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Personal Jurisdiction in Texas and Internet Web-Sites

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PERSONAL JURISDICTION IN TEXAS AND INTERNET WEB-SITES

INTRODUCTION

Is it a stream of electrons or stream of commerce?[1] This is the fundamental problem many courts and commentators have in discussing

1. The phrase "stream of commerce" was used most notably in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980).

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the Internet. The Internet,[2] while commonly known as a storehouse of information much like an encyclopedia, is also an interactive means of communication much like a telephone. Indeed, many commentators discuss these various aspects of the Internet in determining how legal precedent should apply to this new media of communication.[3] This Comment will address one distinct aspect of this media—obtaining personal jurisdiction over the creator of an Internet "web-site"[4] originating out-of-state.

Personal jurisdiction of Internet web-sites can be properly analogized to court precedent.[5] Both federal and state courts in Texas, as

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2. The Internet refers to what has now become a global network of computers that are linked together through telephone lines and satellites. In the Internet, computers communicate with one another through modems attached to each computer and software within each computer drives the commands of the person (user) typing at the keyboard. Cris Shipley & Matthew Fish, *Chapter 1: The Web and the Internet*, 3 COMPUTER LIFE 115 (1996) [hereinafter *The Web*]. The user commands her personal computer to call a local main-frame computer through the phone lines, which in turn is connected to another main-frame computer called a server. The server is the local Internet provider, such as America Online, CompuServe and AT&T, among others. Next, the server can communicate with backbone computers that are maintained by large communications companies such as AT&T or MCI. These backbone computers can then call the particular server that the user desires if it contains a web-site in its computer memory. The World Wide Web refers to the collection of web-sites that can be contacted through the Internet that are located on computers across the world. As a whole, the Internet is not regulated by any organization, nor is it owned or managed by any one organization. However, each backbone computer is maintained by the company which owns it and each server likewise. *See id.*

3. *See, e.g.*, Richard S. Zembeck, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339 (1996) (using general hypothetical situations in describing how courts should acquire personal jurisdiction in Internet cases). *See also* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197 (1995) (rejecting current precedent as non-applicable to the Internet in favor of changes in the law); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996) (using past Supreme Court precedent, combined with model scenarios in describing how courts should acquire jurisdiction over nonresidents).

4. A web-site refers to a site that can be called through phone lines from one computer to another. *See The Web*, *supra* note 2. A web-site is merely stored information on a magnetic disk located on a computer. This information is accessed through the Internet when the user's computer is commanded to call a particular site. This can be done in numerous ways that make the process seem far removed from calling, but it is in fact the same as when a person picks up a phone and dials a number. The computer merely automates the process and makes it faster by allowing the user to click onto an icon on the computer screen, which in turn commands the computer to make the call or locate the web-site of interest. The icon is called a "hyperlink," and activating it commands the software in the web-site to call the particular site that is indicated. Thus, the site is indeed a site in the literal sense, being located in a particular computer, which is located in some state or country. Other terms used in reference to a web-site are "web-page" and "bulletin board." *See id.*

5. This fact is what distinguishes this Comment from Zembeck. *Cf.* Zembeck, *supra* note 3. The Zembeck article uses hypothetical model scenarios to exemplify how personal jurisdiction should be analyzed. While this method is useful, it does not take into account the various forum-specific precedents that courts use in analyzing

well as the United States Supreme Court, have dealt with the issue of obtaining jurisdiction over a nonresident defendant who has done nothing more than launch an injurious writing into the stream of commerce.[6] And, as the Internet expands,[7] so too will the need for a coherent method of maintaining personal jurisdiction over a web-site that has injured someone in Texas.[8] By elucidating the physical nature of the Internet as an extension of present technology and not something fundamentally new, courts will realize that the present law of jurisdictional analysis is perfectly adequate. No fundamental changes are needed in the law to show that a nonresident creator/owner of a web site can be haled into a Texas court.

What makes the Internet seem so formidable lies in part in some of the rhetoric surrounding it.[9] Information on the Internet is not in the mythical realm popularly called "Cyberspace,"[10] but magnetic etch-

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situations. This Comment is more specific in that it relies on Texas court precedent in modeling how web-site jurisdiction should be analyzed in Texas.

6. The best example of this in Texas is *Jetco Electronic Industries v. Gardiner*, 325 F. Supp. 80 (S.D. Tex. 1971). For a discussion of this case see *infra* Part II.B.1. The best examples of this fact situation from the United States Supreme Court are *Calder v. Jones*, 465 U.S. 783 (1984), and *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984). For a discussion of these cases see *infra* Part I.B.1-2.

7. Recent reports show that the explosion of Internet use has nearly halted normal telephone use due to the dual sharing of Internet users and regular telephone communications. *See* CBS *Evening News* (CBS television broadcast, December 18, 1996). There are about 1500 Internet providers nationwide. *See* Kara Swisher, *As Internet Grows, So Do Interests of Trade Groups*, THE WASHINGTON POST, June 17, 1996, at F12. Internet usage is growing at an annual rate of 341,634%, and every 10 minutes a new network is connected to the Internet. *See* Michael Schrage, *For Time's 'Man of the Year,' Consider the Incredible Internet*, THE WASHINGTON POST, December 24, 1993, at D10. In 1996, over 9,400,000 host computers were linked to the Internet. *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

8. Injuries can arise from contract actions or tort actions on the Internet. *See* Elliot E. Polebaum, *Procedural Issues*, *in* INTERNET AND ONLINE LAW § 10.02[2] (Kent D. Stuckey ed., 1996). Such torts as fraud, defamation and tortious interference will be common on the Internet. *See id.* Specifically, trademark and copyright infringement have been the most common types of suits to date. *See infra* Part III.

9. The confusion surrounding the Internet is highlighted in a recent comment by the three-judge panel of the District Court in *American Civil Liberties Union v. Reno*:

> The Internet is *not a physical or tangible entity*, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks . . . . The nature of the Internet is such that it is very difficult, if not impossible, to determine its size at a given moment.

929 F. Supp. at 830-31 (emphasis added). While this statement may be accurate in that the Internet is not a physical or tangible entity, it must be understood that the *information* on the Internet is located at a physical and tangible place—a computer located in some state and under the control of a person or entity.

10. The term "cyberspace" was coined by the science fiction author William Gibson in *Neuromancer*. *See* WILLIAM GIBSON, NEUROMANCER (1984).

ings on a solid disk.[11] These disks are located on computers (servers), and these computers are located in some forum. Likewise, the person at the other end—the user sitting at her desk "surfing the net"—is merely commanding her computer software[12] to call the modem of a computer in that forum through means of telephone lines.[13] Above all, it is vital to understand this: Telephone communication is not an analogy to Internet communication, *the Internet is telephone communication.* The term "Cyberspace," invoked to make the Internet sound like something fundamentally new, is best left to the world from which it came—science fiction.[14]

Perhaps the most unique feature of the Internet, and the one most confusing, is the fact that the Internet can act in both an *interactive* and *passive* capacity. Newspaper and magazine print, on the one hand, are clearly passive. Once it is printed and mailed or delivered by the publisher, the receiver cannot interact with this print to communicate directly with, for example, its creator. On the other hand, the telephone is almost exclusively interactive. Most often, the telephone is used in an interactive capacity in that it takes an affirmative act by two people to operate it. However, when coupled to a computer, telephone communication has the ability to take on a passive role, just as newsprint.[15] And therein lies the problem.

The Internet incorporates both aspects of communication so that it can be passive at one extreme and interactive at the other extreme. The interactive extreme occurs in situations where there is two-way communication between a user and the owner of a web-site through either the computer itself or the phone or mail.[16] Determining whether or not a court has personal jurisdiction over a defendant in

11. These magnetic etchings ultimately reside on what is called a "hard-drive," which is a magnetic storage device built into most computers. It is the computer operating system that translates these etchings into a readable format.

12. *Netscape* and *America Online* are two of the more popular software packages commonly referred to as "browsers."

13. The computers at each end of the line transmit and translate the data through the use of a modem, much like the mouthpiece of a telephone transmits and translates a voice into electronic signals. *See The Web*, *supra* note 2.

14. *See supra* note 10.

15. Thus, a computer has the potential of acting as a passive newspaper or magazine in that the user can contact a web-site through the telephone lines. Instead of interacting with another person which must make an affirmative action to respond to the user, the web-site is a passive magnetic signal on the hard drive of a computer which can simply be read like a newspaper.

16. *See, e.g.,* Compuserve Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (acquiring jurisdiction over the defendant through the language of the contract which stated that the agreement is governed by the law of Ohio, and the many transmissions of information directed from the Texas defendant to the Ohio plaintiff were made over the Internet in three year period); Playboy Enter., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996) (jurisdiction over the defendant in its actions of responding to user inquiries for access to its service and receiving payments for those services); Zippo Mfr. Co. v. Zippo Dot Com, Inc., No. 96-397, 952 F. Supp 1119 (W.D. Pa. 1997) (finding that the injury to the plaintiff arose from the repeated Internet

these cases should become simpler as the interactions accumulate.[17] This Comment, however, focuses on the most challenging aspect of the Internet for purposes of personal jurisdiction—its passive capacity.

To date, there are several cases from other jurisdictions that can be classified as falling into the category of "passive" web-site cases[18] and one case that falls somewhere near the passive end of the continuum between passive and interactive fact patterns.[19] Considering that courts in other states will rely on their own precedent,[20] it would be confusing for a Texas court to base its analysis of personal jurisdiction on any of these cases. While a discussion of the analytical pros and cons of these cases is insightful, a discussion of Texas precedent would be of more use when web-site cases arise.

When the nonresident defendant's contacts with Texas are as tenuous as they are bound to be in the case of passive web-sites, personal jurisdictional analysis becomes critical. Central to the court's analysis is the nexus between the actions of the defendant in making the web-site and the injury caused to a Texas resident. This Comment shows that the nexus is formed by finding some degree of intent in the defendant's actions. This "intent" has been variously described by such terms as "foreseeability,"[21] "purpose,"[22] "knowledge,"[23] and other terms by various courts. A refinement of this issue is vital in defining how Texas courts may obtain personal jurisdiction over web-site owners.[24]

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activities through the use of the plaintiff's trademark and that the defendant consciously chose to process applications from the plaintiff's forum).

17. This fact was recognized in the recent decision in *Zippo*, when the court made an effort to categorize Internet related cases by their level of passivity or interactivity. *See Zippo*, 952 F. Supp. at 1124. This Comment focuses on cases that fall mostly into the "passive" category, although in reality the cases present a continuum of fact patterns between the extremes. The focus on passive web-sites is due to the inherent difficulty in that analysis, since the lack of activity between plaintiff and defendant makes the due process reach of the state more tenuous.

18. *See infra* Part III.A.-B.1.

19. *See infra* Part III.B.2.

20. *See* DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 82, 90 (2d ed. 1992). ("Each state has one or more 'long-arm' statutes. The reach of long arm jurisdiction depends upon the traditions and values of the people of the state, as expressed by its legislature in its long-arm statute. [E]very state's statutes are subject to interpretation by the courts of that state.").

21. *See* cases cited *infra* note 89.

22. *See* cases cited *infra* note 92.

23. Memorial Hosp. Sys. v. Fisher Ins. Agency, Inc., 835 S.W.2d 645, 651 (Tex. App.—Houston [14th Dist.] 1992, writ denied) The defendant knew that the information he provided would be used in forum state; therefore, the court found defendant had purposefully availed himself of the forum law.

24. For more on the legal ramifications of creating and owning a web-site, see Thomas J. Smedinghoff, *From Web Sites to Online Sales: A Road Map to the Legal Issues*, *in* ONLINE LAW, THE SPA'S LEGAL GUIDE TO DOING BUSINESS ON THE INTERNET § 2 (Thomas J. Smedinghoff ed., 1996).

This Comment sets forth the analysis that Texas courts should use in maintaining personal jurisdiction over the nonresident creator/owner of a web-site on the Internet. This will be accomplished by elucidating the nature of the Internet in such a way as to show that its inherent nature is not unlike fact situations that Texas courts have dealt with previously. First, the foundation of jurisdictional analysis is outlined, concluding that for web-site cases jurisdiction hinges upon the intent or purpose in the web-site owner's actions. Second, significant Texas cases are discussed to explore the exact nature of what a court must find to properly maintain personal jurisdiction over a nonresident defendant when injuries arise from printed material and/or wire communications. Finally, cases from other states that analyze web-site personal jurisdiction are compared and contrasted with the analysis of Texas courts. This Comment concludes that, when the injury claimed arises from the web-site itself, the Texas court can maintain personal jurisdiction if the proper nexus between the defendant's actions and the alleged injury is established.

