Squeezing Cyberspace into International Shoe: When Should Courts Exercise Personal Jurisdiction over Noncommercial Online Speech

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SQUEEZING CYBERSPACE INTO INTERNATIONAL SHOE: WHEN SHOULD COURTS EXERCISE PERSONAL JURISDICTION OVER NONCOMMERCIAL ONLINE SPEECH?

The advent, evolution and growth of the Internet is, I think, one of the most fascinating and unprecedented human achievements of the century. . . . It's really something new, it's a new kind of civilization. And of course the thing I love about it is that it's transnational, non-profit—it isn't owned by anyone—and its shape is completely user driven. What it is, is determined by the needs of millions and millions of users.\(^1\)

I. INTRODUCTION

As the century closes, we are entering a new digital age.\(^2\) Our lives are changing as more and more people go online.\(^3\) It is now possible to buy groceries, visit a doctor, date or place a bet on the Internet.\(^4\)


\(^2\) For a further discussion of developments on the Internet, see infra notes 3-8 and accompanying text.

\(^3\) See, e.g., The Dawn of E-Life, NEWSWEEK, Sept. 20, 1999, at 38-41 (discussing impact of Internet on our lives). According to this article, 196 million people will use the Internet in 1999 and more than 500 million people will use the Internet by 2003. See id. at 41 (projecting growth of Internet use).

\(^4\) See, e.g., Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 4 (D.D.C. 1996) (noting that Internet users may browse football scores, listen to music or look at law school classes). In online auctions, people can purchase anything from plane tickets to watches. See Robert D. Hof, Going, Going, Gone, Bus. Wk., Apr. 12, 1999, at 30 [hereinafter Hof, Going] (discussing growth in online auctions). Over three million people purchased something from online auctions in 1998 and this number is expected to grow to 14 million by 2003. See id. People are also using the Internet to manage their own investments through discount brokerages, buy groceries, Christmas shop and download IRS forms. See Robert D. Hof, The 'Click-Here' Economy, Bus. Wk., June 22, 1998, at 122 [hereinafter Hof, Click-Here] (examining various online commercial activities); Glenn Ruffenach, Jumping Online, WALL ST. J., Sept. 13, 1999, at 6 (describing range of services and activities that Internet offers).

Using the Internet to obtain healthcare information, fill prescriptions and consult with doctors has become increasingly popular. See Marilyn Chase, Calling on Doctors in Cyberspace (Bring Your Own Magazine), WALL ST. J., Aug. 23, 1999, at B6 (discussing online medical information options); Erika Check, Doctors Go Dot.Com, NEWSWEEK, Aug. 16, 1999, at 65 (stating that 25 million patients went online for medical information in 1998 and 33 million are expected to go online by end of 2000). But see Let the Surfer Beware, NEWSWEEK, Nov. 16, 1998, at 90 (warning that online healthcare information is "sketchy" at best).
Although most media attention centers on commercial online activity, the Internet is primarily a way for people to communicate about personal, rather than commercial, interests. People can find advice on raising their children or tracing their family trees online. The Internet provides a way for people with common interests to discuss almost anything from *Buffy the Vampire Slayer* to Marxism on listservs, Usenet discussion groups and chat rooms. The Internet has also encouraged political activism; Serbians have used email to draw attention to atrocities in Yugoslavia and Chinese dissidents have used the Internet to promote democracy.

Because the Internet has touched almost every aspect of our daily lives, it is not surprising that these changes have spread to the legal world. As online activity increases, so do Internet-based crimes such as fraud, hacking, pornography, trademark infringement and defamation. Due

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5. See, e.g., ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996) ("The Internet is not exclusively, or even primarily, a means of commercial communication."). aff'd, 521 U.S. 844 (1997). In *ACLU*, the court finally characterized the Internet as a "never-ending worldwide conversation." id. at 883. Other commentators have also remarked on how the Internet brings people together. See, e.g., Jill Smolowe, *Intimate Strangers*, Time, Spring 1995, at 20 (stating that "the vast majority of people who troll the Internet's byways are there in search of social interaction"). Through the Internet, people may form lifelong friendships or fall in love. See *id.*. The Internet also allows older people to stay connected. See Dale D. Bass, *Email: Restoring the Village*, Wall St. J., Sept. 13, 1999, at 7 (recognizing that Internet facilitates grandparents staying in touch with grandchildren and friends).


8. See Julian Dibbell, *Email from Belgrade*, Time, Mar./Apr. 1997, at 56 (examining how Serbians used Internet to protest against President Milosevic). Due to the decentralized nature of the Internet, it is difficult for governments to censor how their citizens use it. See *id.* (noting technological difficulties in government control of Internet); see also Jaime A. Florcruz, *Downloading Dissent*, Time, Nov. 9, 1998, at 25 (discussing Chinese dissidents’ use of Web sites and mailing lists to promote democracy).

9. For a discussion of how the Internet has affected people’s lives and the legal community, see *supra* notes 3-8, and *infra* notes 10-12 and accompanying text.

10. See Weber v. Jolly Hotels, 977 F. Supp. 327, 333 (D.N.J. 1997) ("Litigation involving the Internet has increased as the Internet has developed and expanded."); Blakey v. Continental Airlines, Inc., 750 A.2d 854, 863 (N.J. Super. Ct. App. Div. 1999) (noting "proliferation" in Internet cases since growth of Internet’s popularity); Steven Betensky, *Jurisdiction and the Internet*, 19 Pace L. Rev. 1, 2-5 (1998) (discussing large number of cases involving personal jurisdiction on Internet). Betensky speculates that there are several possible explanations for these cases. See *id.* at 2 (explaining increase in Internet personal jurisdiction cases). First, he suggests that the popularity of the Internet has offered plaintiffs a new way
to the rise in Internet-based cases, courts must apply traditional principles such as personal jurisdiction to the newest of technologies.\textsuperscript{11} It is unclear, however, whether personal jurisdiction principles derived from notions of state sovereignty and territorial limits can apply neatly to technology with no geographical boundaries or physical presence.\textsuperscript{12} The United States

11. See Edberg v. Neogen Corp., 17 F. Supp. 2d 104, 113 (D. Conn. 1998) ("As the Internet has experienced nearly exponential growth over the past few years, its impact on conventional notions of personal jurisdiction has been hotly debated in courts throughout the country and in countless law review articles and treatises."); Henry H. Perritt, Jr., Jurisdiction in Cyberspace, 41 VILL. L. REV. 1, 2-3 (1996) ("Conventional doctrines of jurisdiction to prescribe, to adjudicate and to enforce legal decisions must evolve to handle new disputes in cyberspace."); Christopher E. Friel, Comment, Downloading a Defendant: Is Categorizing Internet Contacts a Departure from the Minimum Contacts Test?, 4 ROGER WILLIAMS U. L. REV. 293, 303 (1998) (calling personal jurisdiction "most important procedural issue in regards to Internet cases"); John A. Lowther IV, Comment, Personal Jurisdiction and the Internet Quagmire: Amputating Judicially Created Long-Arms, 35 SAN DIEGO L. REV. 619, 653 (1998) ("Our ancient and outdated notions of geography, territory, and presence have finally met their match against an entity that has no geography, is not confined to any one territory, and gives everyone an instant presence everywhere."); Jason H. Eaton, Effect of Use, or Alleged Use, of Internet on Personal Jurisdiction in, or Venue of, Federal Court Case, 155 A.L.R. FED. 535, 535 (1999) ("The explosive rise of the Internet as a communications medium has had tremendous implications for courts faced with the application of personal jurisdiction doctrines.").

12. See, e.g., Blumenthal v. Drudge, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998) (stating "‘cyberspace’ is not ‘space’ at all. At least not in the way we understand space. It’s not located anywhere; it has no boundaries; you can’t ‘go’ there. At the bottom, the Internet is really more idea than entity."); Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456, 462 (D. Mass. 1997) ("To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps 'no there there,' the 'there' is everywhere where there is Internet access."); ACLU, 929 F. Supp. at 830 ("The Internet is not a physical or tangible entity."); Allan R. Stein, The Unexceptional Problem of Jurisdiction in Cyberspace, 32 INT’L LAW. 1167, 1173 (1998) ( remarking that "place in cyberspace has been reduced to a mere metaphor"). As one commentator described the Internet:

I . . . start thinking about this thing that buzzes around the entire world, through the phone lines, all day and all night long. It’s right under our noses, and it’s invisible. It’s like Narnia, or Magritte, or Star
District Court for the Eastern District of Pennsylvania recently confronted this issue in Barrett v. Catacombs Press. This Note discusses the process of applying traditional personal jurisdiction principles to the Internet. Part II summarizes the history of personal jurisdiction and how courts have applied these concepts to cases involving the Internet. Part III presents the facts of Barrett. Part IV analyzes and critiques the reasoning of the United States District Court for the Eastern District of Pennsylvania in Barrett. Finally, Part V examines Barrett's possible impact on noncommercial, Internet cases.

II. Background

A. State Long-Arm Statute Requirements

Federal courts rely on the Federal Rules of Civil Procedure to establish personal jurisdiction. First, a federal court must examine the long-arm statute of the state it sits in to decide if the exercise of personal jurisdiction would be proper. If a case does not meet the requirements of the state long-arm statute, then the court cannot exercise personal jurisdiction.

Trek, an entire goddamned world. Except it doesn’t physically exist. It’s just the collective consciousness of however many people are on it.

J.C. Herz, Surfing on The Internet 3 (1995).


14. For a discussion of the application of personal jurisdiction principles to the Internet, see supra notes 1-13, and infra notes 15-182 and accompanying text.

15. For a discussion of personal jurisdiction and the Internet, see infra notes 19-77 and accompanying text.

16. For a discussion of the facts of Barrett, see infra notes 78-90 and accompanying text.

17. For a discussion of the district court's analysis in Barrett, see infra notes 91-182 and accompanying text.

18. For a discussion of Barrett's possible impact on noncommercial Internet cases, see infra notes 183-93 and accompanying text.

19. See Fed. R. Civ. P. 4(e)(1) (authorizing service upon individual in any judicial district “pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State”). Service of summons will establish personal jurisdiction over the defendant “who would be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located . . . .” Fed. R. Civ. P. 4(k)(1)(A).

NOTE

diction.\textsuperscript{21} If the case does fall within the state long-arm statute, then the court must determine whether exercising personal jurisdiction is proper under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{22}

The Supreme Court of the United States has distinguished between general and specific personal jurisdiction.\textsuperscript{23} General jurisdiction occurs "when the cause of action does not arise out of or relate to the foreign [defendant's] activities in the forum."\textsuperscript{24} For a court to exercise general jurisdiction, the defendant must have had "continuous and systematic" contacts with the forum state.\textsuperscript{25} When the cause of action arises directly from or relates to the nonresident defendant's contacts with the forum, then specific jurisdiction is proper.\textsuperscript{26}

B. Due Process Limitations on Personal Jurisdiction

The Due Process Clause of the Fourteenth Amendment limits a state's power to exercise personal jurisdiction over a nonresident defendant.\textsuperscript{27} Based on the Due Process Clause, the Supreme Court has ruled that personal jurisdiction is proper if a defendant has "certain minimum contacts

\textsuperscript{21} See, e.g., \textit{FED. R. CIV. P. 4(e)(1)} (requiring courts to comply with applicable state long-arm statutes in order to exercise personal jurisdiction).

