CYBERSELL, INC. V. CYBERSELL, INC.

By Tu Phan

"Minimum contacts," the personal jurisdiction doctrine established by *International Shoe Co. v. Washington*,[1] consists of two words: the first an adjective, and the second a noun. Both the adjective and the noun seem equally important to the test, and yet, at least in Internet-related jurisdiction cases, courts and commentators have, in case after case[2] and article after article,[3] written expansively on the adjective and given short shrift to the noun. Ignoring the noun has had its consequences. In particular, it has

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1. 326 U.S. 310 (1945).

2. Courts have analyzed sufficiency of web-related contacts in conjunction with other types of contacts. *See, e.g.*, No Mayo-San Francisco v. Memminger, No. C-98-1392 PJH, 1998 WL 544974 (N.D. Cal. 1998); Edberg v. Neogen Corp., No. 3:98CV00717 (GLG), 1998 WL 458249 (D. Conn. 1998); Scherr v. Abrahams, No. 97 C 5453, 1998 WL 299678 (N.D. Ill. 1998); Vitullo v. Velocity Powerboats, Inc., No. 97 C 8745, 1998 WL 246152 (N.D. Ill. 1998); Mieczkowski v. Masco Corp., 997 F. Supp. 782 (E.D. Tex. 1998); Gary Scott Int'l, Inc. v. Baroudi, 981 F. Supp. 714 (D. Mass. 1997); Resuscitation Technologies, Inc. v. Continental Health Care Corp., No. IP 96-1457-C-M/S, 1997 WL 148567 (S.D. Ind. 1997); Digital Equipment Corp. v. Altavista Technology, Inc., 960 F. Supp. 456 (D. Mass. 1997); McDonough v. Fallon McElligott Inc., 40 U.S.P.Q.2d (BNA) 1826 (S.D. Cal. 1996). They have also analyzed the sufficiency of web-only contacts, without questioning whether or not these contacts should be considered in personal jurisdiction analysis. *See, e.g.*, Blackburn v. Walker Oriental Rug Galleries, 999 F. Supp. 636 (E.D. Pa. 1998); Green v. William Mason & Co., 996 F. Supp. 394 (D.N.J. 1998); Transcraft Corp. v. Doonan Trailer Corp., No. 97 C 4943, 1997 WL 733905 (N.D. Ill. 1997); E-Data Corp. v. Micropatent Corp., 989 F. Supp. 173 (D. Conn. 1997); Hasbro, Inc. v. Clue Computing, 994 F. Supp. 34 (D. Mass. 1997); Telco Communications v. An Apple a Day, 977 F. Supp. 404 (E.D. Va. 1997); Hearst Corp. v. Goldberger, No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097 (S.D.N.Y. 1997); Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996); Conseco, Inc. v. Hickerson, No. 29A04-9802-CV-85, 1998 WL 47485 (Ind. Ct. App. 1998); Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. Ct. App. 1997).

3. *See, e.g.*, Christian M. Rieder & Stacy P. Pappas, *Personal Jurisdiction for Copyright Infringement on the Internet*, 38 SANTA CLARA L. REV. 367 (1998); Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED. COMM. L.J. 117 (1997); Corey B. Ackerman, Note, *World-Wide Volkswagen, Meet the World Wide Web: An Examination of Personal Jurisdiction Applied to a New World*, 71 ST. JOHN'S L. REV. 403 (1997); Christine E. Mayewski, Note, *The Presence of a Web Site as a Constitutionally Permissible Basis for Personal Jurisdiction*, 73 IND. L.J. 297 (1997).

led to a situation where courts indiscriminately lump together two entirely different types of contact: contacts initiated by the defendant ("creator" contacts) and contacts initiated by third parties ("user" contacts). This, in turn, has produced a confusing morass of holdings on cyberspace jurisdiction,[4] of which *Cybersell, Inc. v. Cybersell, Inc.*[5] is a prime example. In *Cybersell*, the Ninth Circuit refused to grant personal jurisdiction over a web-only business.[6] Its ruling effectively ignored five other decisions, which had allowed jurisdiction in circumstances similar to the one in *Cybersell*.[7]

Such a contradictory result could have easily been avoided if courts had distinguished between "creator" and "user" contacts. Only "creator" contacts meet the traditional definition of defendant contacts; "user" con-

