Which Stream to Follow: Why the Eleventh Circuit Should Adopt a Broader Stream of Commerce Theory in Light of Growing E-Commerce Markets

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WHICH STREAM TO FOLLOW: WHY THE
ELEVENTH CIRCUIT SHOULD ADOPT A
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INTRODUCTION

The Due Process Clauses of the Fifth and of the Fourteenth
Amendments1 “limit[] the power of . . . court[s] to exert personal
jurisdiction over a nonresident defendant.”2 Due process in the
personal, or in personam, jurisdiction context requires that, absent
consent to suit or physical presence in the forum state, a defendant
“have 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.’”3 As the U.S. Supreme Court noted in
World-Wide Volkswagen Corp. v. Woodson:4

The concept of minimum contacts . . . perform[s] two related,
but distinguishable, functions. It protects the defendant against
the burdens of litigating in a distant or inconvenient forum. And
it acts to ensure that the [s]tates, through their courts, do not
reach out beyond the limits imposed on them by their status as
coequal sovereigns in a federal system.5

In assessing whether a particular exercise of personal jurisdiction
comports with due process, courts focus on “the relationship among
the defendant, the forum, and the litigation.”6 Further, the exercise of
personal jurisdiction satisfies due process when a defendant’s
contacts with the forum state “proximately result from actions by the

457, 463 (1940)).
5. Id. at 291-92.
defendant himself that create a ‘substantial connection’ with the forum state.’”

In cases where the defendant is a business entity, such as a corporation, courts utilize the “stream of commerce” theory in assessing whether a nonresident-defendant enterprise has sufficient minimum contacts with the forum state such that the court may properly exercise personal jurisdiction over that defendant. The Supreme Court’s most recent case on the stream of commerce theory, Asahi Metal Industry Co. v. Superior Court of California, produced only conflicting plurality opinions regarding the quantity and the quality of contacts a nonresident business (in this case a manufacturer) must have with a forum state to be constitutionally amenable to suit there. This absence of controlling authority regarding the stream of commerce analysis has led to conflicting decisions in the lower federal courts, including within the Eleventh Circuit Court of Appeals. Some courts have, in the absence of a Supreme Court majority opinion, declined to cite Asahi and have instead continued to apply the foreseeability-based stream of commerce analysis from the Court’s earlier decision in World-Wide Volkswagen.

This lack of guidance, and the resulting disparate treatment of the stream of commerce theory in the lower courts, becomes more important when considered in light of burgeoning Internet-based product and information markets “as courts struggle to apply old


8. E.g., World-Wide Volkswagen, 444 U.S. at 297-98 (“The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.”); Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 108-12 (1987).


10. Id.


12. See Vermeulen, 985 F.2d at 1548 n.17 (noting the absence of decisive Supreme Court guidance on stream of commerce theory); see also Pennzoil Prods. Co. v. Colelli & Assoc., Inc., 149 F.3d 197, 205 (3d Cir. 1998) (collecting cases and discussing the inconsistent circuit court treatment of the stream of commerce theory).
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doctrines to dynamic technology.” The quantity of Internet related cases will likely grow exponentially in the coming years, just as the worldwide Internet user population has grown in recent years. In 1981, the Internet linked fewer than 300 computers. By 1993, that number exceeded 1,000,000 computers; in 1996, an estimated 9,400,000 computers connected to the Internet. The number of worldwide Internet users has recently grown even more dramatically. In 2000, analysts projected the worldwide Internet population at 349,000,000 users. Analysts further expect that figure to increase to over 490,000,000 users by 2002. By year-end 2005, there could be over 765,000,000 Internet users connected worldwide. While this increase in Internet activity has led to a substantial increase in Internet-related litigation, courts have yet to clarify the issue of when personal jurisdiction over a defendant is proper based on the defendant’s Internet contacts with the forum.

Part I of this Note will review the history of the stream of commerce theory of personal jurisdiction. Part II will discuss the lower courts’ treatment of personal jurisdiction in cyberspace in the absence of Supreme Court guidance. Part III will suggest why the Eleventh Circuit should adopt the broader stream of commerce standard advocated by Justice Brennan in Asahi to adapt personal jurisdiction jurisprudence to the realities of online product and information markets in 2003.


