward the forum—a form of purposeful availment. Because some courts have allowed plaintiffs to conduct "jurisdictional discovery" and have also occasionally found the web site's records of forum visitors to be relevant, it would seem prudent for states seeking to enforce their laws against outlaw web sites to seek discovery of the

139. *Id.* at 7–8.

140. *Id.* at 8. The due weight given to the state's interest in regulating alcohol was a factor missing in private actions against similar online beer distributors. *See, e.g.*, Butler v. Beer Across Am., 83 F. Supp. 2d 1261 (N.D. Ala. 2000), discussed, *infra* note 183.

web server logs in order to attempt to make a sufficient record as to the number of forum contacts.[141]

From almost any web server, precise data can be culled indicating the originating Internet Protocol ("IP") address of each computer that has connected to, or visited the site, the date and time of the visit, the number of visits, and even the activity, or "clicking" done during the visit. In some instances, if the IP address is permanently assigned to one computer, then that IP address can be associated with a particular location, and ultimately, to a specific jurisdiction.[142] In many cases, however, the logs will only record a visitor's "dynamically-assigned" IP address, which actually is assigned to the user by his dial-up ISP, such as America Online ("AOL").[143] In those cases, the logs will show an IP address that is assigned computers located at AOL in Virginia. Consequently, in the case of dynamically-assigned IP addresses, the actual location of the visitor would not be shown in the web server logs. Additional records would have to be sought from the ISP to see which user was assigned that dynamic IP address on the date and time that it appeared in the web site logs. Unfortunately for investigators and litigators, the records pertaining to dynamically assigned IP addresses are normally not retained by ISPs for more than a few days. If for some reason such records are logged by the ISP's system, then they will be available.

If the web site requires users to register and provide personal information, such as their names and addresses, these records can be used to develop a profile of the web site's traffic. Although unverified registration information may be viewed with skepticism given the ease with which it can be fabricated by the user, where reliable,

141. Web servers are record-making wizards, which can be programmed to log and save reams of information regarding the traffic that visits web sites. For a detailed discussion of how web server technology tracks visitors, see Philip Greenspun, *User Tracking* (visited Nov. 25, 2000) <http://www.photo.net/wtr/thebook/user-tracking.html>.

142. A static IP address may actually be assigned to a particular computer in one location, or it may be assigned to a service provider who then allows a customer to use it. Consequently, the IP address, even if static, may show the location of the provider rather than the physical location of the user. The next step for the investigator, or litigator, is to seek the subscriber information for that IP address from the service provider. That information will usually lead to a physical location of the computer.

143. A dynamically-assigned IP address could be compared to a number given to a shopper in line at the butcher. The number is assigned by the ISP because it is part of what is necessary for a computer to communicate over the Internet. The number is assigned to the user during his Internet session; then, after the session is complete, the number is re-used by the ISP just like the numbers at the butcher shop.

such records can clearly show where a web site is having the biggest impact. Because Internet companies normally track this information and use it for marketing purposes or to derive other commercial advantages, it would not be unreasonable for a court to conclude that a company which knowingly continued to interact with a large number of residents of a certain state through repeated contacts over the Internet for a long period of time had purposefully availed itself of the privileges of that state forum. As states continue to face the need to protect their consumers from a variety of scams and other unlawful conduct on the Internet, attorneys general and other officials can be expected to continue to push the outward limits of personal jurisdiction: the records available on web server logs may give them some data to support that push.

## II. EXTRATERRITORIAL APPLICATION OF STATE CRIMINAL JURISDICTION

Just as the Internet increases the possibility that states will need to bring civil actions against out-of-state parties, it also presents new and difficult challenges for state criminal law enforcement.[144] The mainstreaming of the Internet means that more and more frequently, local law enforcement authorities will find themselves confronted with citizen complaints of crimes by perpetrators who are not located within their jurisdiction.[145] Although large-scale crimes and matters

144. As Attorney General Janet Reno recently pointed out in discussing the issue of unlawful conduct on the Internet:

> There is a dark side. A dark side in terms of traditional crime, of threats, child pornography, fraud, gambling, stalking, and extortion. They are all crimes that, when perpetrated via the Internet, can reach a larger and more accessible pool of victims, and can transform local scams into crimes that encircle the globe. By connecting a worldwide network of users, the Internet has made it easier for wrongdoers to find each other, to congregate, to socialize, and to create an online community of support and social reinforcement for their antisocial behaviors.

Reno Remarks of January 10, 2000, *supra* note 2.

145. *Id. See also The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet: A Report of the President's Working Group on Unlawful Conduct on the Internet: March 2000* (visited Sept. 14, 2000) <http://www.usdoj.gov/criminal/cybercrime/unlawful.htm> [hereinafter "The President's Report"]. The interagency report explained:

> In responding to the challenge of law enforcement on the Internet, one of the problems that state and local governments face is that, although the crimes and schemes on the Internet may victimize local populations, the medium over which these crimes are committed permits a defendant to be located anywhere in the world.

*Id.*

of national or international importance will usually call federal law enforcement resources into play,[146] state and local authorities will undoubtedly be called upon to respond to citizen complaints of Internet crime which fall within their traditional areas of primary responsibility.[147]

The Internet will cause states to confront the legal limits of their ability to exercise extraterritorial criminal jurisdiction over perpetrators located outside their territorial boundaries. As they attempt to carry out their duties to prosecute these cases, state authorities will find support in the case law holding that: (1) the exercise of limited extraterritorial jurisdiction by state courts over conduct occurring outside of state boundaries has been approved by the Supreme Court since 1911;[148] and (2) subsequent codification of state statutes authorizing extraterritorial jurisdiction can further expand the reach of such jurisdiction.[149]

### *A. Case Law Supporting State Extraterritorial Criminal Jurisdiction*

At common law, criminal jurisdiction was based on the territorial

146. The President's Report categorized into eight areas the predominant types of Internet crime. Of these eight areas of online unlawful activity, five are traditional offenses or regulated conduct in which state and local authorities already carry a heavy enforcement responsibility: fraud, child pornography, sales of prescription drugs and controlled substances, gambling, and alcohol. The other three areas are ones in which the federal government has played a predominant enforcement role: sale of firearms, securities fraud, and software piracy and intellectual property theft. *See id.* at app. B–I (describing categories of Internet crimes).

147. In *Mesa v. California* the Supreme Court reiterated the preeminent responsibility of states in the field of criminal law enforcement:

> [U]nder our federal system, it goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government. Because the regulation of crime is pre-eminently a matter for the States, we have identified a strong judicial policy against federal interference with state criminal proceedings.

489 U.S. 121, 138 (1989) (citing *Arizona v. Manypenny*, 451 U.S. 232, 243 (1981)) (citations and internal quotations omitted).

148. *See* Strassheim v. Daily, 221 U.S. 280, 284–85 (1911) (reversing grant of habeas corpus for a defendant who was not present in the forum state at the time the crime of solicitation of a bribe occurred).