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4. Since the influential *Zippo* decision, courts have generally considered web sites to fall into three categories: 1) web sites which involve contractual relationships, 2) interactive sites, and 3) passive sites. *See Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). Most courts generally agree that the presence of a contractual relationship justifies an extension of jurisdiction. *See, e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (holding that there is jurisdiction because defendant knowingly signed an agreement in which he transmitted and marketed shareware programs to the forum state); Rubbercraft v. Rubbercraft, No. CV 97-4070-WDK, 1997 WL 835442 (C.D. Cal. 1997) (holding that there is jurisdiction because defendant derived significant revenue from California through its sales efforts, 1-800 number, web-page and other nationally circulated media). They disagree, however, on the difference between interactive and passive sites. Some courts consider web sites to be inherently interactive, by their very nature. *See, e.g.*, Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996); Telco Communications v. An Apple a Day, 977 F. Supp. 404 (E.D. Va. 1997). Other courts state that the posting of a web site alone does not automatically establish interactivity. *See, e.g.*, McDonough v. Fallon McElligott Inc., 40 U.S.P.Q.2d 1826 (S.D. Cal. 1996); Green v. William Mason & Co., 996 F. Supp. 394 (D.N.J. 1998). These courts all require some additional evidence to prove interactivity, but no court has as yet established a consistent rule for analyzing that additional evidence. Because of this, courts often reach contradictory holdings. *Compare* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996) (web site which provided user service sufficient to establish interactivity) *with* E-Data Corp. v. Micropatent Corp., 989 F. Supp. 173 (D. Conn. 1997) (web site which provided user service not sufficient to establish interactivity); *compare* Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. Ct. App. 1997) (toll-free number and e-mail link sufficient to establish interactivity) *with* Conseco, Inc. v. Hickerson, No. 29A04-9802-CV-85, 1998 WL 47485 (Ind. Ct. App. 1998) (toll-free number and e-mail link not sufficient to establish interactivity).

5. 130 F.3d 414 (9th Cir. 1997).

6. *See id.* at 420.

7. *See* Hasbro, Inc. v. Clue Computing, 994 F. Supp. 34 (D. Mass. 1997); Telco Communications v. An Apple a Day, 977 F. Supp. 404 (E.D. Va. 1997); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996); Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996); Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. Ct. App. 1997).

tacts do not. If courts wish to reach more fair and consistent results, they should limit their analysis to the former.

I. A STATEMENT OF THE CASE: *CYBERSELL, INC. V. CYBERSELL, INC.*

Cybersell, Inc. v. Cybersell, Inc., a case of first impression for the Ninth Circuit,[8] involved a trademark dispute between a Cybersell in Arizona ("Cybersell AZ")[9] and a Cybersell in Florida ("Cybersell FL"). Though unrelated, both companies provided Internet consulting services, which they advertised on their respective web pages. Cybersell FL ran a page created by its founders, Dr. Samuel Certo and Matt Certo, which included a Cybersell logo, a sign proclaiming "Welcome to Cybersell!," a local phone number, and an e-mail link.[10] At the time the company chose the name Cybersell, it did not know that Cybersell AZ's page existed[11] or that Cybersell AZ had filed an application to register the mark. The company only discovered this fact when it received a cease and desist e-mail from the two well-known spammers who ran Cybersell AZ.[12] Although Cybersell FL moved to comply by changing its name, it failed to remove the message stating "Welcome to Cybersell!," leading Cybersell AZ to file a complaint for trademark infringement, unfair competition, fraud, and RICO violations in the District of Arizona.[13] Cybersell FL, in turn, filed for declaratory relief in the Middle District of Florida, but the action was transferred to Arizona and consolidated with the Cybersell AZ suit.[14] Cybersell FL then moved to dismiss for lack of personal jurisdiction, which the Arizona district court granted.[15]

The Ninth Circuit affirmed.[16] Looking to the applicable Arizona long-arm statute, the Ninth Circuit applied its traditional three-part test for specific jurisdiction.[17] It focused particularly on the first prong—purposeful availment—which requires that the nonresident defendant do some act to

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

9. For the sake of convenience, this Note follows the Ninth Circuit's conventions for naming the parties.

10. *See id.* at 415-16.