14. See discussion infra Part II.


16. Id.


18. Id.

19. Id.

20. Id.

21. See discussion infra Part II.

22. See discussion infra Part I.

23. See discussion infra Part II.

24. See discussion infra Part III.
I. EVOLUTION OF THE STREAM OF COMMERCE THEORY OF PERSONAL JURISDICTION

A. Personal Jurisdiction Generally

The Supreme Court and the lower courts generally apply a three-part analysis in determining whether to assert specific personal jurisdiction over a defendant. First, the defendant's contacts with the forum state must relate to the plaintiff's cause of action; for example, the cause of action must "arise out of" the defendant's contacts with the forum. Second, the defendant's contacts must involve "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum . . . , thus invoking the benefits and protections of its laws." Third, the defendant must have sufficient contacts with the forum "such that [the defendant] should reasonably anticipate being haled into court there." Once the court finds that a defendant has sufficient minimum contacts with the forum state to be amenable to suit there, the court must still determine whether subjecting the defendant to personal jurisdiction would be fair and reasonable under the circumstances. The Supreme Court has set out five factors courts must consider in assessing the fairness and reasonableness of the exercise of personal jurisdiction. These factors are:

[T]he burden on the defendant [in litigating in a distant forum,] the interests of the forum [s]tate, . . . the plaintiff's interest in obtaining relief[,] the interstate judicial system's interest in

30. Id. at 113.
obtaining the most efficient resolution of controversies[,] and the shared interest of the several [s]tates in furthering fundamental substantive social policies.\textsuperscript{31}

If analysis of these factors suggests that jurisdiction would be fair and reasonable under the circumstances, the court may constitutionally subject the defendant to personal jurisdiction.\textsuperscript{32} Conversely, if, according to these factors, the court finds the exercise of personal jurisdiction unfair or unreasonable, the court may not subject the defendant to personal jurisdiction in the forum.\textsuperscript{33} According to the Court in \textit{Burger King Corp. v. Rudzewicz}, “minimum requirements inherent in the concept of ‘fair play and substantial justice’ may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.”\textsuperscript{34}

\section*{B. The Stream of Commerce Theory}

The U.S. Supreme Court first considered the stream of commerce theory of personal jurisdiction in \textit{World-Wide Volkswagen Corp. v. Woodson},\textsuperscript{35} although state courts gave birth to the theory.\textsuperscript{36} In \textit{World-Wide Volkswagen} the plaintiffs, New York residents, purchased an Audi automobile from a New York retailer and, while passing through Oklahoma, suffered severe burns following a rear-end collision with another car.\textsuperscript{37} The plaintiffs brought a products-liability action in Oklahoma state court “claiming that their injuries resulted from [a] defective design” that placed the Audi’s gas tank toward the vehicle’s rear.\textsuperscript{38} The plaintiffs included as defendants the automobile

\begin{thebibliography}{99}
\bibitem{31} \textit{id.}
\bibitem{32} \textit{See id.}
\bibitem{33} \textit{See id.}
\bibitem{35} 444 U.S. 286 (1980).
\bibitem{36} \textit{See, e.g., Gray v. Am. Radiator & Standard Sanitary Corp.}, 176 N.E.2d 761, 764 (Ill. 1961) (finding no personal jurisdiction where the defendant manufacturer’s only contact with Illinois was that “a product manufactured in Ohio was incorporated in Pennsylvania, into a hot water heater which in the course of commerce was sold to an Illinois consumer”).
\bibitem{37} \textit{World-Wide Volkswagen}, 444 U.S. at 288.
\bibitem{38} \textit{id.}
\end{thebibliography}
manufacturer, importer, regional distributor, and retailer.\textsuperscript{39} The regional distributor and the retailer challenged jurisdiction in the Oklahoma court claiming that the exercise of personal jurisdiction over the nonresident defendants violated the Due Process Clause of the Fourteenth Amendment.\textsuperscript{40} The trial court rejected the defendants' challenge to jurisdiction, and the Oklahoma Supreme Court affirmed.\textsuperscript{41} The U.S. Supreme Court granted certiorari and reversed, holding that the New York distributor and the retailer had not purposefully availed themselves of the benefits and the protections of the Oklahoma forum; thus, personal jurisdiction over them would not be proper.\textsuperscript{42} The Court focused on the "total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction," stating:

[Defendants] carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the [s]tate. . . . In short, [plaintiffs] seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.\textsuperscript{43}

The plaintiffs argued that it was "foreseeable" that the Audi purchased in New York would cause injury in Oklahoma because an automobile is mobile by design.\textsuperscript{44} The Supreme Court rejected the plaintiff's argument, noting that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due

\textsuperscript{39} Id.
\textsuperscript{40} Id. The Due Process Clause provides, "nor shall any [s]tate deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.
\textsuperscript{41} World-Wide Volkswagen, Corp. v. Woodson, 444 U.S. 286, 289 (1980).
\textsuperscript{42} Id. at 297-98.
\textsuperscript{43} Id. at 295.
\textsuperscript{44} Id.
Process [C]lause. The Court explained that if foreseeability (that a manufacturer’s product would find its way to the forum state) were the criterion, “[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.”

In rejecting the argument that foreseeability alone is enough to acquire personal jurisdiction over a nonresident defendant, the Court noted that foreseeability is not “wholly irrelevant” to a due process analysis. The Court held:

[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 [s]tate. Rather, it is that the defendant’s conduct and connection with the forum [s]tate are such that he should reasonably anticipate being haled into court there.