I. LONG-ARM STATUTE AND DUE PROCESS LIMITS OF PERSONAL JURISDICTION IN TEXAS

A. *The Texas Test*

Both state[25] and federal[26] courts in Texas must establish that personal jurisdiction exists over nonresident defendants before the merits are tried.[27] The Fifth Circuit has determined that it must use the same analysis as Texas state courts use in acquiring personal jurisdiction.[28] This analysis is based on the Texas long-arm statute[29] and federal constitutional due process[30] requirements.[31] The long-arm statute requires that the defendant must have conducted business in this state, defined as either contracting with or recruiting a Texas resident, committing a tort in the state or committing "other acts" that may be con-

25. *See* O'Brien v. Lanpar Co., 399 S.W.2d 340, 342 (Tex. 1966) (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

26. *See* Bullion v. Gillespie, 895 F.2d 213, 215 (5th Cir. 1990).

27. *See* TEX. R. CIV. P. 120(a)(2); Portland Sav. & Loan v. Bernstein, 716 S.W.2d 532, 536 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) ("When reaching a decision to exercise or decline jurisdiction, the trial court should rely only upon the necessary jurisdictional facts and should not reach the merits of the case."); D.J. Inv., Inc., v. Metzeler Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542, 543 (5th Cir. 1985) (stating that only a prima facie showing is necessary to show that the court has personal jurisdiction over nonresident defendant).

28. *See Bullion*, 895 F.2d at 215. *See also* FED. R. CIV. P. 4(k)(1)(A).

29. TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-17.069 (Vernon 1995).

30. *See* U.S. CONST. amend. XIV, § 1 cl. 3. The first United States Supreme Court case to interpret the Due Process Clause as limiting a state's ability to maintain in personam, or personal, jurisdiction over a nonresident defendant was *Pennoyer v. Neff*, 95 U.S. 714 (1877), which held that in order to hale a nonresident defendant into the state court the defendant must be served personally within the state.

31. *See* Schlobohm v. Schapiro, 784 S.W.2d 355, 356 (Tex. 1990).

sidered doing business in the state.[32] The Texas long-arm statute places no limits on the mode of communication or injury—it may be made "by mail or otherwise."[33]

The Texas long-arm statute has been interpreted by the Texas Supreme Court as extending to the limits of due process.[34] For this reason, the long-arm statute is interpreted broadly by the Texas Supreme Court as to what constitutes "doing business" in Texas, placing the limits of due process at the center of personal jurisdiction analysis.[35] The Texas Supreme Court in *Schlobohm v. Schapiro*[36] has combined the Texas long-arm statute and federal due process requirements for personal jurisdiction into a three-part inquiry for specific and general minimum contacts[37] and fairness called the Texas Test:[38]

1. The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;
2. The cause of action must arise from, or be connected with, such act or transaction. Even if the cause of action does not arise from a specific contact, jurisdiction may be exercised if the defendant's contacts with Texas are continuing and systematic; and
3. The assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.[39]

A party is subject to being haled into Texas court when this test is satisfied.[40] Since the Texas Supreme Court has stated it is unlikely the

32. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1995).

33. *Id.*

34. *See Schlobohm*, 784 S.W.2d at 357. *See also* Guardian Royal Exch. Assurance v. English China Clays, P.L.C., 815 S.W.2d 223, 226 (Tex. 1991); U-Anchor Adver., Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977).

35. *See Schlobohm*, 784 S.W.2d at 357.

36. 784 S.W.2d 355.

37. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). *See Guardian Royal Exch.*, 815 S.W.2d at 230 ("First, the nonresident defendant must have purposefully established 'minimum contacts' with Texas. There must be a 'substantial connection' between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed toward Texas.") (footnotes omitted).

38. *See International Shoe Co.*, 326 U.S. at 316 (exercising of jurisdiction must comport with "traditional notions of fair play and substantial justice" (quoting Millikin v. Meyer, 311 U.S. 457, 463 (1940))). *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985).

39. *Schlobohm*, 784 S.W.2d at 358. Part (1) and (2) refer to "minimum contacts," while part (3) refers to the finding of "fair play and substantial justice."

40. *See id.*

test will fail for fairness contained part (3),[41] parts (1) and (2) will most always control personal jurisdictional analysis.[42] In particular, maintaining personal jurisdiction depends on the court's finding of a "nexus"[43] between the first and second parts of the test. Throughout this Comment, the facts and analysis of the cases discussed centers on the first two elements of the Texas Test, showing how the defendant's actions are purposefully connected to Texas.

B. *Tools to Analyze Specific Fact Patterns*

If a Texas court seeks jurisdiction over the creator of a web-site, the legal analysis must center around the Texas Test. This is true regardless of the specific fact pattern or the specific means of communication.[44] In this regard, the Internet is not distinguishable from any other medium of communication. In fact, it has been recently recognized in Texas "[t]hat . . . information . . . sent over the phone does not prevent jurisdiction."[45] Yet, it is tempting to see web-sites as different from other mail or wire forms of communication. This is because people are once removed from the communication medium by the modem/computer interface while using the Internet. Regardless of whether communication occurs directly by phone or mediated by computers through the Internet, there must be some action on the part of the defendant. And it is this action that is vital to finding personal jurisdiction over nonresident owners of web-sites.

As communication technology made non-physical contacts between states ever more present, the United States Supreme Court has recog-

41. *See id.*

42. *See id.* The "Texas Test" has evolved since the Texas Supreme Court first devised a three-prong test in *O'Brien v. Lanpar Co.*, 399 S.W.2d 340 (Tex. 1966). It has not changed substantively since then and is currently used in both federal and state courts in Texas. The version of the "Texas Test" quoted above was revised only recently in *Schlobohm*, 784 S.W.2d at 358, to incorporate the elements of general jurisdiction in part (2), which was already used in Texas courts but not formally incorporated into the test for specific personal jurisdiction.

43. Justice Pope, who wrote the dissenting opinion in *Hall v. Helicopteros Nacionales de Colombia, S.A.*, 68 S.W.2d 870, 877 (Tex. 1982), *rev'd*, 466 U.S. 408 (1984), and with whom the United States Supreme Court agreed, stated that the Texas long-arm statute required that a "nexus" be formed between the injury alleged and the defendant's contacts with the state in order to maintain personal jurisdiction. Incidentally, it was Justice Pope who wrote the majority opinion in *O'Brien v. Lanpar Co.*, 399 S.W.2d 340 (Tex. 1966), which created the precursor to the current Texas Test outlined *supra*, text accompanying note 39.

44. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1995). "In addition to *other acts* that may constitute doing business, a nonresident does business in this state if the nonresident: (1) contracts by *mail or otherwise* with a Texas resident." *Id.* (emphasis added).

45. Memorial Hosp. Sys. v. Fisher Ins. Agency, Inc., 835 S.W.2d 645, 651 (Tex. App.—Houston [14th Dist.] 1992, no writ).

nized that the limits of due process must remain flexible.[46] As stated by the Supreme Court in *Hanson v. Denkla*,[47]

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, to the flexible standard of *International Shoe v. Washington*.[48]

Yet, there is still a fundamental limitation on personal jurisdiction in the Due Process Clause, and states may not make judgments against a nonresident individual or corporation who has "no contacts, ties, or relations" with the forum state.[49] Thus, the act of creating a web-site and placing it on a server computer[50] must be analyzed within the same due process limitation on personal jurisdiction as the Supreme Court has always recognized.

The physical presence of a defendant in the forum state is not needed in order for a court to obtain personal jurisdiction.[51] This will most often be the case in a web-site which is contacted from one state to another via telephone lines. The Supreme Court has acknowledged that the modern trend in communications through "mail and wire communications across state lines . . . obviates the need for physical presence."[52] However, this does not preclude defendants from "purposefully directing" their actions at a particular forum.[53]

To determine the purposeful direction of a defendant's actions, courts have used a flexible analysis for each case.[54] With web-site cases, as with all cases,[55] the court must not lose sight of the relation-

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46. *See* Hanson v. Denkla, 357 U.S. 235 (1958).

47. *Id.*

48. *Id.* at 250-51 (citations omitted).

49. *See id.*

50. *See The Web*, *supra* note 2. Often, this act is referred to as placing a web-site *on the Internet*. This is misleading, for the Internet is not a place. The only "place" in this regard is the location of the server computer. This is an issue in *Pres-Kap, Inc. v. System One, Direct Access Inc.*, 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994), discussed *infra* Part III.A.

51. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

52. *Id.*

53. *See id.*

54. *See* Schlobohm v. Schapiro, 784 S.W.2d 355, 358 (Tex. 1990) (rejecting mechanical application of any test, including the Texas Test).

55. *See, e.g.*, Guardian Royal Exch. Assurance v. English China Clays, P.L.C., 815 S.W.2d 223, 230 (Tex. 1991) ("There must be a 'substantial connection' between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed towards Texas."); Portland Sav. & Loan Ass'n v. Bernstein, 716 S.W.2d 532, 537 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (finding the necessary nexus between the nonresident defendant's calls, letters, and visit to Texas and the injury).

ship between the injury in the forum and the nonresident defendant's actions. A plaintiff cannot claim that personal jurisdiction exists over a nonresident defendant due to the plaintiff's unilateral actions.[56] According to the Texas Supreme Court, minimum contacts exist between the forum and defendant when he purposefully avails himself through his conduct.[57] To find the nexus between the forum and the defendant's actions, the court must "focus upon his *intentional activities and expectations*."[58]

The defendant's "expectations," as the Texas Supreme Court defines it, parallels the United States Supreme Court's "foreseeability" language:

> [T]he *foreseeability* that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that [1] the defendant's conduct and [2] connection with the forum state are such that he should reasonably anticipate being haled into court there.[59]

Foreseeability alone, however, is never enough.[60] The specific facts of the case must be carefully analyzed to form the nexus between the actor's intent and his actions.[61] It is then that a defendant's actions are purposefully directed.

Satisfying the minimum contacts requirements for due process becomes increasingly difficult as the nexus between the defendant's actions and the injury in the forum become attenuated. This will most certainly be the case in many web-site cases, where the only action of the defendant who owns a web-site is its creation and placement on a server computer. But, once this act is completed, the web-site may be analogized to a nationally circulated magazine that is placed in stores or a magazine subscription placed in mailboxes.[62]

Once the web-site is placed on the server computer, how is personal jurisdiction maintained over the nonresident defendant? In these situations, two well known models can be used to break down fact patterns into their important elements.[63] Although a purely artificial creation, these models are helpful in analyzing personal jurisdiction

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56. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984).

57. *See Schlobohm*, 784 S.W.2d at 357.

58. *Id.* (emphasis added).

59. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (emphasis added) (citing Kulko v. Superior Court, 436 U.S. 84, 97-98 (1978); Shaffer v. Heitner, 433 U.S. 186, 216 (1977)). *See also* Burger King v. Rudzewicz, 471 U.S. 462, 474 (1985).

60. *See World-Wide Volkswagen*, 444 U.S. at 287.

61. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 110-11 (1987). *Accord* Guardian Royal Exch. Assurance v. English China Clays, P.L.C., 815 S.W.2d 223, 230 (Tex. 1991).

62. *See infra* Part I.C.

63. *See* W. Frank Newton & Jeremy C. Wicker, *Personal Jurisdiction and the Appearance to Challenge Jurisdiction in Texas*, 38 BAYLOR L. REV. 491, 535 (1986).

over passive web-sites used to solicit business or advertise a product.[64] Using this approach, the two most helpful models are the "Stream of Commerce" and "Tort Effects" models.[65]

1. Stream of Commerce—*Keeton v. Hustler Magazine, Inc.*

The Stream of Commerce model is exemplified by the Supreme Court case *Keeton v. Hustler Magazine, Inc.*[66] The Stream of Commerce model applies when (a) a defendant delivers a product into the stream of interstate commercial activity, (b) the defendant acts with the *expectation* that the product will be used or purchased by someone in the forum state, (c) someone in the forum state does use or purchase the product, and (d) the product causes injury.[67] The "product" can be tangible as well as intangible.[68] For instance, the harmful product in *Keeton* was an intangible article written for a publication that is circulated nationally.[69] There, the Court found that the nonresident defendant "continuously and deliberately exploited"[70] the forum market (satisfying (a) and (b) in the Stream of Commerce test), and that the plaintiff was injured as a result of the defendant's activities (satisfying (c) and (d)). Thus, the defendant could reasonably anticipate being haled into court in the forum.[71] The defendant's *expectation* or *foreseeability* in this instance arose from the defendant's knowledge that the publication entered the forum state.[72]

64. In this regard, the models outlined by Newton & Wicker, *supra* note 63, are more relevant than the models used by Zembeck, *supra* note 3, in that they are based on actual cases, while the Zembeck models are theoretical in nature. Furthermore, Newton & Wicker is a Texas-specific article, focusing on Texas precedent. *See* Newton & Wicker, *supra* note 63, at 537-77.