11. *See id.* at 415.

12. *See id.*

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

14. *See id.*

15. *See id.*

16. *See id.* at 415.

17. *See id.* at 416.

purposefully avail himself of the privilege of conducting activities in the forum state.[18]

Because the context of cyberspace was a matter of first impression for the circuit,[19] the court looked to the decision of other jurisdictions to help determine purposeful availment.[20] In particular, the court found the language of *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*[21] to be persuasive. It agreed with *Zippo* that an interactive site might justify a finding of jurisdiction, but an essentially passive site would not.[22] The court did not attempt to define interactive versus passive sites per se, but its survey of the case law allowed it to conclude that interactivity occurred when the defendant entered into contracts, sent data, or placed toll-free numbers on sites.[23] The Ninth Circuit also noted that courts had given weight to the number of hits received by a web page.[24]

At the time of the litigation, Cybersell FL had no physical presence, agent, or holdings in the forum state.[25] The court, therefore, looked only at contacts generated by the company's web page.[26] Because it found that no Arizona users had hit or consummated a transaction with the Florida site, and because Cybersell FL failed to offer a toll-free number, the court held that there was no purposeful availment.[27] Because Cybersell FL had not purposefully availed, the Ninth Circuit refused to continue with the analysis, ruling that jurisdiction over an essentially passive page could not be proper.[28]

18. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416-17 (9th Cir. 1997).
19. *See id.* at 417.
20. *See id.*
21. 952 F. Supp. 1119 (W.D. Pa. 1997).
22. See *Cybersell*, 130 F.3d at 418.
23. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 417-19 (9th Cir. 1997).
24. *See id.* at 419.
25. *See id.*
26. *See id.*
27. *See id.* at 419-20.
28. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419-20 (9th Cir. 1997).

II. THE ARGUMENT FOR FOCUSING ON CREATOR CONTACTS

A. The Meaning of "Contacts"

1. The meaning of "contacts" in a traditional legal context

The dictionary defines the word "contact" to mean "the act or state of touching."[29] Alternatively, it defines "contact" to mean "the act or state of being in communication."[30] To be in contact, therefore, two entities must either exist in close proximity or else establish some minimal relationship that involves the exchange of information.

The legal definition of contact generally parallels this dictionary definition: courts may assert jurisdiction based on physical proximity, as they originally did under *Pennoyer v. Neff*,[31] or based on a certain minimal relationship, as they currently do under the "minimum contacts" analysis[32] of *International Shoe Co. v. Washington*.[33] The legal definition diverges from the dictionary definition in one respect, however: it emphasizes defendant-initiated contacts, as opposed to contacts initiated by other entities.[34] This emphasis on defendant-initiated contacts can be traced back to the time of *Pennoyer*, when the courts based personal jurisdiction on the physical location of the defendant, as opposed to the physical location of any other entity.[35]

Since *Pennoyer*, the Supreme Court has held firm to this idea that only defendant-initiated contacts should matter. In *International Shoe*, the Court reaffirmed the importance of the defendant's activities by requiring an analysis of the "quality and nature" of the defendant's activity.[36] It based this decision on fairness grounds: a non-resident defendant who enjoyed the benefits should also shoulder the obligations of conducting ac-

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29. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 293 (1991).

30. *Id.*

31. 95 U.S. 714 (1877).

32. Under modern minimum contacts analysis, jurisdiction is appropriate if the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Minimum contacts is generally established if the non-resident defendant purposefully avails himself of some privilege of conducting activities in the forum state.

33. 326 U.S. 310 (1945).

34. *See infra* following discussion.

35. The location of the plaintiff certainly mattered, but it was rarely at issue, since a plaintiff who wished to sue always invariably submitted to the court's jurisdiction.

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

tivity in a state.[37] The same rationale permeated *Hanson v. Denckla*.[38] In that decision, the Supreme Court stated that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State."[39] Only defendant-initiated contacts could serve as constitutionally cognizable contact.