Thus, due process, which the Court construed to require more than mere foreseeability that a product may end up in the forum, “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” The Court further explained:

When a corporation “purposefully avails itself of the privilege of conducting activities within the forum [s]tate,” it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the [s]tate.

45. Id.
46. Id. at 296.
47. World-Wide Volkswagen, 444 U.S. at 297.
48. Id.
49. Id.
50. Id. (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
Thus, *World-Wide Volkswagen* set a limit on the scope of the stream of commerce theory. While a defendant’s mere awareness that its product may make its way into the forum state through the unilateral actions of the consumer plaintiff does not sufficiently support jurisdiction, “[t]he forum [s]tate does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum [s]tate.”

The Court was not clear, however, as to what quality and quantity of contacts would constitute an expectation that products would be sold in the forum. Several years later, in *Asahi*, the Supreme Court attempted to elucidate the stream of commerce issue.

In 1987, the Supreme Court decided *Asahi* and revisited a question that had divided lower courts for many years:

[W]hether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum [s]tate in the stream of commerce constitutes “minimum contacts” between the defendant and the forum [s]tate such that the exercise of [personal] jurisdiction “does not offend ‘traditional notions of fair play and substantial justice.’”

In *Asahi*, the plaintiff “lost control of his Honda motorcycle” while riding on a California highway. The plaintiff was severely injured,

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54. *Id.* at 105 (quoting Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

55. *Id.*
and his wife was killed in the accident. The plaintiff filed a products-liability action in California Superior Court alleging that the motorcycle tire, tire tube, and sealant were defective. The plaintiff named Cheng Shin Rubber Industrial Co. ("Cheng Shin"), the Taiwanese manufacturer of the motorcycle’s tire tube, as one of the defendants. Cheng Shin subsequently filed a cross-complaint seeking indemnification from one of its codefendants, Asahi Metal Industry Co. ("Asahi"), the Japanese corporation that manufactured the valve stem assembly for Cheng Shin’s tire tube. Prior to trial, the plaintiff settled his claims against Cheng Shin and the other defendants, leaving only Cheng Shin’s indemnification action against Asahi. When Asahi challenged personal jurisdiction on due process grounds, the California Supreme Court held that Asahi’s intentional act of placing its tire valve assemblies in the stream of commerce (by delivering them to Cheng Shin in Taiwan), “coupled with [its] awareness that some of [them] would eventually [reach] California,” provided sufficient contacts to support California’s jurisdiction under the Due Process Clause.

The U.S. Supreme Court granted certiorari and reversed, unanimously finding California’s exercise of personal jurisdiction over Asahi unconstitutional. While all Justices agreed that personal jurisdiction violated due process in this case, the Court divided sharply as to the reason for its holding. A majority of eight Justices, Justice Scalia excepted, held that subjecting Asahi to personal jurisdiction in California was “unreasonable and unfair” under the circumstances. The Court had already held in Burger King that a finding that personal jurisdiction would be unfair or unreasonable

56. Id.
57. Id. at 105-06.
58. Id. at 106.
59. Asahi, 480 U.S. at 102, 106.
60. Id.
61. Id. at 108.
62. Id. Notably, this was the only issue on which the Court came to a unanimous decision. See id.
63. Id. at 105.
64. Id. at 116. Although Justice Scalia agreed with the Court that Asahi did not have sufficient minimum contacts with California, he did not join in the Court’s finding that forcing Asahi to defend in California would be unfair or unreasonable under the circumstances. Id. at 105.
may defeat jurisdiction even if the defendant has established minimum contacts with the forum. As to the minimum contacts issue, the Court was markedly more divided.

Justice O’Connor, writing for four Justices, found that Asahi lacked sufficient minimum contacts with California to be subjected to personal jurisdiction there. Justice O’Connor noted that lower courts have interpreted the World-Wide Volkswagen stream of commerce analysis differently. Justice O’Connor instead interpreted the Due Process Clause to require “something more than that the defendant was aware of its product’s entry into the forum state through the stream of commerce in order for the state to exert jurisdiction over the defendant.” Subsequent cases refer to this interpretation as the “stream plus” or the “additional conduct” test. Justice O’Connor stated:

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, for example, designing the product for the

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65. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985). Under the “fair and reasonable” factor analysis, the Court found that (1) the burden on the defendant was “severe” because Asahi was based in Japan, (2) the plaintiff’s interest in obtaining relief was minimal because Cheng Shin was also a foreign corporation, (3) California’s interest in hearing the case was slight, as this was an indemnity action between two foreign corporations, and (4) neither the interstate judicial system nor the several states had a significant interest in adjudicating the rights of two foreign entities. Asahi, 480 U.S. at 114-15; see also supra text accompanying note 32.

66. See Asahi, 480 U.S. at 103-04.

67. See id. at 112-13. Joining Justice O’Connor were Chief Justice Rehnquist, Justice Powell, and Justice Scalia. Id. at 105.

