A Brave New Borderless World: Standardization Would End Decades of Inconsistency in Determining Proper Personal Jurisdiction in Cyberspace Cases

Jonathan Spencer Barnard[*]

CONTENTS

INTRODUCTION

Cyberspace[1] is the new frontier—the 21st century *Brave New World*.[2] While the Internet[3] opens up a universe of new possibilities, who

[*] J.D. Candidate, Seattle University School of Law, 2017; B.S. in Mathematics, Gonzaga University, 2014; University of Rochester, Biomedical Engineering and Neuroscience, 2011. Thank you to my family Rob, Linda, Kelly, and Mary Lou; your unconditional, boundless support has made the pursuit of my goals possible, and I would not have made it this far without you. Thank you Professor Steve Tapia, Distinguished Practitioner in Residence at Seattle University School of Law and former Senior Attorney at Microsoft Corporation and head of Microsoft's Copyright and Trade Secret practice groups; B.A., Yale University, J.D., University of Southern California, for your dedicated effort and mentorship in helping draft and edit this Note. Finally, thank you Professor Julie Shapiro, Professor of Law at Seattle University School of Law; B.A., Wesleyan University, J.D., University of Pennsylvania School of Law, and Jamie Pfeiffer, B.A., Bowling Green State University, J.D., DePaul University School of Law, for your thoughtful insights and editing.

is the sheriff in this frontier town and what law should he apply? In crafting the boundaries of the virtual world, historical legal precedent can be both instructive and informative. Arguably one of the most famous civil procedure cases to date is *Pennoyer v. Neff*.[4] In this 1877 case, the United States Supreme Court established that an individual is not bound by the judgment of a specific court until and unless that court has properly acquired authority over that individual.[5] One important and instructive principle underlying this decision is that a court's power and authority over an individual is limited by territorial boundaries.[6] In reaching its decision, the Court emphasized a federal constitutional limit on the power a state court could wield, limiting it to a rigid system of authority over only those persons or property located within a state's borders.[7] In its approach to the territorial power of state courts, *Pennoyer* assumed that each state was essentially a separate entity and that interstate activity was the exception.[8] Indeed, the Supreme Court initially relied upon traditional notions of sovereignty adopted from international law wherein states were treated like countries, each with exclusive sovereignty over its own persons or property.[9]

Although *Pennoyer* prevailed for seventy years as the overarching philosophy of the territorial limits of proper exercise of judicial power, its rigidity and lack of foresight left many courts without guidance when attempting to apply the traditional notion of jurisdiction to interstate commerce. This became glaringly apparent with the railway boom during

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1. *See generally* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197 (1995). The term "cyberspace" is sometimes treated as a synonym for the Internet and sometimes treated as a completely different, and much broader, concept that emphasizes its treatment as a place. For purposes of this Note, I will use the two interchangeably and to mean a notional environment in which communication and data transfer over computer networks occurs.

2. *See generally* ALDOUS HUXLEY, BRAVE NEW WORLD (1932) (anticipating developments in reproductive technology, psychological manipulation, sleep-learning, and classical conditioning that drastically change in response to a profoundly different society in the 26th century characterized as a densely imagined dystopian state).

3. *See generally* Am. Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (illustrating one of the first instances in which a United States District Court attempted to describe the basic infrastructure of the Internet). While the foundational structure of the Internet remains, the Internet has evolved over the past two decades with changes including: reduction in expense to use, reduction in technical challenge to log on, increase in amount of information and services provided, etc. *Id.*

4. *See generally* Pennoyer v. Neff, 95 U.S. 714 (1877).

5. *Id.* at 721–35.

6. HOWARD M. ERICHSON, INSIDE CIVIL PROCEDURE: WHAT MATTERS AND WHY 33 (2d ed. 2012).

7. *Id.* at 35.

8. *Id.*

9. JEFFREY W. STEMPEL, STEVEN BAICKER-MCKEE, BROOKE D. COLEMAN, DAVID F. HERR & MICHAEL J. KAUFMAN, LEARNING CIVIL PROCEDURE 76 (2013).

the last third of the nineteenth century, the birth of the automobile, and the construction of interstate highways.[10] It has become ever more complicated with the invention of the airplane and the expansion of the Internet.[11] Just as the industrialization and mobilization of our nation reduced the significance of state and national boundaries, those same boundaries have become all but invisible with the rise of the Internet.[12] Commentators agree that the "explosive growth of [the Internet] has raised concerns about applying existing substantive and procedural doctrine, both largely defined by geography, to a world without physical borders."[13]

Certainly, the post-*Pennoyer* era itself saw an expansion in case law and a partial overruling[14] of *Pennoyer*—rejecting the schema of *Pennoyer*—with the decision of *International Shoe v. Washington* in 1945.[15] In *International Shoe*, the United States Supreme Court shifted from an analysis of whether the defendant was present in the forum state's geographical boundaries to an examination of the defendant's contacts with the forum state.[16] In *Pennoyer*, the Court stressed the importance of sovereignty and territorial boundaries.[17] By 1945, however, the Court understood the need for a more abstract way of determining whether exercise of personal jurisdiction over a nonresident defendant was proper.[18] *International Shoe*'s "minimum contacts" requirement allows states to exercise jurisdiction over individuals who purposefully avail themselves of the benefits of the forum state, whether or not that includes being physically present within the state's territorial boundaries.[19]

In 1980, the Court had an opportunity, in *World-Wide Volkswagen Corp. v. Woodson*,[20] to examine the application of purposeful availment to the ever-increasing modern mobilization of society, specifically the automotive industry.[21] In *World-Wide Volkswagen*, plaintiffs brought a product liability suit in an Oklahoma state court against nonresident

10. ERICHSON, *supra* note 6, at 45.

11. *Internet Used by 3.2 Billion People in 2015*, BBC (May 26, 2015), http://www.bbc.com/news/technology-32884867 [https://perma.cc/72R5-NJTA].