The Court has disfavored attempts to recognize other types of contacts as constitutionally cognizable. In *World-Wide Volkswagen Corp. v. Woodson*,[40] the Supreme Court refused to exercise in personam jurisdiction when the defendant's only connection with Oklahoma was an automobile accident in Oklahoma involving a car sold in New York to New York residents.[41] It rejected the idea that jurisdiction could result from the unilateral activity of third parties (in this case, the consumer), or that amenability to suit could "travel with the chattel."[42] Similarly, in *Asahi Metal Industry Co. v. Superior Court*,[43] Justice O'Connor, in her plurality opinion, refused to extend the meaning of defendant contact to include the component parts created by the defendant and then sent into the stream of commerce.[44] She wrote:

> 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 towards 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.[45]

In short, the Supreme Court has made it quite clear that the permissibility of jurisdiction depends on the "nature and quality" of the defendant's conduct, and not on the conduct of other entities.

2. *The meaning of "contacts" in a modern cyberspace jurisdiction context*

The strength of commitment to defendant contacts, however, has not survived unchanged in the context of cyberspace jurisdiction. While the courts continue to apply a "minimum contacts" analysis, they have sup-

37. *See id.*
38. 357 U.S. 235 (1958).
39. *Id.* at 253.
40. 444 U.S. 286 (1980).
41. *See id.* at 298-99.
42. *Id.* at 296.
43. 480 U.S. 102 (1987).
44. *See id.* at 112-13 (O'Connor, J., plurality opinion).
45. *Id.* at 112 (O'Connor, J., plurality opinion).

plemented it with a three-tiered standard for examining web sites, where site interactivity is key.[46] The courts have also subtly changed the personal jurisdiction analysis by subtly shifting the focus from the "nature and quality" of the defendant's conduct to "the nature and quality of commercial activity that an entity conducts over the Internet."[47]

3. The meaning of "contacts" in a World Wide Web context

This shift in language would have been harmless six years ago. Before the advent of the Web, a defendant's commercial enterprise often determined the nature of the defendant's conduct. This was true because most advertising had limited, rather than world-wide, circulation. Because businesses had limited budgets, they would choose the form of advertisement that most efficiently reached their target market. A local business would spend money on local, rather than national, advertising. A court could, therefore, analyze the "nature and quality" of the defendant's advertising activity as a sort of shorthand to the defendant's conduct, on the theory that certain businesses merit only certain conduct.

The World Wide Web has made a fallacy of this connection between nature of the commercial activity and nature of the defendant's conduct. Cyberspace knows no national boundaries: a page can potentially be viewed by anyone around the world.[48] Courts accordingly assume that a business using this medium wishes to target the world. But the Web is also relatively cheap,[49] and attracts local as well as (inter)national businesses. It would, therefore, be improper for a court to assert jurisdiction with the assumption that every site is internationally-oriented.

The problem worsens once a court realizes how the web has shifted power from creator to user. On the web, a defendant rarely initiates a commercial transaction; she must wait for a user to find, browse, and interact with her site.[50] This sudden shift in power has suddenly opened up a world of choices for courts trying to judge "nature and quality of commercial activity."

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46. According to this standard, web sites can be divided into three categories: 1) web sites which involve contractual relationships, 2) interactive sites, and 3) passive sites. Jurisdiction is almost always proper in the first category, and might be proper in the second, but is never proper in the third. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

47. *Id.*

48. *See* VINCE EMERY, HOW TO GROW YOUR BUSINESS ON THE INTERNET 5 (1995).

49. *See id.*

50. *See* JILL H. ELLSWORTH & MATTHEW V. ELLSWORTH, MARKETING ON THE INTERNET 240 (1995).

Courts continue to deal with defendant-initiated "creator" contacts. "Creator" contacts, in the context of the web, include actions taken by the defendant to create, maintain, promote, and secure a site. Courts also now encounter "user" contacts. "User" contacts come in a variety of forms, but they all have one characteristic: the creator has no direct control over the contact. "User" contacts include the intent of the user, the actions the user employs to interact with a page, the data inputted or sent by the user, the path traveled by a user, the "hits" made by users to a site, and the geographic data of the user.