65. *See* Newton & Wicker, *supra* note 63, at 535-36.

66. 465 U.S. 770 (1984).

67. *See* Newton & Wicker, *supra* note 63, at 535.

68. *See id.* at 539 (citing Riley v. New York Trust Co., 315 U.S. 343 (1942)). *See also* Thomas J. Smedinghoff, *Understanding Electronic Property Rights, in* ONLINE LAW, THE SPA'S LEGAL GUIDE TO DOING BUSINESS ON THE INTERNET § 8 (Thomas J. Smedinghoff, ed., 1996) (citing that property rights to information on the Internet includes the right to control access to and copying of that information).

69. *See Keeton*, 465 U.S. at 772. The national publication is "Hustler" magazine, and 10,000 to 15,000 residents of New York receive the magazine. *See id.* The Court does not state if these magazines are directed at individual residents via mail, or if they are simply sold in stores, the latter arguably being less directed. This distinction, if made, is comparable to the facts highlighted in *Maritz v. Cybergold*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996), where 12,000 residents in Missouri have access to the Internet—less directed action by defendant—and 311 residents of Missouri have actually received communications from the defendant (more directed action). *See infra* Part III.B.2.

70. *See Keeton*, 465 U.S. at 781 (citing World-Wide Volkswagon v. Woodson, 444 U.S. 286 (1980)).

71. *See id.*

72. *See id.* ("[S]ince respondent can be charged with knowledge [that his actions in publishing the article could cause harm in another forum], it must anticipate that such a suit will seek nationwide damages.").

To obtain personal jurisdiction over the defendant, it would not have been enough for the defendant to foresee that its publication might enter the forum. This was elucidated in *World-Wide Volkswagen v. Woodson*,[73] where the plaintiff claimed a car dealership in New York could foresee the possibility a car it sold in New York would enter another state and cause injury. But, the Court found that the car dealer's action of selling a car to someone in New York was too attenuated an act to hail the New York defendant into Oklahoma, where the plaintiff was injured by the car.[74] The defendant must make a *deliberate* act to get the injurious product into the forum state.[75] The Court in *Keeton* found that the defendant's actions were deliberate, thus satisfying due process.[76] It does not matter that the product enters other forums or causes or does not cause injury in other forums.[77] What is important in terms of maintaining personal jurisdiction is the defendant's intent which forms the nexus between her actions and the injury in the forum.

2. Tort Effects—*Calder v. Jones*

The Tort Effects model is exemplified by the United States Supreme Court in *Calder v. Jones*.[78] The Tort Effects model applies when the defendant intentionally inflicts injury on a resident of the forum state.[79] The *Calder* case, as the *Keeton* case, also involved libel from a national publication.[80] In *Calder*, a California actress sued the Florida authors for an article that was circulated nationwide.[81] The Court upheld personal jurisdiction in California by finding the defendants had intentionally targeted California with the article since they knew the article could be potentially devastating to the actress.[82] The Court found the defendant's actions were "intentional . . . and expressly aimed at California."[83] The fact that the actress lived in California was not a random occurrence or unilateral act on her part. Thus, the Court found that the defendants could "reasonably anticipate being haled into the California court."[84]

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73. 444 U.S. 286, 295-96 (1980).

74. *See id.*

75. *See Keeton*, 465 U.S. at 781.

76. *See id.*

77. *See id.* at 780-81. Indeed, the Court in *Keeton* acknowledged that it is out-of-state where the bulk of injury in a libel action will ensue with a nationally circulated writing. *See id.*

78. 465 U.S. 783 (1984).

79. *See* Newton & Wicker, *supra* note 63, at 535-36.

80. *See* Calder v. Jones, 465 U.S. 783, 784-85 (1984).

81. *See id.*

82. *See id.* at 789-90.

83. *Id.* at 789.

84. *Id.* at 790 (quoting World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

The facts in *Calder* are similar to those in *Keeton*; both involved libelous writings in nationally published magazines and a single injury that arose from its publication.[85] These magazines have no directional aspect since they are not directed to any one state but are distributed throughout the states depending on the market for them.[86] The common ground that both opinions find is in the defendant's intent to cause injury within the forum. This is true of libel as well as other torts of an intangible nature such as trademark violations. In cases such as these, purposeful availment that rises to the level of minimum contacts is grounded in the following critical language of the United States Supreme Court:

> The "substantial connection[ ]" between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an *intent or purpose* to serve the market in the forum State .... [A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state.[87]

Although a defendant might foresee that its product, writing, or unique mark will travel to other states and cause an injury in another state, this foreseeability alone is not enough to satisfy the due process requirement. The defendant's conduct must indicate some "intent or purpose."[88] Hence, there must be a nexus between the defendant's underlying actions and her intent or purpose to find that the defendant directed her actions at a particular forum.

A finding of purposeful availment between the defendant's actions and the injury in the forum is often obfuscated by the various use of "nexus" words such as "foreseeability,"[89] "awareness,"[90] "expecta-

85. In *Calder*, the actress, Shirley Jones, sued the *National Enquirer* for distributing an article that she claimed invaded her privacy and inflicted emotional harm. *See id.* at 785.

86. Of course, individuals may also subscribe to the magazine, thus making the magazine more directional. But the Court in *Keeton* and *Calder* make no mention of this directionality in their analysis of the cases, instead focusing on the randomness of the magazine's distribution throughout the United States. *See Keeton*, 465 U.S. at 770 ("Respondent's contacts with [the forum] consist of monthly sales of some 10,000 to 15,000 copies of its nationally published magazine."); *Calder*, 465 U.S. at 784 ("The article was published in a national magazine with a large circulation in California.").

87. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (alteration in original) (emphasis added) (citations omitted).

88. *Id.*

89. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) ("Yet 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."); Guardian Royal Exch. Assurance v. English China Clays, P.L.C., 815 S.W.2d 223, 227 (Tex. 1991) ("Although not an independent com-

tion,"[91] "purpose,"[92] and "intent."[93] But it is the gray area between "foreseeability" and "intention" that Texas courts often tread when maintaining personal jurisdiction over nonresident defendants. In fact, the Texas Supreme Court in *Guardian Royal Exchange Assurance v. English China Clays, P.L.C.*[94] suggests that various nexus standards are necessary and dependent upon the exact fact situation.[95] Further, the Fifth Circuit in *Prejean v. Sonatrach, Inc.*[96] states that purposeful availment will depend, among other things, on "the existence and *degree of purposefulness* with which the effect in that forum was created."[97] Thus, the language that the court uses to describe the defendant's intentions in his actions will depend upon the specific facts of the case.

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ponent of the minimum contacts analysis, the concept of 'foreseeability' is implicit in the requirement that there be a 'substantial connection' between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed toward Texas.").

90. *Guardian Royal Exch.*, 815 S.W.2d at 227 ("'Foreseeability' was based upon the insurer's awareness . . . .").

91. *World-Wide Volkswagen*, 444 U.S. at 298 (stating that products delivered into stream of commerce with "expectation that they will be purchased by consumers in the forum state"); Jetco Elec. Indus., Inc. v. Gardiner, 325 F. Supp. 80, 84 (S.D. Tex. 1971) ("Here, the defendant contends that he did not specifically intend to advertise in Texas. But the fact of the matter is that not only could he reasonably expect that his advertisements would be read by Texas citizens, but the very purpose of the advertisements was to entice potential customers . . . ."); Schlobohm v. Schapiro, 784 S.W.2d 355, 357 (Tex. 1990) (finding that the court must "focus upon [defendant's] intentional activities and expectations in deciding whether it is proper to call him before the courts of the forum"); Newton & Wicker, *supra* note 63, at 535. *See also* Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961).

92. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) ("Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State . . . ."); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) ("We have noted several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents."); *Jetco*, 325 S.W.2d at 84 (purpose of the advertisements).

93. *Asahi*, 480 U.S. at 112 (intent or purpose); *Schlobohm*, 784 S.W.2d at 357 (stating that the court must "focus upon [defendant's] intentional activities and expectations in deciding whether it is proper to call him before the courts of the forum").

94. 815 S.W.2d 223, 227 (Tex. 1991) (suggesting that "foreseeability" is appropriate in insurance cases in describing the nexus).

95. *See id.*

96. 652 F.2d 1260 (5th Cir. 1981).

97. *Id.* at 1269 (emphasis added) (listing three factors to determine purposeful availment of the nonresident defendant: (1) existence and degree, (2) other substantial contacts, and (3) magnitude of the injury itself). The court in *Prejean* stated:

> Purposeful creation is strongest when the defendant intended the impact to be felt in the forum. It is also present, as in the 'stream of commerce' cases, when the defendant can reasonably expect the effect to localize itself in the forum. The expectation is stronger when the defendant establishes or relies on a marketing distribution system that serves the forum than when the defendant merely introduces his products into the general currents of commerce.

Id. at 1269 n.18 (citations omitted). The court also cites *Jetco* approvingly. *See* Jetco Elec. Indus. v. Gardiner, 325 F. Supp. 80 (S.D. Tex. 1971).

C. *Who's Crossing State Lines—The Web-Site Owner or the Internet User?*

The fundamental problem with personal jurisdiction on the Internet is discerning whose action places the web-site into the stream of commerce, or more specifically, into Texas.[98] Whether using the Stream of Commerce or Tort Effects model, it is assumed that the writing is either specifically directed at the plaintiff's forum, or there is some intent to cause injury to a person in the forum through its random distribution. This is simple to visualize with, for instance, the *National Enquirer*[99] or *Hustler Magazine*,[100] both of which have national distribution that is initiated by the *owner or publisher* of those publications. In the case of web-sites, the only act of the defendant is to create the web-site and place it onto a server computer.[101] The *user* is the one that calls up the web-site that resides on a server computer.[102] As mentioned previously,[103] and a fact that is often misunderstood about the Internet in other cases,[104] web-sites do not "float" in some sort of "Cyberspace"[105] or "electronic location"[106] that is indeterminable. Web-sites are at a physical location that must be accessed by an affirmative act on the part of the user. Until this fact is dealt with, ob-

98. Fortunately, some other commentators have recognized this fundamental problem. *See* Perritt, *supra* note 3, at 19-25. However, other commentators see the problem differently. *See* David L. Stott, Comment, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site*, 15 J. MARSHALL J. COMPUTER & INFO. L. 819, 840 (1997) (stating that "[b]y nature, once information is posted on the Internet, that information is instantly in the stream of commerce on a world-wide basis"). The analysis of the personal jurisdiction problem taken in this Comment is inconsistent with the approach taken by Stott.

99. *See* Calder v. Jones, 465 U.S. 783, 785 (1984).

100. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 772 (1984).

101. *See The Web*, *supra* note 2.

102. *See id.*

103. *See supra* text accompanying notes 2-13.

104. *See, e.g.*, Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (finding that the defendant had purposefully directed its advertising at the forum and all states merely by placing its web-site on the Internet); Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 621 (C.D. Cal. 1996) (finding, through the merits of the case, that the defendant had expressly aimed its conduct at the forum by inferring an intent to interfere with plaintiff's business); Minnesota v. Granite Gate Resorts, Inc., No. C6-95-7227, 1996 WL 767431, at *6-*7 (D. Minn. Dec. 11, 1996), *aff'd*, 1997 WL 557670 (Minn. Ct. App. Sept. 5, 1997) (finding that the placement of a web-site "onto" the Internet and its continuous availability availed its owner of the forum).

105. *See supra* note 10. *See also* David Bender, *Emerging Personal Jurisdictional Issues on the Internet*, 7, 17 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. 64-3961, 1996), available in Westlaw, 453 PLI/Pat 7 ("Transactions using the Internet occur in cyberspace."); Dan L. Burk, *Federalism In Cyberspace*, 28 CONN. L. REV. 1095, 1096-99 (1996) (speaking of multi-jurisdictional regulation of the Internet as a problem due to its nebulous boundaries in cyberspace and the "cybernauts" that "inhabit" it).

106. Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So. 2d 1351, 1353 (Fla. Dist. Ct. App. 1994).

taining personal jurisdiction over web-sites will certainly be an inaccurate and unfair ordeal.

Courts that have dealt with the issue of web-site jurisdiction to date have, for the most part, simply held that the owner of a web-site who places it onto "the Internet" has "purposefully availed" himself of the forum.[107] However, this act alone by the creator/owner is not enough without some analysis of the owner's intent or purpose in his actions. Thus, the purpose or intent in these actions is the critical factor in finding the nexus necessary to acquire personal jurisdiction over web-sites. In Texas, there are two basic considerations that can assist in finding that nexus.

