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CIVIL PROCEDURE—Effects of the "Effects Test": Problems of Personal Jurisdiction and the Internet; Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063 (10th Cir. 2008)

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CASE NOTE

CIVIL PROCEDURE—Effects of the "Effects Test": Problems of Personal Jurisdiction and the Internet; *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008).

*Teresa J. Cassidy**

Introduction

True to its name, the World Wide Web has created an intricate network of people, places, things, and ideas. No longer a novelty, the "Web" has moved so firmly into the category of global necessity, it is nearly impossible to imagine contemporary culture without it.[1] Around the globe, people connect seamlessly in an online arena that appears to defy all traditional notions of law and territory.[2] Although conducted over an electronic medium, Internet communication exists as an extension of the human sphere, complete with disagreements and infringements. As such, the Internet has created a slew of recent problems in the legal world.[3] Unsure of how to address harms incurred in the borderless sphere of cyberspace, courts and practitioners continue to grapple with the sheer breadth of the Internet's reach.[4] Particularly, issues of personal jurisdiction arise, creating a dilemma for courts attempting to assert power over a defendant whose actions have taken place in the amorphous arena of cyberspace.[5]

Fortunately for legal practitioners, the effects of Internet communication provide a more concrete answer to jurisdiction issues.[6] Initially, the limits of a

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[1] *See generally* Federal Communications Commission Internet Policy Statement 05-151, September 23, 2005, http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf (last visited February 22, 2009).

[2] Dr. Georgios I. Zekos, *State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction*, 15 Int'l. J.L. & Info. Tech. 1, 1 (2007).

[3] David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1367 (1996).

[4] *Id.* at 1368.

[5] *See* Zekos, *supra* note 2, at 4.

[6] *See, e.g.,* CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (holding that when the defendant knowingly made an effort to market a product over the Internet, it was reasonable to subject the defendant to suit in the state where his Internet service provider was located); Digital Equip. Corp. v. Alta Vista Tech., Inc., 960 F. Supp. 456 (D. Mass. 1997) (holding the totality of the defendant's contacts with the forum state rendered assertion of personal jurisdiction over the defendant appropriate); Park Inns Int'l., Inc. v. Pac. Plaza Hotels, Inc., 5 F. Supp. 2d 762 (D. Ariz. 1998) (holding the defendant's websites, used to transact and solicit business into the forum state, proved sufficient to assert jurisdiction).

court's personal jurisdiction were strictly defined by territorial boundaries, and activities occurring only in cyberspace remained tied to geographically constrained locations.[7] As such, courts must look to balance these Internet and real-world connections when determining jurisdiction.[8] Many theories have emerged as to how to weigh these ties and consequent effects when determining issues of jurisdiction, and courts have used a trial and error method to determine which theories provide fair results.[9]

In October 2005, Karen Dudnikov and Michael Meadors, owners of a small, Internet-based business in Colorado, launched an auction for the sale of fabric on the Internet auction site, eBay.[10] The fabric offered for sale portrayed a cartoon character wearing several gowns, each gown with a different artistic design.[11] One gown depicted distinct designs by the artist and designer, Erte.[12] The designs depicted on the character's gown mimicked Erte's work, with the cartoon character herself replacing the female figure in Erte's designs.[13]

SevenArts, a British corporation, owns the copyright to the original Erte designs.[14] Chalk & Vermilion ("Chalk"), a Delaware corporation with its principal place of business in Connecticut, acts as SevenArts' agent in the United States.[15] To protect the copyrights of Erte's designs, Chalk is a member of eBay's "Verified Rights Owner" ("VeRO") program.[16] Under this program, eBay will terminate an auction when it receives a notice of claimed infringement ("NOCI") from a

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[7] *See* cases cited *supra* note 6.

[8] *Id.*

[9] *Id.*

[10] Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1068 (10th Cir. 2008).

[11] *Id.*

[12] *Id.* A famed artist and fashion designer, Erte, served as the primary design influence for the "Art Deco" movement of the early Twentieth Century. Erte, http://www.chalk-vermilion.com/artist_page/erte_bio_cv.html (last visited Feb. 25, 2009). Born in Russia in 1892, the artist died in 1990, at age 97. *Id.* For a more detailed biography, along with an extensive collection of Erte's works and designs see www.erte.com.

[13] *Dudnikov*, 514 F.3d at 1068.

[14] *Id.*

[15] *Id.*

[16] *Id.* Safe Harbor provisions of the Copyright Act allow copyright holders to impel auction sites to terminate infringing auctions. *See* 17 U.S.C. § 512(c) (2000). If an intellectual property rights owner, in good faith, believes his copyright is being infringed on eBay, he may submit a notice of claimed infringement ("NOCI") as part of the VeRO program. eBay, Reporting Intellectual Property Rights (VeRO), http://pages.ebay.com/help/tp/vero-rights-owner.html (last visited Feb. 25, 2009). The NOCI is a form filled out by the copyright and then faxed to eBay. *Id.* A NOCI filed against an eBay user may result in removal of the infringing items and multiple NOCI infringements may result in suspension of the user, hence Dudnikov's fear of a "black mark" on her eBay sellers' record. *Id.* For more information on eBay copyright protection see http://pages.ebay.com/help/tp/programs-vero-ov.html.

VeRO member.[17] Upon learning of the fabric auction, Chalk filled out an NOCI and faxed it to eBay in California, thereby exercising its rights under the VeRO program on behalf of SevenArts.[18] Per VeRO rules, eBay immediately terminated Dudnikov and Meador's auction and notified them of the NOCI submission.[19] Dudnikov, in Colorado, contacted Chalk, in Delaware, by email, to state that she would voluntarily refrain from relisting the disputed fabric and requested the NOCI be withdrawn for fear of a "black mark" on her eBay record.[20] SevenArts refused to withdraw the NOCI, causing Dudnikov to submit a counter notice to eBay contesting SevenArts' copyright claim.[21] SevenArts then notified Dudnikov via email of its intent to file an action in court.[22]

On December 12, 2005, Dudnikov and Meadors filed a pro se complaint against Chalk and SevenArts in the United States District Court for the District of Colorado.[23] The suit sought both a declaratory judgment to determine the fabric did not infringe SevenArts copyrights, and an injunction to prevent Chalk and SevenArts from interfering with future sales of the fabric.[24] SevenArts and Chalk responded by moving to dismiss for lack of personal jurisdiction and improper venue.[25] The magistrate judge recommended a finding of specific jurisdiction, reasoning that while the court lacked general jurisdiction over the defendants, specific jurisdiction did exist.[26] The defendants objected to the recommendation

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[17] *Dudnikov*, 514 F.3d at 1068.