68. Id. at 110. Justice O’Connor explained:

Some courts have understood the Due Process Clause, as interpreted in World-Wide Volkswagen, to allow an exercise of personal jurisdiction to be based on no more than the defendant’s act of placing the product in the stream of commerce. Other courts have understood the Due Process Clause and . . . World-Wide Volkswagen to require the action of the defendant to be more purposefully directed at the forum state than the mere act of placing a product in the stream of commerce.

Id.

69. Id. at 111-12.

70. See, e.g., Kende, supra note 13, at 320.
market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state. But 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.\textsuperscript{71}

Thus, Justice O’Connor would require more than a defendant’s mere placement of a product into the stream of commerce before a court in the forum into which the product is swept could assert personal jurisdiction.\textsuperscript{72}

Taking a different view of the stream of commerce theory, Justice Brennan, also writing for four Justices, argued that Asahi had established sufficient minimum contacts with California.\textsuperscript{73} Justice Brennan would not require a showing of additional conduct evincing an intent to serve the forum market in order to subject a defendant to personal jurisdiction there.\textsuperscript{74} Noting that many lower courts have likewise not required such a showing, Justice Brennan stated:

The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum state, and

\textsuperscript{71} Asahi, 480 U.S. at 112.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 116 (Brennan, J., concurring in part). Justices White, Marshall, and Blackmun joined Justice Brennan. Id.
\textsuperscript{74} Id. at 117 (Brennan, J., concurring in part).
indirectly benefits from the state's laws that regulate and facilitate commercial activity.\textsuperscript{75}

Justice Brennan reiterated his contention that the Court in \textit{World-Wide Volkswagen} merely "distinguish[ed] 'between a case involving goods which reach a distant state through a chain of distribution and a case involving goods which reach the same state because a consumer . . . took them there.'"\textsuperscript{76} Thus, according to Justice Brennan, personal jurisdiction should not require additional conduct so long as the stream of commerce, and not the unilateral actions of the plaintiff, brought the product to the forum state.\textsuperscript{77}

Justice Stevens disagreed with both Justice O'Connor and Justice Brennan as to the correct stream of commerce theory.\textsuperscript{78} Justice Stevens disagreed with Justice O'Connor's assertion that a bright line exists between "mere awareness" that a product will end up in the forum and "purposeful availment" of that forum's market.\textsuperscript{79} Justice Stevens also disagreed with Justice Brennan's conclusion that mere placement of a product in the stream of commerce is a sufficient contact to subject the defendant to personal jurisdiction in the forum.\textsuperscript{80} According to Justice Stevens, "[w]hether [a defendant's] conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components."\textsuperscript{81}

In \textit{Asahi}, the Court was unable to provide a majority opinion as to what quality and quantity of contacts are sufficient for personal jurisdiction under the stream of commerce theory.\textsuperscript{82} Lower courts, including those within the Eleventh Circuit, have inconsistently handled this issue.\textsuperscript{83}

\textsuperscript{75} Id.
\textsuperscript{76} Id. at 120 (alteration in original) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 306-07 (1980) (Brennan, J., dissenting)).
\textsuperscript{77} Asahi, 480 U.S. at 117 (Brennan, J., concurring in part).
\textsuperscript{78} See id. at 121 (Stevens, J., concurring in part).
\textsuperscript{79} See id. at 122 (Stevens, J., concurring in part).
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} See id. at 105.
\textsuperscript{83} See supra note 11.
Two federal circuit courts of appeals have embraced the additional conduct analysis espoused by Justice O’Connor in *Asahi*. Two other federal circuits have adopted the broader stream of commerce theory advocated by Justice Brennan. The majority of the circuits, in the absence of a Supreme Court majority in *Asahi*, have declined to adopt either *Asahi* analysis; instead, they have continued to apply only the Court’s earlier *World-Wide Volkswagen* analysis.

Notably, the Eighth Circuit recently shifted its position regarding which stream of commerce analysis to follow. While initially embracing Justice O’Connor’s stream plus or additional conduct approach, the Eighth Circuit has gradually moved toward Justice Brennan’s broader interpretation of the stream of commerce theory. The Eighth Circuit’s shift toward a broader, more flexible, stream of commerce theory exemplifies the shift that this Note suggests should occur in the Eleventh Circuit.

II. PERSONAL JURISDICTION IN THE CYBERSPACE CONTEXT

The U.S. Supreme Court noted in 1958 that “[a]s technological progress has increased the flow of commerce between [s]tates, the need for jurisdiction over nonresidents has undergone a similar

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88. *Compare* Barone, 25 F.3d at 614 (rejecting additional conduct test, stating that *Asahi* failed to set new precedent because no majority agreed as to the minimum contacts test under the stream of commerce theory), *with* Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 375 (8th Cir. 1990) (adopting Justice O’Connor’s additional conduct test). Although the Eighth Circuit has “taken an inconsistent path in liberalizing its stream of commerce theory[,] . . . the result is equitable.” Elias, *supra* note 52, at 122.
increase." The Internet’s growth has compounded the problematic question of when a court may exert personal jurisdiction over a nonresident defendant.