\textsuperscript{22} See, e.g., Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 723 (E.D. Pa. 1999) (describing two-step analysis that federal courts must engage in when deciding whether personal jurisdiction is proper); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (recognizing that even if personal jurisdiction was proper under New York Long-Arm statute it must also comply with due process), aff'd, 126 F.3d 25 (2d Cir. 1997).


\textsuperscript{24} \textit{Id.} at 414.

\textsuperscript{25} \textit{Id.} at 415-16. In \textit{Helicopteros}, the Court found that the defendant's contacts with Texas were not "continuous and systematic" enough to justify general jurisdiction. See \textit{id.} at 416. The defendant had sent its CEO to Texas for one negotiation session, accepted checks drawn on a Texas bank, bought equipment in and sent pilots to Texas for training. See \textit{id.} (describing defendant's contacts with Texas). Plaintiffs generally have had difficulty proving that defendants' forum contacts satisfied the systematic and continuous standard of general jurisdiction. See \textit{Surgical Laser Techs., Inc. v. C.R. Bard, Inc.}, 921 F. Supp. 281, 284 (E.D. Pa. 1996) (stating that \textit{Helicopteros} illustrates difficulty of satisfying continuous and systematic standard).


\textsuperscript{27} See \textit{Pennoyer v. Neff}, 95 U.S. 714, 722 (1877) (holding that states have sovereignty and exclusive jurisdiction over people within their territory but cannot exercise these powers over people outside their territory); \textit{see also Helicopteros}, 466 U.S. at 413-14 (noting purpose of Due Process Clause); \textit{Kulko v. Superior Court}, 496 U.S. 84, 91 (1978) ("The Due Process Clause . . . operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interest of nonresident defendants.").
with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" In deciding whether it can exercise personal jurisdiction over a nonresident defendant, a court must analyze: (1) whether the defendant has sufficient minimum contacts with the forum; (2) and if there are sufficient minimum contacts, whether the exercise of personal jurisdiction comports with "fair play and substantial justice."

1. **Minimum Contacts**

   To conclude that a defendant has sufficient minimum contacts with the forum, a court must find that the defendant could "reasonably anticipate being haled into court there." A defendant can anticipate being

28. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In *International Shoe*, the Supreme Court affirmed the Supreme Court of Washington’s ruling that personal jurisdiction was proper. *See id.* at 320-22. The defendant had employed 11 to 13 salespeople to sell shoes in Washington. *See id.* at 313-14. The salespeople showed samples, took orders and transmitted these orders to the defendant’s headquarters in Missouri. *See id.* (detailing job duties of salespeople). The shoes were then shipped into Washington from Missouri. *See id.* at 314. The state of Washington sued the defendant to collect overdue contributions to a state unemployment fund. *See id.* at 311-12. The Supreme Court found that the defendant had "systematic and continuous" contacts with Washington. *See id.* at 320 (finding defendant’s contacts "were neither irregular nor casual"). Because the defendant had exercised the privilege of conducting business within Washington, it was also bound by the obligations of acting in that state (namely making payments to unemployment fund). *See id.* at 319-20. Therefore, the exercise of personal jurisdiction over the defendant was proper. *See id.* at 321.

29. *Id.* at 320.

30. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see* *Calder v. Jones*, 465 U.S. 783, 789-90 (1984) (holding that California could exercise personal jurisdiction over *National Inquirer* editor and writer because defendants could have anticipated being haled into court in California, defendants wrote article causing harm in forum and newspaper had largest circulation there); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (deciding personal jurisdiction in New Hampshire was proper because defendant had "continuously and deliberately exploited" forum market and could have reasonably anticipated being haled into forum court for libel). *But see Kulko*, 436 U.S. at 97-98 (refusing to allow California personal jurisdiction over nonresident father who had allowed his children to move to California because father could not have anticipated being haled into California court); *Shaffer*, 433 U.S. at 216 (finding personal jurisdiction in Delaware was improper because defendants could not have reasonably expected to be haled into Delaware court system).

The "reasonably anticipate being haled into court" standard is stronger than mere foreseeability of injury. *See Burger King*, 471 U.S. at 474. *World-Wide Volkswagen* established that foreseeability alone is not enough for jurisdiction. *See World-Wide Volkswagen*, 444 U.S. at 295-99 (rejecting plaintiff’s argument that personal jurisdiction was proper in Oklahoma just because it was foreseeable that car could cause injury there). In that case, it was foreseeable that the defendants’ car could end up in a car accident in Oklahoma. *See id.* at 295. It was also foreseeable that a divorced wife would live in California and that her daughter would move there to be with her, but the Supreme Court refused to find California had personal jurisdiction over the ex-husband who lived in New York. *See id.* at 296.
haled into a forum state’s court if it has "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." The Supreme Court has found purposeful availment when a defendant entered into a contract and negotiations in the forum state, sold magazines across the nation including the forum state and maintained a sales force in the forum state. It is unclear whether entering a product into the stream of commerce subjects a defendant to personal jurisdiction.

In cases involving tortious conduct, the Supreme Court has formulated an "effects test" to determine whether the forum state can exercise personal jurisdiction.

World-Wide Volkswagen, the Court refused to exercise personal jurisdiction over the retailer and wholesaler because they had not purposefully availed themselves of conducting business in Oklahoma; it was a "fortuitous circumstance" that the car was involved in an accident in Oklahoma. Id. at 295.

31. Hanson v. Denckla, 357 U.S. 235, 253 (1958). As the Court pointed out in Burger King, requiring purposeful availment "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated,' contacts." Burger King, 471 U.S. at 475 (quoting Keeton, 465 U.S. at 774).

32. See Burger King, 471 U.S. at 478-82 (holding defendant was subject to personal jurisdiction in Florida because he had negotiated and entered into contract containing Florida choice-of-law provision).

33. See Keeton, 465 U.S. at 73-74 (holding defendant's "regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine").

34. See International Shoe, 326 U.S. at 320-22 (concluding defendant's business activities in Washington were sufficient for personal jurisdiction). For a further discussion of International Shoe, see supra notes 28-29 and accompanying text.

35. See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-13 (1987) (plurality opinion) (addressing stream of commerce theory). In Asahi, the petitioner was a Japanese manufacturer of tire valve assemblies. See id. at 106. These valve assemblies were sold to a number of companies including Cheng Shin, a Taiwanese corporation, which used these assemblies in tires shipped all over the world. See id. After Cheng Shin was sued in California for damages relating to the blowout of a tire, Cheng Shin attempted to indemnify Asahi. See id. The California Supreme Court found personal jurisdiction over Asahi was proper because the company was aware that its valve assemblies could end up in California. See id. at 108. The Supreme Court reversed, however, finding California could not exercise personal jurisdiction over Asahi. See id.

Although all of the Justices agreed that the exercise of personal jurisdiction in California was improper under the reasonableness prong of the International Shoe test, the Justices were split on whether Asahi had sufficient minimum contacts with California. See id. at 105 (giving breakdown of votes). Justice O'Connor, Chief Justice Rehnquist, Justice Powell and Justice Scalia found that Asahi's "placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." Id. at 112. Justices Brennan, White, Marshall and Blackmun, however, concluded that Asahi had purposefully availed itself of the privilege of conducting business in California. See id. at 116-21. Finally, Justice Stevens believed it was unnecessary to consider the stream of commerce theory because the exercise of personal jurisdiction was unreasonable. See id. at 121-22 (stating that minimum contacts analysis was unnecessary and even if required there were probably enough contacts to constitute purposeful availment).
personal jurisdiction. Under the effects test, courts have exercised personal jurisdiction over nonresident defendants when the forum state was the "focal point" of the plaintiff's injury. The Supreme Court held in Calder v. Jones that California could exercise personal jurisdiction over the defendants because "their intentional, and allegedly tortious, actions were expressly aimed at California."

2. Fair Play and Substantial Justice

Even if a defendant has sufficient minimum contacts with the forum, a court must look at whether the exercise of personal jurisdiction would be reasonable. In deciding whether the exercise of personal jurisdiction was reasonable, courts have considered the burden on the defendant, the forum state's interest in protecting its residents, the plaintiff's interest in obtaining convenient relief, the "interstate judicial system's interest in obtaining the most efficient resolution of controversies" and the states' interest "in furthering substantive social policies." Lesser minimum contacts may support personal jurisdiction if these factors are particularly strong.

36. See Calder v. Jones, 465 U.S. 783, 788-91 (1984) (discussing effects test). In Calder, the National Inquirer had published an allegedly libelous story about entertainer Shirley Jones. See id. at 784. The plaintiff sued the Florida-based publication in California. See id. The petitioners, an editor (who resided in Florida and traveled frequently to California) and writer (who resided in Florida and prior to the lawsuit had only visited California twice) moved to have the suit dismissed for lack of personal jurisdiction. See id. at 784-86. The Supreme Court, however, held that California could exercise personal jurisdiction over both defendants. See id. at 791. Because the plaintiff's career was based in California, she suffered most of the damage from the defendants' story there. See id. at 789 (concluding California was "focal point both of the story and of the harm suffered"). Furthermore, the defendants used California sources to research and write the story. See id. California's exercise of personal jurisdiction over the defendants was proper because "their intentional conduct in Florida [was] calculated to cause injury . . . in California." Id. at 791. Because the defendants knew that the plaintiff would suffer most of the harm in California, they could reasonably anticipate being haled into court there. See id. at 789-90.

37. Id. at 789. The defendants were subject to personal jurisdiction in California because the plaintiff felt the effects of their conduct there. See id.


39. Id. at 789.


42. See Burger King, 471 U.S. at 477 (noting that strong factors in favor of personal jurisdiction may compensate for lesser minimum contacts).
C. Personal Jurisdiction on the Internet

To comprehend the challenges of establishing personal jurisdiction on the Internet, it is important to understand some basic Internet concepts. The United States District Court for the Eastern District of Pennsylvania has described the Internet as a "giant network which interconnects innumerable smaller groups of linked computer networks." This "network of networks" has no central location or single administrator. Users can communicate and distribute information over the Internet in a variety of ways including by email, Usenet discussion groups, real time chat (Internet Relay Chat) and the World Wide Web.


44. Id. at 830. The decentralized structure of the Internet is a result of its original purpose. See id. at 831 (discussing origins of Internet). In 1969 the Advanced Research Project Agency ("ARPA") created ARPANET, a network to connect various military and university computers. See id. ARPANET was designed so researchers and military personnel could continue to communicate even if war damaged parts of the network. See id. Sent messages did not follow a single route to their destination; instead a message could bounce through dozens of different locations. See id. at 832. Nor is a single message transmitted in one piece. See id. Messages are broken into packets and each packet may take a separate route to the destination where all the packets are reassembled (this process is called packet switching). See id. Thus, the end of a message may reach its destination before the beginning. See id. In addition to ARPANET, other networks such as Usenet and BITNET were created by universities and businesses. See id. Over time all these individual networks linked together and today are known collectively as the Internet. See id.