[18] *Id.* at 1069.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Dudnikov*, 514 F.3d at 1069.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* For more information on recommended dispositions, see 28 U.S.C. § 636(b)(1)(A) (2000). Relevant statutory language states:

> (b)(1) Notwithstanding any provision of law to the contrary—
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> (A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

Id. Black's Law Dictionary defines general jurisdiction as: "A court's authority to hear all claims against a defendant, at the place of the defendant's domicile or place of service, without any showing that a connection exists between the claims and the forum state." BLACK'S LAW DICTIONARY 869 (8th

and the district court sustained the objection.[27] Finding neither specific nor general jurisdiction, the district court granted the defendant motion to dismiss on September 15, 2005.[28] Dudnikov and Meadors appealed the dismissal of their action, contesting the district court's finding that the court lacked personal jurisdiction.[29]

In *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, the United States Court of Appeals for the Tenth Circuit Court examined whether the effects of an electronic notice intended to cancel an Internet auction would support a finding of specific personal jurisdiction in the forum of Colorado, where the plaintiffs reside and from which they are providing the online auction site in question.[30] Tenth Circuit judges Gorsuch, McConnell and Ebel unanimously held the notice sent by Chalk & Vermilion to eBay satisfied personal jurisdiction in Colorado because it expressly intended to suspend Dudnikov's Colorado-based Internet auction.[31] In a case of first impression, the court applied the "effects test" as set forth in the landmark United States Supreme Court case, *Calder v. Jones*, to analyze "purposeful availment" via electronic means.[32] Following the sister circuits that applied the *Calder* "express aiming" test to Internet-based cases, the Tenth Circuit determined the intentional nature and consequences of the NOCI filed by Chalk

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ed. 2004). Black's Law Dictionary defines specific jurisdiction as follows: "Jurisdiction that stems from the defendant's having certain minimum contacts with the forum state so that the court may hear a case whose issues arise from those minimum contacts." BLACK'S LAW DICTIONARY 870 (8th ed. 2004).

[27] *Dudnikov,* 514 F.3d at 1069. Defendants also moved to dismiss for improper venue, however, in a copyright action, lack of jurisdiction also renders venue improper. *Id.*

[28] *Id.*

[29] *Id.* at 1063–82.

[30] *Id.*

[31] *Id.*

[32] *Dudnikov*, 514 F.3d at 1070–81 (citing Calder v. Jones, 465 U.S. 783, 788–90 (1984)) (holding "[petitioners'] intentional, and allegedly tortious, actions were expressly aimed at California. . . . [T]hey knew [the article] would have a potentially devastating impact upon respondent . . . in the State in which she lives and works . . . [a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California"). The "Purposeful Availment Test" states that in order for the "minimum contacts test" to be satisfied, the defendant must have "purposefully avail[ed]" itself of the benefits and privileges of the forum. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (quoting Hanson v. Denckla, 357 U.S. 235 (1958)). Black's Law Dictionary defines minimum contacts as follows: "A non-resident defendant's forum-state connections, such as business activity or actions foreseeably leading to business activity, that are substantial enough to bring the defendant within the forum-state court's personal jurisdiction without offending traditional notions of fair play and substantial justice." BLACK'S LAW DICTIONARY 457 (3rd Pocket ed. 2006) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

& Vermilion sufficient to satisfy purposeful availment.[33] Relying on the "effects test," the court deemed the electronic NOCI an adequate contact to support a finding of specific personal jurisdiction in Colorado.[34] In adopting the *Calder* "effects test," the court additionally implied that parties' locations and manner of electronic transmission, as well as the involvement of a third party, proved nearly irrelevant when compared to the aimed, intentional effect of the action.[35]

This case note follows the evolution of jurisdiction and the Internet, beginning with a brief history of the Internet and early Internet jurisdiction problems.[36] Exploring the body of law surrounding Internet jurisdiction, this discussion covers both the landmark cases and current trends reflecting the state of the common law.[37] The note then covers the principal case of *Dudnikov*, explaining the court's analysis and its use of the *Calder* "effects test."[38] Discussion then moves to the dilemmas of applying territorial law in the borderless online arena, and demonstrates courts' ongoing struggle to tailor the established law of jurisdiction to fit rapidly evolving legal issues involving online contacts.[39] Finally, the analysis shifts to future problems and the need to create a unified, activity-based approach to cases involving the Internet to ensure the exercise of jurisdiction harmonizes with constitutional due process demands.[40]

BACKGROUND

History and Development of the Internet

The amorphous, borderless quality of the Internet is explained by examining its beginnings. Internet building-blocks date back to the early 1960s, when a section of the United States Department of Defense facilitated the development of a communication system which could, hypothetically, withstand a nuclear war

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[33] *See, e.g.,* Bancroft & Masters, Inc. v. Augusta Nat'l. Inc., 223 F.3d 1082, 1089 (9th Cir. 2000); *contra* Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797 (9th Cir. 2004); *Dudnikov*, 514 F.3d at 1076. The *Calder* "express aiming" or "effects test" allows the exercise of personal jurisdiction when the defendant's intentional, tortious actions are expressly aimed at the forum state and cause harm to the plaintiff in the forum state of the type that the defendant knows is likely to be suffered. *Id*. at 1074–75. According to the court, "the . . . [effects] test focuses more on a defendant's intentions-where was the 'focal point' of its purposive efforts." *Id.* at 1075 n.9.

[34] *Dudnikov*, 514 F.3d at 1082.

[35] *Id.* at 1073–77.

[36] *See infra* notes 41–90 and accompanying text.

[37] *See infra* notes 65–90 and accompanying text.

[38] *See infra* notes 91–119 and accompanying text.

[39] *See infra* notes 91–179 and accompanying text.