12. ERICHSON, *supra* note 6, at 45.

13. Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 926 (1998).

14. ERICHSON, *supra* note 6, at 36.

15. *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

16. *Id.* at 316–17.

17. ERICHSON, *supra* note 6, at 36.

18. *Id.*

19. *Id.*

20. *See generally* World-Wide Volkswagen Corp. v. Woodson, 444. U.S. 286 (1980).

21. ERICHSON, *supra* note 6, at 41.

defendants for burns caused by a car fire in Oklahoma, from an automobile purchased in New York.[22] In a narrowly divided 5–4 decision in favor of the defendants, the majority "made it clear that state lines still matter, and a court's power over an out-of-state defendant depends on whether the defendant acted purposefully toward the forum state."[23] In a vigorous dissent, Justice Brennan argued that the defendants knowingly sold an inherently mobile product and that it is not unreasonable to hold defendants answerable in a foreign state over a product that foreseeably could have ended up and caused harm in that foreign state.[24] Further, Justice Brennan emphasized that personal jurisdiction "need not be so restrictive in an era in which modern transportation and communication reduce the inconvenience of litigating in another state."[25]

While the nature of jurisdiction makes the implementation of a bright-line test impractical, the dawning of the Internet age has posed further dilemmas for the Court. These dilemmas and the inability to reach a practicable, coherent solution have created a desperate need for guidance from the Supreme Court or the Legislature to create, at the very least, a federal standard or a single, clear test for determining proper Internet jurisdiction.[26] As it stands now, "[r]ecent cases interpreting the jurisdictional effect of conducting business on the Internet have reached opposite conclusions based on nearly indistinguishable facts."[27] Courts have grappled with analyzing the extent to which a defendant's Internet presence constitutes minimum contacts with a forum state.[28] Although case law involving Internet jurisdiction is still sparse, "it is clear that the federal circuits are employing different standards to determine personal jurisdiction issues derived from Internet contacts."[29]

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22. *World-Wide Volkswagen*, 444 U.S. at 288–91.

23. ERICHSON, *supra* note 6, at 41.

24. *Id.*

25. *Id.*

26. *See generally* INTERNET CRIME COMPLAINT CTR., FED. BUREAU OF INVESTIGATION, 2014 INTERNET CRIME REPORT 4–48 (2014). According to the Federal Bureau of Investigation's Internet Crime Complaint Center, there were 269,422 complaints of Internet crime in the United States filed in 2014—a 2.5% increase in cybercrime from 2013. *See id.* at 4. As of May 10, 2014, the Internet Crime Complaint Center received its three millionth complaint since its inception in 2000. *Id.* The complaints range from a wide variety of crimes affecting victims of all nationalities, ages, backgrounds, educational levels and socio-economic levels. *Id.* at 5. These statistics further illustrate the glaring prevalence of cybercrime in the United States, and the desperate need for a single test for how examine cases in controversy that arise in cyberspace.

27. Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565, 565 (1999).

28. STEMPEL, *supra* note 9, at 117.

29. Richard P. Rollo, *The Morass of Internet Personal Jurisdiction: It is Time for a Paradigm Shift*, 51 FLA. L. REV. 667, 668 (1999).

While various courts and numerous legal professionals have addressed the issue of inconsistent application of personal jurisdiction in cyberspace cases, the Supreme Court has yet to discuss the impact that technology might have on the analysis of personal jurisdiction; thus, many details remain unresolved.[30] This Note examines the varying jurisdictional splits between the lower district courts, the courts of appeals, and the federal circuit court of appeals in determining the proper approach to take when dealing with Internet jurisdiction. After an examination of several key cases, this Note will explain why the Supreme Court, or the Legislature, should adopt an expanded version of the Ninth Circuit's test in *Cybersell, Inc. v. Cybersell, Inc.*,[31] but with one categorical limitation, in order to standardize the test for a state's exercise of personal jurisdiction over nonresident Internet sites. This solution merges two lines of thought and amounts to the creation of a single standardized and clear objective rule that requires "something more"—interactivity and commercialization—for non-tortious cases and the inclusion of an additional limiting factor for tortious cases in controversy. This solution fully comprehends the needs of the injured party to be made whole and couples it with the need for "something more" in order to satisfy a finding of proper personal jurisdiction over a nonresident defendant in cyberspace.

Part I of this Note summarizes the traditional notions of general and specific personal jurisdiction and their applications to the physical and tangible. Part II discusses case law from several different United States district and appellate courts, analyzing the key facts on which each holding turns regarding the application of traditional jurisdiction. Part III examines the Ninth Circuit's attempt to further clarify proper cyberspace jurisdiction in *Cybersell, Inc. v. Cybersell, Inc*. Part IV describes a representative sample of the different approaches and solutions legal scholars have posited to potentially solve the issue of how to properly determine cyberspace jurisdiction. Part V sets forth a workable, useful solution. Finally, the conclusion projects how the new approach will effectively adapt to future advances in technology and the positive,

30. Jay C. Carle & Henry H. Perritt, Jr., *Civil Liberty on the Internet*, AM. B. ASS'N (Jan. 2006), http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/civilliability.html [https://perma.cc/Z3DK-4WF2] (noting that the "harm caused by Internet-related frauds, defective software, and the failure to adequately secure online data is increasing commensurate with our dependence on computers and the Internet" and that the "common law must expand to perform its traditional function of allocating the burdens associated with risks of harm so as to maximize social welfare, which includes both technological innovation and consumer peace of mind").

31. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416 (9th Cir. 1997).

consistent, and stable effects a single, clear test would have on cyberspace and the Internet.