The “Internet” is a general term for the modern development of communications among the nationwide and indeed worldwide network of computers. 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 Internet’s pervasiveness in the years leading up to this Note has presented problems in the context of personal jurisdiction “as courts [have] struggle[d] to apply old doctrines to dynamic technology.” As Professor Michael Geist, a leading Internet scholar, stated:

As business[es] gravitated to the Internet in the late 1990s, concern over the legal risks of operating online quickly moved to the fore, as legal issues inherent in selling products, providing customer service, or simply maintaining an information-oriented website [sic] began to emerge. . . . Since [sic] websites [sic] are instantly accessible worldwide, the prospect that a website [sic] owner might be haled into a courtroom in a far-off jurisdiction is much more than a mere academic exercise; it is a very real possibility.

The courts have been inconsistent in determining whether a defendant is constitutionally amenable to suit based on his Internet

90. See generally Michael A. Geist, Is There a There There? Toward Greater Certainty for Internet Jurisdiction, 16 BERKELEY TECH. L.J. 1345 (2001).
92. Kende, supra note 13, at 334.
93. See Geist, supra note 90, at 1347.
activity. Entrepreneurs desire to utilize the Internet as an efficient and economical business tool but fear being “subject to personal jurisdiction at each and every location on the planet where someone is capable of logging on the Internet.” As one circuit court of appeals has noted:

The Internet represents perhaps the latest and greatest manifestation of these historical, globe-shrinking trends. It enables anyone with the right equipment and knowledge . . . to operate an international business cheaply, and from a desktop. That business operator, however, remains entitled to the protection of the Due Process Clause, which mandates that potential defendants be able “to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit.”

In the absence of Supreme Court guidance, lower courts have utilized innovative, albeit unpredictable analyses in deciding when personal jurisdiction is proper.

A. Two Approaches to Internet Personal Jurisdiction

1. Zippo: The Sliding Scale

In Zippo Manufacturing Co. v. Zippo Dot Com, Inc., a Pennsylvania district court asserted personal jurisdiction over a defendant corporation whose contacts with the state “occurred almost exclusively over the Internet.” The plaintiff was the Pennsylvania-based manufacturer of Zippo lighters. The defendant was a

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97. See generally Geist, supra note 90, at 1360.
99. Id. at 1121.
100. Id.
California Internet news service with its principal place of business in Sunnyvale, California.\textsuperscript{101} When the defendant news service acquired the rights to the Internet domain name "zippo.com," the plaintiff filed a claim in Pennsylvania district court for trademark infringement.\textsuperscript{102} The court based its exercise of personal jurisdiction over the California defendant on two facts: (1) of the defendant's 140,000 news service subscribers worldwide, 3000 of them (2\%) were Pennsylvania residents and (2) the defendant entered into agreements with seven Pennsylvania Internet service providers to provide those residents with the news service.\textsuperscript{103} Noting that the law of Internet-based personal jurisdiction is "in its infant stages," the court set out the "sliding scale" approach in which "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that [a defendant] conducts over the Internet" with the forum state.\textsuperscript{104} The court stated:

This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity

\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Zippo, 952 F. Supp. at 1123-24.
and commercial nature of the exchange of information that occurs on the Web site.\textsuperscript{105}

While the court wrapped Internet-based personal jurisdiction in a neat package, the critical finding in the \textit{Zippo} test was that “jurisdictional analysis in Internet cases should be based on the nature and quality of [the defendant’s] commercial activity conducted on the Internet,” not simply based on the mere use of the Internet.\textsuperscript{106} Despite the \textit{Zippo} sliding scale’s apparent workability, Professor Geist has criticized the approach for several reasons. First, most Web sites fall into the middle “interactive” category for which the \textit{Zippo} scale offers little guidance.\textsuperscript{107} Second, many Web sites may appear “passive” yet use hidden data collection techniques not apparent to a user.\textsuperscript{108} Third, “standards for what constitutes an active or passive website [sic] are constantly shifting,” forcing Web site owners to “constantly re-evaluate their [potential liabilities] on the passive versus active spectrum.”\textsuperscript{109} Despite these criticisms of the \textit{Zippo} sliding scale, many courts have adopted this analysis.\textsuperscript{110}

2. \textit{The “Effects” Test}

Courts have also found personal jurisdiction to exist under the “effects” test adopted by the U.S. Supreme Court in \textit{Calder v. Jones}.\textsuperscript{111} A recent application of the effects test appears in \textit{Blakey v.}