149. *See*, *e.g.*, N.Y. Crim. Proc. § 20.20(2)(a)–(d) (2000) (adopting a broad rule allowing jurisdiction where a criminal offense "was a result offense and the result occurred within this state," or "[t]he statute defining the offense is designed to prevent the occurrence of a particular effect in this state and the conduct constituting the offense committed was performed with intent that it would have such effect herein . . . ").

principle, which provided that if the crime occurred within the physical borders of a state then that state would have jurisdiction to prosecute the defendant.[150] Indeed, the general rule that a state could not prosecute an individual for a crime committed outside its boundaries was accepted as "axiomatic" and "too deeply embedded in our law to require justification."[151] This theory of jurisdiction developed problems in application, however, such as "the very unreasonable principle" propounded in "[t]he ancient common law . . . that, if a person be wounded in one county, and die in another, his murderer could be tried in neither . . . because the offense was not complete in either county."[152] The law developed fictions to deal with this anomaly, such as the doctrine of constructive presence, which held that the offender putting an action in motion, such as the firing of a bullet, remains constructively present with the action until it is completed.[153] In more recent times, the law has recognized three primary bases for justifying extraterritorial jurisdiction: (1) the common law detrimental effects test; (2) the "omission" theory; and (3) statutory grants of power which codify a form of either or both jurisdictional bases. These three bases will now be discussed.

*1. The "detrimental effects" test*

Justice Holmes' 1911 decision for the United States Supreme Court in *Strassheim v. Daily*[154] offered a clear statement of the "detrimental effects" test for extraterritorial criminal jurisdiction. In *Strassheim*, the Supreme Court held that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if

150. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 180 (1972). The theory was that each crime had only one situs or location, and the place of the situs would have jurisdiction.

151. *See In re* Vasquez, 705 N.E.2d 606, 610 (Mass. 1999) (citing DOUGLAS LAYCOCK, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law,* 92 COLUM. L. REV. 249, 318 (1992)).

152. *See* State v. Smith, 421 N.W.2d 315, 318 (Minn. 1988) (quoting *Ex parte McNeely*, 14 S.E. 436, 436–37 (W. Va. 1892)).

153. *See* People v. Blume, 443 Mich. 476, 500 n.12 (Mich. 1993) (Boyle, J. dissenting) (quoting *Simpson v. State*, 17 S.E. 984 (1893) ("So if a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes. . . .")).

154. 221 U.S. 280 (1911).

he had been present at the effect, if the state should succeed in getting him within its power."[155]

In *Strassheim*, the Supreme Court clarified the theoretical underpinnings of a state's power to exercise criminal jurisdiction over conduct occurring outside the state's territorial boundaries. To satisfy the Supreme Court's minimum requirement for an exercise of jurisdiction over out-of-state conduct, there must be an act occurring outside the state which is (1) intended to produce detrimental effects within the state, and (2) causes detrimental effects within the state.[156]

In contrast to the cases arising in the context of *in personam* civil jurisdiction, several criminal cases have specifically noted that the "minimum contacts" analysis required in civil cases is irrelevant and does not apply when determining whether an exercise of criminal jurisdiction is proper.[157] Consequently, factual inquiry into the nature and quality of the contacts between the defendant and the forum, as well as the other factors discussed above in the analysis of personal jurisdiction cases, are immaterial in criminal cases. In criminal cases, the factual questions at issue under the detrimental effects test are the defendant's act, his intent in causing the detrimental effects in the forum state, and the effects themselves.

While articulating a useful general test, the *Strassheim* Court did not discuss it at length. Courts have needed to flesh out the contours of the precise state of mind or level of intent required on the part of

155. *Id.* at 285. The defendant in *Strassheim* offered to pay over $1000 to the warden of the State Prison in Jackson, Michigan, if the warden would agree to take used machinery in lieu of new as required on a state contract. The bribe offer was made while the defendant was outside of Michigan, though he had been in Michigan at various times in connection with the contract.

156. *See*, *e.g.*, *In re* Vasquez, 705 N.E.2d 606 (Mass. 1999).

157. *See*, *e.g.*, *id.* at 608–09 (citing *Rios v. State*, 733 P.2d 242, 244 (Wyo. 1987)) (holding that minimum contacts analysis has no application in criminal cases); Ex parte Boetscher, 812 S.W.2d 600, 602 (Tex. Ct. App. 1991) (finding no case applying a *Kulko*-type minimum contacts analysis to criminal jurisdiction); State v. Luv Pharmacy, Inc., 388 A.2d 190 (N.H. 1978) (holding that application of minimum contacts analysis questionable); *see also* State v. Amoroso, 975 P.2d 505, 508 (Utah Ct. App. 1999) (collecting cases and stating that "the rule is well-settled that civil 'minimum contacts' analysis has no place in determining whether a state may assert criminal personal jurisdiction over a foreign defendant"). Noting that the United States Supreme Court has held that it did not violate the Constitution to exercise jurisdiction where a defendant had been kidnapped and brought to a jurisdiction by illegal force, the Massachusetts Supreme Judicial Court made it clear that "[t]he jurisprudence of personal jurisdiction has no bearing on the question whether a person may be brought to a State and tried there for crimes under that State's laws." *In re* Vasquez, 705 N.E. 2d at 609 (citing *Frisbie v. Collins*, 342 U.S. 519, 522 (1952)).

the out-of-state defendant who causes the detrimental effect. The Michigan Supreme Court in *People v. Blume*, for example, found no basis for jurisdiction over a Florida drug co-conspirator who had sold cocaine to a Michigan resident because there was insufficient proof that the Florida resident had *intended* that the cocaine be distributed in Michigan.[158] The *Blume* Court interpreted *Strassheim* as requiring both "specific intent to act and the intent that the harm occur in Michigan." Proof that the defendant knew that the person to whom he sold the cocaine was from Michigan and would return there was not considered sufficient to show that the defendant intended the cocaine to be sold in Michigan.[159] Other courts have focused less on the defendant's *intent* to cause the detrimental effect within the state than on the fact that the defendant's act caused a result in the forum state which is a crime or an element of a crime.[160]

Ironically, the first state Supreme Court to consider an assertion of criminal territorial jurisdiction over an out-of-state defendant in an Internet fraud case did not apply, or even cite, the *Strassheim* case. In *State v. Cain*,[161] the highest court in Maryland, the Court of Appeals, reversed and remanded the lower court's opinion finding no jurisdiction over a Georgia resident who refused to refund six thousand one hundred forty dollars paid by a Maryland doll-collector who was sent a set of thirty-six Barbie dolls in poor condition that had been represented over the Internet to be a set of ninety-five Barbie dolls in "mint" condition. The Maryland Court declined to apply the detrimental effects test because it found that an essential element

158. *Blume*, 505 N.W.2d at 851 n.28.

159. *Id.* at 850–51. The *Blume* decision was largely governed by its facts, i.e., the lack of any proof that the defendant agreed with the objects of the overall conspiracy, or intended to affect the forum. The Court made it clear that proof of a continuing drug supplier relationship, or repeated conduct, or knowledge of the co-defendant's intent would "certainly" have meant a different outcome. *Id.* at n.30. *But c.f.* Moreno v. Baskerville, 452 S.E.2d 653, 654–55 (Va. 1995) (holding that even where defendant *knew* that drugs sold in Arizona were bound for Virginia, jurisdiction was not established as to distribution charges because "immediate result" of drug sale to intermediary occurred in Arizona, and intermediary sold them to a person in Virginia).