I. TERRITORIAL PERSONAL JURISDICTION: FROM GENERAL TO SPECIFIC

The U.S. judiciary does not have the power to adjudicate cases over every person in the entire world.[32] A court's authority to rule over a particular party—in other words, the territorial reach of a court's power over a particular party—is referred to as "personal jurisdiction."[33] The law of personal jurisdiction, as it exists today, makes sense only if it is viewed as a progression, with *Pennoyer v. Neff* as the starting point.[34] As described above, *Pennoyer* focused on territorial boundaries.[35] After the turn of the century and the mobilization of the nation in the 1890s, the Court again addressed personal jurisdiction, redefining the conventional test from an examination of a defendant's physical presence in a state to an evaluation of whether the defendant had the "minimum contacts" with the state for jurisdiction to be fair and reasonable.[36] In *International Shoe*, the Court set forth its new interpretation 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.'"[37] This standard may be sufficiently met "by such 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 that particular suit which is brought there,"[38] which includes "an 'estimate of the inconveniences' the defendant would face in litigating away from home."[39]

The Court determined that a state's exercise of jurisdiction could be proper over a defendant in two ways: general and specific.[40] General jurisdiction exists when a defendant's contacts with a forum are so strong that a state's courts could properly exercise authority over that defendant for any and all claims, without regard for where the claims arose.[41] For

32. STEMPEL, *supra* note 9.
33. ERICHSON, *supra* note 6, at 31.
34. *Id.* at 32.
35. *See* Pennoyer v. Neff, 95 U.S. 714, 725 (1877).
36. *See* ERICHSON, *supra* note 6, at 36.
37. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
38. ERICHSON, *supra* note 6, at 36.
39. *Id.*
40. *Id.* at 37–39.
41. *Id.* at 37.

an individual defendant, general personal jurisdiction is based on his or her domicile.[42] If the defendant is a corporation, general personal jurisdiction is based on some similar, strong presence within the forum.[43] This standard ensures that every defendant is subject to the general jurisdiction of a court in at least one forum.[44]

Regardless of whether or not a court can properly exercise general personal jurisdiction over a defendant for all purposes, a court may be able to properly exercise specific personal jurisdiction for a discrete matter. Specific jurisdiction is proper for a particular lawsuit if the suit's claim arises out of the defendant's contact with the forum state; this is known as the minimum contacts test.[45] Long-arm statutes—specific state laws—are one such tool used to "empower courts to assert personal jurisdiction over out-of-state defendants," allowing each court to extend its reach beyond state lines.[46] Long-arm statutes can be narrow, enumerating the specific instances in which a state court can extend its jurisdictional powers, or they can be broad, allowing the proper exercise of jurisdiction by a state's courts over a nonresident, so long as the exercise does not offend the Due Process Clause of the Fourteenth Amendment.[47]

In determining whether it can establish personal jurisdiction over a nonresident defendant under a long-arm statute, a court generally employs the minimum contacts test, which may be applied using several methods: purposeful availment, the effects test, business relationships, stream of commerce, and reasonableness.[48] The Supreme Court held in *Hanson v. Denckla* that personal jurisdiction requires "some act by which the defendant purposefully avails itself to the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[49] Sometimes, however, the court determines whether jurisdiction is proper by examining whether or not the defendant's out-of-state conduct causes effects in the forum state.[50] *Calder v. Jones* reinforced the notion that a court has proper personal jurisdiction over a nonresident so long as there are sufficient minimum contacts.[51]

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42. *Id.* at 38.
43. *Id.*
44. ERICHSON, *supra* note 6, at 39.
45. *Id.*
46. *Id.* at 40.
47. *Id.*
48. *Id.* at 39–45.
49. Hanson v. Denckla, 357 U.S. 235, 253 (1958).
50. ERICHSON, *supra* note 6, at 42.
51. *See generally* Calder v. Jones, 465 U.S. 783 (1984).

Other times, a court looks to the business relationships between the parties to determine if jurisdiction is proper. In *Burger King Corp. v. Rudzewicz,* the Supreme Court noted that, even without any physical presence in the forum state, there can still be grounds for a proper exercise of jurisdiction if there are sufficient business relations between the parties in the forum state.[52] In that case, the defendant was headquartered in the forum and the parties contracted for the laws of the forum to govern their contract.[53]

If the defendant is a manufacturer that never made contact with the forum, the court can look to see whether or not the defendant placed products into the stream of commerce—which may ultimately have affected the interests of the forum state—to determine jurisdiction. *Asahi Metal Industry Company v. Superior Court of California* is the Supreme Court's leading stream of commerce case, which, without a majority, articulated three different standards for establishing the minimum contacts requirement within the stream of commerce.[54] Garnering four votes, Justice O'Connor's plurality concluded that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."[55] Her opinion recognized the need for "[a]dditional conduct of the defendant," such as advertising or marketing directed toward the forum, before a finding of proper jurisdiction could be made.[56]

Also winning four votes, however, Justice Brennan's plurality articulated that placement of a product into the stream of commerce by the defendant *with the mere awareness of the product's distribution into the forum state* would be enough to satisfy the minimum contacts requirement and allow the forum jurisdiction.[57] Justice Stevens, writing separately and joining neither plurality, suggested that "a regular course of dealing [by a nonresident defendant] that results in deliveries . . . annually over a period of several years" is conduct that should rise to a level sufficient enough to meet the purposeful availment, and thus the minimum contacts, requirement.[58] Although only a plurality, Justice O'Connor's views of the stream of commerce have "prevailed for jurisdictional disputes on the electronic stream of commerce."[59]

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52. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472–77 (1985).
53. *Id.* at 462.
54. *See generally* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102 (1987).
55. *Id.* at 112.
56. *Id.*
57. *Id.* at 117 (Brennan, J., concurring).
58. *Id.* at 122 (Stevens, J., concurring).
59. Stravitz, *supra* note 13, at 932.