Individuals connect to the Internet through computers directly connected to networks that are connected to the Internet or through a computer and modem that connects by phone into a network that is connected to the Internet. See id. With the necessary equipment, people may connect to the Internet at work, home, school, stores and libraries. See id. at 832-33. Many people access the Internet through commercial Internet Service Providers ("ISPs") such as America Online, CompuServe and Erols. See id. at 833.

45. See id. at 832 (describing decentralized nature of Internet).

46. See id. at 834-38 (discussing methods of communicating on Internet). Through email, a person can directly communicate with one or several people with Internet access. See id. at 834.

Listservs are automatic mailing list services organized around particular topics such as opera, children's literature or German. See id. at 834. To join a particular listserv, a person must subscribe to that listserv by email. See id. After subscribing to the listserv, a person will receive emails from other members of that listserv. See id. To respond to an email, the recipient sends an email to the listserv which is then automatically distributed to the other members (usually a computer does this but some listservs are moderated by a person who will read and then only email select messages). See id. Listservs that are run by computers are "open" and can be joined automatically while closed listservs are run by human moderators who may limit the number of subscribers. See id.

Like listservs, Usenet groups are organized around topics (such as job opportunities in Delaware, Star Wars or tattoos). See id. at 834-35. Today there are about 45 thousand Usenet groups generating half a million postings a day. See Katie Hafner, Old Newsgroups Marketed in New Packages, N.Y. Times, June 24, 1999, at G1 (giving Usenet statistics). As of 1995, approximately 20 people used Usenet. See id.
1. Commercial Interactivity of Web Site

The general framework for analyzing personal jurisdiction on the Internet was laid out in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*\(^{47}\) General (stating last known number of Usenet participants). To access a particular Usenet group, a person can subscribe to that group and read other subscriber’s posts. See *ACLU*, 929 F. Supp. at 834-35 (providing information on joining Usenet group). On moderated newsgroups a moderator, who decides which messages to post, reviews all messages. See *id.* at 835. On unmoderated groups (the majority) posts are automatically forwarded to all USENET servers that furnish access to the group. See *id.* Unlike listserv messages, Usenet posts are not distributed to a person by email. See *id.* Instead Usenet posts are disseminated to servers which temporarily store these messages and periodically purge them. See *id.* So if a person wishes to respond to somebody else’s post or post his or her own messages, he or she will post a message that is sent either to a moderator on a closed group or sent to other servers on an open group. See *id.* Usenet groups are among the most open and diverse methods of interaction on the Internet. See *Ross*, *supra* note 10, at 24 (calling Usenet discussion groups “loosely moderated anarchy”); *Hafner*, *supra*, at G1 (calling Usenet “particularly untamed, free-flowing part of the Internet”).

Internet users may also “chat” online. See *ACLU*, 929 F. Supp. at 835 (providing overview of Internet chat). Through Internet Relay Chat (“IRC”), a person may communicate with one or more people who are online at the same time. See *id.* The user will type a message on his or her computer, which will be transmitted and displayed on the recipient’s computer. See *id.* ISPs such as America Online and CompuServe have their own “chat” systems. See *id.*

People can also view and obtain information such as text, pictures, movies and music from other computers. See *id.* at 835-36. Previously people used telnet or file transfer protocol (“ftp”) to access information on other computers. See *id.* at 835. Today, however, most people use the World Wide Web. See *id.* The Third Circuit defined the World Wide Web as “a series of documents stored in different computers all over the Internet.” *Id.* at 836. World Wide Web pages are created with hypertext markup language (“HTML”) and then displayed on individual computers through browsers such as Netscape and Microsoft Explorer using hypertext transfer protocol (“http”). See *id.* at 836. Web pages can contain music, animation and text. See *id.* Web pages also contain hypertext links that viewers can click on to visit other Web sites or download information. See *id.* at 836-37. Although individual computers may be incompatible, they can exchange information through the World Wide Web. See *id.* at 838. The World Wide Web has become increasingly popular because it is so easy to use. See *id.* at 837. Furthermore, HTML is so simple and Web pages so cheap that it is fairly easy for non-technological people to publish their own Web pages that are available to the entire world. See *id.*

47. 952 F. Supp. 1119 (W.D. Pa. 1997). In *Zippo*, the United States District Court for the Western District of Pennsylvania found that the defendant was subject to personal jurisdiction in Pennsylvania because it had sold approximately three thousand passwords to Pennsylvania residents and entered into seven contracts with Pennsylvania ISPs. See *id.* at 1125-26 (analyzing defendant’s contacts with forum). The *Zippo* court described the following framework for examining personal jurisdiction on the Internet:

This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested
erally, the establishment of personal jurisdiction is "directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." If a company has clearly conducted business over the Internet with the forum state, then the forum state's exercise of personal jurisdiction is proper. CompuServe, Inc. v. Patterson is the leading example of a case where the nonresident defendant's business contacts with the forum state supported the exercise of personal jurisdiction.

Courts have usually refused to exercise personal jurisdiction when the defendant's only contact with the forum state was the posting of a passive Web site. A passive Web site merely provides information to the

in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id. at 1124 (citations omitted).

48. Id.

49. For a further discussion of a forum state's exercise of personal jurisdiction based upon a defendant's business contacts, see infra notes 113-14 and accompanying text.

50. 89 F.3d 1257 (6th Cir. 1996).

51. See id. In CompuServe, the defendant (a Texas resident) had entered into a contract with the plaintiff (an Ohio corporation) to provide software. See id. at 1259-60. The contract stated that Ohio law would govern. See id. at 1260. The defendant transmitted 32 software files to the plaintiff, which then made these files available for downloading by subscribers. See id. at 1261. According to the defendant, he sold about $650 worth of software to Ohio residents. See id.

After the defendant complained that the plaintiff was infringing on his software trademarks, the plaintiff sought a declaratory judgment finding that it had not infringed on any of the defendant's trademarks in the United States District Court for the Southern District of Ohio. See id. at 1261. The district court granted the defendant's motion to dismiss for lack of personal jurisdiction. See id. at 1261. On appeal, the United States Court of Appeals for the Sixth Circuit reversed the lower court's decision, holding that the defendant was subject to personal jurisdiction in Ohio. See id. at 1268-69. The Sixth Circuit found that the defendant had purposefully availed himself of the privilege of conducting business in Ohio by entering into a contract with an Ohio-based company, transmitting software to Ohio over a three year period and contacting the plaintiff by phone, mail and email when he believed they were infringing on his software's trademark. See id. at 1264-67.

viewer. In *Bensusan Restaurant Corp. v. King*, the United States District Court for the Southern District of New York held that a passive Web site did not justify the exercise of personal jurisdiction over the nonresident defendant. A few courts, however, have found that the creation of a passive Web site did justify the exercise of personal jurisdiction. Comparing defendant's Web site "to an advertisement in a national publication" that did not support personal jurisdiction; *Zippo*, 952 F. Supp. at 1124 (noting that maintenance of passive Web site did not expose nonresident defendant to personal jurisdiction); *McDonough v. Fallon McElligott, Inc.*, No. CIV.95-4037, 1996 WL 753991, at *3 (S.D. Cal. Aug. 5, 1996) (recognizing that Web site alone was not enough to establish personal jurisdiction); *Ragonese v. Rosenfeld*, 722 A.2d 991, 995-96 (N.J. Super. Ct. Law Div. 1998) (characterizing defendant's page as passive and therefore not supporting personal jurisdiction).

55. *See id.* at 299-300 (holding passive Web site did not support personal jurisdiction). In *Bensusan*, the plaintiff, who owned a New York City jazz club called "The Blue Note," sued the defendant, an owner of a Missouri club also called "The Blue Note," for infringing on his rights to the trademark "The Blue Note." *See id.* at 297. The defendant had promoted his small club on a Web page. *See id.* (describing defendant's Internet activities). The Web page provided information on the defendant's club, addresses of locations to buy tickets and a phone number to call and charge tickets. *See id.* To pick up the tickets, people had to go to the club in Columbia, Missouri. *See id.* The court refused to exercise jurisdiction over the defendant under the New York Long-Arm statute and due process because the defendant had "done nothing to purposefully avail himself of the benefits of New York." *Id.* at 301. The court compared the defendant's creation of the Web site to placing a product in the stream of commerce, which was not enough for personal jurisdiction without something more. *See id.* Even though it was foreseeable that a New York resident might have viewed this Web site and become confused as to the relationship between the two clubs, this was not enough for personal jurisdiction. *See id.* (dismissing foreseeability as grounds for personal jurisdiction).

One commentator has pointed out that *Bensusan* offers dubious precedent because it was decided under the New York Long-Arm Statute, which is more restrictive than due process. *See Todd D. Leitstein, A Solution for Personal Jurisdiction on the Internet, 59 LA. L. REV. 565, 577-78 (1999) (finding use of *Bensusan* for passive analysis "problematic"). Therefore, courts can distinguish Internet cases based on less restrictive state long-arm statutes from *Bensusan*. *See id.* The United States District Court for the Eastern District of Pennsylvania also recognized that *Bensusan* offered limited precedent. *See Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 725 n.3 (noting that *Bensusan* and *Hearst* decisions were only "instructive" because they were decided under New York Long-Arm Statute).

56. *See Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164-65 (D. Conn. 1996) (holding that Web site with toll-free number subject defendant to personal jurisdiction in Connecticut). In this case, the district court focused on the worldwide availability of the defendant's Web site. *See id.* Based on the defendant's Web site, the court concluded that the defendant had attempted to advertise in every state including Connecticut. *See id.* at 165 (recognizing that Internet is "designed to communicate with people and their businesses in every state"). The court concluded that the defendant had purposefully availed itself of acting in Connecticut because its Web site was available to the entire nation including 10,000 Connecticut residents. *See id.* at 165.

Other courts have followed this reasoning. *See Telco Communications v. An Apple A Day, 977 F. Supp. 404, 406-07 (E.D. Va. 1997) (following Inset to hold that Web site advertisement subjected defendant to personal jurisdiction in Virginia);*
In cases where the level of Web site activity fell in between a totally passive site and an actively commercial site, courts have examined the amount of commercial interactivity to determine whether personal jurisdiction was proper. In *Maritz, Inc. v. Cybergold, Inc.*, the United States District Court for the Eastern District of Missouri held personal jurisdiction was proper because the defendant had actively solicited Internet users from all over the world including the forum state, Missouri. Internet

Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 4-5 (D.D.C. 1996) (suggesting that Web site with toll-free number that was always available to forum residents might be enough to support exercise of personal jurisdiction in forum); State v. Granite Gate Resorts, Inc., No. CIV.A.6-95-7227, 1996 WL 767431, at *11 (Minn. Dist. Ct. Dec. 11, 1996) (concluding that defendant was subject to personal jurisdiction in Minnesota because it had purposefully availed itself of conducting business there when it "place[d] its ad on the Internet 24 hours, seven days a week, 365 days a year"), aff'd, 576 N.W.2d 747 (Minn. 1998). *But see Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34, 46 (D. Mass. 1997) (expressing reservations about holdings in *Inset, Heroes and Maritz*).