160. *See, e.g.,* State v. Doyen, 676 A.2d 345, 350 (Vt. 1996) (finding jurisdiction where defendant failed to return child to custodial parent in Vermont because act had result in forum which was a crime); *Rios*, 733 P.2d at 242 (holding that failure to return child to forum state had effect there); Keselica v. Commonwealth, S.E.2d 756, 760 (Va. Ct. App. 1997) (holding that a Maryland defendant's fraud scheme amenable to Virginia jurisdiction because defendant put in motion a criminal scheme the immediate result of which caused the intended harm in the forum state).

161. No. 140 Sept. Term 1999, 2000 WL 1036286 (Md. July 28, 2000).

of the crime of theft by deception occurred in Maryland. The defendant's obtaining control of the property could be proven to have occurred in Maryland at the time when the victim deposited her check in the mail in Maryland. The Court thus did not directly address the question of whether jurisdiction could be had where the elements occurred elsewhere, but the intended effects of the crime occurred in the forum state. The opinion clearly implies, however, that if all of the essential elements of a crime occur outside Maryland, then the occurrence of detrimental effects within Maryland, whether intended or not, would *not* be sufficient under that state's common law to provide a basis of jurisdiction.[162]

As will be seen in the discussion below dealing with state statutes conferring extraterritorial jurisdiction, some statutes expressly allow the state to exercise criminal jurisdiction only if the intended result that occurs in the forum is an element of the crime,[163] while others will allow jurisdiction when an offense has a harmful impact in the forum, even though that result is not necessarily an element of the offense.[164] Regardless of the different weight that jurisdictions may give to the intent or whether the in-state effect must be an element of the crime or merely a result, the detrimental effects test remains the touchstone of much of the state jurisprudence on extraterritorial jurisdiction.

*2. The "omission" theory*

Many of the state cases addressing the issue of extraterritorial criminal jurisdiction arise in the context of child-custody or non-support disputes in which one parent absconds with the child to another jurisdiction in violation of the custodial rights of the first parent, or fails to comply with child support obligations. Then the state of the first parent files criminal charges against the out-of-state ab-

162. *See id.*

163. *See*, *e.g.*, Lane v. State, 388 So.2d 1022, 1027 (Fla. 1980) (applying Florida jurisdictional statute allowing jurisdiction where an element of the crime occurs in the forum or a result of the offense that is an element occurs in the forum).

164. *See*, *e.g.*, People v. Sandy, 666 N.Y.S.2d 565 (N.Y. App. Div. 1997) (holding that intent to have harmful impact in forum plus consequences in the forum confer jurisdiction under New York jurisdiction statute even where consequences—unavailability of evidence which had been subpoenaed by the grand jury—were not elements of the crime); State v. Miller, 755 P.2d 434 (Ariz. Ct. App. 1988) (limiting effect of Arizona statute allowing jurisdiction if the "result" of an element of an offense committed outside the state occurs within the state).

sconder or deadbeat.[165] These cases frequently discuss the jurisdictional basis which arises from the omission or failure to act under circumstances in which there is a legal duty to act.[166]

Under this theory, if a crime consists of the omission or failure to comply with a legal duty, proper jurisdiction may be had in the place where the omitted legal duty is required to be performed.[167] In the child custody cases, the situs of the crime is considered the state where the custodian obligation arose. Although these custody cases frequently discuss the omission theory, they also rely heavily on the detrimental effects analysis, as well as any applicable state statutes regarding state jurisdiction.

Another example cited as a crime of omission is the failure to file a tax return.[168] This basis of jurisdiction is an independent ground upon which to seek extraterritorial jurisdiction, in addition to the detrimental effects test, though frequently it is discussed as an alternative basis.

*3. State statutes authorizing extraterritorial criminal jurisdiction*

Many state legislatures have enacted jurisdictional statutes[169]

165. *See*, *e.g.*, In re Vasquez, 705 N.E.2d 606, 610 (Mass. 1999) (finding jurisdiction and collecting cases); State v. Doyen, 676 A.2d 345, 347 (finding jurisdiction); Trindle v. State, 602 A.2d 1232, 1236–37 (Ct. App. Md. 1992) (finding jurisdiction); State v. Kane, 625 A.2d 1361, 1363 (R.I. 1993) (finding jurisdiction); *Ex parte* Boetscher, 812 S.W.2d 600, 603 (Tex. Crim. App. 1991) (finding jurisdiction); Wheat v. Alaska, 734 P.2d 1007, 1012 (Alaska Ct. App. 1987) (finding jurisdiction); *Rios*, 733 P.2d at 250 (finding jurisdiction). *But see* People v. Gerchberg, 131 Cal. App. 3d 618 (Cal. Ct. App. 1982) (finding no jurisdiction); State v. McCormick, 273 N.W.2d 624, 627 (Minn. 1978) (finding no jurisdiction); State v. Cochran, 538 P.2d 791 (Idaho 1975) (finding no jurisdiction).

166. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 282–83 (1986).

167. *See*, *e.g.*, *In re Vasquez*, 705 N.E.2d at 611, (collecting cases); *Doyen*, 676 A.2d at 347, State v. Gantt, 548 N.W.2d 134 (Wis. Ct. App. 1996); State v. McGill, 836 P.2d 1371, 1373 (Or. Ct. App. 1992).

168. *See*, *e.g.*, *Doyen*, 676 A.2d at 347.

169. For an non-exhaustive list of state statutes that establish bases for extraterritorial criminal jurisdiction, see, ALA. CODE § 15-2-4 (1999); ARIZ. REV. STAT. § 13-108 (1999); ARK. CODE ANN. § 5-1-104 (1999); CAL. PENAL CODE § 778 (West 1999); COLO. REV. STAT. ANN. § 18-1-201 (1999); DEL. CODE ANN. tit. 11, § 204 (1999); FLA. STAT. ANN. § 910.005 (West 1999); GA. CODE ANN. § 17-2-1 (1999); HAW. REV. STAT. § 701-106 (1999); 720 ILL. COMP. STAT. Tit. 5/1-5 (West 1998); IND. CODE § 35-41-1-1 (1999); IOWA CODE ANN. § 803.1 (West 1999); KAN. STAT. ANN. § 21-3104 (1998); KY. REV. STAT. ANN. § 500.060 (Banks-Baldwin 1998); ME. REV. STAT. ANN. tit. 17-A, § 7 (West 1999); MINN. STAT. ANN. § 609.025 (West 1999); MO. REV. STAT. § 541.191 (1999); MONT. CODE ANN. § 46-2-101 (1999); N.H. REV. STAT. ANN. § 625:4 (1999); N.J. STAT. ANN.

codifying the bases of jurisdiction similar to the detrimental effects test set out in *Strassheim*, the omission theory, the Model Penal Code ("MPC"),[170] or extending their jurisdictional reach even further.[171] Most of the statutes cited track the MPC's language or

§ 2C:1-3 (West 1999); N.Y. CRIM. PROC. LAW § 20.20 (McKinney 1999); OHIO REV. CODE ANN. § 2901.11 (Anderson 1999); OR. REV. STAT. § 131.215 (1998); 18 PA. CONS. STAT. ANN. § 102 (West 1999); S.D. CODIFIED LAWS § 23A-16-2 S.D.C.L. (Michie 1999); TEX. PENAL CODE ANN. § 1.04 (West 1999); UTAH CODE ANN. § 76-1-201 (1999); WIS. STAT. ANN. § 939.03 (West 1999).