The final portion of the traditional constitutional examination of whether a forum's exercise over a nonresident defendant is proper is an inquiry into whether that jurisdiction is reasonable. The reasonableness inquiry requires the court ask several questions: (1) how burdensome would it be on the defendant to litigate the dispute in the forum; (2) how strong is the forum's interest in hearing the case (for example, if the forum is the plaintiff's home state); and (3) how strong is the plaintiff's interest in litigating in the forum (which may be persuasive if the dispute arises there and implicates forum laws and policies).[60] Notably, while the reasonableness inquiry may be instructive, it is not always dispositive. In *Asahi*, the Court determined it would be unreasonable to make the nonresident defendant cross international waters to litigate the case—the "reasonableness" standard was determinative.[61] In contrast, the Court determined in *Burger King* that while there existed a significant burden for the defendant to litigate in Florida, the forum state and the plaintiff had a stronger interest that outweighed the defendant's burden.[62]

Although the Court has a long history of grappling with personal jurisdiction as it applied to a modernizing society and what minimum contacts were sufficient, "[w]ith the explosion of computers in the 80's, the question soon became what Internet contacts are sufficient to support personal jurisdiction."[63]

II. JUDICIAL ATTEMPTS AT APPLYING TRADITIONAL PERSONAL JURISDICTION TO CYBERSPACE

Although the Internet is no longer a new phenomenon, and the concept of claims arising out of conduct performed in cyberspace is no longer novel, there remains no consistent standard for how to apply traditional notions of personal jurisdiction to cyberspace cases.[64] While the United States Supreme Court has not discussed the impact that technology may have on the application of jurisdiction to matters arising from cyberspace, lower courts have explored this issue.[65] Even so, the cases[66] that have been decided are all but consistent and showcase the "courts' struggle to conceptualize the nature of Internet contacts."[67]

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60. ERICHSON, *supra* note 6, at 47.

61. *Asahi Metal Indus. Corp.*, 480 U.S. at 114.

62. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

63. Rollo, s*upra* note 29, at 678.

64. *Id.*

65. Betsy Rosenblatt, *Principles of Jurisdiction*, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y HARV. U., http://cyber.law.harvard.edu/property99/domain/Betsy.html [https://perma.cc/F7ZA-C8EA].

66. *See generally* ERIC GOLDMAN, INTERNET LAW: CASES & MATERIALS 39, 39–52 (2014). Professor Eric Goldman is a Professor of Law and Co-Director of the High Tech Law Institute at

In translating the basic concepts of personal jurisdiction to the Internet, courts have split on whether merely putting something on the Internet—like launching a passive website or using a trademark on a website—is enough to establish jurisdiction wherever the website is received and consumed or whether "something more" is necessary. The cases that seem to be most in line with traditional notions of "minimum contacts" are those that rely on "something more" than merely the reach of a passive website into a particular jurisdiction.

In *CompuServe v. Patterson*, the "something more" was that the defendant knowingly entered into a contract with CompuServe (knowing that CompuServe was an Ohio corporation) and knowingly used CompuServe to fill software orders from its servers in Ohio.[68]

The Sixth Circuit reasoned that Patterson "knowingly made an effort—and, in fact, purposefully contracted—to market a product in other states, with Ohio-based CompuServe operating, in effect, as his distribution center. Thus, it is reasonable to subject Patterson to suit in Ohio, the state which is home to the computer network he chose to employ."[69] The court applied the traditional notion of the state long-arm statute to examine if the Ohio court had proper personal jurisdiction, and its holding turned on the fact that Patterson had entered into a contract with, and continually sent his shareware software to, an Ohio company.[70] Further, Patterson also repeatedly advertised to Ohio citizens through CompuServe's network.[71] The Sixth Circuit articulated that contracting with, repeated distribution of products to, and targeted advertisement of a Company and a people of a foreign state are sufficient contacts to allow that state to exercise proper personal jurisdiction over a nonresident.[72]

In *Zippo Manufacturing v. Zippo Dot Com, Inc.*, the "something more" was that the defendant's website required participants to submit personal address information in order to receive a data service and,

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Santa Clara University School of Law. His research and teaching focuses on Internet law, intellectual property, and marketing law. He blogs on Internet matters at the Technology & Marketing Blog, as well as the Tertium Quid Blog at Forbes. Professor Goldman has also taught on topics related to Internet law at Marquette School of Law, University of California, Berkeley School of Law, and the University of San Francisco School of Law. In the jurisdiction chapter of his book, Professor Goldman examines several other unsuccessful attempts by the court to apply traditional personal jurisdiction to cyberspace.

67. Rollo, *supra* note 29, at 679.

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

69. *Id.*

70. *Id.* at 1265.

71. *Id.* at 1264.

72. *See generally id.*

thereby, the website operators targeted and knowingly transacted business with residents of each participant's state.[73]

Similar to the *CompuServe* court, the *Zippo* court adopted the traditional application of a long-arm statute to claims arising through cyberspace to determine if exercise of personal jurisdiction was proper.[74] The district court had to determine (1) whether or not Zippo Dot Com had sufficient "minimum contacts" to the forum; (2) if the claim asserted against the defendant arose from those contacts; and (3) whether or not exercise of jurisdiction would be reasonable.[75] It noted that its threshold for determining minimum contacts was whether or not the defendant purposefully availed itself of the forum; in other words, whether the defendant purposefully established contacts with the forum.[76]

In determining whether or not Zippo Dot Com met the threshold for each of the three prongs, the court reasoned that Zippo Dot Com had: (1) not just posted information on a Website that is accessible to Pennsylvania residents who are connected to the Internet; (2) done more than create an interactive website through which it exchanges information with Pennsylvania residents in hopes of using that information for commercial gain later; (3) contracted with approximately 3,000 individuals and seven Internet access providers in Pennsylvania; and (4) consciously chose to conduct business in Pennsylvania, pursuing profits from the actions that are now in question.[77]