[40] *See infra* notes 123–79 and accompanying text.

with the Soviet Union.[41] Originally called ARPANET, the communication system utilized early computers and telephone lines.[42] To connect between computers, communications were chopped into tiny packets to be transmitted separately via a network of pathways which would automatically re-route to a final destination if a path became blocked.[43] The individual packets of information gathered at a receiving computer and then reassembled into the original communication, thus explaining the unique and current amorphous quality of Internet connections.[44]

New technology allowed for the interconnection of larger groups of computers and allowed networks to use other databases.[45] Increased demand for network connections eventually necessitated the replacement of ARPANET with high-speed cable technology in the 1980s.[46]

Amplified popularity led to dramatically increased usage of the Internet.[47] Hyper Text Transfer Protocol ("HTTP") and Hypertext Markup Language ("HTML") allowed users to operate computer systems without the use of special computer text commands, creating the "World Wide Web."[48] By January 2001, the number of hosts totaled 110 million and the number of web-sites had reached 30 million.[49] As such, increasingly affordable computers and services increased

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[41] *See* Richard T. Griffith, *History of the Internet,* Universiteit Leiden, http://www.Internet history.leidenuniv.nl/index.php3?c=3&m=&session= (last viewed Feb. 22, 2008).

[42] JANET ABBATE, INVENTING THE INTERNET, 8–46 (1999). ARPANET stands for Advanced Research Projects Agency Network. *Id.* The Advanced Research Projects Agency (ARPA), created by the Department of Defense in the early 1950s, stood as a state-of-the-art technological think tank designed to advance the state of America's defense systems. *Id.* Headed by MIT scientists for ARPA, ARPANET became a revolutionary computer network which advanced the idea of a "Galatic Network" concept in which computers would be networked together and accessible everywhere. *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Griffith, *supra* note 41, at 1.

[47] ABBATE, *supra* note 42, at 8–46.

[48] Griffith, *supra* note 41, at 1. The Webopedia Computer Dictionary explains HTTP and HTML:

> Short for HyperText Transfer Protocol, the underlying protocol used by the World Wide Web. HTTP defines how messages are formatted and transmitted, and what actions Web servers and browsers should take in response to various commands. For example, when you enter a URL in your browser, this actually sends an HTTP command to the Web server directing it to fetch and transmit the requested Web page.
>
> The other main standard that controls how the World Wide Web works is HTML, which covers how Web pages are formatted and displayed.

Definition is available at http://www.webopedia.com/TERM/H/HTTP.html (last viewed Feb. 22, 2008).

[49] *See* Internet Usage Statistics, Miniwatts Marketing Group, http://www.Internetworldstats.com/stats.htm (last visited Feb. 22, 2008).

computer usage dramatically.[50] In the second quarter of 2008, the estimated global number of Internet users totaled nearly 1.5 billion.[51]

Traditional Personal Jurisdiction

As culture changes, the judicial system demands a constantly evolving scheme of jurisdiction. The United States Supreme Court's decision in *International Shoe v. Washington* changed the decades-old rule, set forth by *Pennoyer v. Neff* in 1877, that only service of process on a defendant present in the forum state would support a finding of *in personam* personal jurisdiction.[52] *International Shoe* ushered in a new era for personal jurisdiction, allowing courts to move beyond traditional bases of jurisdiction, such as citizenship or incorporation, to analyze the defendant's contacts with the forum state.[53]

In the absence of a traditional basis for jurisdiction, a court must first determine whether the forum has a long-arm statute extending to the nonresident defendant.[54] If the statute applies, the court must then examine whether the exercise of jurisdiction complies with constitutional due process protections.[55] The due process analysis is based on the defendant's contacts with the forum state to determine fairness of asserting personal jurisdiction over the defendant.[56] Analysis of the defendant's contacts with the forum depends on the type of personal

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[50] *Id.*

[51] *Id.*

[52] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *see also* Pennoyer v. Neff, 95 U.S. 714 (1877).

[53] *See* Hanson v. Denckla, 357 U.S. 235, 250–51 (1958) (stating "technological progress has increased the flow of commerce between the States . . . in response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*"); *see also Int'l Shoe*, 326 U.S. at 316. For an explanation of "minimum contacts," see *supra* note 32 and accompanying text.

[54] Fed. R. Civ. P. 4(k)(1)(A) (2007). Black's Law Dictionary defines long-arm statute as follows: "A statute providing for jurisdiction over a nonresident defendant who has had contacts with the territory where the statute is in effect. Most state long-arm statutes extend this jurisdiction to its constitutional limits." BLACK'S LAW DICTIONARY 961 (8th ed. 2004).

[55] U.S. CONST. amend. XIV, § 1.

> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[56] *Int'l Shoe*, 326 U.S. at 316.

jurisdiction at issue: general or specific.[57] For specific jurisdiction to be met, the defendant's contacts with the forum state must show the defendant purposefully availed itself of the benefits of the forum and that assertion of jurisdiction over the defendant "a[rose] out of" the forum-related activities.[58] Finally, the plaintiff must show that an assertion of jurisdiction over the defendant is consistent with "traditional notions of fair play and substantial justice."[59]

Early Cases Involving Internet Jurisdiction

While it now seems logical that connections between Internet users may constitute the type of contact necessary to assert personal jurisdiction in a forum, courts have struggled with the global concept of the Internet.[60] Dwelling on the sheer breadth of the Internet's reach, early decisions resulted in the broadest assertions of Internet jurisdiction.[61] Early courts found reason to support a finding of purposeful availment anywhere a website could be viewed, because the Internet existed nearly anywhere.[62] As cases involving the Internet multiplied dramatically in the mid-1990s, courts and legal scholars soon realized the overbreadth of these early decisions led to inequitable results.[63] Assertions of jurisdiction anywhere the

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[57] Arthur von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–49 (1966). The terms "specific" and "general" jurisdiction originated in this article. *Id*. If the plaintiff's claim arises from the defendant's contacts with the forum state, "specific" jurisdiction is said to exist. *Id.* at 1144–49. However, if the claim does not arise out of the defendant's contacts with the forum state, but those contacts are sufficient to justify an assertion of jurisdiction over the defendant, "general" jurisdiction is said to exist. *Id.* at 1136–44.

[58] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); *Int'l Shoe*, 326 U.S. at 316.

[59] *Int'l Shoe*, 326 U.S. at 316.

[60] *See, e.g.,* Reno v. ACLU, 521 U.S. 844, 853 (1997) (acknowledging the Internet's great expanse, the court stated: "The Web is . . . both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services"); Inset Sys., Inc. v. Instruction Set, 937 F. Supp. 161, 163 (D. Conn. 1996) (stating that "[u]nlike television and radio, in which advertisements are broadcast at certain times only, or newspapers in which advertisements are often disposed of quickly, advertisements over the Internet are available to Internet users continually, at the stroke of a few keys of a computer").

[61] *See, e.g., Inset Systems*, 937 F. Supp. at 164 (concluding "that advertising via the Internet is solicitation of a sufficient repetitive nature to satisfy [jurisdiction]"); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1330 (E.D.Mo. 1996) (finding jurisdiction because the defendant maintained a website that was "continually [sic] accessible to every [I]nternet-connected computer in Missouri and the world").