170. THE MODEL PENAL CODE, § 1.03, provides as follows:

> § 1.03. Territorial Applicability.
>
> (1) Except as otherwise provided in this Section, a person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if:
>
> (a) either the conduct which is an element of the offense or the result which is such an element occurs within this State; or
>
> (b) conduct occurring outside the State is sufficient under the law of this State to constitute an attempt to commit an offense within the State; or
>
> (c) conduct occurring outside the State is sufficient under the law of this State to constitute a conspiracy to commit an offense within the State and an overt act in furtherance of such conspiracy occurs within the State; or
>
> (d) conduct occurring within the State establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction which also is an offense under the law of this State; or
>
> (e) the offense consists of the omission to perform a legal duty imposed by the law of the State with respect to domicile, residence or a relationship to a person, thing or transaction in the State; or
>
> (f) the offense is based on a statute of this State which expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.
>
> (2) Subsection (1)(a) does not apply when either causing a specified result or a purpose to cause or danger of causing such a result is an element of an offense and the result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense, unless a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result.
>
> (3) Subsection (1)(a) does not apply when causing a particular result is an element of an offense and the result is caused by conduct occurring outside the State which would not constitute an offense if the result had occurred there, unless the actor purposely or knowingly caused the result within the State.
>
> (4) When the offense is homicide, either the death of the victim or the bodily impact causing death constitutes a "result," within the meaning of Subsection (1)(a) and if the body of a homicide victim is found within the State, it is presumed that such result occurred within the State.
>
> (5) This State includes the land and water and the air space above such land and water with respect to which the State has legislative jurisdiction.

*Id.*

171. State v. Miller, 755 P.2d 434, 435 (Ariz. Ct. App. 1988). In *Miller,* the Arizona Court of Appeals explained that Arizona's jurisdictional statute was broader than the Model

adopted similar language, to the effect that, for the state to exercise jurisdiction over an offense occurring partly outside the state, either an element of the offense or a result of the offense—which is also an element—must occur within the forum state. The states that have adopted this kind of language include Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Minnesota, Montana, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, Texas, and Utah. States which have broadened the Model Penal Code approach by also allowing jurisdiction where a result of the offense, whether an element or not, occurs in the forum state, are Arizona, Kansas, New York, and Missouri.[172]

Wisconsin's statute permits jurisdiction even if no result occurs in the state, but the out-of-state person "does an act with intent that it cause in this state a consequence set forth in a section defining a crime."[173] Alabama, California, and South Dakota have statutes which establish jurisdiction where an offense is commenced outside a state and "consummated" within the state.[174] Ohio and Mississippi both have jurisdictional statutes that specifically target computer or Internet-related crime.[175] The Ohio statute creates a new basis of jurisdiction whenever a person "by means of a computer, computer system, computer network, [etc.] . . . causes or knowingly permits any writing, data, image, or other telecommunication to be disseminated or transmitted into this state in violation of the law of this state."[176] Although Ohio's statute may require some judicial interpretation in order to know what it means for data to be transmitted into the state "in violation of the law of this state" (i.e., does the transmission have to be an element of the offense, a complete offense, or the result of an offense?), the statute certainly appears to be aimed at ensuring jurisdiction in the common panoply of Internet

Penal Code. While the Model Penal Code would allow jurisdiction only when a result which is an element of the offense occurs in the forum state, Arizona's statute would allow jurisdiction where the conduct constituting the element of the offenses occurred outside the State, but the result of that conduct occurred within the State. *Id.* at 438–39.

172. For a discussion of state case law discussing the application of many of these statutes, see *Rios v. State*, 733 P.2d 242, 247–49 (Wyo. 1987) (collecting cases).

173. WIS. STAT. ANN. § 939.03(c) (West 1999).

174. ALA. CODE § 15-2-4 (1999); CAL. PENAL CODE § 778 (West 1999); S.D. CODIFIED LAWS § 23A-16-2 (Michie 1999).

175. OHIO REV. CODE ANN. § 2901.11 (Anderson 1999); MISS. CODE ANN. § 97-45-11 (1999) (governing "venue" for computer crimes).

176. OHIO REV. CODE ANN. § 2901.11 (Anderson 1999).

crimes such as fraudulent web sites, online child pornography, and Internet sales of contraband. Whether a statute such as Ohio's actually extends state jurisdiction any further than the *Strassheim* detrimental effects test or the MPC approach will need to await judicial interpretation.

Courts have suggested that the state's power to exercise extraterritorial jurisdiction is an inherent authority reserved to the states pursuant to the Tenth Amendment.[177] Moreover, as *Strassheim* made clear, a state does not need to have a statute explicitly defining extraterritorial reach in order to exercise such jurisdiction.[178] Comparing the common law grounds for exercising extraterritorial jurisdiction and the statutes of several states, it is arguable that the common law rule of *Strassheim* is both narrower and broader than some of the statutory grants of authority.

*Strassheim* requires (1) an *intent* to produce detrimental effects within the forum, and (2) detrimental effects in the forum. The intent requirement is not found in most of the state statutes,[179] and in this sense, *Strassheim* confers jurisdiction in a narrower band of cases. However, *Strassheim* is also broader than state statutes because it would allow jurisdiction as long as detrimental effects were produced in the forum, regardless of whether these effects were an element of the offense committed. Most of the state statutes, in contrast, require that the conduct constituting an element of the offense, a result that is itself an element, or a result of an element occur within the state. The question arises whether states with jurisdictional statutes can nevertheless rely on common law grounds to establish extra-

177. U.S. CONST. amend. X. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *See also* State v. Miller, 755 P.2d 434, 436 (Ariz. Ct. App. 1988); *Rios,* 733 P.2d at 249.

178. *See Rios*, 733 P.2d at 249 ("While Wyoming does not have a specific statute which permits the exercise of jurisdiction when extraterritorial conduct causes a result in this state, the concept articulated in *Strassheim v. Dailey* . . . does not depend on the existence of such a statute.").

179. Some states have adopted criminal statutes aimed at unlawful conduct on the Internet that include jurisdictional grants of authority within the criminal statute. For example, Michigan's criminal statute prohibiting the use of a computer to commit certain crimes includes a provision stating that "a violation or attempted violation of this section occurs if the communication originates in this state, is intended to terminate in this state, or is intended to terminate with a person who is in this state." MICH. COMP. LAWS § 750.145d(6). This appears to be a broader grant of jurisdiction than *Strassheim*, as it does not require that a detrimental effect occur within the state.

territorial jurisdiction. At least one court has held that, unless expressly abrogated, the common law basis for jurisdiction survives and may provide jurisdiction.[180]

### *B. Cybercrime Prosecutions Involving State Extraterritorial Jurisdiction*

Other than the Maryland case discussed above,[181] state courts have not rendered many decisions regarding state assertions of extraterritorial jurisdiction in cases charging cybercrimes.[182] Our examination of the non-cyber case law and statutes demonstrates, however, that state law currently would support an aggressive response to Internet-related unlawful activities which impact on a particular state, even if the perpetrator is not physically located within the forum state. Recently, states have engaged in criminal and civil enforcement actions against online distributors of alcohol and prescription drugs, as well as child pornography and child sexual predators.[183]

180. State v. Doyen, 676 A.2d 345, 350 (1996).

181. *See* State v. Cain, No. 140 Sept. Term 1999, 2000 WL 1036286 (Md. July 28, 2000) (finding jurisdiction on narrow grounds in Internet fraud case, where Georgia defendant failed to deliver the number and quality of ordered "Barbie" dolls, and the court found that element of obtaining control of the victim's property occurred in the forum state when the victim placed the check in the mail in the forum jurisdiction).