Courts, for several reasons, have been attracted to user contacts. First, the focus on interactivity and "nature and quality of the commercial activity" has encouraged courts to analyze user data. Because users play a large role in determining interactivity and in initiating commercial activity, it seems inappropriate not to consider such contacts. Second, "user" contacts often blur into defendant-initiated contacts. A user comes to a page only because a defendant has placed the page on the web in the first place. Finally, and perhaps most insidiously, "user" data is often the only "hard" data that a court will see about a web page. Often, because a defendant appears to do little besides putting up the page, it is difficult to pin down a defendant's intent from his conduct alone. Rather, it seems easier to extrapolate from user statistics, which are tracked automatically by the server and which can be processed into easily understandable graphs and charts. "User" data therefore presents an alluring alternative to defendant-initiated "creator" contacts.

B. Defending Creator Contacts

Courts, however, should not heed this siren call, because doing so would undermine personal jurisdiction as a viable legal doctrine. Focusing on "user" contacts mangles the distinction that only defendant's conduct should matter. It also ignores two of the most basic rationales underlying personal jurisdiction: fairness and predictability.

1. Rationales underlying jurisdiction

a) "Traditional notions of fair play and substantial justice"

Personal jurisdiction is grounded first on "traditional notions of fair play and substantial justice."[51] As a doctrine of fairness, it serves one main purpose: it regulates the number of allowable suits. Properly defined, personal jurisdiction establishes a fair and just balance between the needs of the forum state to protect its own citizens and the rights of the defendant to

51. International Shoe v. Washington, 326 U.S. 310, 316 (1945).

be free from burdensome litigation in a strange and foreign jurisdiction.[52] It establishes this balance by demanding a price for a benefit. In particular, it demands that a plaintiff who wishes to acquire the benefit of suit must first establish a meaningful relationship with the defendant. Plaintiffs who can only show "random, fortuitous or attenuated" contacts will be barred from taking advantage of the system.[53]

"User" contacts are by nature random, fortuitous, and attenuated. Therefore, focusing on these contacts tilts the balance too far in favor of the plaintiff and increases the likelihood of meritless and harassing actions, without exacting a proper price in return. With "user" contacts, plaintiffs can assert jurisdiction even if the defendant did not act at all, which is basically unfair.

"User" contacts are random because web site creators have no control over most users and their actions. They cannot reject users from a particular state, unless they make their site entirely inaccessible to the general public (a non-viable solution for a commercial site).[54] Similarly, inserting disclaimers, even one on every page of the defendant's site, would not suffice. If a disclaimer is placed on a normal web page, the users might not see it or might ignore it. Even assuming that a user sees the warning and decides to follow its dictates, the damage has already been done: the user has already hit the site, opening the creator to liability. Click agreements would also not solve the dilemma because of implementation problems. The creator has two choices with click agreements: she can place the agreement on a normal web page or put it in a pop-up window. The first method runs into problems because there is no one single entry-way into a web site. Every page on the site would, therefore, have to be devoted to the click agreement, with no room for actual content. The second method is more viable, but runs into compatibility problems. To display a pop-up window, the creator would have to use JavaScript, frames or similarly advanced features, which some older browsers do not support. A creator who does not wish to sacrifice accessibility would not be able to use this method, but would have to allow users free rein over her site. Such lack of control, in turn, distorts the picture courts receive about the defendant's amenability to suit.

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52. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

53. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

54. It would be impossible to restrict by state, because usually servers are not provided with information about a user's geographic location or residence. *See* ROBBIN ZEFF & BRAD ARONSON, ADVERTISING ON THE INTERNET 68-69 (1997). This might change with the advent of such technological innovations such as "cookies," which are Internet features that can keep track of user information.

"User" contacts are fortuitous because many users find pages by browsing, or navigating by moving from link to link. By doing so, they move in a non-linear fashion, without reading a page in full or seeing a section in a particular order.[55] Whimsy and luck determine where these users will go. Often, users will hit a page, even if they have no interest in it and do not intend to stay. Hitting a useless page increases with user error. Even a knowledgeable and responsible browser can occasionally hit the wrong site by clicking on the wrong link or following an erroneously labeled or outdated link. Counting "user" contacts, therefore, results in unfairness because a lucky defendant would be able to avoid suit where an unlucky defendant would not.

Finally, "user" contacts might be more attenuated than courts assume. "User" contacts are recorded through hits. Many hits, however, do not necessarily mean many users, because a user can hit a site several times in one visit.[56] Hits may also be misleading because a server will record a hit for each file it downloads.[57] For example, a server will record five hits every time a user downloads a page with four images, even though the user has really only seen the site once. Therefore, courts relying on hit numbers will sometimes allow jurisdiction over a site, even though it was accessed by only a few individuals.