57. See *Zippo*, 952 F. Supp. at 1124 (setting forth personal jurisdiction analysis for "interactive Web sites where a user can exchange information with the host computer").


59. *See id.* at 1333-34 (finding that defendant had purposefully availed itself of privilege of acting in Missouri and could have anticipated being haled into court there). The defendant, based in California, had created a Web site promoting its services. *See id.* at 1330. Users could sign up on the defendant's mailing list and receive an electronic mailbox. *See id.* In signing up for a mailbox, users would specify particular areas of interest and the defendant would then send the users advertisements that matched these interests. *See id.* The defendant planned on charging advertisers for access to these users. *See id.* The service was not operational yet. *See id.* According to the court, Missouri residents accessed this service 311 times although at least 180 times were by the plaintiff. *See id.* Because the defendant had transmitted its Web site promotion approximately 131 times to Missouri residents, the court found that the defendant had purposefully availed itself of the privilege of acting in Missouri. *See id.* at 1333 (finding Missouri could exercise personal jurisdiction over defendant). One court, however, has characterized *Maritz* as a passive Web site case rather than an interactive site case. *See Hasbro*, 994 F. Supp. at 46 ("I have reservations about decisions such as *Inset, Heroes,* and *Maritz* which found that the existence of a Web site alone is enough to allow jurisdiction in any state."). *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738 (W.D. Tex. 1998) might be a better example of an interactive Web site that supported the exercise of personal jurisdiction. In that case, the plaintiff sued the defendant in Texas for breach of contract, fraud and violations of the Texas Deceptive Trade Practices Act. *See id.* at 741. The defendant ran an Internet casino from California. *See id.* The plaintiff claimed that he had won approximately $193,728.40 through the defendant's Web site and the defendant refused to pay this money. *See id.* The defendant attempted to escape personal jurisdiction in Texas by claiming it did not have sufficient minimum contacts with the forum. *See id.* at 743. Because the defendant's Web site had continuously interacted with the plaintiff in Texas, the court held that the exercise of personal jurisdiction was proper. *See id.* at 744 (noting defendant "continuously interacted with the casino players, entering into contracts with them as they played the various games"). The defendant interacted with the plaintiff even more than the defendants in *Maritz* and *Inset*. *See id.* (recognizing defendant did more over Internet than merely maintain Web site with toll-free phone number).
users interacted with the defendant's Web site by signing onto the defendant's mailing list.60

2. Other Approaches to Examining Personal Jurisdiction on the Internet

A few courts have analyzed personal jurisdiction on the Internet under the stream of commerce theory.61 In Hasbro, Inc. v. Clue Computing, Inc.,62 the United States District Court for the District of Massachusetts stated that posting information on a Web site was "most analogous to . . . placing a product in the 'stream of commerce.'"63 According to that court, courts can use the stream of commerce theory to decide whether a Web site has targeted the forum state.64 Ultimately, the district court concluded that the defendant was subject to personal jurisdiction in the forum because it had directed its Internet advertising to the entire nation including the forum and had conducted business with a forum company.65

Courts have also considered defendants' non-Internet, as well as Internet, contacts in deciding whether personal jurisdiction was proper.66 In Blumenthal v. Drudge,67 for example, the district court found personal jurisdiction was proper in the District of Columbia based upon the defendant's Internet, mail and phone contacts with forum residents.68 The defendant's Internet activities consisted of a Web site with District of Columbia gossip, a contract with America Online to publish this gossip and contributions from at least fifteen forum residents who responded to

60. See Maritz, 947 F. Supp. at 1332-34 (holding that defendant's interactive Web site supported personal jurisdiction).


63. Id. at 42. For more specific information on the Asahi analysis, see supra note 34 and accompanying text.

64. See Hasbro, 994 F. Supp. at 42 (recommending use of Asahi analysis).

65. See id. at 45 (finding defendant's Internet activity satisfied purposeful availment requirement of due process).

66. For a further discussion of how courts use Internet and non-Internet contacts to support personal jurisdiction, see infra note 117 and accompanying text.


68. See id. at 56 (basing personal jurisdiction on defendant's activities on and off Internet). In this case, the defendant was a gossip columnist who resided in California. See id. at 46. The defendant wrote allegedly defamatory statements about the plaintiffs that appeared on America Online as well as the defendant's own Web site. See id. at 47-48.
his Web site. In addition to these Internet activities, the defendant had also visited the District of Columbia twice (once for an interview with C-SPAN), mailed and phoned forum residents to obtain information. Based upon all of these activities, the court held that the exercise of personal jurisdiction over the defendant was proper.

In cases involving tortious conduct, courts have invoked the *Calder* effects test to determine whether a defendant's Internet contacts supported personal jurisdiction. In *Panavision International v. Toeppen*, for example, the United States Court of Appeals for the Ninth Circuit held that the defendant was subject to personal jurisdiction in California under the effects test. Under the effects test, the court concluded that the defendant had purposely targeted his tortious behavior at California and knew that the plaintiff would suffer the most injury there. Therefore,

69. *See id.* at 56-57 (describing defendant's Internet contacts).

70. *See id.* at 57 (listing defendant's non-Internet contacts with D.C.).

71. *See id.* at 56-58 (finding defendant had sufficient minimum contacts with D.C. for exercise of personal jurisdiction).


73. *141 F.3d 1316 (9th Cir. 1998).*

74. *See id.* at 1321-22 (exercising personal jurisdiction over nonresident defendant under effects test). In this case, the plaintiff, Panavision, accused the defendant, Dennis Toeppen, of trademark dilution. *See id.* at 1318. The defendant had registered and used the plaintiff's trademarks as domain names. *See id.* at 1318-19. After the plaintiff told the defendant to stop using these trademarks, the defendant offered to sell the domain names back to the plaintiff. *See id.* at 1319. The defendant had engaged in "cybersquatting" before. *See id.* (noting that defendant had registered over 100 marks as domain names and attempted to sell at least 2).

75. *See id.* at 1321-22 (using "effects test" to subject nonresident defendant to personal jurisdiction in California). The defendant had engaged in tortious-like conduct by intentionally registering the plaintiff's trademarks as domain names and then attempting to extort money from the plaintiff for these marks. *See id.* at 1321. The plaintiff's principal place of business was California, and the defendant knew that the plaintiff would suffer the most harm there. *See id.* Therefore, under the "effects test" the defendant had purposefully availed himself of the privilege of acting in California. *See id.* at 1322 (rejecting defendant's argument that he had no contacts with California).
California could exercise personal jurisdiction over the defendant. In Barrett, the Eastern District of Pennsylvania used a combination of these approaches in finding that the nonresident defendant was not subject to personal jurisdiction in Pennsylvania for her noncommercial, allegedly defamatory Internet activities.

III. FACTS

In Barrett, the plaintiff, Stephen Barrett, a Pennsylvania psychiatrist, sued multiple defendants including Darlene Sherrell, an Oregon resident, for defamation under Pennsylvania law. The defendant moved for the court to dismiss the plaintiff's lawsuit for lack of personal jurisdiction under rule 12(b)(2) of the Federal Rules of Civil Procedure.

This lawsuit arose from the plaintiff's activities as a consumer health advocate on the Internet. On his Web site, Quackwatch, the plaintiff provided information about a number of healthcare issues including the benefits of fluoridation. The defendant opposed the fluoridation of water

76. See id. at 1322-24 (affirming district court's ruling that defendant was subject to personal jurisdiction in California).
77. For a further discussion of the Barrett analysis, see infra notes 112-53 and accompanying text.
79. See Barrett, 44 F. Supp. 2d at 722-23 (describing defendant's motion).
80. See id. at 720 (giving background of case). The plaintiff had been involved in consumer health issues such as fraud and misinformation since 1969. See id. (examining plaintiff's occupation as consumer activist). In December of 1996, the plaintiff created a Web site called Quackwatch (http://www.quackwatch.com), which provided information about a variety of consumer health issues including a brief (about 1% of the site) discussion of fluoridation. See id. at 720-21 (discussing content of Web site). The plaintiff's information on fluoridation included hypertext links to other sites that "promote[d] fluoridation of public water sources." See id. at 721.
81. See id. at 721-22 (discussing plaintiff's materials on fluoridation). In addition to his Web site information, the plaintiff had edited some articles and a book that positively mentioned the fluoridation of water. See id. at 721.

The plaintiff's Web site provides extensive information on a number of consumer health issues including quackery, questionable medical treatments and dietary information. See Stephen Barrett, Quackwatch (last modified Oct. 11, 1999) <http://www.quackwatch.com> (listing consumer health resources). There is one page with an article by Bob Sprague and Mary Berhardt debunking anti-fluoridation activists. See Stephen Barrett, Quackwatch (visited Oct. 11, 1999) <http://www.
and joined a health fraud discussion group co-sponsored by Quackwatch. The defendant attempted to discuss fluoridation with the plaintiff by email, but he did not respond.

Shortly thereafter, the defendant made allegedly defamatory comments about the plaintiff on her own Web site. After the plaintiff sent the defendant an email threatening to sue, the defendant modified her Web page. The defendant also posted messages on several health-related listservs and Usenet groups with a hypertext link back to her Web site (that contained the allegedly defamatory statements).

The plaintiff sued the defendant for defamation in Pennsylvania. The defendant’s contacts with Pennsylvania consisted of her Internet activities at quackwatch.com/03HealthPromotion/fluoride.html (criticizing tactics of anti-fluoridationists). This page includes links to other pro-fluoridation sites such as the American Dental Association and American Academy of Pediatrics. See id.

82. See Barrett, 44 F. Supp. 2d at 722 ("Defendant is closely associated with individuals who are interested in advocating against the fluoridation of water sources throughout the United States."). The plaintiff noticed the defendant after she joined the discussion group. See id. at 721. The defendant claimed that she posted one message to the group and also responded to other members’ posts. See id. at 722. The plaintiff, however, claimed that the defendant posted so many messages that he was forced to post a message stating that the discussion had become "unproductive." See id. at 721-22 (contrasting plaintiff’s claims with defendant’s).

83. See id. at 722, 729 (stating that plaintiff did not respond to defendant’s email).

84. See id. at 722 (describing appearance of defendant’s defamatory comments). Currently the defendant’s Web site contains a large amount of information on the dangers of fluoridation. See Darlene Sherrell, Dental Fluorosis Prevention Program (last modified July 25, 1999) [http://www.ia4u.net/~sherrell/] [hereinafter Sherrell, Dental Fluorosis] (providing information on dangers of fluoridation). Clicking on the “Bogus Consumer Watchdogs” button takes the user to a Web page criticizing various pro-fluoridation activists including the plaintiff. See Darlene Sherrell, Consumer Reports Stephen Barrett and Other Bogus Consumer Watchdogs (visited Oct. 14, 1999) [http://www.ia4u.net/~sherrell/yia.htm] [hereinafter Sherrell, Consumer Reports] (discussing pro-fluoridation activists). On this page, the defendant critiques the plaintiff’s use of the phrase “poison mongers.” See id.