First, the court in *Memorial Hospital System v. Fisher Insurance Agency*[108] held that a single phone call *initiated by the Texas plaintiff* was enough to maintain personal jurisdiction over the nonresident defendant.[109] Thus, the court found no problem with the fact that the plaintiff initiated the contact. The key factor in the court's holding may be that the plaintiff and defendant were acting in the course of their business when the call was made. Specifically, the court stated that when the plaintiff called the nonresident defendant inquiring about business matters, the defendant "knew the call originated from Texas and should have known that the information provided would be relied upon by a Texas resident: therefore[,] who initiated the telephone call is not determinative in finding personal jurisdiction."[110] The same reasoning applies to Internet communication. If the intent or purpose of the web-site owner is for residents of Texas to access its web-site, and he knows that there are Internet users in Texas, then *Memorial Hospital* may be reliable precedent for the maintenance of personal jurisdiction over nonresident web-site owners. Thus, regardless of who initiates the wire contact with a web-site, personal jurisdiction can be acquired by Texas.[111]

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107. *See infra* Part III.B.

108. 835 S.W.2d 645, 651 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (discussing suit for fraud and misrepresentation).

109. *See id.* Although California plaintiffs initiated contact, the court in *California Software Inc. v. Systems Technology Associate, Inc.*, 557 F.2d 1280 (9th Cir. 1977), also exerted personal jurisdiction over a nonresident defendant based on misrepresentations made over the telephone. *See Data Disc*, 557 F.2d at 1284-89. Although the facts in *Data Disc* were in dispute, the court did not seem to be troubled by *who* initiated the phone transactions.

110. *Memorial Hosp.*, 835 S.W.2d at 651. But, in *Brown v. Flowers Industries, Inc.*, 688 F.2d 328 (5th Cir. 1982), a Mississippi case, the fact that the nonresident defendant initiated phone contact was important to the court for acquiring personal jurisdiction. This is in apparent conflict with the court in *Memorial Hospital.* However, *Brown* is a Mississippi case, thus not reliable precedent for Texas.

111. The only limitation on this general rule will depend on the type of action at bar, whether tort or contract. In particular, in tort actions, Texas precedent suggests that, if the plaintiff initiates the contact, the defendant must be acting within the scope of its employment or normal business activities. *See Memorial Hosp.*, 835 S.W.2d at 651 (indicating a strong nexus formed when defendant acts in the course of business

Second, Internet access by individual users is controlled much like a subscription to a nationally circulated publication. Indeed, a user "subscribes"[112] to an Internet provider such as America Online in much the same way as people in California subscribed to the *National Enquirer* in *Calder v. Jones*.[113] The only difference is that, while the company that distributes a magazine must physically deliver the publication to the subscriber, web-site owners only need to place their creation onto one server computer that will allow access by others who must initiate contact. Internet subscribers must pay to access the information on the server just as magazine subscribers must pay for magazines. The Internet server is like a conventional publisher of information that sends information only when the user, or customer, demands it.[114] Thus, the question for both Internet and print publications that enter the forum and cause injury is whether the nonresident defendant *intended* for the publication to enter the forum.[115] If the court in Texas can find that the web-site owner knew that Internet subscribers in Texas had access to their site and intended for the web-site to be accessed, then the court can properly maintain personal jurisdiction over the nonresident.

II. PERSONAL JURISDICTION IN TEXAS CASES INVOLVING NO PHYSICAL CONTACT WITH THE FORUM—PAPER OR ELECTRONIC COMMUNICATIONS

Texas cases dealing with printed publications that are launched into the stream of commerce and create a tortious injury in the forum are of precedential value in cases of web-site jurisdiction. The act of a person going to the newsstand or mailbox to receive printed material is identical to the act of receiving a wire transmission of a server-based web-site on a computer screen through the user's act of commanding the computer. Furthermore, Texas courts have clearly held that wire

in establishing jurisdiction); Wilson v. Belin, 20 F.3d 644, 649 (5th Cir. 1994) (denying jurisdiction from statements made during the phone call initiated by plaintiff since the defendants were not acting in the course of their normal business activities). Thus, a finding of the web-site owner's intent and purpose in making the web-site and placing it on a server is all the more vital.

112. *See* Perritt, *supra* note 3, at 19-20 (finding no valid distinction between subscription-based commercial systems such as America Online and print subscribers).

113. 465 U.S. 783, 785 (1984). This proposition is analogous to the subscription process for commercial newspapers. *See id.*

114. *See* Perritt, *supra* note 3, at 21-22 (in accord with the view in this Comment). However, Perritt goes on to make distinctions between certain hypothetical situations where a web-site acts as an intermediary to another web-site and so forth. *See* Perritt, *supra* note 3, at 23-25. These situations, while real and common, are abstractions of the real problem. Regardless of how a user gets to a web-site, once he gets there, the question still becomes one of defendant's acts, intentions, and the injury that arises from these.

115. In this regard, Perritt and Zembeck are silent. *See generally* Perritt, *supra* note 3; Zembeck, *supra* note 3. These articles make no mention of the nexus that must be found in the defendant's intent or purpose in his actions.

communication is not distinguishable from print for purposes of personal jurisdiction.[116]

All of the web-site cases to date arise from injury caused by the violation of a federally registered trademark.[117] In spite of the fact that no Texas cases exist where jurisdiction arose from advertising that violates a trademark,[118] the commission of other torts is equally applicable. Hence, prior precedent is useful for future Texas Internet web-site cases. These cases should guide the court in finding the nexus between (1) the actions of the defendant, and (2) the intention of the defendant in the actions that caused the injury in Texas.

A. *No Minimum Contacts*

1. When the Defendant's Actions are Insufficient for Minimum Contacts

Nationally distributed advertising that finds its way into Texas does not satisfy minimum contacts,[119] nor is it sufficient to satisfy the requirements for general jurisdiction.[120] Further, the court in *Curry v.*

116. *See* Memorial Hosp. Sys. v. Fisher Ins. Agency, Inc., 835 S.W.2d 645, 650-51 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

117. *See infra* Part III. *See also* Andrew R. Basile, Jr., *Trademark Rights, in* ONLINE LAW, THE SPA'S LEGAL GUIDE TO DOING BUSINESS ON THE INTERNET 209, 210-11 (Thomas J. Smedinghoff ed., 1996) (finding that trademark rights on the Internet include use of words and phrases, symbols and pictures, nicknames, and domain names).

118. The only two Texas cases dealing with trademark violations in which personal jurisdiction was an issue are *Hupp v. Siroflex of America, Inc.*, 848 F. Supp. 744 (S.D. Tex. 1994), and *Sinko v. St. Louis Music Supply Co.*, 603 F. Supp. 649 (W.D. Tex. 1984). In both of these cases, the finding of minimum contacts rested upon the sale of an item that violated a trademark or patent and not on advertising.

119. *See* Loumar, Inc. v. Smith, 698 F.2d 759, 764 (5th Cir. 1983) (advertising in nationally circulated trade magazines, some or all of which may have been circulated in the state of Texas); Curry v. Williams, 880 F. Supp. 487, 488 (S.D. Tex. 1994) (nationally circulated advertisement); Siskind v. Villa Found. For Educ., Inc., 642 S.W.2d 434, 437 (Tex. 1982) (relying on various interactions between nonresident and forum and not the initial contact made with the plaintiff through nationally distributed advertising, implying that lone advertisement is not enough for personal jurisdiction); Hayes v. Wissel, 882 S.W.2d 97, 98 (Tex. App.—Fort Worth 1994, no writ) (internationally circulated trade magazine advertisement and one phone call).

120. *See* Bounty-Full Entertainment, Inc. v. Forever Blue Entertainment Group, Inc., 923 F. Supp. 950, 957 n.4 (S.D. Tex. 1996). The court in *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985), elucidates the exact nature of this rule that advertising alone will not allow Texas courts to maintain jurisdiction over nonresidents. In *Wilkinson*, the court held that advertising alone would not support personal jurisdiction. *See id.* at 321. However, in that case the nonresident defendants' cumulative actions of spending $1,150,000 in 1982 to 1984 on advertising in Texas alone, and the existence of three local travel agents within the state that generated $21,000 in gross ticket revenues for the company, together created personal jurisdiction. *See id.* at 320-21. The actions of the defendant are so substantial when compared to possible passive web-site scenarios that this case will not be discussed at length in this Comment.

Williams[121] states "that merely contracting with a resident of a forum state is insufficient here to subject the nonresident to the forum's jurisdiction."[122] There must be some affirmative act initiated by the defendant, either doing business or committing a tort,[123] that puts the defendant on notice that he has availed himself to the protections of the law in Texas. Thus, the claim of jurisdiction over a nonresident will only be sustained from nationally distributed advertising where the injury arises from the advertising itself.

Cases where the court found that the nonresident's activities are insufficient for jurisdiction in Texas, such as *Loumar, Inc. v. Smith*[124] and *Curry*,[125] have fact patterns that lend themselves to possible web-site situations. In those cases, the nonresident defendants had distributed advertising throughout the country that elicited a response from the Texas plaintiffs. However, in neither case did the cause of action—the injury—arise out of the advertising itself, thus not meeting the requirements of specific personal jurisdiction. Further, the nonresident defendants had no offices in Texas, were not licensed to do business in Texas, nor had any other continuous or systematic contacts that would amount to general personal jurisdiction. This will most often be the case in web-site situations where one party (the user) connects to the Internet via his phone line and views a web-site which is stored on a server computer in another forum. The user then accesses another site through a hyperlink[126] seeking more information, or to be contacted by the nonresident owner of the web-site directly. The speed and ease of these actions may be greater than that of traditional person-to-person phone conversations, but this fact does not distinguish web-site communication from the situation in *Curry*. Responding to a print advertisement using the telephone or mail is not only analogous to web-site communication,[127] it is *identical* to Internet communication. The web-site does not "reach out" to the user any more than a print advertisement does.[128] It is only through the de-

121. 880 F. Supp. 487 (S.D. Tex. 1994) (finding that plaintiff was solicited through defendant's nationally circulated advertisement and subsequently negotiated a contract to purchase defendant's business, claiming injury in defendant's later refusal to follow through on the deal), *aff'd*, 49 F.3d 728 (5th Cir. 1995).

122. *Id.* at 489 (citing Colwell Realty Inv., Inc. v. Triple T Inns of Arizona, Inc., 785 F.2d 1330, 1334 (5th Cir. 1986)).

123. *See id. See also* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1995).

124. 698 F.2d 759 (5th Cir. 1983).

125. Curry v. Williams, 880 F. Supp. 489 (S.D. Tex. 1994).

126. *See supra* note 4.

127. This is suggested in Zembeck, *supra* note 3.

128. *See* Byassee, *supra* note 3. In Byassee, the author analogizes web-sites to products in a store in which the plaintiff must take the affirmative act of traveling across state lines to purchase. *See id.* at 211. Thus, Byassee places the unilateral act upon the resident plaintiff, not the nonresident defendant. *But see supra* Part I.C. for an alternative view.

fendant's intention or expectation to cause an injury that he can "purposefully avail" himself of an out-of-state forum.

Most cases involving web-sites will likely involve specific acts. Hence, the analysis must focus on a finding of specific personal jurisdiction[129] as opposed to general personal jurisdiction.[130] The previous cases analyze the specific acts of the parties in order to determine if the Texas court can obtain specific personal jurisdiction over the defendants. While it will often be useful to argue that placing a web-site on the Internet amounts to placing a writing in the stream of commerce, this argument should fail if it is used to argue that the court has general personal jurisdiction over the defendant without some specific act that harms the Texas plaintiff.[131] Like the Tort Effects pattern, there must be a nexus between the thing distributed and the harm inflicted by the defendant in the forum.[132]

2. When The Defendant's Intent is Insufficient for Minimum Contacts

The nexus between the first and second parts of the Texas Test is completed through the defendant's purpose or intent. In this regard, the Fifth Circuit in *Wilson v. Belin*[133] exemplifies how the defendant's intent is crucial in maintaining personal jurisdiction in cases where the contacts of the defendant with the forum are tenuous, as will be the case in web-sites. The analysis in the *Wilson* case closely parallels the Supreme Court's analysis in *Calder*.[134] In *Wilson*, the plaintiff, a resident of Pennsylvania, sued reporters in Indiana and Iowa for defamation.[135] The plaintiff brought suit in Texas because the defamatory articles written by the defendants concerned a speech that the plaintiff made in Texas.[136]

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129. *See* Guardian Royal Exch. Assurance v. English China Clays, P.L.C., 815 S.W.2d 223, 227 (Tex. 1991) ("When specific jurisdiction is asserted, the cause of action must arise out of or relate to the nonresident defendant's contact with the forum state . . . .").