A focus on "user" contacts, therefore, does not further fairness because it increases the likelihood of meritless actions without correspondingly raising the price for suit.

b) Predictability: The orderly administration of justice

Besides establishing a fair and just balance, personal jurisdiction also should insert an element of predictability into the system and ensure the orderly administration of justice.[58] An established and set rule places a defendant on notice, and allows the defendant to efficiently gauge the cost of performing certain activity.[59]

Inserting "user" contacts into the equation lowers predictability, however, because defendants now must consider not only their conduct, but the conduct of countless unknown users over which they have no control.

Of course, lack of control might not be a problem if defendants received notice every time a user from a particular state hit their site. How-

55. *See* CHERYL GOULD, SEARCHING SMART ON THE WORLD WIDE WEB 3 (1998).
56. *See* ZEFF, *supra* note 54, at 67.
57. *See id.*
58. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).
59. *See id.*

ever, notice is impossible with the current technology of recording hits. Defendants face several tracking problems.

First, most defendants do not have the necessary hit lists conveniently at hand. When the server records a hit in a log file, the file is not automatically sent to the creator, but is stored on the server, and, therefore, can be accessed immediately only by those who maintain the server.[60] Some creators, however, do not maintain their own servers, but merely lease sites from other companies.[61] They would have no immediate access to the list of hits, and no clue that they might be suddenly open to jurisdiction from a particular state.

Second, even if the creator has access to a hit list, a hit list is not very useful because it does not register geographic location, only the domain name[62] of the user's server.[63] A domain name itself provides little clue as to geographic data;[64] a defendant, therefore, must have access to a table which matches domain names to physical locations to determine the latter.

Third, domain names are merely labels; they can be randomly assigned to different locations, like a phone number.[65] This means that the defendant must constantly update his conversion table.

Finally, even if the defendant had an updated conversion table, he would receive false location information by analyzing the hit. First of all, users can remotely access most servers, and therefore server location might not correspond to user location. For example, a conversion of an American Online address would place the user in Virginia, where the

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60. *See* SIMON COLLIN, DOING BUSINESS ON THE INTERNET 169 (1997).

61. This situation applies particularly to individual, non-commercial and small business users who might not have the resources necessary to pay either for their own service or for access to the log files maintained by their host server. *See id.*

62. Domain names should be distinguished from IP addresses. Domain names are convenient labels such as www.berkeley.edu, which help users identify particular machines by providing easily remembered names. They must be translated into IP addresses, sequences of unique numbers separated by dots, before a machine can understand the name. *See* CHUCK MUSCIANO & BILL KENNEY, HTML: THE DEFINITIVE GUIDE 165 (1996).

63. At most, the server will record the visitor's host computer and platform, the date and time of the request, the names of the files requested, the type of browser used, and the referring URL in a text document called a "log file." Raw log files do not provide demographic information, nor do they enable site managers to track the movement of a user through a site. *See* ZEFF, *supra* note 54, at 67-69.

64. *See* COLLIN, *supra* note 60, at 170.

65. IP addresses are determined by physical location—where the computer is tied to the network. *See* DOUGLAS E. COMER, INTERNETWORKING WITH TCP/IP 63 (1995). Domain names are not bound to a specific physical location; they can be assigned to various IP addresses, and therefore to various physical locations. *See id.* at 390.

company is headquartered, even though the user might actually be logging in from a different state.[66] Second, advanced users can mask their true server location by generating packets of data containing false source information.[67] A "hit" from such a user would record a false server name, increasing the likelihood that the actual physical location of the user could not be determined. Both these circumstances increase the chance that a defendant will not be able to properly predict his amenability to suit.

Personal jurisdiction strives to achieve a fair and predictable balance between the rights of the plaintiff and the rights of the defendant. Focusing on user contacts, however, increases the chances that a court will reach an unfair and unpredictable result. It lowers the standard of proof for plaintiffs, but does so for contacts over which both users and creators have no control. A creator could be free from jurisdiction one day, but not the next, because a user, on a whim, happened to erroneously click on a link. To avoid such a disturbing result, courts should therefore avoid "user" contacts, and treat such contacts with wariness.