182. Indeed, research has located few other reported state decisions involving criminal activity over the Internet. Most of the reported cases relate to the transmission of child pornography over the Internet, or sexual solicitation of children over the Internet, but do not directly address jurisdictional issues. *See*, *e.g.*, People v. Foley, 692 N.Y.S.2d 248 (N.Y. App. Div. 1999), *aff'd,* 731 N.E.2d 123 (N.Y. Ct. App. 2000) (affirming conviction for Internet dissemination of indecent material to minors, and upholding the constitutionality of state statute); People v. Barrows, 709 N.Y.S.2d 573 (N.Y. App. Div. 2000) (holding as constitutional the dissemination statute, following the *Foley* case, and rejecting Commerce Clause preemption and extraterritoriality challenge because defendant's "purposeful" acts demonstrated intent to commit crime in New York); Greer v. Texas, 999 S.W.2d 484 (Tex. App. 1999), *cert. denied,* 2000 LEXIS 5927 (U.S. Oct. 2, 2000) (holding that computer image of child pornography did not meet statutory definition of "film image" then in effect and could not be basis of probation violation, though other basis found); People v. Munn, 688 N.Y.S.2d 384 (N.Y. Crim. Ct. 1999) (denying motion to dismiss charge of aggravated harassment based on Internet newsgroup posting of solicitation to murder police officer); Janjua v. State, 991 S.W.2d 419 (Tex. App. 1999) (finding computer to be forfeitable "criminal instruments" in the context of conviction for promoting child pornography); State v. Duke, 709 So. 2d 580, 582 (Fla. Dist. Ct. App. 1998) (holding that in-state defendant's explicit sexual solicitation of undercover officer in chatroom, plus attendance at planned tryst insufficient evidence to prove attempted sexual battery).

183. States have taken action recently in several areas, including civil enforcement actions involving online pharmacies (Kansas and Michigan), online sales of alcohol to minors (Massachusetts, Michigan, and Missouri), sales of unlawful kits to manufacture controlled substances

Because online sales of regulated items such as alcohol, drugs, and tobacco present a typical area in which state criminal actions may arise, a recent Utah decision in a prosecution of an online beer distributor presents an analogous setting.[184] In *Amoroso*, the state filed misdemeanor charges against Beer Across America ("BAA") and its president arising out of the sale of beer to minors. The trial court granted defendant's motion to dismiss the charges for lack of jurisdiction, but the court of appeals reversed. The appellate court found the civil "minimum contacts" analysis to be inapplicable and applied Utah's criminal jurisdiction statute, and the *Strassheim* analysis.[185] Although the defendant shipped the alcohol from Illinois, the court found that:

> BAA is subject to prosecution in Utah for conduct committed in Illinois because its conduct caused an unlawful result in Utah. In sum, the information alleges conduct that resulted in unlawful importation of alcohol into Utah; unlawful sale or supply of alcohol in Utah; unlawful warehousing, distribution, or transportation of alcohol to Utah; unlawful supplying of alcohol to persons within Utah; and unlawful distribution or transportation for sale or resale to retail customers in Utah without a license.[186]

Unfortunately, the *Amoroso* court did not offer a summary of the facts, which were referenced as alleged in affidavits but were not recounted in the opinion; so, it is unclear whether the case involved Internet sales of alcohol. Nevertheless, the case offers support for the conclusion that an out-of-state supplier of regulated items may be prosecuted by the forum based on what appears to be a single course of conduct involving the shipment of items to the forum state.[187]

(Michigan), Internet gambling (New York, Minnesota, and Wisconsin), and child sexual exploitation (many states). *See*, *e.g.*, *Michigan Targets Internet Alcohol Sales to Minors, Reaches Agreement with UPS,* 5 ELECTRONIC COM. & L. REP. 173, 192 (Feb. 23, 2000).

184. State v. Amoroso, 975 P.2d 505 (Utah Ct. App. 1999).

185. *Id.* at 508.

186. *Id.* at 509.

187. The fact that *Amoroso* was a criminal prosecution, where minimum contacts analysis was irrelevant, may have been decisive. *See* Butler v. Beer Across Am., 83 F. Supp. 2d 1261 (N.D. Ala. 2000) (granting defendant's motion to dismiss in civil action based on lack of minimum contacts where Alabama plaintiff's son, a minor, ordered and received beer over the Internet). In addition to finding no minimum contacts because the web site did not anticipate the regular exchange of information across the Internet, and other contacts with the forum were slight, the district court in *Butler* also found that, under both states' versions of the Uniform Commercial Code ("UCC"), the "sale" of the beer actually occurred in Illinois. *Id.* at 1267–68. For this reason, the *Butler* Court found that jurisdiction did lie in the home state of

In summary, the case law and statutory authority providing for extraterritorial criminal jurisdiction suggest that states will be successful in prosecuting out-of-state defendants who victimize their populations using the technology of the Internet if they can either (1) show intent to cause detrimental effects within the forum state and detrimental effects within the state, or (2) meet the requirements of the relevant criminal jurisdiction statute. A showing of minimum contacts will not be required for criminal prosecutions of conduct over the Internet.

## III. INVESTIGATIVE CHALLENGES TO STATES ENFORCING THE LAW IN CYBERSPACE

States seeking to carry out their traditional enforcement role in cyberspace will not only confront recurring questions of how to establish jurisdiction over nonresidents in civil and criminal actions, they will also face new, unique and daunting challenges in gathering the evidence necessary to bring such actions.[188] States will need new procedural tools because, as individuals increasingly choose the Internet as a medium of social interaction and commerce,[189] they utilize a technology that presents jurisdictional challenges to law enforcement which do not exist in any like degree in real world transactions. In this section, we will examine two criminal-friendly aspects of the Internet that are not found in the brick and mortar world and

Beer Across America and transferred the case to Illinois. When states are attempting to bring actions against nonresident merchants, this UCC-driven analysis can be significant, as Connecticut found in *State v. Cardwell*, 718 A.2d 954, 959 (Conn. 1998). In *Cardwell*, the Connecticut Attorney General brought an unfair trade practices case against an out-of-state company for "ticket scalping." Although in-state residents had bought tickets from the defendant, the Supreme Court of Connecticut applied the UCC definition of "sale," which did not require the seller to deliver the goods because of the contract, but allowed them to be sent, meant that the "sale" occurred at the time and place of *shipment*, not delivery. Thus the *Cardwell* Court found that the defendant did not "sell" tickets in Connecticut.