130. *See id.* at 228 ("General jurisdiction may not be asserted when the cause of action does not arise from or relate to the nonresident defendant's purposeful conduct within the forum state but there are continuous and systematic contacts between the nonresident defendant and the forum state.").

131. *See id. Accord* Schlobohm v. Schapiro, 784 S.W.2d 355, 357 (Tex. 1990).

132. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779-80 (1984).

133. 20 F.3d 644 (5th Cir. 1994).

134. *See* Calder v. Jones, 465 U.S. 783 (1984).

135. *See id.* at 646.

136. *See id.* A *Dallas Times Herald* reporter who had attended a Dallas symposium, where the plaintiff gave a speech, telephoned the defendants, Belin and Blakey, to discuss the plaintiff's comments in his speech. *See id.* As it turns out, Belin and Blakey had some disparaging comments to make regarding the plaintiff's speech. *See id.* Blakey was quoted as saying, "You know the saying among computer people, 'Garbage in, garbage out.'? This is garbage." *Id.* This statement was printed in the Dallas newspaper, and the plaintiff instituted this lawsuit. *See id.*

The Fifth Circuit uses the analysis[137] set out by the Texas Supreme Court in *Schlobohm* in finding that there was no personal jurisdiction over the nonresident defendant.[138] Relying on *Calder*, the plaintiff's leading argument was that there were minimum contacts because the defendants could reasonably foresee that their statements would be published in Texas, thus causing the plaintiff injury to his reputation.[139] Unlike the situation in *Calder*, the publication in question in *Wilson* was in fact more directed to the forum.[140] The *Calder* case dealt with the *National Enquirer*, a nationally circulated publication, while the defamatory statements in *Wilson* were printed in a Dallas newspaper which is arguably much more localized and directed to the forum. But the court found that the plaintiff "reads *Calder* too broadly."[141]

The Fifth Circuit in *Wilson* distinguishes *Calder* by looking carefully at the *actions and intentions* of the defendants. The reporters, Blakey and Belin, did no research in Texas, they did not get paid for their comments, they were not acting as part of any business venture in Texas, nor was there any indication that their unsolicited comments were made to further their own careers.[142] Above all, the defendants did not initiate the contacts.[143] Further, the plaintiff himself is not a Texas resident, and his career was not centered there. The court also finds that, while the tort did occur in Texas, this fact alone is "not dispositive of whether jurisdiction is appropriate."[144]

The Fifth Circuit expressly rejects the notion of pure foreseeability[145] as critical to acquiring personal jurisdiction over nonresident defendants. Although the court goes back to the Supreme Court's somewhat circular definition of just what type of "foreseeability" is relevant, the facts that appear dispositive to the court center upon the actions and intentions of the defendants. The court found that the defendants were not acting in the course of their normal professional activities and thus "took no planned action to inject themselves or their opinions into the Texas forum."[146] Thus, in fact situations as tenuous as when some writing or mark is deemed to cause an injury to a resident in Texas, a finding of minimum contacts must center upon the defendant's intent in his actions.

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137. *See id.* at 647 n.4.

138. *See id.* at 648.

139. *See id.*

140. *See* Wilson v. Belin, 20 F.3d 644, 646 (5th Cir. 1994) (citing as important the fact that the publication is a Dallas newspaper which may reach other states but is largely targeted at Dallas and the immediately surrounding area).

141. *Id.* at 648.

142. *See id.*

143. *See id.* at 649.

144. *Id.* at 648 (citation omitted).

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

146. *Wilson,* 20 F.3d at 649.

Even if contacts are greater than mere communication by wire or paper, the defendant's actions and intentions will still be dispositive of acquiring personal jurisdiction. Both the Stream of Commerce and the Tort Effects models fail in cases like *Wilson* because there is no indication of an injury intentionally directed at Texas. National advertising within the forum, without more, will not be sufficient to acquire personal jurisdiction in Texas. The nonresident defendants must have intended their actions to cause injury to avail themselves of Texas.

B. *Cases Finding Minimum Contacts Satisfying Due Process*

1. Nationally Distributed Print Communication

When national, undirected advertising results in some specific injury within a forum, it is likely that the court can acquire personal jurisdiction over the defendant who created the advertisement. In this regard, *Jetco Electronics Industries, Inc. v. Gardiner*[147] is the most important Texas case to date that is coextensive with likely web-site scenarios. The plaintiff, Gardiner, manufactured and sold metal-detectors to be used by hobbyists.[148] The defendant, Jetco Electronic Industries, was an Arizona manufacturer and purveryor of similar items. The plaintiff alleged that he was injured by false statements made by the defendant in his nationally circulated catalog. The catalogue made direct comparisons between the defendant's product and a similar product made by the plaintiff. The plaintiff claimed that this description was false and injurious and sought injunctive relief and damages against the defendant.[149]

The court in *Jetco* found that the defendant had not targeted the state of Texas in its publication of a catalogue.[150] Yet, the court found that the Arizona defendant could be haled into Texas court. Specifically, the court stated that "[t]he injuries in this suit resulted because defendant purposefully advertised in a national magazine. Consequently, the contacts defendant have with the State of Texas are integrally related to the plaintiff's cause of action."[151] The court in *Jetco* found sufficient minimum contacts by looking at the nexus between the contact made by the defendant's action (advertisement) and the intent of the defendant (to make statements that could cause injury). The court outlines the factors it used to determine minimum contacts:

1. The nature and the character of the business;
2. The number and type of activities within the forum;
3. Whether such activities give rise to the cause of action;
4. Whether the forum state has some special interest in granting relief; and

147. 325 F. Supp. 80 (S.D. Tex. 1971).
148. *See id.* at 82.
149. *See id.*
150. *See id.* at 82-83.
151. *Id.* at 83.

5. The convenience of the parties.[152]

Although rarely worded as such by most courts, a common factor in determining personal jurisdiction lies in the *intent* of the nonresident defendant—were his actions calculated or intentional enough to be directed at a particular forum so that he can expect to be haled into that forum's courts? That the court in *Jetco* asked this central question is evident when comparing *Jetco* and *Curry*, two similar cases. In comparing *Jetco*, where the court found personal jurisdiction existed over an Arizona defendant, and *Curry* or *Wilson*, where the courts did not find sufficient minimum contacts between the defendants and the forum, the intent in the defendant's actions is the vital distinguishing factor in determining whether the court's maintenance of personal jurisdiction over the defendant violates due process.

The Arizona corporation in *Jetco* was found to have purposefully availed itself of Texas by its intentional action of comparing its products to those of the plaintiff and then deliberately distributing that comparison in Texas and other forums. The court in *Jetco* states that

> [h]ere, the defendant contends that he did not specifically intend to advertise in Texas. But the fact of the matter is that not only could he reasonably expect that his advertisements would be read by Texas citizens, but the *very purpose* of the advertisements was to entice potential customers, wherever they may be, not to do business with the plaintiff in Texas.[153]

Here, the terms "expect" and "very purpose" are interchangeable with the word "intent."[154] It is a court's finding of intent in the defendant's actions which distinguishes the holdings in cases like *Curry* and *Jetco*. *Jetco* should ultimately set the legal standard in Texas for acquiring personal jurisdiction over nonresident web-site owners.

2. Interactive Print and Wire Communication

Moving along the continuum of actions linking the defendant to the forum are cases where several actions of interstate advertising and phone contacts define personal jurisdiction. The Texas Supreme Court in *Siskind v. Sonatrach, Inc.*[155] bases personal jurisdiction on a combination of interactions between the plaintiff and the nonresident defendant involving both print advertising, letters, and phone communications. In *Siskind*, the Texas resident sued an Arizona resident for breach of contract, claiming an exercise of personal jurisdiction over the defendant due to its specific acts of business in Texas.[156] The de-

152. *Id.* (citing Hearne v. Dow Badische Chem. Co., 224 F. Supp. 90 (S.D. Tex. 1963)).

153. *See id.* at 84 (emphasis added).

154. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987). *See also supra* text accompanying note 87.

155. 642 S.W.2d 434 (Tex. 1982).

156. *See id.* at 435.

fendant operated a school in Arizona that she advertised in a national publication. The plaintiff learned of the Arizona school through these advertisements. As a result of the advertisements, the plaintiff called the defendant, and the defendant responded by sending an informational packet through the mail to the plaintiff. The plaintiff later signed a contract to enroll his son in the school. After one year of school, the plaintiff signed a second contract for the following year. The new contract was changed in that it deleted a provision providing for Arizona being the exclusive forum to resolve any disputes, and it also stated that tuition was non-refundable.[157] Later that year, after having signed the contract and enrolling his son in the defendant's school, the son was expelled, and the plaintiff was unable to get a refund of his tuition. The plaintiff then sued the Arizona school for misrepresentation and breach of contract in Texas court.

The issue in *Siskind* was whether the Texas court could maintain personal jurisdiction over the operator of the Arizona school.[158] Using the three-prong Texas Test,[159] the court found that Texas could acquire jurisdiction.[160] The court in *Siskind* at least partially relied on the Arizona school's listing in the Texas telephone directory yellow pages in satisfying the first prong of the Test.[161] The court's reliance on this is an important distinction for future Internet cases because publication in a telephone directory is much more directed than a national publication, and national publications are akin to Internet websites.[162]

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157. *See id.*

158. *See id.*

159. *See id.* at 436. *Siskind* refers to this as the O'Brien test (developed in O'Brien v. Lanpar Co., 399 S.W.2d 340 (Tex. 1966)). This test was modified in *Schlobohm. See supra* text accompanying notes 36-42.

160. *See Siskind,* 642 S.W.2d at 436.

161. *See id. See also* Wilkerson v. Fortuna Corp., 554 F.2d 745, 748-49 (5th Cir. 1977). In *Wilkerson*, a New Mexico defendant advertised through the El Paso yellow pages, newspaper, radio, and television as well as engaging in other promotional activities. The court held that the defendant's actions were directed and continuous enough to give the Texas court general jurisdiction since Texas residents were the primary patrons of the defendant, whose business was solicited through those advertisements. *See id.* However, the court's ruling in *Wilkerson* is suspect due to its reliance on the Supreme Court's opinion in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977). The issue in *National Geographic* was not personal jurisdiction over a nonresident defendant but dealt instead with the collection of taxes on mail order sales in the District of Columbia by a company based in California. *See id.* at 552-53.

162. However, the court never addresses whether or not the plaintiff in Texas actually used the telephone directories. In fact, the plaintiff first learned of the defendant through a nationally circulated publication. *See* Siskind v. Villa Found. For Educ., Inc., 642 S.W.2d 434, 435 (Tex. 1982). Further, there is some confusion as to what acts of the defendant were enough to satisfy prong one of the Texas test. The court in *Siskind* states that "[c]onsidering Villa's [telephone directory] advertising *in conjunction with* its practice of mailing informational packets, applications for admission, invitations to re-enroll, and enrollment contracts to Texas residents, it is apparent that Villa is affirmatively seeking business in Texas . . . [that amounts to] a purposeful act

The second prong of the Texas Test was satisfied by the plaintiff's allegations of injury through defendant's advertising, and through the mail and phone communications between the plaintiff and the Arizona corporation.[163] The Arizona defendant in *Siskind* cited numerous Texas authorities holding that contracts negotiated by mail cannot support the exercise of personal jurisdiction over nonresidents.[164] But the court in *Siskind* found that those cases could be distinguished because (1) in none of those cases had the nonresident defendants solicited business in Texas to the same degree, and (2) none of those cases involved allegations of misrepresentation and deceptive trade practices arising out of the defendant's contacts with Texas.[165]

The opinion in *Siskind* highlights the importance of directed advertisement and of cumulative actions by the defendant which rise to the level of purposeful acts done in Texas.[166] Although the Texas plaintiff first contacted the nonresident defendant through undirected, nationally circulated advertising, the subsequent interactions were used as the basis of maintaining jurisdiction in Texas.[167] This fact pattern may arise in web-site cases where the injury claimed arose after subsequent interactions between the plaintiff and the defendant, as was the case in *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*,[168] *Compuserve Inc. v. Patterson*,[169] and *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[170] The purposefulness of the defendant's actions is always important. But, "the stronger the form of the purposefulness, the less substantial must be either the effect or the other contacts."[171] This is what makes interactive web-site cases inherently simpler than passive web-sites. In interactive web-site situations, the defendant's

committed in Texas." *Id.* at 436 (citing Vencedor Mfg. Co. v. Gougler Indus., 557 F.2d 886, 891 (1st Cir. 1977) (emphasis added)).

163. *See Siskind,* 642 S.W.2d at 437.