In *Panavision International, L.P. v. Toeppen*, the "something more" was that the defendant intentionally targeted the plaintiff as part of a "scam" to make the plaintiff purchase a domain name from him; thereby, directing its actions toward the plaintiff's home state.[78] The district court found that "under the 'effects doctrine,' Toeppen was subject to personal jurisdiction in California."[79] On appeal, Toeppen argued that the "district court erred in exercising personal jurisdiction over him because any contact he had with California was insignificant, emanating solely from his registration of domain names on the internet, which he did in Illinois."[80]

Due to the lack of guidance in both federal and common law, the Ninth Circuit Court of Appeals decided to examine this question by

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73. *See generally* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D. Pa. 1997).
74. *Id.* at 1122.
75. *Id.* at 1122–23.
76. *Id.* at 1123.
77. *Id.* at 1125–27.
78. *See* Panavision Int'l v. Toeppen, 141 F.3d 1316, 1320–22 (9th Cir. 1998).
79. *Id.* at 1318.
80. *Id.*

applying California's long-arm statue.[81] The Ninth Circuit noted that the defendant had to be domiciled in the forum state or the defendant's activities in the forum state had to be substantial or continuous and systematic to find personal jurisdiction proper.[82] Although the court did not have general personal jurisdiction over Toeppen, as Toeppen was neither domiciled in California nor were his activities in California substantial or continuous and systematic, the Ninth Circuit affirmed the district court's holding that it had specific personal jurisdiction.[83]

In determining whether the specific personal jurisdiction was proper, the court applied a three-part test. First, the court asked whether the nonresident defendant acted or consummated some transaction with the forum state or performed some action by which the defendant purposefully availed himself of the privilege of conducting activities in the forum, thereby invoking the protections and benefits of the forum's laws.[84] Second, the court examined whether the claim was one that arose out of or resulted from the defendant's activities as they relate to the forum state.[85] Third, the court examined whether the exercise of specific personal jurisdiction would be reasonable.[86]

The court found that (1) the purposeful availment prong was satisfied by "the effects felt in California, the home state of Panavision, from Toeppen's alleged out-of-state scheme to register domain names using the trademarks of California companies . . . for the purpose of extorting fees from them";[87] (2) the claims asserted by Panavision arose out of the defendant's forum-related activities, namely that Panavision would not have been injured and the suit not brought "but for" the defendant's conduct directed toward Panavision in California;[88] and (3) Toeppen failed to present a compelling case that the district court's exercise of personal jurisdiction over him in California would be unreasonable.[89]

Similar to *Zippo*, in *Maritz, Inc. v. Cybergold*, the "something more" was that the defendant's site invited users to send and receive information about services it offered, and the defendant company had sent information to more than 100 users in the forum state.[90] In its

81. *Id.* at 1320.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 1321.
88. *Id.* at 1322.
89. *Id.* at 1324.
90. *See* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp 1328, 1334–36 (E.D. Mo. 1996).

affirmation, the court noted that (1) CyberGold's website was operational; (2) the website provided information about CyberGold's new upcoming service; (3) the website explained that the forthcoming service will maintain a mailing list of Internet users, presumably including many residents of Missouri; and (4) CyberGold will provide each user with a personal electronic mailbox and will forward to the user advertisements that match the users selected interests.[91] Put another way, jurisdiction was properly exercised because CyberGold's website "invite[d] Missourians to put their names on CyberGold's mailing list and get up-to-date information about the company and its forthcoming internet service," and that through the website, CyberGold actively solicited customers from Missouri for advertising.[92]

Viewing these cases together, it seems clear that "something more," although different in each case, constitutes some form of knowing or purposeful exchange of data between defendant and plaintiff in the forum state, rather than merely a one-way passive delivery of a website. While these cases, taken in totality, provide some clarity as to what the "something more" ought to be in cyberspace cases, courts remain fractured on how to apply traditional personal jurisdiction to the Internet; there is no single, useful test to guide the court on this issue.

III. A STEP IN THE RIGHT DIRECTION: *CYBERSELL, INC. V. CYBERSELL, INC.*

The disagreements and inconsistencies in the above cases illustrate some of the variations among courts as to what constitutes sufficient minimum contacts and what is the correct approach when dealing with Internet jurisdiction. The Ninth Circuit attempted to remedy this inconsistency by articulating a clearer vision of what "something more" really meant—commercialization and interactivity—with its 1997 ruling in *Cybersell, Inc. v. Cybersell, Inc*.[93] In *Cybersell*, the plaintiff was an Arizona corporation ("Cybersell AZ") that advertised commercial services over the Internet under the service mark "Cybersell."[94] Cybersell AZ brought a trademark infringement suit against an identically-named Florida corporation ("Cybersell FL") in the United States District Court for the District of Arizona.[95] The district court dismissed the case for lack of personal jurisdiction, and Cybersell AZ appealed.[96]

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91. *Id.* at 1330.
92. *Id.*
93. *See generally* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997).
94. *Id.* at 415–16.
95. *Id.*
96. *Id.* at 415.

The Ninth Circuit noted that to exercise specific jurisdiction over a nonresident defendant in a manner consistent with due process, the defendant must do "some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking benefits and protections."[97] The court further noted that the "claim must be one which arises out of or results from defendant's forum-related activities, and exercise of jurisdiction must be reasonable."[98]

The key facts examined by the appellate court included the following: (1) Cybersell FL did nothing to encourage people in Arizona to access its site; (2) no Arizonan except for Cybersell AZ "hit" Cybersell FL's website; (3) there was no evidence that any Arizona resident signed up for Cybersell FL's web construction services; (4) Cybersell FL entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona; (5) the interactivity of Cybersell FL's web page is limited to receiving the browser's name and address and an indication of interest; (6) signing up for the service in Arizona is not an option, nor did anyone from Arizona do so; and (7) no money changed hands on the Internet from (or through) Arizona.[99] The court summarized that, in short, Cybersell FL had consummated no transaction, nor had it performed any act by which it purposefully availed itself of any privilege of conducting activities in Arizona.[100] Since it did not invoke the benefits and protections of Arizona law, jurisdiction in Arizona was not proper.[101]