2. *Contacts that the courts can properly consider: Revamping the notion of creator contacts*

If courts should not look at user contacts, what contacts can they properly consider? The answer lies in traditional case-law: courts should return to analyzing defendant contacts. In the context of web sites, courts should look at "creator" contacts, because the creator is often the defendant. "Creator" contacts refer to the *targeting* activity taken by the defendant—actions taken by the defendant to create, promote, and control access to his page. The term does not include the mere act of putting up a page, because this act, by itself, does not allow the creator to target a specific market.[68]

a) Site construction and content

Courts analyzing web sites can first look at how the creator constructs or structures his site. Courts can analyze the properties of the creator's server. A server system with greater capacity, for example, might go against a finding that a company is a local site catering to just a particular

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66. *See* ZEFF, *supra* note 54, at 94.

67. This practice is known as spoofing, and it works because some systems depend on source information to authenticate a user. *See* WARWICK FORD & MICHAEL S. BAUM, SECURE ELECTRONIC COMMERCE 148 (1997).

68. There is a distinct difference between creating a site and putting up a site. Creating a site includes picking a server, choosing content, developing a design, and coding the actual pages. Putting up a site is the act of going "live," placing the pages on the server so that it is accessible to the public. A page can therefore be created, and be in perfect working order, without being "put up."

city. Similarly, a company that places its site on an electronic mall catering to the city San Francisco would seem to be targeting residents in the San Francisco area.

Courts can also look at site content. Courts already take note of such geographic information as the presence of a toll-free number or the presence of a local address.[69] In addition, they can analyze the site's text and list of links to see if information contained there is primarily of local interest. If a page incorporates a database, courts should check to see if the database incorporates information useful only to local residents.

Finally, courts can look at site arrangement, which influences the order of pages in a search engine's result list. URL's of sites do not magically appear in search engine databases. Rather, these databases are built by computers using programs (known as "spiders," "worms," or "robots"), which wander the web recording site information.[70] Once the site information is recorded by the spider, it is weighed by the search engine, based on various factors such as the frequency and position of key terms.[71] Therefore, a smart creator will place multiple key terms in the URL, title bar, metatag,[72] title headings, or near the top of the page to attract certain users.[73] These key terms might contain information that can help a court determine whether or not the site is local.

b) Site advertisement and promotion

In addition to analyzing site structure, the court can consider how a creator advertises its site. Creators promote their sites in various ways. Besides using traditional advertising media, a creator can place web-based classified ads or graphical banners and buttons on other sites,[74] list the site in directory services such as Yahoo!,[75] or send the site information to search engines.[76] Taken in totality, if the creator mostly advertises on sites dedicated to the users of a certain forum then that should weigh towards finding jurisdiction for that particular forum. For example, several compa-

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

70. *See* GOULD, *supra* note 55, at 16-17.

71. *See id.* at 14, 41.

72. A metatag is a special tag placed in the HTML code which allows a creator to classify the page according to certain key terms. The key terms do not effect the appearance of the page, and therefore a user will often not even realize that a metatag has been incorporated in a certain document. *See id.* at 14.

73. *See id.* at 14, 41.

74. *See* ZEFF *supra* note 54, at 20-21, 38-49.

75. *See id.* at 188.

76. *See* ELLSWORTH, *supra* note 50, at 219.

nies, such as Yahoo!, AOL, and Microsoft, have developed local directories catering to popular cities.[77] A creator listing itself in the San Francisco directory of one of these companies might only be targeting San Francisco area customers.

c) Member control

Finally, the court can look at how the creator controls membership to its site. Usually, a creator cannot bar users from accessing a page open to the public,[78] but if the defendant does limit access to part of its site (for example, through password protection),[79] courts should look to see who the defendant allows into those limited areas. If the company refuses to serve or send data to customers from certain forums, then it might be improper to find jurisdiction for those forums. In analyzing limited access sites, courts should take care, however, to distinguish between sites where the defendant has control over the issuance of passwords, and the sites which automate password issuance. Unless the machine asks for geographic data, and is able to reject users based on that data, the defendant will have little knowledge or control over who can access the sites.