[62] *See, e.g.*, *Maritz*, 947 F. Supp. at 1330 (holding a website's universal accessibility may subject it to jurisdiction anywhere it can be viewed); *Inset Systems*, 937 F. Supp. at 164–65 (holding website advertising alone established personal jurisdiction over the defendant wherever the website could be viewed); *see also* Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154, 1159 (W.D. Wis. 2004) (addressing the problems of universal assertion of personal jurisdiction wherever a website can be viewed, established by *Inset* and its progeny).

[63] *See, e.g.,* Digital Control Inc. v. Boretronics Inc., 161 F. Supp. 2d 1183, 1186 (W.D.Wash. 2001). In *Digital Control*, the court explained:

Internet was accessible meant the potentiality of calling a defendant into court *anywhere* around the world.[64]

The first significant test to evaluate the connection between Internet contact and purposeful availment debuted in the 1997 case, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc*.[65] Addressing the problem of asserting purposeful availment anywhere a website could be viewed, *Zippo* provided the most widely-used analysis of Internet jurisdiction to date.[66] Taking into account due process demands, the United States District Court for the Western District of Pennsylvania proposed a "sliding scale" of purposeful availment to analyze the nature of the defendant's activities in the forum.[67] The court stated:

> [T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. 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

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> *Inset* is far from compelling: after citing two cases in which national advertising was coupled with inquiries from, correspondence with, and sales to citizens of the forum state, the court jumped to the conclusion that the ready availability of the Internet and its potential to reach thousands of Connecticut residents justified the exercise of jurisdiction over defendant even though there was no indication that the offending web site had actually been seen by a Connecticut resident or that defendant had engaged in any commercial activity within the forum. As recognized by another court [*Zippo*], *Inset* represents the "outer limits" of the personal jurisdiction analysis.

Id.; *see also* Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997) (contesting the previous supposition that the ability of a person to access information about a product equates, for purposes of jurisdiction, to promoting, selling or advertising the product); Vinten v. Jeantot Marine Alliances, S.A., 191 F. Supp. 2d 642, 647 n.10 (D.S.C. 2002) (stating that "[s]ome earlier cases did find that the mere presence of a website, without more, was enough to subject a defendant to personal jurisdiction in the forum where the website could be accessed . . . . However, as case law in this area has developed, the majority of courts have rejected this conclusion" (citations omitted)).

[64] *See, e.g., Inset*, 973 F. Supp. at 163; *Maritz*, 947 F. Supp. at 1332 (discussing that "[u]nlike use of the mail, the Internet, with its electronic mail, is a tremendously more efficient, quicker, and vast means of reaching a global audience. By simply setting up, and posting information at, a website in the form of an advertisement or solicitation, one has done everything necessary to reach the global Internet [audience]").

[65] 952 F. Supp. 1119 (W.D. Pa. 1997) (holding that in a domain name dispute with famous lighter-maker, Zippo Manufacturing, Zippo Dot Com forged a substantial connection with Pennsylvania through Internet contacts which included use of Pennsylvania Internet service providers and interaction between the company and 3000 Pennsylvanians who had subscribed to the Zippo Dot Com service).

[66] *Id.* at 1124.

[67] *Id.* at 1124–27.

> 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.[68]

Although initially applauded by the legal community, the *Zippo* decision proved unsuited to address the many demands of an increasingly interactive online community.[69] While *Zippo* did provide initial guidance, by 1999 courts began shifting away from the *Zippo* "passive v. active" approach in search of a more thorough test.[70] Again, courts diverged on the issue of Internet jurisdiction, applying scattered models and testing the outcomes and often incorporating parts of the "Zippo Test."[71] The most frequently repeated tests strove to apply traditional models of jurisdiction to Internet communication, as derived from the seminal United States Supreme Court cases *Burger King v. Rudzewicz*, *World Wide Volkswagen Corp. v. Woodson*, and *Asahi Metal Industry Co. v. Superior Court of California*.[72]

While the United States Supreme Court has yet to address the specific issue of Internet jurisdiction, current trends focus less on the Internet connection itself and more on the concrete relationship between the parties, the harm suffered, and the location and significance of each contact.[73] The "effects test," as set forth in

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[68] *Id*. (internal citation omitted).

[69] *See* Dennis T. Yokoyama, *You Can't Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1166–77 (2005).

[70] Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1371 (2001); *see, e.g.,* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir.1997) (holding that a passive Internet website alone is sufficient to subject a party to jurisdiction in another state and "something more" must also exist to support a finding of jurisdiction); Panavision Int'l., L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998) (extending *Cybersell*, the court stated: "we agree that simply . . . posting a [passive] web site on the Internet is not sufficient to subject a party . . . to jurisdiction." The court then used the "effects test" to support a finding of jurisdiction); *Compuserve*, 89 F.3d at 1257; Neogen Corp. v. Neo Gen Screening, Inc., 109 F. Supp. 2d 724, 729 (W.D. Mich. 2000).

[71] Yokoyama, *supra* note 69, at 11.

[72] *See, e.g., Compuserve*, 89 F.3d at 1261–66 (using Asahi Metal Indus. Co. Ltd. v. California, 480 U.S. 102 (1987) to determine that defendant's placement of shareware into the stream of commerce was not sufficient to render personal jurisdiction in Ohio); *see also Burger King*, 417 U.S. 462; *World-Wide Volkswagen*, 444 U.S. 286.