The court held that, "Cybersell FL's contacts are insufficient to establish 'purposeful availment.' Cybersell AZ has thus failed to satisfy the first prong of our three-part test for specific jurisdiction."[102] The *Cybersell* opinion articulates a noticeably clearer vision of what "something more" really means: interactivity and commercialization. One commentator has suggested:

> Under the rule set forth in Cybersell [sic], a court would decide whether a website creates minimum contacts by examining the degree to which the site is commercial and interactive, and the degree to which the site is directed at citizens of the forum state. The more interactive a site is (i.e. the more exchange of

97. *Id.* at 416.
98. *Id.*
99. *Id.* at 419.
100. *Id.*
101. *Id.*
102. *Id.* at 419–20.

> information is possible between the site and the user), and the more commercial the site's nature, the more likely a court is to find that contact exists between the site owner and the distant user. Similarly, the more the site is directed at an audience in the forum [state] or designed to harm citizens of the forum state, the more likely a court will be to find that purposeful availment has occurred.[103]

While a court should always take into account the degree of interactivity—that is, the information exchanged—between the website and its users in determining whether jurisdiction is proper, when the website is engaging in commerce, the court should focus more on where the goods or services are to be delivered. Although the Ninth Circuit's attempt at clarification is admirable, it is underinclusive in that it fails to consider other claims of actions, such as tortious claims.

IV. PREVIOUSLY SUGGESTED SOLUTIONS TO THE PROBLEM OF CYBERSPACE JURISDICTION

Over the past decade commentators have suggested solutions to the question of how to properly examine and apply the traditional notions of personal jurisdiction to cyberspace. While the solutions are too numerous to examine individually, the following is an examination of a representative sample of the various posited solutions offered to solve this very real problem.

In *Jurisdiction in Cyberspace: A Theory of International Spaces*, author Darrel C. Menthe suggests the application of the theory of international spaces: adding cyberspace to the list of "others" that currently includes Antarctica, the high seas, and outer space.[104] According to Menthe, the solution to the cyberspace jurisdiction problem can be solved by recognizing cyberspace as an international space and mandating that the nationality of the person uploading information or data be the primary determining factor for the exercise of jurisdiction.[105] Menthe postulates that because Antarctica, the high seas, outer space, and cyberspace are all characterized by their lack of territorial borders, the nationality of an explorer therein should be the primary principle in establishing where personal jurisdiction is proper.[106] Menthe concludes that such a standard rule would "provide predictability and international

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103. Rosenblatt, *supra* note 65.

104. Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. & TECH. L. REV. 69, 70 (1997).

105. *Id.* at 101–02.

106. *Id.*

uniformity. It strikes a balance between anarchy and universal liability, and it works."[107]

Additionally, Richard P. Rollo proposes a federally regulated approach to cyberspace jurisdiction and suggests the federal regulation should be an adoption of the "cyberspace model."[108] Rollo's cyberspace model approach suggests that because there is no physical presence associated with Internet contacts, all contacts must then exist in cyberspace, and, as such, to assign a physical location to a web page, website, or Internet interaction would be to engage in an arbitrary fiction, which would lead to every state having jurisdiction over every individual who used the Internet.[109] For example, under Rollo's interpretation, if an individual in California contacts a website posted and maintained in New York, contact occurred in neither California nor New York because all contacts arising from cyberspace happen in cyberspace.[110] Although Rollo notes his solution would wreak havoc on the traditional model of jurisdiction[111] because it would deprive all courts of jurisdiction from the Internet[112] and claims arising therefrom, he posits that his solution of federal regulation is "the simplest and most complete solution"[113] to the problem of cyberspace jurisdiction.

Yet, other commentators, such as Professor Julia A. Gladstone, suggest that the proper solution to cyberspace jurisdiction is to use a combination of the *Calder* "effects test" and the *Zippo* "sliding scale test."[114] Professor Gladstone also suggests that there should be a showing of specific intent to inflict damage to the plaintiff in the forum state, or that contact to the forum state in question impacted at least a critical mass of actual Internet viewers in the forum jurisdiction.[115] In reaching her solution, Professor Gladstone asserts that her combination of tests would allow courts to shift away from territorial physical jurisdiction to a modern, standardized rule based on the subject matter and the cause of action for which the case arises.[116] Professor Gladstone suggests the court rely on two factors to indicate if a directed cause of action or a case in controversy is directed to the forum state. These two factors are the

107. *Id.* at 102.

108. Rollo, s*upra* note 29, at 693.

109. *Id.* at 693–94.

110. *Id.* at 693.

111. *Id.* at 694.

112. *Id.* at 693.

113. *Id.* at 694.

114. *See generally* Julia Alpert Gladstone, *Determining Jurisdiction in Cyberspace: The "Zippo" Test or the "Effects" Test?*, INFORMING SCI., 143 (June 2003).

115. *Id.* at 155.

116. *Id.*

"selection of language" by which information between two parties is communicated and the chosen choice of currency.[117]

While this representative sampling of posited solutions has its strengths, the weaknesses far outweigh the strengths. Some of the solutions are overinclusive, others are underinclusive, while still others completely shift away from the notions and policies behind traditional personal jurisdiction. Menthe's suggestion to add cyberspace into the international theory of spaces only works for international cyberspace controversies; the problem of how to address cyberspace jurisdiction within the United States still remains.[118] Rollo's position of adopting the cyberspace model is unworkable in that it is not a solution at all. This position deprives all courts the authority to adjudicate cases and controversies arising from cyberspace activity,[119] which leaves an even bigger question for how to deal with cybercrimes,[120] cyberterrorism,[121] and cybertorts.[122] This solution is further unworkable when its creator unequivocally notes that its impact would wreak havoc on the questions of cyberspace jurisdiction.[123]

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117. *Id.* at 156.