\textsuperscript{105} \textit{Id.} at 1124 (citations omitted).
\textsuperscript{106} Geist, \textit{supra} note 90, at 1367.
\textsuperscript{107} \textit{Id.} at 1379.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{See, e.g., SF Hotel Co. v. Energy Invvs., Inc.,} 985 F. Supp 1032 (D. Kan. 1997) (finding no personal jurisdiction under the \textit{Zippo} analysis where defendant advertised on a passive Web site that only provided information about its hotel, and reservations could not be booked online). \textit{See generally} Kende, \textit{supra} note 13, at 324.
\textsuperscript{111} 465 U.S. 783 (1984). In \textit{Calder}, the Supreme Court held that a California court could assert personal jurisdiction over the Florida-based \textit{National Enquirer} for publishing a libelous article about entertainer Shirley Jones. \textit{Id.} at 788-89. The Court held that jurisdiction was proper since the \textit{Enquirer} should have known the effects of the libel would be felt in Hollywood, California, where Ms. Jones worked and resided. \textit{Id.} at 789-90. National distribution of the magazine did not defeat purposeful availment towards California. \textit{See id.}
Continental Airlines, Inc., an online defamation case in the New Jersey Supreme Court. In that case, plaintiff Tammy Blakey was Continental Airlines' first female captain to fly a 250-passenger Airbus aircraft. When Ms. Blakey's male co-employees began publishing defamatory statements about her on the company's online "Crew Members Forum" (an Internet bulletin board), Ms. Blakey filed a defamation suit against her male co-employees in New Jersey state court. After the lower court dismissed Ms. Blakey's action against the co-employees for lack of personal jurisdiction and the appellate division affirmed, she appealed to the New Jersey Supreme Court. In reversing the ruling below, the supreme court held that if the defendant co-employees' defamatory statements on the Internet bulletin board were published in New Jersey, where Ms. Blakey was based, those intentional contacts with the New Jersey forum would satisfy the minimum contacts requirements necessary to subject defendants to personal jurisdiction in New Jersey's courts. The court stated that "[a]n intentional act calculated to create an actionable event in a forum state will give that state jurisdiction over the actor." After finding that the co-employees intended their defamatory statements to cause injury in New Jersey, the court explained that "[t]he fact that the actions causing the effects in [New Jersey] were performed outside the [s]tate did not prevent the [s]tate from asserting jurisdiction over a cause of action arising out of those effects." Courts have applied this broader, effects-based personal jurisdiction analysis to other disputes including intellectual property and commercial activities.

112. 751 A.2d 538 (N.J. 2000).
113. Id. at 543. The plaintiff was only one of five Continental pilots trained to fly the Airbus. Id.
114. Id. at 544-47.
115. Id. at 547-48.
116. Id. at 556.
117. Id. at 555 (quoting Waste Mgmt., Inc. v. Admiral Ins. Co., 649 A.2d 379 (1994)).
119. See Geist, supra note 90, at 1373.
B. Bensusan and Inset: *An Illustration of Disparate Treatment*

In the absence of Supreme Court guidance on the issue of Internet personal jurisdiction, state and lower federal courts have grappled with the issue and have produced inconsistent decisions.\(^{120}\) The two cases discussed below illustrate how courts have treated Internet contacts inconsistently for the purpose of analyzing whether a defendant’s Internet activity in the forum is constitutionally sufficient to subject it to personal jurisdiction there.\(^{121}\) One approach, used by a New York federal district court in *Bensusan Restaurant Corp. v. King*,\(^{122}\) is a restrictive approach which would not subject a defendant to personal jurisdiction simply because its Web site is available to Internet users in the forum state.\(^{123}\) This approach mirrors Justice O’Connor’s opinion from *Asahi*.\(^{124}\) A Connecticut federal district court used a different, more expansive approach to Internet-based personal jurisdiction in a case with facts nearly identical to those in *Bensusan*.\(^{125}\) This more expansive approach is consistent with Justice Brennan’s broader stream of commerce theory from *Asahi*.\(^{126}\) These two cases, opposite decisions on similar facts, illustrate the need for a definitive Supreme Court decision on this issue.

1. Bensusan: *Mere Web Site Is Not Enough*

The plaintiff in *Bensusan* was the owner of the famous “The Blue Note” jazz club in New York City.\(^{127}\) When the defendant posted a Web site advertising its Columbia, Missouri club, also called “The Blue Note,” the plaintiff filed a trademark infringement action in

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123. *Id.* at 300-01.

124. *See supra* notes 68-72 and accompanying text.


126. *See supra* notes 73-77 and accompanying text.

127. *Bensusan*, 937 F. Supp. at 297. The plaintiff also owned the rights to the name “The Blue Note” under a federal trademark. *Id.*
New York federal district court. The defendant moved to dismiss the case for lack of personal jurisdiction. The Web site advertising "The Blue Note" club, available to New York residents via the Internet, was the defendant's only contact with New York. The defendant's Web site was informational only and contained "general information about the club . . . as well as a calendar of events and ticketing information." The Web site contained a telephone number by which interested patrons could order show tickets, which they could pick up the day of the show at the ticket office.