85. See Barrett, 44 F. Supp. 2d at 722 (noting that defendant modified her Web page after plaintiff complained). According to the defendant, her modifications made it clear that she was quoting another defendant, James R. Privitera. See id. (mentioning defendant’s modifications).

86. See id. (discussing defendant’s postings to other listservs and Usenet groups). These groups included a Dental Public Health List with national distribution, a Chiro-List with about 350 chiropractors, sci.med.dentistry, misc.health.alternative (a busy newsgroup with “tens of thousands of participants”) and misc.kids.health. See id. The plaintiff claimed that the defendant had “posted a total of at least 90 messages to at least 12 Usenet news groups, with total membership in the tens of thousands, and that many of these messages encouraged people to visit one or more [of] her sites that contained defamatory statements.” See id. The court, however, questioned this claim. See id.

87. See id. at 720.
ities and a few visits during a fluoridation lawsuit in the 1980s. In mov-
ing to dismiss the lawsuit for lack of personal jurisdiction, the defendant argued that she had not visited Pennsylvania other than for the previous lawsuit and that her Internet activities were directed to the world at large rather than Pennsylvania. The district court granted the defendant's motion to dismiss for lack of personal jurisdiction, finding that she had not purposefully availed herself of the privilege of acting in Pennsylvania nor caused the plaintiff harm in Pennsylvania as a result of her tortious conduct.

IV. ANALYSIS

A. Narrative Analysis

1. District Court's Examination of the Federal Rules of Civil Procedure

As the district court noted, the Federal Rules of Civil Procedure govern whether a federal court can exercise personal jurisdiction over a defendant. Under the Federal Rules of Civil Procedure, a federal court's exercise of personal jurisdiction over a nonresident defendant depends upon state law. Federal courts may exercise personal jurisdiction if the state long-arm statute authorizes the exercise of personal jurisdiction and if personal jurisdiction would not violate the Due Process Clause of the United States Constitution.

Thus, to determine whether Pennsylvania allowed the district court to exercise personal jurisdiction over the defendant, the court examined the Pennsylvania Long-Arm Statute. Under the Pennsylvania Long-Arm Statute, personal jurisdiction extends to the limits of the Due Process

88. See id. at 722 (setting forth defendant's contacts with Pennsylvania). The defendant's non-Internet activities in Pennsylvania were related to a major fluoridation lawsuit in the late 1970s and early 1980s. See id.
89. See id.
90. See id. at 730-31.
91. See id. at 723. For the requirements of the Federal Rules of Civil Procedure, see supra notes 19-21 and accompanying text.
93. See Barrett, 44 F. Supp. 2d at 723 (describing two-prong analysis of personal jurisdiction). For a further discussion of personal jurisdiction, see supra notes 19-42 and accompanying text.
94. See id. at 723 (looking at Pennsylvania Long-Arm Statute). The Pennsylvania Long-Arm Statute allows a court to exercise personal jurisdiction over a nonresident defendant in several situations. See 42 PA. CONS. STAT. ANN § 5322 (West 1998) (setting forth acts that subject nonresident defendant to personal jurisdiction in Pennsylvania). A nonresident defendant who caused "harm or tortious injury . . . by an act or omission" in Pennsylvania is subject to personal jurisdiction. See id.
2. District Court's Analysis of Traditional Due Process Requirements

The district court next analyzed whether the exercise of personal jurisdiction over the defendant was proper under due process. In addressing this issue, the court distinguished between general and specific jurisdiction. General jurisdiction is proper when the defendant has engaged in "systematic and continuous" contacts with the forum state. The district court concluded that the defendant’s contacts with Pennsylvania did not justify the exercise of general jurisdiction. The district court stated that the defendant's Internet activities did not amount to "systematic and continuous" contacts with Pennsylvania.

95. See 42 PA. CONS. STAT. ANN. § 5322(b) (West 1998) (stating that personal jurisdiction extended "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States").

96. See Barrett, 44 F. Supp. 2d at 723 (moving on to due process analysis). The Third Circuit has held that the two-prong inquiry collapses into a single inquiry because the Pennsylvania Long-Arm statute allows courts to exercise personal jurisdiction to the limits of the Constitution. See Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992) (finding that court may exercise personal jurisdiction so long as it does not violate due process because Pennsylvania Long-Arm statute extends personal jurisdiction to limits of Constitution); Empire Abrasive Equip. v. H.H. Watson, 567 F.2d 554, 556 (3d Cir. 1977) (same). But see Lehigh Coal & Navigation Co. v. Geko-Mayo, 56 F. Supp. 2d 559, 564 n.7 (E.D. Pa. 1999) (criticizing courts that collapse two-prong inquiry into single inquiry and only analyze personal jurisdiction under due process rather than first looking at whether claim falls under Pennsylvania Long-Arm statute).

97. See Barrett, 44 F. Supp. 2d at 723 (moving on to due process analysis).

98. See id. at 722-24 (discussing differences between specific and general jurisdiction). For a further discussion of the differences between specific and general jurisdiction, see supra notes 23-26 and accompanying text.


100. See Barrett, 44 F. Supp. 2d at 723 (stating that “general jurisdiction is clearly inapplicable in this case”).

101. See id. at 723-24 (dismissing plaintiff’s claim that exercise of general jurisdiction was proper). The court compared the national accessibility of the defendant’s Internet activities with national publications. See id. at 724. According to the Third Circuit, national publications did not qualify as the continuous and substantial contacts required for general jurisdiction. See Gehling v. St. George’s Sch. of Med., Ltd., 773 F.2d 539, 542 (3d Cir. 1985) (refusing to exercise general jurisdiction over nonresident defendant based upon advertisements in New York Times and Wall Street Journal); Reliance Steel Prods. Co. v. Watson, Ess, Marshall & Enggas, 675 F.2d 587, 589 (3d Cir. 1982) (concluding that defendant’s advertisement in Martindale-Hubbell Law Directory did not support exercise of general jurisdiction). In Gehling, parents had sued a Grenada medical school for negligence, breach of contact, fraudulent misrepresentation and intentional infliction of emotional dis-
Because the defendant's Internet contacts with Pennsylvania did not support general jurisdiction, the district court moved onto the specific jurisdiction analysis. The court defined specific jurisdiction as arising when "the defendant, the cause of action, and the forum fall[s] within the 'minimum contacts' framework first announced in International Shoe . . . and later refined by the abundant progeny of that landmark case." To support the exercise of specific jurisdiction, a defendant must have had sufficient minimum contacts with Pennsylvania so "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Although the defendant was not physically present in Pennsylvania, the district court pointed out that physical presence was no longer necessary to establish personal jurisdiction.

The district court used two standards to determine whether it could exercise personal jurisdiction over the defendant. First, the defendant must have had such minimum contacts with the forum state so that she could "reasonably anticipate being haled into court there." In analyzing this issue, the district court stated that courts should examine the "quality of the contacts between the forum, the defendant and the litigation." The district court also noted that it had to determine whether the cause of action arose from the defendant's contacts with the forum and whether the defendant purposefully availed himself or herself of the privilege of acting in the forum. If the defendant had sufficient min-

102. See Barrett, 44 F. Supp. 2d at 724 (rejecting general jurisdiction analysis and using specific jurisdiction analysis instead).

103. Id. at 723 (quoting Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992)). For discussion of specific jurisdiction, see supra notes 26-34 and accompanying text.


106. See Barrett, 44 F. Supp. 2d at 724 (applying two standards to decide if personal jurisdiction was proper).


109. See Barrett, 44 F. Supp. 2d at 724 (discussing requirements of due process for exercise of personal jurisdiction); see also Hanson v. Denckla, 357 U.S. 235, 253 (1958) (same). For a further discussion of the purposeful availedment standard, see supra notes 30-34 and accompanying text.
mum contacts, then the district court had to consider whether the exercise of personal jurisdiction would comport with "fair play and substantial justice." Finally, the district court pointed out that this analysis would not produce clear cut answers.

3. District Court’s Analysis of Personal Jurisdiction Cases Involving the Internet

The district court examined how other courts have applied these principles to the Internet. According to the district court, courts have usually focused on the "nature and quality of commercial activity that an entity conducts over the Internet." As the district court pointed out, courts have generally exercised personal jurisdiction when the defendant conducted business over the Internet. In more difficult cases, courts have attempted to base personal jurisdiction on the Web site’s "level of interactivity and commercial nature of the information." The district court also acknow-


111. See Kulko v. Superior Court, 496 U.S. 84, 92 (1978) (recognizing that "test of International Shoe is not susceptible of mechanical application").

112. See Barrett, 44 F. Supp. 2d at 724 (looking at precedent).

113. Id.; see Zippo Mfg. Co. v. Zippo Dot Com., Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (stating that "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").

114. See CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1264-65 (6th Cir. 1996) (holding that defendant was subject to personal jurisdiction in Ohio because he had entered into written contract with Ohio-based corporation and supplied that corporation with software); Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738, 743-44 (W.D. Tex. 1998) (holding that Texas could exercise personal jurisdiction over defendant because defendant had entered into contracts with Texas residents over online casino); Superguide Corp. v. Kegan, 987 F. Supp. 481, 486-87 (W.D.N.C. 1997) (deciding that North Carolina could not exercise personal jurisdiction over defendant because defendant conducted business through Web site accessible by North Carolina residents); Gary Scott Int’l, Inc. v. Baroudi, 981 F. Supp. 714, 716-17 (D. Mass. 1997) (finding that defendant was subject to personal jurisdiction in Massachusetts because he had sold 12 humidors to forum company, solicited business from forum on his Web site and planned to sell products to company with stores in forum); Zippo, 952 F. Supp. at 1125-26 (finding that defendant’s incomplete Web site did not support personal jurisdiction in Pennsylvania because defendant had sold passwords to approximately 3,000 Pennsylvania residents and entered into contracts with seven Pennsylvania ISPs).

115. Barrett, 44 F. Supp. 2d at 725; see Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418-19 (9th Cir. 1997) (holding that defendant was not subject to personal jurisdiction in Arizona because it had merely posted passive Web site); ESAB Group, Inc. v. Centricut, LLC, 34 F. Supp. 2d 323, 329-35 (D.S.C. 1999) (finding that South Carolina could not exercise personal jurisdiction over defendant because although Web site was interactive viewer could not buy anything through site without first calling toll-free number to set up account); CFOs 2 Go, Inc. v. CFO 2 Go, Inc., No. CIV.A.97-4676 SI, 1998 WL 320821, at *5 (N.D. Cal. June 5, 1998) (deciding that defendant’s incomplete Web site did not support personal jurisdic-
edged that a few courts have held that a Web site alone is enough to trigger personal jurisdiction. Other courts have used defendants' non-Internet and Internet contacts to establish personal jurisdiction. In tort cases, as the district court recognized, courts have analyzed personal jurisdiction issues under the effects test.