[73] *See, e.g.,* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)) (speaking about specific jurisdiction, the court stated foundations for personal jurisdiction arise out of the "relationship among the defendant, the forum and the litigation"); *see also* Diamond Healthcare of Ohio, Inc. v. Humility of Mary Health Partners, 229 F.3d 448, 450 (4th Cir. 2000) (holding that in the absence of continuous and systematic contacts, personal jurisdiction may exist where contacts are related to the cause of action and create substantial connections with the forum).

the 1984 landmark cases *Calder v. Jones* and *Keeton v. Hustler Magazine*, provides courts with a more directed approach for the evaluation of Internet contacts.[74]

In *Calder v. Jones*, a California actress sued a Florida magazine publisher for libel.[75] To determine appropriateness of personal jurisdiction, the United States Supreme Court focused on the effects of the allegedly libelous material within California.[76] In creating the "effects test," the Court held personal jurisdiction over an out-of-state defendant is proper when: a) the defendant's intentional and tortious actions; b) expressly aimed at the forum state; c) cause harm to the plaintiff in the forum state; and d) the defendant exhibited awareness that the brunt of the injury would occur in the forum.[77] Perhaps drawn to the systematic analysis the test affords, courts have extended *Calder* to address a broad range of cases involving Internet contacts.[78] Yet, while the "effects test" acts as a deciding factor in many cases, federal circuit courts vary in their implementation and interpretation of the test.[79] Additionally, some circuits have not adopted the *Calder* test to determine Internet jurisdiction, or fail to apply it consistently to questions of Internet jurisdiction.[80]

Inconsistency in the application of personal jurisdiction analysis by the courts creates confusion for citizens and legal scholars alike.[81] With courts facing similar

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[74] *See* Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); *see also Panavision*, 141 F.3d at 1321–22 (applying the *Calder* "effects test" after stating cases of cybersquatting parallel cases of intentional torts); Blakey v. Continental Airlines, Inc., 751 A.2d 538 (N.J. 2000) (using the "effects test," the New Jersey Supreme Court analyzed the effects of defamatory statements in an online defamation case).

[75] *Calder*, 465 U.S. at 784.

[76] *Id.*

[77] *Id.* at 789.

[78] The *Calder* "effects test" has been applied in defamation, intellectual property, business torts, and contract cases. *See, e.g.,* Euromarket Designs Inc., v. Crate & Barrel Ltd., 96 F. Supp. 2d 824 (N.D. Ill. 2000) (using the "effects test" to determine personal jurisdiction in a trademark infringement case); Tech Heads, Inc. v. Desktop Serv. Ctr., Inc., 105 F. Supp. 2d 1142 (D. Or. 2000) (deeming a Virginia company's use of an Internet domain name insufficient to subject it to personal jurisdiction in Oregon under the "effects test").

[79] *See* Yahoo! Inc., v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1208 (9th Cir. 2006) (*en banc*) (the *en banc* panel held acts applied in the "effects test" need not be wrongful acts, overruling the court's earlier decision in Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082 (9th Cir. 2000)).

[80] *See* Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456 (D. Mass. 1997) (holding a "stream of commerce" model—not the "effects test"—was appropriate to assert jurisdiction in a case involving online commerce); Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002) (using a "passive/interactive" test); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707 (4th Cir. 2002) (using a "targeting" test to determine if sufficient Internet contacts existed to exercise jurisdiction).

[81] Timothy P. Lester, *Globalized Automatic Choice of Forum: Where Do Internet Consumers Sue?*, 9 NEW ENG. J. INT'L & COMP. L. 431 (2003).

factual situations and reaching different results, the body of law surrounding Internet jurisdiction remains murky.[82]

Given the global nature of the Internet, an international jurisdiction solution may eventually be the answer.[83] Currently, an international system of regulation is under investigation by international bodies, such as the European Union, The Hague Convention, and the Internet Law and Policy Forum.[84] However, progress in the field remains slow.[85] Vast disparities between United States and European procedural law, along with individual considerations concerning jurisdiction, present an uphill battle with no quick resolution.[86]

The history of Internet jurisdiction has evolved in conjunction with the technology itself.[87] Early cases required courts to rapidly comprehend and distinguish Internet activities as they evolved and then apply existing models of jurisdiction.[88] Today, trends focus on the effects and targets of Internet activities within the forum state, but precedent varies among jurisdictions.[89] Eventually, global regulation may provide a consistent means to determine Internet jurisdiction; however, international substantive and procedural differences prevent an easy solution.[90]

PRINCIPAL CASE

Following the trend set forth by its sister circuits, the United States Court of Appeals for the Tenth Circuit unanimously adopted the *Calder* "effects test" to establish personal jurisdiction over an out-of-state defendant connected to the forum by electronic contacts.[91] Basing its jurisdictional analysis on the "effects test" in *Calder v. Jones*, the *Dudnikov* court found the intentional sending of an electronic NOCI, specifically designed to terminate the plaintiff's auction, as sufficient to support exercise of personal jurisdiction.[92] Explaining the nature of its review, the court held precedent required it to defer to the facts alleged by

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[82] *Id.* at 446–49.

[83] *Id.* at 446–47.

[84] *Id.* at 447–58.

[85] *Id.* at 448–61.

[86] Lester, *supra* note 81, at 448–61.

[87] *See supra* notes 40–73 and accompanying text.

[88] *See supra* notes 64–87 and accompanying text.

[89] *See supra* and *infra* notes 64–163 and accompanying text.

[90] *See infra* notes 164–73 and accompanying text.

[91] Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063 (10th Cir. 2008).

[92] *Id.* For information on NOCI, *see supra* note 16 and accompanying text.

the plaintiffs.[93] Precedent also required the plaintiffs to make only a prima facie showing of personal jurisdiction by a preponderance of the evidence.[94]

The court began its analysis using the traditional, two-prong test for personal jurisdiction.[95] Under the first prong, the court sought to determine if any applicable long-arm statute authorized service of process over the defendants.[96] Under the second prong, the court examined whether the exercise of statutory jurisdiction was in harmony with Fourteenth Amendment due process considerations.[97]

In analyzing the first prong, the court found neither the Copyright Act nor the Declaratory Judgment Act provided for nationwide service of process.[98] Therefore, under Federal Rules of Civil Procedure, the court determined it must apply the laws of Colorado under the Colorado long-arm statute.[99] After determining the Colorado long-arm statute allowed for maximum jurisdiction permissible under the Due Process Clause, the court turned to the second prong of the personal jurisdiction analysis.[100]

In addressing the second prong of analysis, the court utilized the test set forth by the United States Supreme Court in *International Shoe Co. v. Washington*.[101] In order to comport with due process under *International Shoe*, a court should exercise jurisdiction only if defendants had "minimum contacts" with the forum state and a lawsuit in the forum would not "offend traditional notions of fair play and substantial justice."[102] Again turning to the United States Supreme Court

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[93] *Dudnikov*, 514 F.3d at 1070 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

[94] *Id.* at 1070 n.4 (citing Dennis Garberg & Assoc., Inc. v. Pack-Tech Int'l Corp., 115 F.3d 767, 773 (10th Cir. 1997)).

[95] *Id.* (citing Trujillo v. Williams, 465 F.3d 1210, 1217 (10th Cir. 2006)).