164. *See id.* (citing, *e.g.*, U-Anchor Adver. v. Burt, 553 S.W.2d 760 (Tex. 1977)). *See also* Barnstone v. Congregation Am Echad, 574 F.2d 286 (5th Cir. 1978).

165. *See Siskind,* 642 S.W.2d at 437.

166. *See id.* at 436. *See also* Portland Sav. & Loan Ass'n v. Bernstein, 716 S.W.2d 532, 536-7 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (relying on *Siskind* in holding that nonresident defendants could be haled into Texas court where allegations of misrepresentation come from various phone calls to Texas, letters sent to Texas, and visits to Texas).

167. *See id.* at 463.

168. 939 F. Supp. 1032 (S.D.N.Y. 1996) (citing as relevant the fact that after an initial inquiry from U.S. citizens to the Italian defendant's web-site, the defendant directed information back to the forum through the Internet, and received fax transmissions, and later, money payments to receive further Internet service).

169. 89 F.3d 1257 (6th Cir. 1996) (citing as important the fact that after contracting with Ohio plaintiff, the defendant directed wire communications to the plaintiff for three years and used the plaintiff's services to sell products).

170. 952 F. Supp. 1119 (W.D. Pa. 1997) (citing as relevant the fact that after the defendant received inquiries from residents of the plaintiff's forum, the defendant directed information back, and entered nearly 3,000 agreements to provide its services to individual and corporate residents of that forum).

171. Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1269 (5th Cir. 1981).

accumulated actions will make the purposefulness of his acts more apparent, thus less of an issue. Hence, unless the plaintiff's claim arises from the server-based web-site advertising itself—the analogous situation to *Jetco*—a *Siskind*-like analysis is necessary to find minimum contacts to satisfy due process in Texas.

C. *Conclusion: The Nexus Between Actions and Injury is Vital to Acquiring Personal Jurisdiction in Texas*

Neither nationally circulated advertising alone, nor injury suffered by a Texas plaintiff alone, is enough to satisfy the requirements of the Texas Test in maintaining personal jurisdiction over nonresident defendants. But if both are present, and a nexus between the two is formed by looking at the defendant's intentions or expectations, then the maintenance of personal jurisdiction is proper.

The actions of placing some injurious writing or mark in an undirected publication, or even an injurious statement over telephone lines, may not constitute purposeful availment to satisfy due process. The court must find that the defendant directed her actions. It is almost always "foreseeable" that some action will injure some party in Texas. But this is not enough. In order to maintain personal jurisdiction, the court must find some evidence from the defendant's actions that those actions were intended to injury a party in Texas. Texas courts have indicated that this analysis is necessary in paper and wire communications. The added abstraction of video and magnetic intermediaries in the actions of the parties, i.e. computers, is not distinguishing. Hence, Texas precedent can be used to show that the owner of a web-site launched in the stream of commerce can be haled into the state court.

III. PERSONAL JURISDICTION ANALYSIS OF WEB-SITES IN OTHER STATES

A. *No Minimum Contacts*

Although the findings of courts outside of Texas are not binding authority, they give excellent guidance in how Texas courts should analyze personal jurisdiction issues. In particular, looking at courts outside of Texas is relevant to the issue of obtaining personal jurisdiction because most states have adopted similar legal standards in their long-arm statutes which allow jurisdiction to the extent of federal due process.[172] Further, there are no cases on point to date dealing with personal jurisdiction over the creators of web-sites on the Internet in Texas, making extra-jurisdictional comparisons more compelling. The discussion in this Part focuses on passive web-site cases. Specifically, the discussion focuses on the defendant's actions in creating the web-

172. *See* CRUMP ET AL., *supra* note 20, § 2.02[3].

site and placing it on a server, highlighting the relevant facts that an analysis of personal jurisdiction in Texas should take into account and the pitfalls to avoid.

The earliest case on point involves computer mediated communication between states in *Pres-Kap v. System One, Direct Access*,[173] where a computer system lessor in Florida brought an action for breach of contract with its lessee in Delaware. The Florida-based plaintiff attempted to acquire personal jurisdiction over the Delaware defendant based on (1) the fact that the defendant forwarded all rental payments under the contract to lease to the plaintiff in Florida, and (2) the defendant's access to the plaintiff's computer database located in Miami.[174] The Florida court in *Pres-Kap* concluded that it could not maintain personal jurisdiction based on these contacts.[175]

The court in *Pres-Kap* concluded that since there was no showing that the Delaware defendant was aware of the exact "electronic location"[176] of the computer database in question, the defendant could not be said to have purposefully availed itself of the Florida court.[177] As a secondary argument, the court cites what amounts to public policy factors for not finding personal jurisdiction over the defendant.[178] The court in *Pres-Kap*, in other words, did not look to the actions of the defendant, nor to the defendants intent or knowledge in contacting the plaintiff's computer. Instead, the court focused on the defendant's lack of knowledge of the database *location*.

In *Pres-Kap*, the Delaware defendant had a contract with the plaintiff and an agreement that allowed the defendant to access, via computer and telephone lines, the plaintiff's database.[179] When the defendant accessed those data bases, he could certainly expect that the plaintiff either had direct control over the computer that the data base was on or indirect control through some other person or entity. Although the location of the computer matters, the party's *intention* to contact the plaintiff who controlled the computer information should

173. 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994).

174. *See id.* at 1353.

175. *See id.*

176. *Id.*

177. *See id.*

178. *See id.* In holding that the court did not have personal jurisdiction over the defendants, the court stated that

> a contrary decision would, we think, have far-reaching implications for business and professional people who use "on-line" computer services for which payments are made to out-of-state companies where the database is located. . . . Such a result, in our view, is wildly beyond the reasonable expectations of such computer-information users, and, accordingly, [acquiring jurisdiction would] offend[ ] traditional notions of fair play and substantial justice.

Id. Thus, in one of the few cases to find personal jurisdiction lacking, the holding seemed to rest not on minimum contacts but on fair play, the equivalent of (3) in the Texas Test discussed *supra* Part I.A.

179. *See Pres-Kap*, 636 So. 2d at 1352.

be the controlling factor. In *Pres-Kap*, the defendant did not intend to make an attenuated contact with Florida or any "electronic location," rather, the defendant specifically intended its actions to be directed at a Florida resident, in this case the plaintiff.

The dissenting opinion in *Pres-Kap* recognized the "fact that the ownership of the computer base may have changed over the years is immaterial."[180] The database was *supplied* by the plaintiff, irrespective of its location.[181] That the plaintiff supplied the database is important, because server computers are under the control of specific entities from which web-sites reside. If the court held that by placing the information on a server computer it is "published," then its subscribers may obtain jurisdiction over them if the entity or person in control of the server knows or should have known that there are subscribers in Texas.[182] In turn, Texas may acquire jurisdiction over the author of the information or writing. The nebulous concept of an "electronic location"[183] is as much a red herring as that of "Cyberspace" and should be avoided in future analysis.

It is likely, given a similar contract case like *Loumar*,[184] that Texas would hold the same as the majority in *Pres-Kap*. Unfortunately, the *Pres-Kap* analysis is a poor example of how Texas should analyze wire communications. A better approach would be the following: What if the defendant had called the Florida company directly by phone and had spoken with a person instead of a computer to acquire the information he had needed? Would this action avail the defendant of Florida jurisdiction? Texas precedent suggests no, unless the injury claimed by the plaintiff arose from that phone call.[185] Texas courts have held that they may acquire personal jurisdiction through a single contact initiated by the defendant, as in the *Pres-Kap* case, when there has been a tort committed in the state of Texas.[186] Thus, under Texas precedent, the decisive factor would be the nexus between the defendant's actions and injury in the state, not, as the *Pres-Kap* court found,

180. *Id.* at 1354 n.1 (Barkdull, J., dissenting). *See also* Michael J. Santisi, Note, Pres-Kap, Inc. v. System One, Direct Access, Inc.: *Extending the Reach of the Long-Arm Statute Through the Internet?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 433 (1995) (applying foreseeability test in finding that the *Pres-Kap* court should have found personal jurisdiction existed, agreeing with dissenting judge).

181. *See Pres-Kap*, 636 So. 2d at 1354.

182. *See supra* Part I.C.

183. *Pres-Kap*, 636 So. 2d at 1353.

184. 698 F.2d 759 (5th Cir. 1983). *See supra* Part II.A.1.

185. *See* Curry v. Williams, 880 F. Supp. 487 (S.D. Tex. 1994) (holding that no injury arose from phone conversations initiated by plaintiff); Memorial Hosp. Sys. v. Fisher Ins. Agency, Inc., 835 S.W.2d 645 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (holding personal jurisdiction was based on injury arising from single phone call to defendant).

186. *See* Southwest Offset, Inc. v. Hudco Publ'g Co., 622 F.2d 149, 151 (5th Cir. 1980) (citing Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974)); *Memorial Hosp.*, 835 S.W.2d at 650.

the lack of knowledge on the part of the defendant in the location of the computer.

The New York court in *Bensusan Restaurant v. King*[187] is one of the latest decisions to look at the issue of personal jurisdiction over web-sites on the Internet. In *Bensusan*, the owner of a night club in New York, who also owned a web-site advertising his nightclub, filed an action against a Missouri night club owner who also advertised on the Internet.[188] Both the New York plaintiff's and the Missouri defendant's night clubs were named "The Blue Note," and this name was used in the defendant's web-site. The action was brought against the Missouri defendant for infringement on the plaintiff's federally registered trademark.

The defendant's web-site was a general access site, meaning that no authorization is required to obtained access to the site.[189] The defendant's web-site also had a phone number that could be used to purchase tickets to the Missouri club, but the tickets had to be picked up at the club in Missouri. Perhaps to avoid any confusion that the defendant knew he might be causing, the defendant's web-site also offered a disclaimer that his club should not be confused with "The Blue Note" club based in New York, and it contained a hyperlink[190] to allow the user to go to the plaintiff's web-site.

The New York court in *Bensusan* held that (1) there was no tort committed enabling long-arm jurisdiction over the Missouri defendant, and (2) even if the New York long-arm statute is satisfied, maintaining personal jurisdiction would violate federal due process.[191] In the court's analysis, it was determined that there was no offer or attempt to sell a product in New York, therefore, there was no trademark violation.[192]

The court in *Bensusan* found that the defendant's web-site was not the equivalent of "advertising, promoting, selling or otherwise making an effort to target its product in New York."[193] The court found that the defendant did not direct any activity to New York, relying heavily on the fact that "[i]t takes several affirmative steps by the New York resident . . . to obtain access to the Web site and utilize the informa-

187. 937 F. Supp. 295 (S.D.N.Y. 1996).
188. *See id.* at 297.
189. *See id.*
190. The fact that the defendant's web-site contained a hyperlink to the plaintiff's web-site is common, but is of little significance to the court's analysis of personal jurisdiction in this case. It may become important in cases where jurisdiction is founded on actions of "doing business" instead of simply the commission of a single tort in the state. Further, the existence and type of hyperlink on the defendant's web-site may indicate the defendant's intent, purpose, knowledge, etc. This Comment suggests that the latter should have been an indicator of the defendant's intent in *Bensusan*.
191. *See Bensusan Restaurant Corp.*, 937 F. Supp. at 299-301.
192. *See id.* at 299.
193. *Id.*

tion there."[194] Furthermore, the court cites as important to its analysis the fact that even if a New York user were to get information from the defendant's web-site, he would have to go to Missouri to purchase tickets, thus creating a trademark infringement in Missouri.[195] In other words, in spite of the confusion that the defendant's web-site may cause, unless there is an actual attempt to sell, or a sale does take place in New York, there is no tort. Further, the plaintiff must also allege "significant economic injury" in the use of its trademark.[196] According to the court, mere use of the plaintiff's "The Blue Note" logo alone is not enough to satisfy the New York long-arm statute.

In finding that due process could not be satisfied in acquiring jurisdiction over the nonresident defendant, the court in *Bensusan* stated that "[c]reating a [web-]site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state."[197] The plaintiff argues that the defendant in Missouri should have foreseen that users in New York could access the site and become confused as to the relationship between the two "Blue Notes."[198] But the court finds that the defendant did not actively conduct business in New York or encourage sales of tickets in New York.[199] The conclusion of the court in *Bensusan* seems to be that confusion does not rise to the level of a tortious injury.

While the analysis in *Bensusan* may comport with New York legal precedent,[200] the same analysis would likely fail in Texas. First, in Texas cases, the analysis surrounding torts committed by parties outside the state does not hinge on the actual injury that has occurred or that is likely to occur in Texas.[201] Texas courts consider intellectual

194. *Id.*

195. *See id.*

196. *See id.* at 300. In order for the long-arm statute to reach out to a non-resident defendant, the court concludes that the New York long-arm statute requires substantial revenue from interstate commerce, not mere participation in it. *See id.* Compare the law in Texas, *infra* note 201 and the text accompanying the note.