The district court had to determine whether the defendant's Internet contacts with Pennsylvania were sufficient to justify personal jurisdiction.

116. See Barrett, 44 F. Supp. 2d at 725 (recognizing that some courts have found personal jurisdiction based on passive Web sites). The majority of courts, however, require more than a Web site to trigger personal jurisdiction. See id. (stating that "weight of case law... seems to favor... something more than a Web site that acts as a worldwide advertisement to trigger personal jurisdiction"). For a further discussion of passive Web sites and personal jurisdiction, see supra notes 52-56 and accompanying text.


118. For a discussion of the use of the effects test in tort cases, see supra notes 72-76 and accompanying text.
Unlike cases where defendants had non-Internet as well as Internet contacts with the forum, the defendant had “not recently participated in any non-Internet related contacts with Pennsylvania residents.” Therefore, the district court had to rely on the defendant’s Internet activities in deciding whether personal jurisdiction was proper.

a. District Court’s Application of These Concepts to Defendant’s Web Page and Usenet Activities

The defendant’s Internet activities consisted of two Web sites with allegedly defamatory information about the plaintiff and posts (occasionally defamatory) to Usenet groups and listservs with links back to her Web sites. In deciding whether it could exercise personal jurisdiction over the defendant, the district court had to decide whether the defendant’s Internet activities constituted sufficient minimum contacts. The court looked to previous personal jurisdiction cases to establish a range of minimum contacts that would support the exercise of personal jurisdiction.

In deciding it could not exercise personal jurisdiction over the defendant, the district court followed cases where courts had refused to find personal jurisdiction based on defendants’ maintenance of passive Web sites. The district court noted that following courts that had found personal jurisdiction based upon passive Web sites would “subject anyone who posted information on the Web to nationwide jurisdiction.” With regard to the defendant’s additional Internet activities (posting to Usenet discussion groups and listservs), the district court acknowledged that these activities differed from maintaining a passive Web site but were sufficiently

119. See Barrett, 44 F. Supp. 2d at 726 (examining whether defendant had sufficient minimum contacts with forum).
120. For a discussion of cases where defendants had non-Internet and Internet contacts with the forum, see supra note 117 and accompanying text.
121. Barrett, 44 F. Supp. 2d at 726.
122. See id. at 727 (moving on to analysis of defendant’s Internet activities).
123. See id. (discussing defendant’s Internet activities). In a post to misc.health.alternative, the defendant stated that the plaintiff only pretended to be a consumer advocate. See id. The defendant also posted a message to misc.kids.health questioning the reliability of the plaintiff’s information. See id.
124. See id. (discussing constitutional test).
126. See Barrett, 44 F. Supp. 2d at 727 (deciding to follow Cybersell rather than Inset and not exercise personal jurisdiction based upon defendant’s Web sites). For a further discussion of passive Web sites, see supra notes 52-56 and accompanying text.
similar to justify a denial of personal jurisdiction. As the district court pointed out, the defendant sent her messages to groups that were concerned with national healthcare issues rather than groups aimed at Pennsylvania residents.

In comparing listservs and Usenet groups to passive Web sites, the district court drew on some limited case law. The district court also emphasized the noncommercial nature of the defendant’s activities. The defendant did not accept email addresses or credit card information from forum residents, enter into a contract with a forum resident by email or use her Web site to contact forum residents. Furthermore, the defendant’s defamatory comments attacked the plaintiff as a national consumer advocate rather than a Pennsylvania psychiatrist.

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128. See id. at 728 (comparing listserv and Usenet to passive Web site). Unlike a Web site, posts to a Usenet group or listserv are actively sent to members of these groups. See ACLU v. Reno, 929 F. Supp. 824, 834-35 (E.D. Pa. 1996) (discussing how Usenet groups and listservs operate), aff’d, 521 U.S. 844 (1997).

129. See Barrett, 44 F. Supp. 2d at 728-29 (examining national nature of defendant’s activities). Although Pennsylvania residents could subscribe to these message groups, the district court found that this fact did not show that the defendant had specifically targeted Pennsylvania residents. See id. (refusing to find that defendant had targeted Pennsylvania just because Pennsylvania residents could view her comments).

130. See id. at 728 (noting that “analogy of a listserv or USENET discussion group to a ‘passive’ Web site comports with the limited case law on the relationship between Internet activity and personal jurisdiction”); Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 42 (D. Mass. 1997) (pointing out that Web site providers cannot limit accessibility of their sites to certain geographic areas unlike magazine and newspaper distributors). Like Web sites providers, people posting to Usenet groups and listservs cannot limit where their posts are received. See Barrett, 44 F. Supp. 2d at 728 (discussing impossibility of “bypassing certain regions”).

131. See Barrett, 44 F.Supp. 2d at 728 (distinguishing defendant’s activities from other Internet cases involving business activities).


133. See CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1263 (6th Cir. 1996) (holding that defendant was subject to personal jurisdiction in Ohio because he had contracted with Ohio-based plaintiff to distribute his software); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1126-27 (W.D. Pa. 1997) (finding that personal jurisdiction was proper over defendant because defendant had entered into seven contracts with Pennsylvania ISPs and sold three thousand passwords to Pennsylvania residents).

134. See Gary Scott Int’l, Inc. v. Baroudi, 981 F. Supp. 714, 717 (D. Mass. 1997) (holding that defendant had used Web site to contact forum residents); Hasbro, 994 F. Supp. at 44 (concluding that defendant was subject to personal jurisdiction in Massachusetts because defendant had conducted business with Massachusetts residents through its Web site).

135. See Barrett, 44 F. Supp. 2d at 728-29 (noting that even plaintiff had not found any statements of defendant attacking him as resident of Pennsylvania).
b. District Court’s Application of These Concepts to Defendant’s Email Communications with Plaintiff

Finally, the court refused to exercise personal jurisdiction over the defendant based upon email between the defendant and the plaintiff.\textsuperscript{136} The district court compared these emails to telephone calls or mail; neither of which supported personal jurisdiction unless they showed purposeful availment.\textsuperscript{137} To exercise personal jurisdiction over a nonresident defendant based upon mail or telephone calls, courts have required additional contacts or a substantial connection.\textsuperscript{138} The district court concluded that the emails between the defendant and the plaintiff were not sufficient to support personal jurisdiction in Pennsylvania.\textsuperscript{139}

4. District Court’s Rejection of Personal Jurisdiction under Effects Test

The district court also refused to exercise personal jurisdiction over the defendant under the effects test of \textit{Calder}.\textsuperscript{140} According to the district court, the Third Circuit has found personal jurisdiction under the effects test if: (1) the defendant has committed an intentional tort; (2) the forum state was the focal point of the plaintiff’s injury; and (3) the defendant’s tortious conduct was deliberately aimed at the forum state.\textsuperscript{141}

\begin{itemize}
\item \textsuperscript{136} See \textit{id.} at 729 (finding two emails did not justify personal jurisdiction).
\item The defendant had initially emailed the plaintiff to discuss fluoridation but the plaintiff did not respond to her email. \textit{See id.} After finding the defendant’s Web site, the plaintiff sent her an email threatening to sue her for defamation. \textit{See id.} The defendant replied to this email after she modified her Web page but this was the extent of their email communications. \textit{See id.}
\item \textsuperscript{137} See \textit{id.} at 729 (stating that phone and mail contacts did not support personal jurisdiction if they did not meet purposeful availment standard); \textit{see also} Mellon Bank (East) PSFS, N.A. v. DiVeronica Bros., Inc., 983 F.2d 551, 556 (3d Cir. 1993) (holding that nonresident defendant was not subject to personal jurisdiction in Pennsylvania because mail and phone calls to forum did not show defendant had purposefully availed itself of benefit of conducting business in Pennsylvania); Gehling v. St. George’s Sch. of Med., Ltd., 773 F.2d 539, 544 (3d Cir. 1985) (deciding that mail did not constitute purposeful availment); Reliance Steel Prods. Co. v. Watson, Ess, Marshall & Engras, 675 F.2d 587, 589 (3d Cir. 1982) (finding that national advertisement and phone calls to forum did not subject nonresident defendant to personal jurisdiction in Pennsylvania).
\item \textsuperscript{138} See Carteret Sav. Bank v. Shushan, 954 F.2d 141, 149 (3d Cir. 1992) (finding that personal jurisdiction was proper over defendant who phoned, mailed and traveled to New Jersey client); Mesalic v. Fiberfloat Corp., 897 F.2d 696, 701 (3d Cir. 1990) (holding that New Jersey could exercise personal jurisdiction over defendant who had mailed, phoned, delivered and repaired product in New Jersey).
\item \textsuperscript{139} See \textit{Barrett}, 44 F. Supp. 2d at 729 (finding that emails did not support exercise of personal jurisdiction).
\item \textsuperscript{140} \textit{See id.} at 729-31 (rejecting plaintiff’s argument that exercise of personal jurisdiction over defendant was proper under effects test). For a further discussion of \textit{Calder v. Jones}, 465 U.S. 783 (1984), see \textit{supra} notes 36-39 and accompanying text.
\item \textsuperscript{141} See IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265-66 (3d Cir. 1998) (summarizing requirements of \textit{Calder} effects test).
\end{itemize}
After discussing the basic requirements of the effects test, the district court looked at how other courts had applied this test to online tortious conduct. In Internet cases involving personal jurisdiction under the effects test, courts have focused on whether plaintiffs suffered the brunt of their injuries in the forum. The district court distinguished this lawsuit from those cases by arguing that the defendant had attacked the plaintiff as a national figure rather than a Pennsylvania psychiatrist. Because the defendant did not aim her defamatory statements at the plaintiff’s Pennsylvania role, the court found that her behavior did not satisfy the requirements of the effects test.

The district court also rejected the plaintiff’s argument that he suffered most of the harm in Pennsylvania. Although the district court recognized that some harm to the plaintiff in Pennsylvania was foreseeable, this foreseeability was not enough to justify personal jurisdiction. Only a small number of Pennsylvania residents probably viewed the defendant’s defamatory statements (that were available worldwide). According to the court, “[u]nless Pennsylvania is deliberately or knowingly targeted by the tortfeasor, the fact that harm is felt in Pennsylvania from conduct occurring outside Pennsylvania is never sufficient to satisfy due process.” Therefore, the district court refused to exercise personal jurisdiction.

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143. See Panavision, 141 F.3d at 1322 (finding that plaintiff suffered most harm in California where its business was based); EDIAS, 947 F. Supp. 413, 420 (recognizing that plaintiff suffered economic harm in Arizona).

144. See Barrett, 44 F. Supp. 2d at 750-31. The defendant attacked the plaintiff and other commentators for their promotion of fluoridation and dismissal of chiropractic. See id. at 750.

145. See id. at 731 (“Under the ‘effects test’ of Calder, we do not find that such defamatory statements amount to actions ‘expressly aimed’ at Pennsylvania.”).