The web should not present an unsolvable problem for the courts. While the technology is new and ever-changing, courts can still reach fair and predictable results if they follow the traditional over-arching principle of considering the technology from the perspective of the defendant. The wealth of "creator" contacts provides more than adequate analytical fodder for jurisdictional analysis, as well as a consistent standard that courts can apply. In short, courts do not need to turn "user" contacts, which merely increase unfairness and unpredictability.

III. THE PROBLEM WITH CYBERSELL: A LESSON IN THE VALUE OF CREATOR CONTACTS

Cybersell presents an excellent example of how a court can reach a questionable decision by relying mostly on "user" contacts. Other than mentioning the fact that Cybersell FL provided no 800 or toll free number, the Ninth Circuit in *Cybersell* failed to analyze any defendant contacts.[80] Rather it focused mainly on the fact that no Arizonan had "hit" Cybersell

77. *See* ZEFF *supra* note 54, at 188.

78. Files can either be marked public or private. A public page can be viewed by anyone. A private page requires a password or other form of authentication. *See generally* COLLIN, *supra* note 60, at 119-20.

79. *See generally id.* (describing password authorization techniques for managing page access).

80. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997).

FL's web site.[81] From that fact, the Ninth Circuit summarily concluded that Cybersell FL had done "nothing to encourage people in Arizona to access its site," and, therefore, refused to find the requisite interactivity for jurisdiction.[82]

The court effectively ignored other available "creator" contact evidence that would have allowed it to reach a different conclusion. In particular, it failed to recognize the importance of site content and did not analyze why Cybersell AZ refused to change the sentence, "Welcome to Cybersell!" on its opening page. A more web-savvy court would have been more suspicious of the mistake. Cybersell FL obviously knew of Cybersell AZ after receiving the cease and desist letter from the latter, but although it changed its name and logo, it failed to change the one welcoming message. Because the company's founders were interested in the Internet,[83] they would have been aware that having the name Cybersell at the top of the page would have weighted the site more heavily in search engines. Arizona users searching for Cybersell AZ might have found Cybersell FL instead. A court, therefore, could have reached the conclusion that Cybersell FL was attempting to target Arizona users.

In the end, of course, the inclusion of this one bit of circumstantial evidence might not have changed the court's decision. Nevertheless, this suspicious act suggests that the court should have looked more closely at how the defendant presented its page. Besides checking site arrangement, the court should have analyzed the server's status, to see if the company had placed its page on a server primarily dedicated to local use. It should have dissected the content of the site, to see if the text assumed that the user would primarily be of local origin. It could have also analyzed the links on the page to see if they pointed to primarily locally-oriented resources, such as Florida better business bureaus or state offices, rather than their national equivalents. It should have delved into how the Certos had promoted their page, and whether the two ever had plans to reject out-of-state users, if they ever encountered any.

As it stands, it is difficult to properly determine the defendant's actual amenability to jurisdiction. The court reaches a conclusion but it provides little in the way of positive evidence to back up its contention. As written, the opinion stands devoid of helpful data such as information on how the defendant promoted, ran, or restricted its site. The inclusion of such information might have made the case that much harder to decide. It is also

81. *See id.*
82. *See id.* at 419-20
83. *See id.* at 415.

possible that, if such information had been included, the court might have reached a different conclusion, as have five other courts in similar cases.[84] This raises the question whether the Ninth Circuit knew enough about the site to actually reach the appropriate conclusion regarding personal jurisdiction. It also highlights the current dilemma faced by the courts: courts will continue to reach different conclusions based on the same facts if they reach out blindly to different types of contacts, without learning to distinguish between the different kinds of contacts available.

IV. CONCLUSION

The analysis of personal jurisdictional for web sites does not need to be confusing as it currently is. Courts disagree because they view "nature and quality of the commercial activity" in different ways—either from the perspective of third party users or from defendant creators. It would be a simple matter, at least for the sake of uniformity, to choose one or the other perspective. However, focusing on "user" contacts disregards prior case law, increases the chance of unfairness both to the defendant and the forum state, and jeopardizes the predictability which jurisdiction rules were meant to establish. Therefore, it would be far more appropriate to return to a focus on "creator" contacts, which ensure a fairer and more predictable personal jurisdiction standard.

84. *See supra* note 7.