188. Attorney General Janet Reno drew attention to this challenge in her speech to the NAAG when she called for "new and more robust procedural tools to allow state authorities to more easily gather information located outside their jurisdictional boundaries." Reno Remarks of January 10, 2000, *supra* note 2.

189. According to a report by the Stanford Institute for the Quantitative Study of Society released on February 17, 2000, 55 percent of the American population has access to the Internet either at home or at work. The report examined Internet use and concluded that, "for the most part, the Internet today is a giant public library with a decidedly commercial tilt." *See* Norman H. Nie & Lutz Erbring, *Internet and Society: A Preliminary Report* (visited Nov. 25, 2000) <http://www.stanford.edu/group/siqss/Press_Release/Preliminary_Report.pdf>.

that have specific consequences which affect the ability of law enforcement to conduct investigations. After examining these consequences, we will consider possible law enforcement fixes intended to level the playing field.

### *A. A "Borderless" Cyber-world Meets the Real World of Territorial Jurisdiction: Problems and Possible Solutions*

Wrong doers seeking to victimize people over the Internet have the world as their oyster. Any minor-league scam artist with an attractive web site can suddenly reach a world-wide pool of victims.[190] This gives criminals an opportunity to ply their craft remotely, and to harm a set of victims in one locality from miles, or perhaps continents away. From the perspective of state law enforcement, this presents serious challenges because the evidence relating to the crime may be physically located in the same remote location where the perpetrator is, or, even more problematic, in one or more other remote locations outside of the jurisdiction of the victims. Even discounting the international issues presented by this problem, from the standpoint of the state governments, the same problem can exist if the target of the investigation is located outside the territorial boundaries of the state (which, in Internet cases, is likely to be the case). States rely upon investigative or grand jury subpoenas to gather evidence, which are essentially court orders. Such court orders normally are not enforceable outside the state's jurisdictional boundaries.[191]

The President's Working Group Report on Unlawful Conduct on the Internet articulated this problem well:

> [I]f a fraud scheme is committed against Ohio residents by an operator of a web site located in Florida, and the Ohio prosecutors issue a subpoena for records from the company in Florida, there is currently no formal procedural mechanism for the service and enforcement of that subpoena. Although the Ohio prosecutors may informally succeed in obtaining assistance from the Florida authorities, this is a matter of professional courtesy rather than legal process. There is no guarantee that the subpoena will be served, or, if

190. *See* Reno Remarks of January 10, 2000, *supra* note 2.

191. *See*, *e.g.,* Brennick v. Hynes, 414 N.Y.S.2d 777 (N.Y. App. Div. 1979) (holding that out-of-state corporation not required to respond to state grand jury subpoenas *duces tecum* issued in other state).

> served, enforced. Running into such a roadblock could well mean the end of the Ohio investigation. In the absence of any ability to investigate the case themselves, it remains possible for the Ohio prosecutors simply to refer the case to their Florida counterparts by reporting their complaints about the cybercriminal in Florida, but if the crime involves no Florida victims or is otherwise outside its jurisdiction, there is no guarantee that the case will be investigated by anyone.[192]

The structure of the Internet and the proliferation of telecommunications methods and providers makes this problem even more acute in two ways. First, states must not only deal with collecting evidence about the perpetrator where he or she is located, they also must determine where the perpetrator's ISP, or web site-hosting service, or free email service provider is located and may also need compulsory process to gather evidence from these third-party providers. Second, in state cases where court-ordered electronic surveillance or wiretapping is being utilized, the phenomenon of satellite telephone communications providers (sometimes foreign-owned) means that the ground station where a communications signal needs to be intercepted may be physically located outside of the jurisdiction issuing the wiretap order.[193] The bottom line is that, in Internet cases, relevant, material, and perhaps crucial, evidence of crimes affecting local citizens can be located anywhere in the world, but the state's ability to reach that evidence does not extend so far. A careful examination of proposed remedies for this problem would serve as the topic for a separate article, but it is worth mentioning several potential solutions.

192. The President's Report, *supra* note 143, at *32. *See also* State v. Cain, No. 140 Sept. Term 1999, 2000 WL 1036286 (Md. July 28, 2000) (recounting that, in that case, the Clayton County, Georgia, authorities would not investigate a matter where the victim was from Maryland and the check at issue was not cashed in Clayton County).

193. *Id.* at 32–33. As the Working Group Report put it:

> [T]he enforcement of state electronic surveillance orders can also be a challenge. The Internet and modern satellite communications have made it more necessary for state wiretap orders to be served on and enforced against an out-of-state service provider. Unfortunately, no legal mechanism exists that would allow this. For example, drug traffickers operating entirely in New York, but using satellite telephones with signals that are received at a ground station outside of New York, potentially are completely immune from a New York wiretap order if the out-of-state ground station refuses to comply with a New York court's wiretap order.

*Id.*

*1. The need for an interstate compact on the enforcement of investigative subpoenas*

States should consider whether a new interstate compact must be reached defining the procedures through which one state court's investigative subpoena could be given force within the boundaries of another state. Precedent for such a compact exists in the form of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.[194] It may be that minor amendments could be made to this agreement which would serve to significantly address the problem. A similar approach might also be effective in addressing the issue of giving effect to out-of-state electronic surveillance orders.

*2. State legislation requiring acceptance of out-of-state service of process*

In order to address the problem of gathering evidence from out-of-state service providers, some states have adopted, or are considering adopting, a state statute requiring ISP's doing business within the state to accept and comply with the legal process from other state courts, and further requiring the resident agent of any out-of-state ISP registered to do business within the state to comply with process from forum state courts upon service of the resident agent.[195] This approach is relatively new and remains untested in the courts, but it clearly addresses lowering the hurdles that state courts currently face when needing to obtain records from an out-of-state service provider.[196]

194. *See generally* UNIFORM LAWS ANNOTATED 9–79 (2000) ("Table of Jurisdictions Listing Uniform Acts Adopted"). This law allows for the production of material witnesses in prosecutions or grand jury investigations that have commenced or are "about to commence." The statute speaks in terms of witnesses to "attend and testify" and further requires a showing that the witness is "material and necessary." Although this statute could apparently be used to compel attendance by record witnesses in states that use grand jury investigations or in cases where the prosecution is imminent, it does not appear to be helpful in strictly investigatory situations, where no grand jury is being used, and charges are not about to be filed.

195. Effective January 2000, California amended its Corporations and Penal Codes to require California ISPs to accept out-of-state process, and resident agents of nonresident ISPs to accept California process. *See* CAL. PENAL CODE § 1524.2 (West 1995); CAL. CORP. CODE § 2105 (West 1990).

196. *See* Reno Remarks of January 10, 2000, *supra* note 2. Attorney General Reno referenced California's efforts in her speech to NAAG as well, stating:

We need to develop an enforceable legal process. We should also consider possible

*3. "Maxing-out" extraterritorial jurisdiction statutes*

In addition to adopting more effective ways to gather evidence, states should examine their state statutes and consider ways to maximize their reach to ensure the ability to exercise jurisdiction over the person of the defendant. With respect to state long-arm statutes, at a minimum states can make certain that their long-arm statutes are coextensive with the limits of constitutional due process. State civil enforcement actions will still face the requirements of the Supreme Court's minimum contacts and purposeful availment jurisprudence, but at a minimum they can ensure that their own long-arm statutes are not less inclusive than the Constitution would allow.