In declining to assert personal jurisdiction over the Missouri defendant, the New York court drew a comparison with Justice O'Connor's stream of commerce theory from Asahi. The court stated:

[Defendant] has done nothing to purposefully avail himself of the benefits of New York. [Defendant], like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a 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.

Thus, the court found that asserting jurisdiction over the Missouri defendant would be unconstitutional under the Due Process Clause based merely on the fact that New York Internet users might access the defendant’s Web site and confuse the two clubs.

129. Id. at 298.
130. Id. at 301.
131. Id. at 297.
132. Id.
133. Id. at 301.
2. Inset: Mere Web Site Is Enough

In Inset Systems, Inc. v. Instruction Set, Inc., a Connecticut federal district court found jurisdiction over a nonresident defendant proper, based merely on the presence of an informational Web site available to Internet users in the forum state. The plaintiff, Inset, Inc. ("Inset"), was a Connecticut corporation, with its principal place of business there. Inset developed and marketed computer software worldwide. The defendant, Instruction Set, Inc. (Instruction Set), was a computer technology and support firm located and incorporated in Massachusetts. Plaintiff Inset owned all rights to the trade name "INSET" under a federal trademark. Subsequent to the registration of the INSET trademark, defendant Instruction Set obtained "INSET.COM" as the domain name for its Web site, which it used to advertise its goods and services. The Web site provided a toll-free telephone number for those interested in the defendant's products and services. The defendant had no offices or employees in Connecticut and did not conduct business there on a regular basis.

In finding personal jurisdiction proper in this case, the court adopted a very broad theory of Internet-based personal jurisdiction consistent with the expansive stream of commerce theory proffered by Justice Brennan in Asahi. The court found that the defendant had purposefully availed itself of Connecticut through its informational Web site, stating:

[Defendant] has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut,

137.  id. at 165.
138.  id. at 162.
139.  id.
140.  id.
141.  id. at 163.
143.  id.
144.  id. at 162-63.
145.  See id. at 165; see also supra notes 73-77 and accompanying text.
but to all states. The Internet as well as toll-free numbers is
designed to communicate with people and their businesses in
every state. Advertisement on the Internet can reach as many as
10,000 Internet users within Connecticut alone. Further, once
posted on the Internet, unlike television and radio advertising,
the advertisement is available continuously to any Internet user.
[Defendant] has therefore, purposefully availed itself of the
privilege of doing business within Connecticut.146

Although the facts do not differ substantially from those in
Bensusan, the court found jurisdiction proper because the defendant
advertised its product using a medium available, at all times, to all
Internet users nationwide.147 The court impliedly stated that the
defendant could be amenable to suit in “each and every location on
the planet where someone is capable of logging on [to] the
Internet.”148 While this approach to personal jurisdiction may seem
overly expansive, it follows the stream of commerce theory adopted
by the Brennan plurality in Asahi.149 In keeping with Justice
Brennan’s contention in Asahi that the defendant benefited from the
commercial laws of every state in which its product was marketed,
the court in Inset found that the defendant benefited from the Internet
marketing in every state in which its Web site was available to
Internet users.150

146. Inset, 937 F. Supp. at 165.
147. Id.
149. See supra notes 73-77 and accompanying text.
150. Inset, 937 F. Supp. at 165.
III. ELEVENTH CIRCUIT DECISIONS

Although the Eleventh Circuit has not yet addressed personal jurisdiction in the Internet context, it has decided personal jurisdiction cases under the stream of commerce theory.\(^{151}\) Unfortunately, the Eleventh Circuit has been inconsistent as to which stream of commerce theory applies.\(^{152}\)

In *Madara v. Hall*,\(^ {153}\) the plaintiff filed suit in a Florida federal district court for an allegedly libelous statement made by the defendant about the plaintiff in a music industry magazine interview.\(^ {154}\) The defendant's contacts with Florida were that: (1) he had performed music concerts there less than eight times in the four years prior to the litigation; (2) his music recordings were available in Florida; and (3) he was "a partner in a partnership that itself own[ed] limited partnership interests in partnerships that own[ed] property in Miami and Jacksonville."\(^ {155}\) In holding that the defendant lacked sufficient minimum contacts with Florida to be amenable to suit there, the court adopted Justice O'Connor's additional conduct stream of commerce test from *Asahi*.\(^ {156}\) The court stated that some additional "purposeful act, directed at the forum state" would be necessary to subject the defendant to jurisdiction in Florida.\(^ {157}\)

In *Vermeulen v. Renault, U.S.A, Inc.*,\(^ {158}\) a case decided three years after *Madara*, the Eleventh Circuit backed away from its adoption of the additional conduct stream of commerce test.\(^ {159}\) In *Vermeulen*, the plaintiff, a Georgia resident, was severely injured in an automobile accident while driving her 1982 LeCar, manufactured by the