[96] *Id.*

[97] *Id.*

[98] *Dudnikov*, 514 F.3d at 1070. The federal Copyright Act enumerates the rights and limitations of copyright holders in the United States. 17 U.S.C. §§ 101–122 (2000). The Federal Declaratory Judgment Act permits parties to bring an action to determine their legal rights "whether or not further relief is or could be sought . . . such declaration shall have the force and effect of a final judgment or decree . . . ." 28 U.S.C. § 2201(a) (2000). The *Dudnikov* court recognized neither act provided for nationwide service of process which would effectively serve the defendants, residents of Delaware and the United Kingdom, respectively. *Dudnikov*, 514 F.3d at 1070.

[99] *Dudnikov*, 514 F.3d at 1070. Federal Rules of Civil Procedure require a district court to apply the law of the state in which it sits. FED. R. CIV. P. 4(k)(1)(A) (2007). Colorado's long-arm statute provides for service of process of an out-of-state defendant and confers maximum jurisdiction permissible under the Due Process Clause. COLO. REV. STAT. ANN. § 13-1-124 (West 2005).

[100] *Dudnikov*, 514 F.3d at 1070.

[101] *Id.* at 1071 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[102] *Id.* (quoting *Int'l Shoe*, 326 U.S. at 316).

for instruction, the Tenth Circuit pointed to *Burger King Corp. v. Rudzewicz* and applied the familiar "purposeful availment" and "arise out of" standards to determine whether the defendant's activities constituted "minimum contacts."[103]

Next, the court determined whether the defendant's actions could stand under the "minimum contacts" inquiries in *Burger King*.[104] Addressing the "lack of predictability and uncertainty in [personal jurisdiction 'purposeful availment' analysis]," the court focused its inquiry on the *Calder v. Jones* "effects test" to determine purposeful availment in this case.[105]

Under the *Calder* "effects test," the court focused on the intentional action of sending the NOCI to eBay and the alleged "wrongfulness" of that action.[106] Pointing to a recent decision by the United States Court of Appeals for the Ninth Circuit, the court held an action need only be intentional, not "wrongful," in order for the *Calder* test to be used.[107] Applying this rationale, the court determined the effects of the NOCI sufficient to infer that Chalk "tortiously interfered with the plaintiff's business," thus satisfying the requirement of an intentional act.[108]

Finally, the court examined the "express aiming" requirement under *Calder*.[109] Addressing the defendant's assertion that the plaintiffs failed to meet the "express aiming" standard, the court examined the path and intent of the NOCI.[110] Looking beyond the physical travel of the NOCI to eBay in California, the court examined the actual intent behind the NOCI: to halt the plaintiff's

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[103] *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)). The "arise out of" standard relates to the contacts an out-of-state defendant maintains with the forum state. *Burger King*, 471 U.S. at 463. When a court seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, the notice requirement is satisfied if the defendant has purposefully directed his activities at residence of the forum and the litigation results from injuries that "arise out of" or relate to those activities. *Id*. at 472–83.

[104] *Dudnikov*, 514 F.3d at 1070.

[105] *Id.* at 1071; *see* Calder v. Jones, 465 U.S. 783 (1984). *See also Int'l Shoe*, 326 U.S. at 322–26 (Black, J. concurring) (referring to the majority's approach to jurisdiction as consisting of "elastic standards" and "vague Constitutional criteria").

[106] *Dudnikov*, 514 F.3d at 1072.

[107] *Id.* at 1072–73; *see* Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1208 (9th Cir. 2006) (holding effects need not be wrongful acts to be "judicially relevant" under the "effects test").

[108] *Dudnikov*, 514 F.3d at 1074–76 (stating that "[e]ven if *Calder* can be properly read as requiring some form of 'wrongful' intentional conduct, we agree with plaintiff's that their complaint complies").

[109] *Id.* at 1074–75.

[110] *Id.* at 1075. The "expressly aimed" criteria set forth in *Calder* is satisfied if the allegedly offending party knew its action would have a potentially devastating impact upon respondent, and they knew that the brunt of that injury would be felt by respondent in the State in which he lives and works. *Calder*, 465 U.S. at 783–84.

auction in Colorado.[111] Comparing the actions of the plaintiff to those of a bank shot in basketball, the court held that while the NOCI actually traveled only to California, the means of the NOCI were intended to cancel the plaintiff's auction in Colorado.[112] Establishing that Chalk's sending of the NOCI sufficiently satisfied either both proximate or "but-for" causation, the court found sufficient minimum contacts.[113] Weighing several factors, including the burden on the defendant and applicable policy interests, the court determined whether bringing the action in Colorado would "offend traditional notions of fair play and substantial justice."[114] In analyzing "fair play and substantial justice," the court found only the potential foreign policy interests of SevenArts to be compelling, as the company resides in the United Kingdom.[115] Finally, the court dismissed all other factors, including the foreign policy factor, and ultimately upheld jurisdiction over Chalk and Vermilion.[116]

In *Dudnikov*, the Tenth Circuit examined the issue of whether the effects of a notice intended to cancel an auction, sent to a third-party via Internet, sufficed to support a finding of specific personal jurisdiction in the forum state.[117] The court

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[111] *Dudnikov*, 514 F.3d. at 1075.

[112] *Id.* In summing up its analysis, the *Dudnikov* court explained:

> A player who shoots the ball off the backboard intends to hit the backboard, but he does so in the service of his further intention of putting the ball into the basket. Here, the defendants intended to send the NOCI to eBay in California, but they did so with the ultimate purpose of canceling the plaintiffs' auction in Colorado. Their "express aim" thus can be said to have reached into Colorado in much the same way that a basketball player's express aim in shooting off the backboard is not simply to hit the backboard, but to make a basket.

Id.

[113] *Id.* at 1078–79. The court declined to choose between "but-for" and "proximate" causation analysis, stating: "As between the remaining but-for and proximate causation tests, we have no need to pick sides today. On the facts of this case, we are satisfied that either theory adopted by our sister circuits would support a determination that plaintiffs' cause of action arises from defendants' contact with Colorado." *Id.* at 1079.

[114] *Dudnikov*, 514 F.3d. at 1080–81 (citing *Int'l Shoe,* 326 U.S. at 316). The court went on to state:

> In making such [a] [fairness] inquiry courts traditionally consider factors such as these: (1) the burden on the defendant, (2) the forum state's interests in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effectual relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states [or foreign nations] in furthering fundamental social policies.

Id. at 1080.

[115] *Id*.

[116] *Id.* at 1080–81.