With respect to statutes defining extraterritorial criminal jurisdiction, states should consider examining their statutes to determine whether they allow for jurisdiction to be exercised in the broadest possible way consistent with the Constitution. Many state statutes require that either an element of the crime, or a result of the crime which is an element, occur in the forum state. The *Strassheim* analysis suggests that jurisdiction would be permissible if a defendant commits a crime intentionally causing detrimental effects (whether an element or not) within in the state. The open question remains whether a state could adopt legislation authorizing jurisdiction in cases where (1) the detrimental effects of a crime occur in the state but are not an element; and (2) there is no requirement of showing the intent of the defendant to direct his action toward the forum state.[197] In light of the case law discussed previously, such a statute

> legislative solutions. One example would be a state law requiring service providers to accept service of process and comply with out-of-state subpoenas, court orders and search warrants. I understand that California has adopted legislation in this area, and I encourage you to consider whether it would be helpful in your state.

*Id.*

197. A possible "maximum reach territorial jurisdictional statute" might be structured as follows:

> Section 1: It is the policy of this State to exercise jurisdiction over crimes and persons charged with the commission of crime to the fullest extent allowable under, and consistent with, the United States Constitution and the Constitution of this State.
>
> Section 2: In accordance with this policy, a person shall be subject to prosecution in this State for an offense he/she commits while he/she is physically located either within or outside the State, and:
>
> (1) He/she commits a criminal offense wholly or partly within the State;
>
> (2) The offender's conduct committed wholly outside the State constitutes an attempt to commit a criminal offense within the State;

would give states the maximum reach possible.

### *B. The Masked Man and the Disappearing Trail: Anonymity and Traceability on the Internet*

As any burglar with a stocking over his face knows, criminals prefer anonymity because they prefer not getting caught.[198] The Internet permits users to remain anonymous both because they can use false screen names and registration information, and because it is possible to obscure or falsify the originating location of an electronic communication.[199] Although some anonymity has always been possible in communications, anonymous Internet communications create

> (3) The offender's conduct committed wholly outside the State constitutes a conspiracy to commit an offense within the State, and an act in furtherance of the conspiracy was committed within the State, either directly or indirectly by the offender, at his/her instigation, or by another member of the conspiracy; or
>
> (4) Any victim of the criminal offense, as defined in [state statute], or any employee or agent of a governmental unit posing as a victim, resides in the State or was located in the State at the time the criminal offense was committed; or
>
> (5) The criminal offense produces substantial and detrimental effects within the State.
>
> Section 3: An offense is committed partly within this State when:
>
> (1) An act constituting an element of the offense is committed within the State; or
>
> (2) The result or consequences of an act constituting an element of an offense occurs within the State; or
>
> (3) The offense produces consequences which have a materially harmful impact upon the system of government or the community welfare of the State, or results in the defrauding or harming of persons within the State.

This proposal was drafted primarily by Assistant Attorneys General Thomas Wheeker and Matthew Keck of the Michigan Department of Attorney General.

198. *See* Kent Alexander & Scott Charney, *Computer Crime,* 45 EMORY L.J. 931, 943 (1996).

199. *See* The President's Report, *supra* note 145, at 22–23. For a technical explanation of a variety of ways that the Internet allows for user anonymity, see EDWARD G. AMOROSO, INTRUSION DETECTION: AN INTRODUCTION TO INTERNET SURVEILLANCE, CORRELATION, TRACE BACK, TRAPS, AND RESPONSE (1999) (Chapter Five: Internet Identity and Anonymity). *See also* Reno Remarks of January 10, 2000, *supra* note 2, at 3. The Attorney General stated:

> It doesn't take a master hacker to disappear on a network. For example, a hacker can leave his communications through a series of anonymous remailers, which advertise the fact that they keep no records. Or he can create a few forged e-mail headers with easy-to-use tools available on hacker web sites. Or he can use a free trial account or two. Even a novice can effectively hide the trail of his communications and do it quickly.

*Id.*

a different kind of impact than anonymous letter writing or phone calls. Unlike physical world contacts that result in crimes or actionable claims, which are usually one-to-one contacts, the Internet creates an environment where the contacts have been described as "one-to-many," or, perhaps more accurately, one-to-all.[200] Even if law enforcement is successful in identifying the Internet protocol address of a computer used in a crime, there remains the challenge of further establishing with certainty the identity of the individual who was sitting at the keyboard when the message was sent.

Related to anonymity is the problem that tracing the source of electronic communications over the Internet can be difficult. A communication over the Internet can be looped through numerous connections, including foreign networks, and can therefore involve a large number of service providers in numerous locations, all of which may have completely inconsistent internal record-keeping and data retention policies.[201] Thus the electronic "trail" that law enforcement must follow, the logs showing records of connections between computers or the stored electronic copies of e-mail, may be deleted (or never be retained) before the investigation even begins.

The problems of anonymity and traceability are difficult policy issues because they touch on privacy concerns[202] and industry prac-

200. *See* Alexander & Charney, *supra* note 198, at 943. The authors explain:

> The telephone and mail systems allow predominantly one-to-one communications. Although it is possible to call thousands of people anonymously, doing so takes a lot of time, not to mention a lot of pocket change. By contrast, the one-to-many nature of the Internet alters the scope of communications.

*Id.*

201. *See* The President's Report, *supra* note 145, at 21.

> For example, a cyberstalker in Brooklyn, New York may send a threatening e-mail to a person in Manhattan. If the stalker routes his communication through Argentina, France, and Norway before reaching his victim, the New York Police Department may have to get assistance from the Office of International Affairs at the Department of Justice in Washington, D.C., which, in turn, may have to get assistance from law enforcement in (say) Buenos Aires, Paris, and Oslo just to learn that the suspect is in New York. In this example, the perpetrator needs no passport and passes through no checkpoints as he commits his crime, while law enforcement agencies are burdened with cumbersome mechanisms for international cooperation, mechanisms that often derail or slow investigations.

*Id.*

202. Some view the anonymity afforded by Internet communications as crucial to the exercise of free expression. Indeed, the American Civil Liberties Union complained about the fact that the President's Working Group Report on Unlawful Conduct on the Internet treated anonymity as a "thorny issue," rather than as a constitutional right. *See ACLU Letter to Attorney General Reno* (Mar. 8, 2000) <http://www.alcu.org/congress/1030800a.html>; John

tices. Nevertheless, there are at least three measures which state governments can adopt as positive steps. First, state officials can play a positive role in encouraging private ISP's to develop industry standards and "best practices" which will emphasize the importance of preserving certain categories of electronic records and logs for minimum periods to assist law enforcement in protecting the public.[203] Second, states can seriously commit themselves to mutual assistance with one another on computer crime matters. For example, Attorney General Reno has called for the establishment of a twenty-four/seven fifty-state network of points of contact for computer crime matters which would provide state-to-state assistance in fast-breaking cases where the electronic trail might disappear.[204] Third, state investigators can make use of a provision of federal law which requires service providers to "freeze" any electronic records they may have that are relevant to a law enforcement request, and preserve the records for a ninety-day renewable period, until appropriate legal process may be obtained by the state.[205]

## IV. CONCLUSION

The revolution of information technology includes all the innovations in software and networking infrastructure, the continuing miniaturization and improved performance of microprocessors and other hardware and, of course, the mainstream application of the

Schwartz, *Online Crime Report Raises Privacy Concerns,* WASH. POST, Mar. 10, 2000, at E1.