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152. See *Vermeulen*, 985 F.2d at 1534; *Madara*, 916 F.2d at 1510.
153. 916 F.2d 1510 (11th Cir. 1990).
154. Id. at 1513.
155. Id. at 1517.
156. Id. at 1519. The court cited *Asahi* for the proposition that "[a] defendant's mere awareness that some of its products would eventually enter the forum state [is] not enough to support the exercise of personal jurisdiction." Id. (citing *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987)).
157. Id.
158. 985 F.2d 1534 (11th Cir. 1993).
159. See id. at 1548.
defendant, Renault.\textsuperscript{160} Renault was a French corporation wholly owned by the French government.\textsuperscript{161} The plaintiff filed suit in a Georgia federal district court, alleging that the negligent design and manufacture of the car’s restraint system caused her injuries.\textsuperscript{162}

Renault’s contacts with the forum were that: (1) it “designed the . . . LeCar for the American market”; (2) it “advertised its product in the United States”; (3) it “established channels for providing regular advice to customers in the United States”; and (4) it “created and controlled the distribution network that brought its products into the United States.”\textsuperscript{163} The court held that Renault had constitutionally sufficient minimum contacts with Georgia to be amenable to suit there; however, the court noted that because jurisdiction over Renault was “consistent with due process under the more stringent ‘stream of commerce plus’ analysis adopted by the \textit{Asahi} plurality, [it did not need] to determine which standard actually control[led] the case.”\textsuperscript{164} Thus, after adopting the stream plus or additional conduct standard in \textit{Madara}, the Eleventh Circuit retreated and declined to definitively adopt either standard.\textsuperscript{165} This shift parallels the near-contemporaneous shift toward Justice Brennan’s broader stream of commerce theory that occurred in the Eighth Circuit.\textsuperscript{166}

\textbf{CONCLUSION}

The stream of commerce theory of personal jurisdiction remains unsettled.\textsuperscript{167} Unless and until the Supreme Court produces a majority opinion as to what contacts will bring a nonresident business defendant within the jurisdiction of a foreign forum, the lower courts are left to decide for themselves. This lack of guidance is becoming even more critical with the growth of Internet-based companies, as

\begin{itemize}
  \item \textsuperscript{160} \textit{Id.} at 1537.
  \item \textsuperscript{161} \textit{Id.}
  \item \textsuperscript{162} \textit{Id.} at 1543.
  \item \textsuperscript{163} \textit{Id.} at 1549-50.
  \item \textsuperscript{164} \textit{Vermeulen}, 985 F.2d at 1548.
  \item \textsuperscript{165} \textit{See id.}
  \item \textsuperscript{166} \textit{See supra} note 88 and accompanying text.
  \item \textsuperscript{167} \textit{See discussion supra} Part I.
\end{itemize}
well as Internet marketing and advertising. The Eleventh Circuit should follow the Eighth Circuit’s lead and decisively reject the additional conduct stream of commerce analysis. The policy considerations surrounding this issue militate in favor of a broad stream of commerce theory. Advocates of a more narrow stream of commerce theory, like the “additional conduct” theory, would argue that requiring a more direct connection between a defendant and the forum state “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”

However, prior Supreme Court decisions already “ensure[] that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.”

Moreover, stronger interests urge a broader stream of commerce theory of personal jurisdiction: those of the forum state and of the plaintiff. The forum “state has ‘a strong interest in providing an effective means of redress for its injured resident who would find it impractical to sue in the defendant’s jurisdiction.’” Further, “[t]he resident plaintiff . . . has a ‘strong interest in avoiding the expense, inconvenience, and potential bias of the foreign defendant’s jurisdiction’” which “‘generally offer plaintiffs fewer chances of recovery.’”

Weighing these policy considerations, the balance favors a broad stream of commerce theory that would force most defendants to defend suit in forum states in which their product is

168. See discussion supra Part II.
169. In Madara, the Eleventh Circuit arguably did reject the additional conduct test by declining to adopt either of the approaches advanced by the pluralities in Asahi. See discussion supra Part III.
171. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985). This guarantee is inherent in the “purposeful availment” requirement in personal jurisdiction analysis. Id.
173. Id.
being used and enjoyed. "After all, it is the manufacturer that voluntary [sic] places its product into the stream of commerce, while it is the plaintiff who involuntary [sic] suffers injury."\textsuperscript{174}

The Eleventh Circuit should explicitly adopt a \emph{broad} stream of commerce analysis, one consistent with Justice Brennan's plurality opinion in \emph{Asahi}, so that the courts are able to (1) protect local plaintiffs who will have claims against out-of-state and foreign companies based on Internet contacts and (2) avoid the confusion that "Internet-specific" jurisdictional analyses have caused in other lower court systems.\textsuperscript{175} This will allow a seamless transition into Internet-based jurisdictional jurisprudence, as the cases involving cyberspace contacts will certainly increase with time.

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\textsuperscript{174} \textit{Id.} at 121.

\textsuperscript{175} See supra Parts II.A.1, II.A.2.