[117] *Id.* at 1081.

determined the intent and effects of the notice created jurisdiction.[118] Therefore, if a cause of action arises from an Internet communication, the effects of that action must serve to determine if personal jurisdiction is appropriate.[119]

ANALYSIS

The *Dudnikov* court established the *Calder* "effects test" as the appropriate minimum contacts test for determining specific personal jurisdiction when electronic contacts exist.[120] The Tenth Circuit is now among the several federal circuits currently using a form of the "effects test" to analyze electronic contacts when determining personal jurisdiction.[121] Following the United States Courts of Appeals for the Fourth, Fifth, Seventh and Ninth Circuits, the Tenth Circuit systematically applied the *Calder* "effects test" standard, providing minimal guidance for practitioners with some type of electronic or Internet contact.[122]

Projected Impact on the Tenth Circuit

While the novelty of *Dudnikov* prevents any conclusive discussion of the case's ramifications in the Tenth Circuit, projected impact may be somewhat predictable.[123] Based on the test's application elsewhere, problems are imminent for the Tenth Circuit.[124] Inherent ambiguity, coupled with inconsistency in application by courts, has muddled predictability of the test, except within a few types of cases involving very evident harm.[125] In utilizing the *Calder* approach to determine minimum contacts, the *Dudnikov* decision may create as many problems as it corrects.[126] As seen in other jurisdictions, the addition of another

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[118] *Id.* at 1080.

[119] *Dudnikov,* 514 F.3d at 1080.

[120] *Id.* The "effects test" holds that personal jurisdiction over an out-of-state defendant is proper when the following exist: a) the defendant's intentional and tortious actions, b) expressly aimed at the forum state, c) cause harm to the plaintiff in the forum state, and d) defendant exhibited awareness that the brunt of the injury would occur in the forum. *See Calder*, 465 U.S. at 788–90.

[121] *See* C. Douglas Floyd & Shima Baradaran-Robinson, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L. J. 601, 657–60 (2006). The "effects test" has been used in courts across the United States, including the Fourth, Fifth, Seventh and Ninth Circuit Courts of Appeals. *Id.*

[122] *See* Ehrenfeld v. Mahfouz, 489 F.3d 542 (2nd Cir. 2007); Stroman Realty, Inc. v. Wercinski, 513 F.3d 476 (5th Cir. 2008); *Yahoo!*, 433 F.3d at 1208.

[123] *Dudnikov*, 514 F.3d at 1063. The *Dudnikov* decision was handed down in January 2008.

[124] *See* Geist, *supra* note 70, at 1345 (calling the effects test a "source of considerable uncertainty").

[125] Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 320 (2002). For examples of these types of cases see *infra* notes 146–47 and accompanying text.

[126] *See* Geist, *supra* note 70, at 1384.

test to a court's jurisdictional inquiry does little to solidify the inherent liquid tendencies of jurisdiction.[127] The decision leaves practitioners stranded, with no bright line to follow and too many tests to be effective.[128] As such, practitioners in other jurisdictions have started taking preventative measures outside the courtroom by adding protections, such as choice of forum agreements, to client websites.[129] Ultimately, the "effects test" exists as the legal equivalent of a necessary evil; although better than nothing, the test is simply not the best solution to the complex dilemmas of Internet jurisdiction.[130]

Forum Prediction Problems

For the most part, what *Dudnikov* adds in rhetoric through the addition of a new test, it equally detracts in clarity.[131] As courts continue to stretch the taut boundaries of jurisdiction even further, practitioners around the globe flounder to predict a forum for disputes.[132] Inherent ambiguity in jurisdictional analysis, coupled with the broadness of the Internet and courts' inconsistent, and often strained, application of jurisdictional principles creates confusion for practitioners, especially on a global scale.[133]

The *Calder* test, like any jurisdictional test, remains subject to the ambiguity inherent in the language of the test itself.[134] Broad phrases like "purposefully directed" and "arise out of" do little to provide a bright line.[135] Accordingly, a test for "minimum contacts" has been elusive, sparking debate from practitioners and

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[127] *See* Berman, *supra* note 125, at 320 (asserting that "our current territorially based rules for jurisdiction (and conflict of laws) were developed in an era when physical geography was more meaningful than it is today" and as such we must reevaluate the theoretical foundation for personal jurisdiction).

[128] *See* GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET, § 303(D)–(E) (2d ed. Supp. 2007).

[129] *See infra* notes 142–48 and accompanying text.

[130] *See* Geist, *supra* note 70, at 1380–1406. For proposed solutions, see *infra* notes 170–78 and accompanying text.

[131] *See generally* Floyd & Baradaran-Robinson, *supra* note 121, at 602–03.

[132] *See* Lester, *supra* note 81, at 431–72 (addressing problems of Internet jurisdiction globally). For more on preventative measures, see *infra* notes 161–69 and accompanying text.

[133] *See* Lester, *supra* note 81, at 431–32.

[134] *Dudnikov*, 514 F.3d at 1071 (calling the rules of jurisdictional law "more aspirational than self-defining" and explaining the general tendency of courts to analogize Supreme Court jurisdiction cases to explain jurisdiction law).

[135] *See, e.g.*, Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L. J. 189, 189 (1998) (asserting "[a]mbiguity and incoherence have plagued the minimum contacts test for the more than five decades during which it was served as a cornerstone of the Supreme Court's personal jurisdiction doctrine").

scholars.[136] The *Dudnikov* court goes even so far as to devote nearly half a page to the inherent ambiguities of jurisdictional analysis.[137]

Adding to the problem, the test becomes only marginally effective due to differing factual interpretations from the bench.[138] Because facts come from initial pleadings, courts are forced to draw inferences from parties' assertions of fact.[139] Accordingly, although facts are similar, conclusions based on those facts may differ from judge to judge.[140]

Additionally, courts have inconsistently applied the test in cases involving Internet contacts.[141] Most notably, not all courts rigorously require intentional targeting of the forum state.[142] To some courts, "targeting" of the forum only indicates an effort to reach an individual in the forum.[143] To others, it may require a finding of intent to target the forum state itself.[144] To still others, "targeting" may only require foreseeability of effects within the forum, as based on other non-Internet connections.[145] For example, in *Cybersell v. Cybersell*, the United States Court of Appeals for the Ninth Circuit used the test to find no jurisdiction in a trademark infringement case because the defendant's website lacked intentional

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[136] *See id.*; *Dudnikov*, 514 F.3d at 1072 (articulating that "[a] venerated principal to be sure, [the "minimum contacts" test] is also one that has long eluded a definitive legal test and proven fertile ground for debate by law students, lawyers and judges alike").