197. *Id.* at 301.

198. *See id.* at 300.

199. *See id.* at 301.

200. This in itself is questionable. For instance, in *Transamerica Corp. v. Transfer Planning, Inc.*, 419 F. Supp. 1261 (S.D.N.Y. 1976), the district court held that the court did have personal jurisdiction over the out-of-state company that used the in-state plaintiff's trademark, but admittedly had no clients. Therefore, the defendant company could not have caused an injury. Jurisdiction was based not on the actual injury, but instead on the defendant's contacts. These contacts included a national mailing of 5,000 brochures to interested companies, 100-250 of which ended up in New York, and one advertisement in the Wall Street Journal. *See id.* at 1262. Following the court's opinion in *Transamerica*, the *Bensusan* court's holding is questionable.

201. *See supra* Part II.A.2. The court in *Prejean v. Sonatrach, Inc.*, 652 F.2d. 1260, 1269 (5th Cir. 1981), held that for purposes of acquiring personal jurisdiction over nonresident defendants, the magnitude of the injury in the forum is one of three factors to consider. In *Prejean*, the court found that even though the plaintiffs may have

property violations and unfair trade to be intentional in nature,[202] and a showing of consumer confusion is the only test in determining infringement.[203] Second, in situations where a party has launched a writing into the stream of commerce, Texas courts look to the intent of the defendants to direct their activity at the Texas plaintiff.[204] For instance, in *Jetco* there was no discussion of actual injury to the plaintiff. In light of the Texas court's ruling in *Jetco*, a Texas court would likely rule in favor of maintaining jurisdiction in Texas in a *Bensusan*-like scenario.

B. *Contacts that Satisfy Due Process*

1. Passive Web-Sites

In contrast to the ruling in *Bensusan*, three courts in substantially similar actions of trademark violations on Internet web-sites have ruled in favor of maintaining personal jurisdiction over the owner of a web-site.[205] In each of these cases, the courts look to the tortious injury itself and the defendant's intent in his actions. In no case does the court discuss the defendant's knowledge of exact computer locations as in *Pres-Kap*,[206] nor the extent of actual injury as in *Bensusan*.[207] In courts that have found that jurisdiction exists over Internet web-sites based out-of-state, the primary analysis was the nexus between the forum and the defendant's intent in his actions.

a. *Torts Effects Approach*

The California decision in *Panavision v. Toeppen*[208] is an interesting juxtaposition to the decision in *Bensusan*. While the court in *Bensusan* focuses on the lack of any actual injury to the plaintiff, the court in *Panavision* concentrates on the defendant's intent in his actions. In *Panavision*, intent is everything. Specifically, the Illinois defendant in *Panavision* used the name "PANAVISION" as a domain address[209]

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suffered an injury, the injury did not arise from the actions of the defendant in Texas. *See id.* at 1268.

202. *See* Hupp v. Siroflex of Am., Inc., 848 F. Supp. 744, 748 (S.D. Tex. 1994) (claiming patent infringement and unfair competition claimed; nonresident defendant encouraged wholesalers to sell infringing product nationwide).

203. *See* Oleg Cassini, Inc. v. Cassini Tailors, Inc., 764 F. Supp. 1104, 1108 (W.D. Tex. 1990) (descriptive trademark infringement). Otherwise, the merits of the case need not be adjudicated. *See supra* note 27.

204. *See* Jetco Elec. Indus. v. Gardiner, 325 F. Supp. 80, 83 (S.D. Tex. 1971).

205. *See* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996); Panavision Int'l v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996).

206. *See* Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So. 2d 1351, 1353 (Fla. Dist. Ct. App. 1994).

207. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300 (S.D.N.Y. 1996).

208. 938 F. Supp. 616 (C.D. Cal. 1996).

209. A domain address is an alphanumeric name given to a particular web-site on a server computer so that it can be easily identified and reached by users, similar to a

for a web-site he created.[210] The California plaintiff, Panavision International, filed suit against the defendant when Panavision International tried to create its own web-site on the Internet, only to find that it could not use the company name as a domain address because the defendant acquired the name "Panavision" first.[211] As it turns out, the Illinois defendant had many web-sites using domain addresses similar to the trademarked names of major companies.[212] The plaintiff claimed that the defendant infringed on the "Panavision" trademark with the intention to extort money.[213] The court agreed.

The California analysis of personal jurisdiction is similar to that in Texas, in that both states look to the limits of federal due process.[214] In *Panavision*, the court held that California had specific jurisdiction using a Tort Effect Test, which states that in a tort setting the court can maintain personal jurisdiction "predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state."[215]

The court in *Panavision* identified the key factual features in the analysis: The term "Panavision" is valuable to the plaintiff, and the registration of that name as a domain address would be valuable; the defendant identified Panavision as a business which did not have a registered domain address; the defendant committed the act of using the domain name and registering it for his use; and the act of the defendant has caused harm to the plaintiff, the brunt of which will be felt in California.[216]

The court in *Panavision* does not cite any specific injury to the plaintiff, nor does it know for "sure" that the defendant intended to harm the plaintiff. The court infers many of its conclusions from the facts in the case, stating that the defendant's actions were "anything but random, fortuitous or attenuated" actions and were not "untargeted negligence," but acts aimed at a California company.[217] The

person's mailing address. Andrew R. Basile, Jr., *Rights to Domain Names, in* ONLINE LAW, THE SPA'S LEGAL GUIDE TO DOING BUSINESS ON THE INTERNET § 14 (Thomas J. Smedinghoff ed., 1996).

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

211. *See id. See also* Richard P. Klau, *Online*, STUDENT LAWYER, Jan. 1996, at 14 (discussing the legal issues surrounding domain name ownership); *Basile*, *supra* note 209, at 229 (domain names).

212. *See Panavision*, 938 F. Supp. at 619 (e.g., deltaairlines.com; eddiebauer.com; frenchopen.com; neiman-marcus.com). *See also* Intermatic Inc. v. Toeppen, 947 F. Supp. 1227 (N.D. Ill. 1996) (holding that defendant's use in a domain address created a likelihood of confusion).

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

214. *See* Core-Vent Corp. v. Nobel Indus., 11 F.3d 1482, 1484 (9th Cir. 1993); Schlobohm v. Schapiro, 784 S.W.2d 355, 357 (Tex. 1990).

215. *Panavision*, 938 F. Supp. at 621 (quoting *Core-Vent*, 11 F.3d at 1486).

216. *See id.*

217. *Id.* at 621.

court specifically cites the Supreme Court case of *Calder* to support its Effects Test analysis as the valid analysis in this setting of web-site jurisdiction.[218]

Perhaps the only problem with the analysis in *Panavision* is the court's attempt to distinguish *Bensusan*.[219] The defendant's actions in *Bensusan*, although perhaps not as egregious as those in *Panavision*, are not so distinguishable. Indeed, if intention is as vital to the analysis as set out in *Panavision*, then the defendant in *Bensusan* can clearly be said to have purposefully availed itself of the New York court—the defendant clearly acknowledged in his web-site that he might have created confusion about his nightclub in the marketplace![220] However, the analysis in *Panavision* is excellent with respect to the issue of personal jurisdiction, and there are many similarities to the opinion in *Jetco*. Most importantly, the courts in *Jetco* and *Panavision* rely heavily on the inferred intention of the defendant from his tortious activity in the forum state. This parallel in analysis supports the use of *Jetco* in any future Texas litigation over web-site personal jurisdiction.

b. *Stream of Commerce Approach*

A Connecticut court has decided another domain name trademark violation involving a web-site in *Inset Systems v. Instruction Set*.[221] Unlike *Panavision*, the intent of the nonresident defendant to violate a trademark and cause injury is not as clear from the facts, which makes this case an interesting comparison to *Panavision*. Thus, the issue is how a Texas court analyzes personal jurisdiction when the intent to cause injury is not clear.

Unlike the Effect Test approach of the California court in *Panavision*, which resembles the Tort Effects analysis,[222] the Connecticut court in *Inset* takes a Stream of Commerce[223] approach in maintaining personal jurisdiction over the nonresident plaintiff. But this does not change the result of the case; using the Stream of Commerce approach to the case merely gives the court a different analytical framework to look at the problem. In *Inset*, a Massachusetts company named Instruction Set registered the domain address "INSET.COM" for its web-site, and filed for registration as the owner of the federal trademark INSET.[224] The Connecticut plaintiff is Inset Systems. The plaintiff claimed that the defendant had violated, among other things, federal trademark law.

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218. *See id.*
219. *See id.* at 621-22.
220. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 297 (S.D.N.Y. 1996).
221. 937 F. Supp. 161 (D. Conn. 1996).
222. *See supra* Part II.B.1.
223. *See supra* Part II.B.2.
224. *See Inset*, 937 F. Supp. at 162-63.

As an initial part of its analysis, the court in *Inset* looks to its long-arm statute,[225] much like the New York court in *Bensusan*. The court in *Inset* finds that through the defendant company's advertising on the Internet, it has availed itself of the Connecticut court through its solicitation of business.[226] Unlike Texas cases involving national advertising,[227] the commission of a tort was not considered the basis of jurisdiction.[228] The court bases its reasoning on past Connecticut precedent which holds that advertisements in hard-copy print "whose circulation clearly includes Connecticut demonstrates a sufficiently repetitious pattern to satisfy [the long-arm statute]."[229] The court notes that there are at least 10,000 access sites in Connecticut, and compares this to the delivery of infringing hard-copy print sent to residents in Connecticut.[230]

The court in *Inset* also finds that maintaining personal jurisdiction is consistent with due process.[231] The court bases its finding of minimum contacts with the Massachusetts defendant on the theory that it could "reasonably anticipate" being haled into a Connecticut court, thus purposefully availing themselves of the forum.[232] The court finds that the defendant "directed its advertising activities via the Internet and its toll-free number toward not only to the state of Connecticut, but to all states."[233] Further, the court in *Inset* relies heavily on the fact that the defendant's advertisement can possibly reach 10,000 Internet users in the forum.[234]

While it is likely that, given a similar set of circumstances as in *Inset*, Texas courts could acquire personal jurisdiction over the owner of the web-site, the analysis in that case is not consistent with Texas precedent. There are two problems with the *Inset* analysis that Texas courts should avoid. First, the *Inset* court never mentions knowledge or purpose on the part of the defendant. Although the court mentions that

225. *See id.* at 163.

226. *See id.* at 164.

227. *See* Bounty-Full Entertainment, Inc. v. Forever Blue Entertainment Group, Inc., 923 F. Supp. 950, 957 n.4 (S.D. Tex. 1996) (holding that marketing activity alone is not sufficient for general personal jurisdiction); Siskind v. Villa Found. For Educ., Inc., 642 S.W.2d 434, 436-37 (Tex. 1982) (holding that nationally circulated publication alone not enough; personal jurisdiction found from cumulative effect of more directed contacts in Texas yellow pages and letters and phone calls sent from defendant to forum).

228. *See Inset*, 937 F. Supp. at 164.

229. *Id.* (quoting McFaddin v. Nat'l Executive Search, Inc., 354 F. Supp. 1166, 1169 (D. Conn. 1973) (stating six advertisements over a six month period in a newspaper "whose circulation clearly includes Connecticut" was solicitation according to the long-arm statute).

230. *See id.*

231. *See id.* at 165.

232. *See id.*

233. *Id.*

234. This is presumably the number of people who have online Internet service in the state. *See id.*

there are 10,000 access sites to the Internet in Connecticut,[235] it never discuss the defendant's knowledge or intentions with respect to causing an injury in that forum. This is a vital aspect to forming the required nexus for personal jurisdictional in Texas.[236]

Second, as an important feature of its analysis, the *Inset* court sets Internet advertising apart from radio, television, and print in that the Internet is available continuously to a user of the Internet.[237] This distinction between radio, television, hard-copy print and a web-site on the Internet is erroneous, and prior court precedent in Texas indicates that any distinction is merely technical at best.[238] The ease and convenience of the Internet is not enough alone to allow courts to acquire personal jurisdiction over the web-site owners. The Texas Supreme Court in *Siskind* has implied that in order to find that a defendant has purposefully directed his actions at Texas, a defendant must do more than advertise in a nationally distributed medium.[239] In other words, merely launching something into the stream of commerce that happens to come into Texas is not enough for personal jurisdiction.[240] The full Stream of Commerce analysis must include some directed activity and some injury in the forum state.[241] The Texas case *Jetco* makes it clear the injury that arises from the advertising must be directed at the forum[242] and the *number* of contacts is not a controlling factor.[243] Further, *Loumar* and *Curry* are on point on the issue in *Inset*: Advertising in a nationally distributed medium is not enough alone for a Texas court to maintain personal jurisdic-

235. *See Inset*, 937 F. Supp. at 164.