118. *See* Menthe, *supra* note 104, at 101–02 ("*[N]ationality* is, and should be, the primary principle for the establishment of jurisdiction [in cyberspace]. Such a rule [would] provide predictability and *international* uniformity.") (emphasis added).

119. *See generally* Jennifer Warnick, *Digital Detectives: Inside Microsoft's New Headquarters for the Fight Against Cybercrime*, MICROSOFT NEWS CTR., http://news.microsoft.com/stories/cybercrime/ [https://perma.cc/RBS4-S42X] (noting about half of online adults were cybercrime victims in 2012, cybercrime costs the global economy up to $500 billion annually, and one in five small to medium sized businesses are targets of cybercrime). *See also* Microsoft, *Cybercrime by the Numbers*, YOUTUBE (Nov. 14, 2013), https://www.youtube.com/watch?v=OZigCFaxbyc [https://perma.cc/G9JA-T6Y4].

120. *See generally* Norton, *What Is Cybercrime?*, NORTON BY SYMANTEC, http://us.norton.com/cybercrime-definition [https://perma.cc/XD8E-LACY]. While cybercrime covers a wide range of different attacks, all deserve their own unique approach when it comes to improving our computer's safety and protecting ourselves, and cybercrime can be concisely defined as "any crime that is committed using a computer network or hardware device." *Id.* Cybercrimes include Trojan horse viruses, phishing scams, bank and e-commerce fraud, cyberstalking, harassment, extortion, blackmail, stock market manipulation, and complex corporate espionage. *Id.* Further, cybercrime has now surpassed illegal drug trafficking as a criminal moneymaker, an individual's identity is stolen every three seconds as a result of cybercrime, and it only takes four seconds for an individual's computer to become infected once connected to the Internet. *Id.*

121. *See generally* Serge Krasavin, *What is Cyber-Terrorism*, COMPUTER CRIME RES. CTR., http://www.crime-research.org/library/Cyber-terrorism.htm [https://perma.cc/THX9-UBND]. Cyberterrorism is the use of information technology and means by terrorist groups and agents. *Id.* In defining the cyber terrorist activity it is necessary to segment action and motivation. *Id.* There is no doubt that acts of hacking can have the same consequences as acts of terrorism, but in the legal sense the intentional abuse of the information cyberspace must be a part of the terrorist campaign or an action. *Id.* Other activities, so richly glamorized by the media, should be defined as cybercrime. *Id.*

122. Carle, *supra* note 30 (noting that cybertorts are harms that include financial injuries, reputational damage, theft of trade secrets, and invasions of privacy).

123. Rollo, s*upra* note 29, at 694.

The most convincing solution is Professor Gladstone's, which would create a categorical system based on subject matter of the action with specific guidance on how to determine proper personal jurisdiction in cyberspace for each group-cause of action.[124] The weakness of this solution is in its practical application. The defining characteristic of jurisdiction is the age-old notion of how to bring a lawsuit into a specific court, whether it be federal or state, municipal or family, or bankruptcy or drug court.

While there are certain areas of the law that are solely litigated in a specific court, such as intellectual property claims and international law claims, these are exceptions to the general rule. Usually, jurisdiction is primarily viewed as an obstacle for plaintiffs in properly bringing a case in a court with appropriate adjudicative authority over the defendant. Therefore, the categorical nature of Professor Gladstone's solution, while potentially convincing, is not, on its own, a practical, feasible alternative to the current personal jurisdiction regime.

V. A WORKABLE SOLUTION: WHY THE NINTH CIRCUIT GOT IT RIGHT (AND WRONG)

While the *Cybersell* opinion articulates a clearer vision of what "something more" really means—interactivity and commercialization—it leaves more to be desired. The court in *Cybersell* implicitly applied the O'Connor plurality test from *Asahi Metal* by subtly analogizing the maintenance of a passive website with the placement of a material good by a manufacturer into the stream of commerce and then articulating the need for "something more" in order for the court of the forum state to properly exercise jurisdiction over a nonresident defendant.[125] Specifically, the court held that the mere presence of a passive website on the Internet does not constitute the minimum contacts needed to subject a nonresident to the jurisdiction of every court and that "something more," either interactivity or purposeful direction, is needed.[126] While this test preserves the constitutional standards of fair play and substantial justice, it is clear that the ruling as it stands remains unsatisfactory as courts have continued to struggle with what "something more" should be.[127]

Interactivity is easier to prove, such as in the case of online contract formation, where assent is reached by a user populating specific fields with their information and clicking an "I Accept" button. However, with

124. *See* Gladstone, s*upra* note 114.

125. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 417–19 (9th Cir. 1997).

126. *Id.*

127. *See* Rollo, *supra* note 29, at 679.

the advent of the Internet, confusion emanated from how to handle purposeful availment in cyberspace (i.e., interactive versus passive websites). It is necessary to define a contemporary set of actions that are sufficient to satisfy the "purposeful availment" prong of the minimum contacts requirement for personal jurisdiction.

While *Cybersell* brings us one step closer to a viable solution for determining when personal jurisdiction is proper for cases in controversy that arise in cyberspace—that is, examining interactivity and commercialization (the information exchange between the website and the user, as well as whether the website has engaged in commerce)—it fails to consider a gamut of other claims that could come before the court. Thus, the *Cybersell* court fails to posit a solution that is entirely useful.

One of the most significant categories of claims that the *Cybersell* ruling fails to address are claims that arise in tort. When a claim is tortious it is more reasonable for the court to focus on the plaintiff's domicile instead of examining fairness of a forum to the defendant. In other words, focusing on decreasing the burdens placed on the injured party particularly, if not specifically, when targeted by the intentionally or negligently harmful actions of the defendant. While this solution is similar to Professor Gladstone's approach, it is not a categorical approach to cyberspace jurisdiction either. Rather, it merely separates tortious claims and gives the court specific direction to focus primarily on the injured party rather than predominantly considering fairness to the defendant.