146. See id. (finding that plaintiff did not suffer brunt of harm in Pennsylvania).

147. For a discussion of foreseeability of injury and personal jurisdiction, see supra note 30.

148. See Barrett, 44 F. Supp. 2d at 731 (recognizing probability that Pennsylvania residents observed defendant’s defamatory comments). The district court presumed Pennsylvania residents had viewed the defendant’s comments even though the plaintiff did not provide any evidence of access by Pennsylvanians. See id. n.10.

risdiction under the effects test because the defendant had not targeted Pennsylvania and the plaintiff had only suffered limited harm in Pennsylvania.¹⁵⁰

5. Fair Play and Substantial Justice

Because the plaintiff had not established the first requirement of due process (that the defendant had sufficient minimum contacts with Pennsylvania), the district court was not required to decide whether the exercise of personal jurisdiction would have been reasonable.¹⁵¹ The district court implied, however, that even if there had been sufficient minimum contacts, it might not have found that the exercise of personal jurisdiction was reasonable.¹⁵² According to the district court, "the exercise of personal jurisdiction over noncommercial on-line speech that does not purposefully target any forum would result in hindering the wide range of discussion permissible on listserves, USENET discussion groups and Web sites that are informational in nature."¹⁵³

B. Critical Analysis

1. District Court's Use of Purposeful Availment Standard Did Not Adapt Well to the Internet

The district court's use of an active/passive Web site analysis to determine whether the defendant purposefully availed herself of the privilege of acting in Pennsylvania illustrates the drawbacks of applying this traditional personal jurisdiction concept to the Internet.¹⁵⁴ First, the court had to stretch the passive Web site analysis to cover the defendant's non-Web activities.¹⁵⁵ Second, the entire concept of a passive Web site is questionable.¹⁵⁶ At some level, Web sites are never passive because they are

¹⁵⁰. See Barrett, 44 F. Supp. 2d at 731 (refusing to find personal jurisdiction was proper).
¹⁵¹. See Pennzoil Prods. Co. v. Colelli & Assoc., Inc., 149 F.3d 197, 201 (3d Cir. 1998) (noting that fair play and substantial justice prong was discretionary).
¹⁵². See Barrett, 44 F. Supp. 2d at 731 (examining fairness issue briefly). The district court noted that the plaintiff was entitled to relief and that either party would be burdened to litigate in the other party's home state. See id. The plaintiff, however, had sued and planned on suing more California residents so he was willing to bear the burden of litigating outside Pennsylvania. See id.
¹⁵³. Id.
¹⁵⁴. For a discussion of problems with the active/passive Web site analysis, see infra notes 155-68 and accompanying text.
¹⁵⁵. See Barrett, 44 F. Supp. 2d at 728-29 (comparing defendant's posting list-serv and Usenet messages to maintenance of passive Web site). The district court did acknowledge that the Internet contacts were "technically differ[ent]" from a Web site but used the passive Web site analysis anyway. Id. at 728.
¹⁵⁶. See Betensky, supra note 10, at 18-20 (doubting that disseminating information through Web site is passive); Martin H. Redish, Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and Nature of Constitutional Evolution, 38 Jurimetrics J. 575, 591 (1998) (questioning whether putting up Web site is ever "passive act").
transmitting information to an individual's computer. 157 And even if a Web site is interactive, it does not necessarily prove that a defendant has purposefully availed himself or herself of the privilege of acting in the forum. 158 Because the Internet contains no geographical boundaries, it is impossible for Web site creators to keep non-forum state residents from their sites. 159 This technological impossibility discredits some courts' reasoning that Web site creators have purposefully availed themselves of the benefits of the forums where their Web sites are available, namely the entire world. 160

157. See F. LAWRENCE STREET, LAW OF THE INTERNET xxvii (1998 ed.) (noting that viewer's browser communicates with Web site to obtain information in order to display page). A Web site that seems passive (only presenting information but not requesting any information from the viewer) could actually be obtaining information about the viewer through cookies. See Stein, supra note 12, at 1187 n.94 (noting that even passive Web sites can collect information about viewer through cookies). Cookies are files that allow a Web site to collect information about a visitor (such as the visitor's email address or other Web sites that the visitor has visited) and then store that information on the visitor's own hard drive. See Rosenor, supra note 10, at 338. When that visitor returns to the Web site, the site can identify the visitor by accessing the cookies on his or her hard drive. See Chip Bayers, The Promise of One to One (A Love Story), WIRED, May 1998, at 184 (explaining operation of cookies). A moderate Web surfer probably has at least 200 cookies stored on his or her hard drive. See id. at 134. Many commercial Web sites use cookies to track people viewing their Web site. See id. Unless a viewer sets his or her browser to display a warning, he or she will never know that a Web site has created or accessed a cookie. See id.

158. See, e.g., Millennium Enters., Inc. v. Millenium Music, Ltd., 33 F. Supp. 2d 907, 921-23 (D. Or. 1999) (declining to assert personal jurisdiction based upon defendant's interactive Web site). According to the United States District Court for the District Court of Oregon, the defendant's interactive Web site did not satisfy the due process requirements of personal jurisdiction. See id. at 922. According to that court, a defendant may not anticipate being haled into a forum state's court even though it created an interactive Web site. See id. (finding defendant's interactive Web site did not show purposeful availment); see ESAB Group, Inc. v. Centricut, LLC, 34 F. Supp. 2d 323, 330 (D.S.C. 1999) (stating that identifying Web site as interactive did not resolve issue of personal jurisdiction). Instead, the United States District Court for the District of South Carolina held that the exercise of personal jurisdiction depended upon the amount of commercial activity that the defendant conducted over the Internet with the forum. See id. at 330-33 (refusing to exercise general or specific jurisdiction over defendant because defendant's only sale to forum occurred after lawsuit was filed and was engineered by plaintiff).

159. See, e.g., Stein, supra note 12, at 1172-73 ("Internet communications are routed to, from, and through places largely unknown and irrelevant to the users."); Lowther, supra note 11, at 653 (stating that Internet "has no geography, is not confined to any one territory, and gives everyone an instant presence everywhere"); Motty Shulman, Comment, http://www.personal_jurisdiction.com, 23 NOVA L. Rev. 781, 807 (1999) (pointing out that Internet does not allow Web site creator to limit availability of site to certain states). For a further discussion of the Internet's lack of geographical boundaries, see supra note 130 and accompanying text.

160. See Millennium, 33 F. Supp. 2d at 922 (criticizing these courts' reasoning because Web sites do not "thrust [information] upon users indiscriminately"; viewers must start their computers, connect to Internet and find Web site to obtain
Commentators have criticized the application of the purposeful availment standard to Internet contacts. These commentators have suggested a variety of alternative solutions including new tests focusing on the reasonableness prong of the traditional analysis, legislative action; Lowther, supra note 11, at 649-50 (complaining that some courts do not understand that Web sites are available everywhere and not just particular states). But see Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (claiming that defendant chose to transmit information about its services worldwide on Web site so exercise of personal jurisdiction was likely); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 164-65 (D. Conn. 1996) (deciding that personal jurisdiction was proper because defendant maintained Web site advertisement that was available everywhere continuously including Connecticut); State v. Granite Gate Resorts, Inc., No. CIV.A.6-95-7227, 1996 WL 767431, *6 (Minn. Dist. Ct. Dec. 11, 1996) (exercising personal jurisdiction over nonresident defendants who placed ad on Web site and stating that once defendants "place an advertisement on the Internet, that advertisement is available 24 hours a day, seven days a week, 365 days a year to any Internet user"), aff'd, 576 N.W.2d 747 (Minn. 1998).

161. See, e.g., Redish, supra note 156, at 606 ("Technological development of the Internet effectively renders the concept of purposeful availment both conceptually incoherent and practically irrelevant."). According to Professor Redish, the purposeful availment standard lacks a strong constitutional basis and ignores the states' interest in protecting their citizens. See id. at 601. Professor Redish also complains that the purposeful availment test is too hard to meet in Internet cases, allowing nonresident defendants to cause a great deal of harm in forum states yet escape personal jurisdiction. See id. Professor Redish argues that the Internet allows defendants to cause harm in forum states "substantially more easily, quickly, and pervasively than any prior form of communication." Id. at 604; see Lowther, supra note 11, at 653-54 (concluding that traditional jurisdictional principles that are based upon geography are too outdated for Internet).

162. See Redish, supra note 156, at 606-10 (recommending that courts focus on forum state's interest in protecting its residents and procedural burdens on defendant). The state's interest and procedural fairness factors would relate inversely. See id. at 609 (explaining test). If the state had a very strong interest in exercising personal jurisdiction, then the defendant would have to show substantial procedural burdens before the court would refuse to exercise personal jurisdiction. See id. at 609. But if the forum had little interest in litigating the matter, then the defendant could escape personal jurisdiction with a lesser showing of procedural unfairness. See id. (noting result if forum had little interest in case).

163. See, e.g., Leonard Klingbaum, Note, Bensusan Restaurant Corp. v. King: An Erroneous Application of Personal Jurisdiction Law to Internet-Based Contacts (Using the Reasonableness Test to Ensure Fair Assertions of Personal Jurisdiction Based on Cyber-space Contacts), 19 PACE L. REV. 149, 188-94 (1998) (concluding that Internet does not require new jurisdictional analysis but recommending that courts focus more on reasonableness prong in deciding whether personal jurisdiction is proper). One court has found the exercise of personal jurisdiction improper in an Internet-based case because it did not comport with fair play and substantial justice. See Expert Pages v. Buckalew, No. C-97-2109-VRW, 1997 WL 488011, *3-5 (N.D. Cal. Aug. 6, 1997) (refusing to exercise personal jurisdiction over nonresident defendant). In Buckalew, the defendant, a Virginia resident, had infringed upon the plaintiff's copyrighted material. See id. at *2-3 (giving facts of case). Although the district court concluded that the defendant had sufficient minimum contacts with California, it refused to exercise personal jurisdiction because the defendant's business was unsuccessful, he lived across the country and had not visited California in a long time. See id. at *4-5. The court concluded that forcing the defendant to defend himself in California was an unacceptable burden. See id. (finding per-
tion, a Supreme Court ruling or rethinking the policies underlying personal jurisdiction. Some commentators, however, claim that there is no need to adopt new personal jurisdiction principles for the Internet. Certainly, Barrett illustrates the challenges in applying the purposeful availment test to online activities.

2. District Court's Use of Effects Test Was Preferable

The district court's use of the effects test to analyze personal jurisdiction on the Internet illustrates the benefits of that approach. The effects test applies to the Internet better than the purposeful availment test because it is based upon the harm a plaintiff actually suffers in the forum state. As the Barrett court pointed out, the plaintiff could not show any personal jurisdiction would hurt defendant's opportunity to defend himself. One commentator, however, found this decision questionable. See Leitstein, supra note 54, at 581 (believing that other courts would probably have found exercise of personal jurisdiction reasonable).