203. This was the approach taken by President Clinton and representatives of large e-commerce concerns, when they met in the wake of the denial of service attacks of early February 2000, which incapacitated Yahoo!, eBay, CNN, and several other popular web sites, and agreed on the need to develop "best practices" regarding network security measures. *Clinton, Executives Pledge to Expand Cooperation to Tighten Internet Security,* 5 ELECTRONIC COM. L. REP. 179 (Feb. 23, 2000); Neil King Jr. & David S. Cloud, *Set Standards, Don't Issue Fiats, High Tech Chiefs Tell Clinton*, WALL ST. J., Feb. 16, 2000.

204. *See* Reno Remarks of January 10, 2000, *supra* note 2.

> I come to you today to ask you to join with me to create a strong, permanent network of federal, state and local computer crime experts to do the following: To share expertise and information technology, to assist each other 24 hours a day, seven days a week, around the clock, to prevent cybercrime wherever possible, and to bring those responsible for such crime, when it does occur, to justice . . . .

*Id.*

205. "(1) In general: A provider of wire or electronic communications services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process." 18 U.S.C.§ 2703(f) (1994).

Internet as a communication tool of every day life. The impact of this revolution on the ability of state governments to enforce their laws is still only beginning to be understood. The law has responded in the area of civil personal jurisdiction by fitting the new technology into the old tests developed over fifty years ago in *International Shoe*.

Interestingly, many of the early Supreme Court cases that first applied the minimum contacts analysis explicitly noted that the new test departed from past jurisprudence because of the technological and economic changes of the mid-twentieth century which had altered perceptions of fairness.[206] Whether the information technology revolution, and all of its attendant impacts on the legal system—creating the possibility of real-time video cross examination of witnesses who are not physically present, eliminating the need for massive and slow paper discovery, allowing encyclopedic quantities of data to be shared (and searched) in the blink of an eye—will eventually lead to further refinement of the *in personam* jurisdiction rules can only be a matter of speculation.

For now, it is clear that the courts will not permit the mere accessibility of a web site as a basis for exercising personal jurisdiction. The *Zippo* sliding scale test is fast becoming the majority rule. The key factors weighing in favor of a finding of jurisdiction will be proof of other non-Internet contacts and purposeful availment of the forum (whether through real world or Internet contacts).

In criminal cases, a state need not show any minimum contacts with the forum, but must comply either with common law standards requiring that an offender intentionally cause detrimental effects in the forum state, or with the state's statute articulating the reach of extraterritorial jurisdiction. Such statutes normally require, for example, that an element of the crime occur within the forum state. In either case, when a victim is located in the forum state and engages in a transaction over the Internet that results in a crime being intentionally committed against the victim, the state will usually be able to

206. *See*, *e.g.*, Kulko v. Superior Court, 436 U.S. 84, 101 (1978) (The "evolving standards of due process . . . in large part 'attributable to the . . . increasing nationalization of commerce . . . [accompanied by] modern transportation and communication [that] have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'" (quoting *McGee v. Int'l Life Ins.*, 355 U.S. 220, 222–23 (1957)). *See also* Hanson v. Denckla, 357 U.S. 235, 250–51 (1958) ("As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase.").

make the case that jurisdiction is appropriate in the state. In common law states following the *Strassheim* rule, the most likely defense would be that the defendant did not intend to have a detrimental impact in the forum state. This will be difficult to sustain in cases where the defendant either ships something to the forum state or fails to do so after communicating with and accepting payment from a forum state resident.

In both civil and criminal cases, however, the Internet presents a variety of challenges for state investigations due to the jurisdictional limitations on the extraterritorial enforcement of state subpoenas. Possible remedies for these problems include a new inter-state compact, state legislation requiring acceptance of out-of-state service of process, and broader jurisdictional statutes. Certain qualities of the Internet create disadvantages for law enforcement, such as the borderless nature of the Internet, and the problems of anonymity and traceability. Overcoming these hurdles will require intense and sustained levels of cooperation among state governments, between them and the federal government, and between the public and the private sectors. The value of developing voluntary industry standards and "best practices" in these areas to assist law enforcement cannot be overestimated.

From the perspective of state governments charged with enforcing their laws, perhaps the Internet does share some characteristics with the old west. It is a vast frontier unbeholden to any one regime of laws; a place where individual freedom reigns supreme. Though faced with new challenges, states retain their traditional enforcement tools, which, they will find, still operate in cyberspace. It remains to be seen whether the courts or the legislatures will fashion more effective tools to ensure that states remain able to fulfill their traditional enforcement responsibilities in the Age of the Internet. Regardless of such initiatives, however, we have seen that existing law does not completely hamstring states from carrying out their duties. As states continue to confront cybercrime and e-consumer litigation, they will continue to apply pressure in favor of the law's outward expansion in finding new jurisdictional rules. For the same wild west that attracted outlaws and renegades also inspired the courage and creativity of those who sought to tame it and create a safe and prosperous community for everyone.[207]

207. On March 9, 2000, at a press conference announcing the release of The President's

## APPENDIX

| Due Process Allows Exercise of Personal Jurisdiction | Due Process MAY Allow Exercise of Personal Jurisdiction | Due Process Does NOT Allow Exercise of Personal Jurisdiction |
|---|---|---|
| Claim arises out of conduct involving forum (specific jurisdiction)<br>-AND-<br>Continuous and systematic or minimum contacts<br>-OR-<br>Purposeful availment of forum<br>-OR-<br>In-forum service of process on the person<br>-AND-<br>Otherwise "reasonable" and consistent with "traditional notions of fair play and substantial justice" | Claim does not arise out of conduct involving forum (general jurisdiction)<br>-AND-<br>Continuous and systematic contacts<br>-OR-<br>Purposeful availment of forum<br>-OR-<br>In-forum service of process on the person<br>-AND-<br>Otherwise "reasonable" and consistent with "traditional notions of fair play and substantial justice" | Claim does NOT arise out of conduct involving forum (general jurisdiction)<br>-AND-<br>Single and isolated contact<br>-AND-<br>No in-state personal service<br>-AND-<br>Not "reasonable" and consistent with traditional notions of fair play and substantial justice" |
| | Claim arises out of conduct involving forum (specific jurisdiction)<br>-AND-<br>Single or few occurrences of conduct<br>-AND-<br>Otherwise "reasonable" and consistent with "traditional notions of fair play and substantial justice" | Claim arises out of conduct involving forum (specific jurisdiction)<br>-AND-<br>Purposeful availment of forum<br>-AND-<br>Not "reasonable" and consistent with "traditional notions of fair play and substantial justice" |

Report, *see supra* note 145, Attorney General Reno stated: "I think there are still some—perhaps it's a little like the Wild West in the development of America—who say, 'Let's not let the government be involved.' But there were also the marshals and Wyatt Earp and others who brought some order to it." *See also* James Vicini, *Technology Firms Urged to Help Collar Hackers*, CHI. TRIB., Mar. 10, 2000, at 3(3).