The solution, while not initially apparent, becomes clearer after a thorough examination and a piecing together of both previously posited solutions and past case law. The "something more" that district courts have been inconsistently struggling with for years is a melding of the *Cybersell* ruling for non-tortious cyberspace claims with a categorical approach for tortious cyberspace claims. This inclusive solution does not abandon traditional notions of personal jurisdiction or the restraint of hailing nonresidents into a foreign forum, but rather, it fully comprehends the need to treat some claims differently than others. When a website, or its owner, commits a tort against one of its users it does so either intentionally or negligently, and the court should look to make the injured party whole again. It should look to where that plaintiff is domiciled in determining which court has the proper authority to exercise jurisdiction over a tort-committing nonresident in cyberspace.

Either judicially or legislatively, the Court should adopt or Congress should enact a single, clear objective test that combines the *Cybersell* ruling of interactivity and commercialization for non-tortious

acts with a focus on the injured party's domicile for tortious cyberspace acts. Put differently, the proposed solution would combine the nexus between the exchange of information and commercial activity with a limiting, categorical factor for tortious actions.

In our current system, jurisdiction is viewed mainly from the side of the defendant.[128] Even if the plaintiff or the forum has a strong interest in litigating a case in a particular state—usually the plaintiff's home state—if a court finds that it would be too burdensome on the defendant to litigate in that state, the court will either dismiss the case for lack of personal jurisdiction without prejudice, or it may remove the case to another jurisdiction with proper authority to adjudicate.[129]

Because torts, whether negligent or intentional, arise from a wrongful act or an infringement of a right of the plaintiff by the defendant, in this and only this category, the interest of the plaintiff should be deemed more important than the burden on the defendant. In other words, the injured party's interest in obtaining effective and convenient relief should far outweigh the burden on the tortious defendant. In *Tamburo v. Dworkin*—an Internet tort case where the defendants used their email lists and websites to encourage potential customers to boycott the plaintiff's business and harass him in person[130]—the Seventh Circuit held that the Illinois long-arm statute conferred jurisdiction over the defendants because they had (1) intentionally directed their communications to Illinois and (2) indented harm to the plaintiff in Illinois.[131]

In *Rusinowski v. Village of Hillside*, the plaintiff brought a tort claim of intentional infliction of emotional distress against the defendant for using phone calls and Internet contact to direct third parties to commit other torts against the plaintiff.[132] Similar to the *Tamburo* court, the *Rusinowski* court held that maintaining jurisdiction over the nonresident defendant was proper because the defendant (1) waged a campaign of harassment against the plaintiff in Illinois and (2) repeatedly contacted local police and the plaintiff's school in order to upset him and potentially have him arrested or expelled.[133] In both cases, the court found that extending personal jurisdiction to a nonresident defendant, when the case in controversy arose out of *intentional* tortious conduct

128. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (emphasizing the importance of the Due Process Clause of the Fourteenth Amendment and that the maintenance of a suit must not offend the traditional notions of fair play and substantial justice).

129. *Id.*

130. Tamburo v. Dworkin, 601 F.3d 693, 700–01 (7th Cir. 2010).

131. *Id.* at 708–09.

132. Rusinowski v. Village of Hillside, 835 F. Supp. 2d 641, 654 (N.D. Ill. 2011).

133. *Id.* at 655.

over the Internet that was specifically targeted toward the plaintiff rather than commercialization or interactivity, was proper and did not offend the traditional notions of fair play and substantial justice articulated in *International Shoe*.[134] Although the court considered the fairness of the defendant as required by *International Shoe*, the court gave primary consideration to the injured party's domicile rather than to the convenience of the defendant to litigate in that particular domicile because the defendant specifically targeted and intentionally injured the plaintiff.

Certainly this categorical, plaintiff-focused, limiting addition to the exercise of personal jurisdiction is not without precedent and should be merged with the Ninth Circuit's *Cybersell, Inc.* holding to make a new, single, clear test for appropriate jurisdiction that is more applicable, more complete, more inclusive, and most significantly, more useful.

CONCLUSION

While industrialization and mobilization gave rise to the railroad, the automobile, the airplane, and the Internet, it also brought new challenges of how to apply existing law to a novel phenomenon.[135] Some commentators suggest the growth of cyberspace changes everything about sovereignty, the state, jurisdiction, and law, while other commentators suggest the opposite.[136] The adoption of the Ninth Circuit's test for jurisdiction set forth in the *Cybersell, Inc.* decision, combined with a single categorical limitation for tortious actions, best comports with the traditional notions set forth in *Pennoyer* and expanded upon by *International Shoe* and *World-Wide Volkswagen*.[137] The solution suggested in this Note is not so much a novel invention as it is a carving out where the single test is amongst a sea of inconsistency and unpredictability at common law. It is not defining new ground, but rather restating it and melding it into a test that is actually useful. The existing lore is needlessly scattered, but when viewed as a whole and retrospectively, each applies a similar standard. The solution posited herein is a clearly restated, useable articulation of the spirit and intent of that standard.

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134. *See generally* Tamburo, 601 F.3d 693 (7th Cir. 2010). *See also* Rusinowski, 835 F. Supp. 2d at 655.

135. *Internet Used by 3.2 Billion People*, *supra* note 11.

136. Joel P. Trachtman, *Cyberspace, Sovereignty, Jurisdiction, and Modernism*, 5 IND. J. GLOBAL LEGAL STUD. 561, 561–62 (1998).

137. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (narrowly holding that foreseeability alone is insufficient for a court's proper exercise of personal jurisdiction over a nonresident defendant who has no other ties, contacts, or relations with the forum state).