164. See, e.g., Michelle R. Jackson-Carter, Comment, International Shoe and Cyberspace: The Shoe Doesn't Fit When It Comes to the Intricacies and Nuances of Cyberworld, 20 WHITTIER L. REV. 217, 238-240 (1998) (concluding that congressional legislation is only way to alleviate courts' confusion in deciding Internet jurisdiction cases). But see Lowther, supra note 11, at 654-55 (believing that federal legislation would merely maintain unacceptable status quo and create federalism concerns).

165. See Klingbaum, supra note 162, at 151-52 (speculating that Supreme Court could end Internet personal jurisdiction confusion by establishing bright line rule).

166. See Betensky, supra note 10, at 22 (recommended that legal community reconsider policy of travel hardship underlying personal jurisdiction because today there is much less hardship in traveling to different jurisdiction for litigation); David Wille, Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases, 87 KY. L.J. 95, 113 (1999) (advising end to minimum contacts test and devising new personal jurisdiction analysis based upon sovereignty of states).

167. See Stein, supra note 12, at 1179-91 (arguing that Internet cases can be resolved under traditional personal jurisdiction framework); Stravitz, supra note 72, at 940-41 ("Because the Internet transcends geography, it is the ideal context in which to finally discard the territorial ghost of Pennoyer, and focus jurisdictional analysis squarely on whether a chosen forum will provide all parties with fair play and substantial justice."); David G. Thomas, Note, Personal Jurisdiction in the Nebulous Regions of Cyberspace: A Call for the Continued Relaxation of Due Process and Another Debilitating Blow to Territorial Jurisdiction, 31 SUFFOLK U. L. REV. 507, 530-34 (1997) (recommending further expansion of personal jurisdiction principles to cover Internet); Richard S. Zembek, Comment, Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace, 6 ALB. L.J. SCI. & TECH. 339, 367-68 (1996) (believing that Internet cases can be resolved under traditional personal jurisdiction principles).

168. For a further discussion of the challenges in applying the purposeful availment standard to the Internet, see supra notes 154-66 and accompanying text.

169. For a further discussion of the advantages of the "effects test" analysis, see infra notes 169-78 and accompanying text.

170. See, e.g., Leitstein, supra note 54, at 585-90 (applying modified "effects test" to hypothetical cases involving personal jurisdiction on Internet). Under Leitstein's test, a court would decide if personal jurisdiction was proper by looking
particular injury that he suffered in Pennsylvania. Furthermore, it is easier to decide whether a defendant knew his or her online actions would hurt the plaintiff in the forum state, than to decide whether the defendant purposefully availed himself or herself of the benefit of acting in the forum through the Internet. Because the Internet lacks a geographical presence, courts have had difficulty determining whether nonresident defendants purposefully availed themselves of acting in the forum. A nonresident defendant may cause the plaintiff great harm in the forum but not purposefully avail himself or herself of the benefit of acting in the forum. But under the effects test, these defendants would be subject to personal jurisdiction because they caused the plaintiffs injury in the forum and knew that injury in the forum was likely.

In utilizing the effects test, the district court distinguished between Internet activities directed at Pennsylvania and Internet activities directed at the entire world. Instead of simply reasoning that the defendant acted on the Internet, and therefore knew her activities were felt worldwide (including in Pennsylvania), the district court tried to determine whether these activities actually had an impact in Pennsylvania. As the district court pointed out, the defendant had attacked the plaintiff as a national consumer advocate on nationally concerned Usenet groups and list-

at "(1) Whether the defendant committed a volitional act that; (2) [c]aused significant harm; (3) [t]o an entity that the defendant knew or should have known would be harmed by the activity, thus, making suit on the harmful result of that conduct foreseeable." Id. at 585. Therefore, under this test, the defendant would probably not be subject to personal jurisdiction in Pennsylvania unless the plaintiff could show that he suffered significant harm.

171. For a discussion of how much harm the plaintiff suffered in Pennsylvania, see supra notes 146-49 and accompanying text.

172. For a further discussion of the advantages of the "effects test" as opposed to the disadvantages of the purposeful availment standard, see supra notes 157-79 and accompanying text.

173. For a further discussion of the difficulties in deciding whether a defendant has met the purposeful availment standard, see supra notes 129, 158 and accompanying text.

174. See Betensky, supra note 10, at 20 (worrying that defendant may create passive, noncommercial Web site that does not trigger personal jurisdiction yet causes plaintiff much harm in forum); Leitstein, supra note 54, at 585 ("On the Internet, harm can be done by an entity without purposeful availment").

175. For a further discussion of the "effects test," see supra notes 72-76 and accompanying text.

176. For a discussion of how the district court examined the defendant's online activities, see supra notes 142-45 and accompanying text.

177. For a further discussion of the district court's analysis, see supra notes 146-50 and accompanying text.
Furthermore, the plaintiff did not suffer a substantial amount of harm in Pennsylvania.

3. Noncommercial Nature of Defendant’s Online Activities

Finally, the district court acted in accordance with other courts in distinguishing the defendant’s noncommercial activities from other commercial Internet cases. Many courts and commentators have noted that finding personal jurisdiction on the Internet is directly related to how much business a defendant has conducted online. Because the defendant was not conducting business over the Internet, the district court was correct in not holding her to the same standard as businesses using the Internet.

V. IMPACT

Barrett provides a useful framework for courts analyzing personal jurisdiction in noncommercial Internet cases. Because most previous cases involving personal jurisdiction on the Internet were based upon commercial activity, courts have had little precedent until Barrett for deciding noncommercial Internet cases. Since Barrett, at least one court has cited its...
analysis approvingly and refused to exercise personal jurisdiction over nonresident defendants accused of online defamation.\(^{185}\) Exercising personal jurisdiction in this case could have jeopardized the freedom of online discussion.\(^{186}\) The Barrett court recognized this danger and sought to avoid it by refusing to exercise personal jurisdiction.\(^{187}\) If the district court had exercised personal jurisdiction over the defendant, it might have chilled free speech.\(^{188}\) As the district court emphasized, the defendant was not profiting from her allegedly defamatory statements concerning the plaintiff.\(^{189}\) The defendant opposed the plaintiff's promotion of fluoridated water for highly personal reasons.\(^{190}\) Even

\(^{185}\) See Blakey v. Continental Airlines, Inc., 730 A.2d 854, 866-67 (N.J. Super. Ct. App. Div. 1999) (affirming lower court's dismissal of plaintiff's suit for lack of personal jurisdiction). Like Barrett, this was a defamation case. See id. at 857 (stating that plaintiff sued defendants for defamation, sexual harassment, business libel and emotional distress). The plaintiff, who resided in Washington but was based in New Jersey, was a pilot for the defendant. See id. at 856-57. After the plaintiff had filed a sexual harassment complaint against the defendant, several employees of the defendant had written allegedly defamatory remarks about the plaintiff on the defendant's computer system. See id. at 957-60. All but one of the defendants who wrote these remarks did not reside in New Jersey. See id. at 860. The New Jersey court refused to exercise personal jurisdiction over the nonresident defendants because the plaintiff did not reside in New Jersey, the defendants' comments did not target New Jersey and the plaintiff did not suffer "identifiable harm" in New Jersey. See id. at 867.

\(^{186}\) See Barrett, 44 F. Supp. 2d at 731 (worrying that exercise of personal jurisdiction in this case "would result in hindering the wide range of discussion permissible on listserves, USENET discussion groups and Web sites that are informational in nature").

\(^{187}\) See id. (discussing possible effects of exercising personal jurisdiction).

\(^{188}\) See Lowther, supra note 11, at 652 (claiming that exercise of personal jurisdiction based upon solicitation for commercial or noncommercial purposes could threaten free speech and damage Internet as revolutionary communication tool). But see Betensky, supra note 10, at 19 (noting that noncommercial passive Web site can still cause great harm in forum and it would be unfair to force injured plaintiff to prosecute outside forum); Wille, supra note 166, at 178-79 (rejecting courts' and commentators' arguments that expansive exercise of personal jurisdiction could threaten Internet). According to Wille, this argument assumes that more participation on the Internet is good although there is already too much useless information on the Internet. See id. at 178 (criticizing amount of useless information on Internet). Wille also argues that these commentators and courts assume that low-cost participation on the Internet is more important than punishing people who use the Internet illegally. See id. at 179 (arguing that interest in punishing wrongdoers should outweigh interest in encouraging Internet growth). Finally, Wille says that even if the personal jurisdiction does damage the Internet, Congress can step in and pass new laws on personal jurisdiction. See id.

\(^{189}\) See Barrett, 44 F. Supp. 2d at 728 (distinguishing defendant's Internet activities from commercial Internet entrepreneurs).

\(^{190}\) See Darlene Sherrell, A Near Death Experience (visited Oct. 14, 1999) <http://www.dayu.net/~sherrell/near.htm> (discussing defendant's reasons for opposing fluoridation). The defendant claims that she went into anaphylactic shock and suffered life long effects after drinking fluoridated water. See id. In this case, the defendant's allegedly defamatory statements were fairly tame compared to other Internet defamation cases. Compare Barrett, 44 F. Supp. 2d at 727, 730 (giving examples of defendant's defamatory statements where she at-
in commercial Internet cases, courts have expressed concern about exercising personal jurisdiction to the detriment of online activities.191 Asserting personal jurisdiction based upon noncommercial comments could have even more serious consequences, such as causing Internet users to censor themselves or discouraging the creation of Web sites.192 Fortunately, the United States District Court for the Eastern District of Pennsylvania avoided this result by refusing to exercise personal jurisdiction over the defendant in Barrett.193

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tacked plaintiff's credibility as consumer advocate), with Bochan v. La Fontaine, No. CIV.A. 98-1749-A, 1999 WL 343780, *1 (E.D. Va. May 26, 1999) (noting that defendants accused plaintiff of subscribing to Usenet groups involving child pornography and cannibalism). Unlike the Barrett court, the Bochan court found that the defendants were subject to personal jurisdiction in Virginia. See Bochan, 1999 WL 343780, at *6. The defendants had business contacts with Virginia (two through book sales and the other through Web site) and the plaintiff felt the effects of their actions in Virginia, where he lived and worked. See id. at *3-6. Additionally, the defendants knew the plaintiff lived in Virginia. See id. at *5.


192. See Barrett, 44 F. Supp. 2d at 731 (fearing exercise of personal jurisdiction over noncommercial online speech could hinder currently open Internet communication); ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (deciding that “[a]s the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion”), aff’d, 521 U.S. 844 (1997); Street, supra note 157, at xxxv (hoping courts do not discourage “exciting aspects of free expression on the Internet”); Lowther, supra note 11, at 652 (arguing that exercising personal jurisdiction based upon Web page is dangerous because “the resultant chilling of speech on the internet could be detrimental to what has been noted to be one of the greatest tools for rapid, precise, and lasting human communication”); Shulman, supra note 159, at 807 (worrying that exercise of personal jurisdiction based upon Web page could “limit Internet advertising only to those enterprises that can afford to litigate matters in foreign and distant jurisdictions”).

193. For a further discussion of the negative consequences of asserting personal jurisdiction based upon noncommercial Internet contacts, see supra notes 186-92 and accompanying text.