236. *See supra* text accompanying notes 107-10. *See also supra* Part II.A.2 (discussing the importance of finding an intent in the defendant's actions); Part II.B.1 (discussing *Jetco*).

237. *See Inset*, 937 F. Supp. at 163.

238. *See supra* text accompanying notes 45 and 110. *See also supra* Part I.C.

239. *See* Siskind v. Villa Found. For Educ., Inc., 642 S.W.2d 434, 436-37 (Tex. 1982) (citing the defendant's advertising in Texas phone books, along with directed mailings and phone conversations as relevant factors in maintaining personal jurisdiction, while not citing as important the defendant's extensive national advertising where in fact the plaintiff first learned of the defendant's services). *See also* Asahi Metal Indus., Co. v. Superior Court, 480 U.S. 102, 110-11 (1987) (indicating that the Court has adopted the position that the mere act of placing a product in the stream of commerce is not enough of a "substantial connection" with the forum state to comport with due process). "Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State . . . ." *Asahi*, 480 U.S. at 112. Given that the Court does not distinguish tangible and intangible property, the "product" could be some manufactured object as well as some form of advertising which distributes marks owned by the advertiser. *See supra* Part I.B. *See also* Newton & Wicker, *supra* note 63, at 539.

240. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295-96 (1980).

241. *See supra* Part I.B.1.

242. *See* Jetco Elec. Indus. v. Gardiner, 325 F. Supp. 80, 83 (S.D. Tex. 1971).

243. *See id. See also* Memorial Hosp. Sys. v. Fisher Ins. Agency, Inc., 835 S.W.2d 645 (Tex. App.—Houston [14th Dist.] 1992, no writ) (explaining that quality, not quantity, of contacts is important for personal jurisdiction analysis).

tion.[244] If a Texas court is to maintain jurisdiction in a fact situation like that in *Inset*, the intent to do some injury directed at Texas must be found before the defendant's actions can be said to be "purposeful" to satisfy the Texas Test. The court in *Inset* failed to do this.

2. Interactive Web-Sites

A passive web-site that does nothing more than provide information does not vest a court with personal jurisdiction over its owner.[245] But, as *Panavision* and *Inset* show, a passive web-site that creates an injury itself within the forum can vest a court in the forum with personal jurisdiction over the owner of the web-site. When the facts of the case reveal some *interaction* between the plaintiff and the defendant's web-site, the analysis must take these interactions into account. But, the injury must still arise from those interactions. This is the case in *Maritz v. Cybergold*,[246] where jurisdiction arose from the injury of the trademark violation itself and the cumulative effect of other defendant/plaintiff interactions that purposefully avail the defendant to the forum state.

The facts of the *Maritz* case show how the defendant's intent, or foreseeability, is less of an issue as the nexus between the defendant's actions and the forum become more transparent. This comes about in *Maritz* because of the web-site owner's affirmative steps in contacting the forum. In *Maritz*, the Missouri plaintiff, Maritz, Inc., brought suit against the California defendant, Cybergold, Inc., for federal trademark violation.[247] The defendant had apparently violated some trademark owned by the plaintiff in the web-site that it posted on the Internet.[248] In the court's due process analysis of personal jurisdiction, the defendant's tortious activities and the infliction of economic injury are the basis for personal jurisdiction analysis.[249] The court determines whether the defendant company has directed its activities such that it could reasonably anticipate being haled into Missouri

244. *See supra* Part II.A.

245. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

246. 947 F. Supp. 1328 (E.D. Mo. 1996).

247. *See id.* at 1329.

248. *See id.* The exact nature of the violation was not discussed in the case, only that the action was for a federal trademark violation. *See id.* This is in sharp contrast to the New York court in *Bensusan*, where the holding hinged upon the merits of the trademark violation, an element of which is the injury caused. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996); Oleg Cassini, Inc. v. Cassini Tailors, Inc., 764 F. Supp. 1104, 1108 (S.D. Tex. 1990) (testing whether there is a "likelihood of consumer confusion"). In Texas, when courts are analyzing personal jurisdiction, the merits of the case are usually not discussed. *See, e.g.*, Bounty-Full Entertainment, Inc. v. Forever Blue Entertainment Group, Inc., 923 F. Supp. 950, 953 (S.D. Tex. 1996). *See also supra* note 27.

249. *See Maritz*, 947 F. Supp. at 1331.

court.[250] But, it is here that the court runs into trouble in its analysis. Although the court acknowledges that past Missouri precedent would find that the court could not maintain jurisdiction if the defendant's advertising was hard-print, they find that in the case of an Internet web-site, the court may maintain personal jurisdiction over a defendant who has caused injury in the state.[251] Specifically, the court seems to distinguish web-site advertising from mailings, calling web-site advertising "active solicitation" of business in Missouri.[252] The court in *Maritz* states that "analogies to cases involving the use of mail and telephone are less than satisfactory in determining whether the defendant has 'purposefully availed' itself to this forum."[253] This is erroneous because, if a state does not consider advertising mailings as active solicitation, then they should not consider a passive web-site as such.

However, the *Maritz* court gets back on track in its analysis, focusing on the actions of the defendant in causing injury to the Missouri plaintiff.[254] First, the court looks to the nature and quality of the defendant's actions. The court looks to the fact that the defendant intentionally used the injurious mark in its web-site, and intentionally placed the web-site on the Internet.[255] Secondly, the court finds that there was solicitation of people in Missouri for business because the defendant responded 131 times to people in Missouri who viewed its web-site.[256] Thus, the defendant initiated contact 131 times to Missouri as a result of its web-site, which is clearly what it intended to do by placing the web-site onto the Internet.[257] The court rightfully concludes the plaintiff's actions in contacting the defendant's web-site

250. *See id.* at 1332.

251. *See id.* at 1331. The cases that the court cites for its authority hold that nationally distributed hard-copy advertising is not enough to maintain jurisdiction when the tortious injury arises from a *contract* with the nonresident defendants. *See* May Dep't Stores Co. v. Wilansky, 900 F. Supp. 1154, 1161 (E.D. Mo. 1992); Peabody Holding Co. v. Costain Group PLC, 808 F. Supp. 1425, 1433-34 (E.D. Mo. 1992). Therefore, this makes the *Maritz* court's distinction of Internet advertising from hard-copy advertising suspect since these cases would not apply anyway. The Supreme Court in *Burger King*, and the Texas Supreme court in *U-Anchor*, have held that a single contract between a plaintiff in the forum and an out-of-state defendant is not enough to vest the court with personal jurisdiction. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); U-Anchor Adver., Inc. v. Burt, 553 S.W.2d 760 (Tex. 1977). *See also* Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026, 1028-29 (5th Cir. 1983) (rejecting the maintenance of personal jurisdiction over Alaskan defendant whose sole contact with Texas was a single contract with Texas plaintiff).

252. *See Maritz*, 947 F. Supp. at 1332-33.

253. *See id.* However, the court correctly analogizes the sequence of actions in hard-copy mailings and web-site interactions. *See id.* at 1333.

254. *See id.*

255. *See id.*

256. *See id.*

257. *See id.*

should not be considered, only the defendant's acts.[258] This is because the injury was created in the defendant's contacting the forum state, not in the plaintiff-initiated contacts with the defendant. Finally, the court concludes that the injury the plaintiff alleges "arises out of" the defendant's actions.[259] It is this latter part of the *Maritz* analysis that is parallel to that in *Siskind*, the nexus between the defendant's intent in his actions and the injury in the forum.

While the court in *Maritz* may use an analysis that is similar to that in *Siskind*, the court's distinction between the Internet and other media is erroneous. The court in *Maritz* makes this distinction based on the "more efficient, quicker" and "global" nature of the Internet.[260] Efficiency of a communications media is not a valid distinguishing factor in determining personal jurisdiction. Indeed, the Supreme Court has acknowledged that communication will become more efficient over time.[261] That is why the Supreme Court adopted the flexible approach of *International Shoe* in finding personal jurisdiction.[262] But this does not do away with the necessity of finding some directionality to the actions of the defendant. If anything, "efficiency" makes the Internet *less* directional, not more.

C. *Texas Should Adapt the* Calder/Jetco *Analysis for Passive Web-Site Cases that Arise in Texas*

The results reached in each of these cases are likely correct given past court precedent in each jurisdiction. But the problem in these cases for Texas courts lies in analysis—specifically, in distinguishing web-sites from other forms of communication media. This false conclusion is likely the reason why the analysis in *Bensusan*, *Panavision*, *Inset*, and *Maritz* varies. The facts of each case must be looked at individually; there is no formula.[263] On the other hand, there is simply no reason for courts to create new rules for cases involving the Internet.[264] The analysis of obtaining personal jurisdiction over the creator of a web-site, and indeed in any Internet case, remains the same as it did in *Schlobohm*: "[D]id the nonresident defendant or foreign corporation . . . purposefully do some act or consummate some transaction in the forum state . . . [and] does the cause of action arise from . . . such act or transaction."[265]

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258. The plaintiff could always try to create personal jurisdiction if the defendant's actions were considered. *See id.* at 1333 n.4.

259. *See id.*

260. *Id.* at 1332.

261. *See supra* text accompanying note 48.

262. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945).

263. *See* Schlobohm v. Schapiro, 784 S.W.2d 355, 358 (Tex. 1990).

264. *See* Zembeck, *supra* note 3, at 368 ("This note suggests that advertisement, telephone, and environmental case law contains the proper paradigms to analyze these novel [Internet] jurisdictional issues.").

265. *Schlobohm*, 784 S.W.2d at 358.

Texas courts should follow the *Calder/Jetco* analysis when dealing with passive Internet web-sites. The California case *Panavision* comes closest to this at present. This court looks specifically at the intentions of the defendant in his actions to create the nexus between the injury and the defendant's links to the forum. When the actions between the nonresident defendant and the forum are interactive as in *Maritz*,[266] the closest Texas case is *Siskind*.[267] If there is an allegation of a tort being committed by the creator of a web-site,[268] these cases offer the best and most consistent approach to the analysis. If further interaction is generated between users in different forums such as in *Maritz*,[269] the analysis in *Siskind* should be used.

CONCLUSION

As the use of the Internet explodes, so too will the need for a consistent jurisprudence. Indeed, by substituting the appropriate case law, the principles enunciated in this Comment should apply to all jurisdictions in the United States. In all cases, a court's maintenance of personal jurisdiction over a nonresident defendant is foundational for Internet cases because of the global nature of this medium of communication. Unique as it is, the Internet is not distinguishable from print or wire communications. The Internet is faster and more efficient but not fundamentally unique as a medium for advertising and communications.

If its uniqueness is distinguishing at all it is in the versatility of the Internet as both a passive and interactive medium. And, as the Supreme Court has found, it is when passive communications are launched into the stream of commerce that the nonresident's connection with the forum becomes particularly tenuous. This does not preclude a finding of personal jurisdiction, but it does make the analysis more focused.

In obtaining jurisdiction over Internet web-sites, a Texas court must find a nexus between the defendant's actions in making and placing the web-site information onto a server computer and the injury it causes in the forum state. If the defendant's actions are found to be purposeful or intentional and the injury arises from these purposeful activities of the defendant, the nexus is formed, and the maintenance of personal jurisdiction is proper.

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266. 947 F. Supp. 1328, 1333 (E.D. Mo. 1996).

267. 642 S.W.2d 434 (Tex. 1982).

268. When the nonresident owner of a web-site has generated substantial revenues from doing business in Texas, coupled with other actions in Texas, but the injury does not arise from the defendant's relationship to Texas, the analysis in *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F. Supp. 318 (S.D. Tex. 1985), may allow the maintenance of general personal jurisdiction over the defendant. *See supra* Part I.A. for a discussion of the Texas Test and general jurisdiction. *See also supra* note 120.

269. 947 F. Supp. at 1333.

While there are no Texas cases to date dealing with the issue of Internet jurisdiction, past Texas cases serve as authority on the issue. Past cases in Texas that adjudicate issues of attenuated nonresident activity are not only useful as analogies to future web-site cases, they are binding authority. Furthermore, given that each forum has its own unique personal jurisdictional analysis, relying on past precedent from other forums may be misleading. In fact, some courts have been lead astray in their analysis of personal jurisdiction over web-sites based on their own precedent. This is erroneous and should be avoided by Texas courts. The proper analysis takes into account the fact that web-sites on the Internet have characteristics of writings in the stream of commerce, while its physical manifestation is a stream of electrons.

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