[137] *Dudnikov*, 514 F.3d at 1072.

[138] *Compare* Bancroft & Masters, Inc. v. Augusta Nat'l. Inc., 223 F.3d 1082, 1087 (9th Cir. 2000) (holding the "expressly aimed" portion of the "effects test" supports jurisdiction simply when the defendant targets a forum resident), *with Dudnikov*, 514 F.3d at 1075 (holding the "expressly aimed" portion of the test must target the forum resident *and* be the "focal point of the tort" (emphasis added)).

[139] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–556 (in determining personal jurisdiction de novo, the court must take all well-pled facts as true and construe them in the plaintiff's favor).

[140] Floyd & Baradaran-Robinson, *supra* note 121, at 602–03 (explaining "[i]n the specific context of Internet activities, the courts sometimes have relied on new interpretations of one or the other of these established approaches to questions of personal jurisdiction, and sometimes have fashioned new tests not dependent upon either of them").

[141] *Compare Bancroft*, 223 F.3d at 1087 (holding the "expressly aimed" portion of the "effects test" supports jurisdiction simply when the defendant targets a forum resident), *with Dudnikov*, 514 F.3d at 1075 (holding the "expressly aimed" portion of the test must target the forum resident *and* be the "focal point of the tort" (emphasis added)), *with Yahoo!*, 433 F.3d at 1208 (holding effects need not be caused by wrongful acts to be "jurisdictionally relevant" under the "effects test").

[142] *See, e.g.*, cases cited *supra* note 141; *Calder*, 465 U.S. at 783–84 (requiring that the "[plaintiff] knew that the brunt of that injury would be felt by respondent in the [forum] State").

[143] *See, e.g., Bancroft,* 223 F.3d at 1082–87.

[144] *See, e.g.,* Euromarket Designs Inc. v. Crate & Barrel Ltd., 96 F. Supp. 2d 824, 824 (N.D. Ill. 2000).

[145] *See, e.g.*, Barrett v. Catacombs Press, 44 F. Supp. 2d 717 (E.D. Pa. 1999) (asserting even if Internet contacts alone are insufficient to warrant a finding of jurisdiction, traditional contacts may also apply to show jurisdiction in Internet cases).

purpose to cause harm in the forum state.[146] Later, in *Panavision International, L.P. v. Toeppen*, the same court expanded its analysis of the test to include harms which were aimed at *or* had an effect in the forum state.[147] Courts within the Seventh Circuit have applied an even looser, and often inconsistent, version of the test in cases similar to *Cybersell* and *Panavision*.[148] While some courts within the Seventh Circuit have used the test to focus broadly on the harm itself, others used it to create complex "targeting" inquiries to examine harm and intent.[149]

Effective Use

Given its shortfalls, the "effects test" is firmly adhered to in only a few types of cases, such as defamation suits and certain intellectual property cases.[150] In many courts, the test has proven effective in cases where the plaintiff's cause of action is obviously harmful.[151] Since *Calder* addressed defamation, it follows logically that cases of active Internet defamation experience the most consistent application of the "effects test."[152] Additionally, courts have more consistently applied the "effects test" in cases involving obvious intellectual property infringement.[153] Even so, application in these types of cases is far from steady and varies greatly depending on the facts of each case.[154] Analogies to facts involving less tangible "harmful" effects, such as the posting of a single copyrighted photo on a webpage or online

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[146] 130 F.3d 414, 417–20 (9th Cir. 1997) (holding "something more" than registering a website and domain name must occur for the court to exercise jurisdiction in the forum, but failing to define "something more").

[147] 141 F.3d 1316, 1322 (9th Cir. 1998). *Compare id.* ("As we said in *Cybersell*, there must be 'something more' to demonstrate that the defendant directed his activity toward the forum state. Here, that has been shown. Toeppen engaged in a scheme to register Panavision's trademarks as his domain names for the purpose of extorting money from Panavision." (internal citations omitted)), *with Cybersell*, 130 F.3d at 417–20 (finding no jurisdiction because defendant's allegedly infringing use of plaintiff's trademark lacked direct purpose to cause harm because "a corporation 'does not suffer harm in a particular geographic location in the same sense that an individual does.'" (quoting Core-Vent Corp. v. Nobel Ind., 11 F.3d 1482, 1486 (9th Cir. 1993)).

[148] *See, e.g.,* Bunn-O-Matic Corp. v. Bunn Coffee Serv., Inc., 88 F. Supp. 2d 914, 919–20 (C.D. Ill. 2000); Ford Motor Co. v. Great Domains, Inc., 141 F. Supp. 2d 763, 771–77 (E.D. Mich., S. Div. 2001).

[149] *Bunn-O-Matic*, 88 F. Supp. 2d at 919–20; *Ford Motor Co.,* 141 F. Supp. 2d at 771–77.

[150] *See* Floyd & Baradaran-Robinson, *supra* note 121, at 618–20 (explaining that the test best applies to cases where harm is most evident).

[151] *See* Zekos, *supra* note 2, at 34–36.

[152] *See, e.g., Blakey*, 751 A.2d 538; Bailey v. Turbine Design, Inc., 86 F. Supp. 2d 790 (W.D. Tenn., E. Div. 2000); Young v. New Haven Advocate, 315 F. 3d 256, 263–64 (4th Cir. 2003).

[153] *See, e.g.,* Sports Authority Mich., Inc. v. Justballs, Inc., 97 F. Supp. 2d 806 (E.D. Mich. 2000); ALS Scan, Inc. v. Digital Serv. Consultants, Inc. 293 F.3d 707, 714–16 (4th Cir. 2002).

[154] *See supra* note 144 and accompanying text.

gambling, present problems of predictability.[155] For example, a practitioner may successfully use the *Calder* test to determine the outcome in a case where an unauthorized party actively used a trademarked company logo to solicit business; however, existing law lacks clarity to determine a case where its effects are arguably harmful, such as posting a copyrighted photo on a passive blog website.[156] In these types of cases, the court's rationale lies in circumstantial details, thus eliminating the possibility of an easy bright line.[157]

Due to problems of ambiguity, interpretation, and application, the body of law surrounding Internet personal jurisdiction remains unquestionably vague.[158] By adding to the already overwhelming tower of tests and factors used to determine jurisdiction, the *Dudnikov* decision seems to do little to rectify the long-term issues of Internet jurisdiction.[159] However, the test has been applied with some consistency in cases involving defamation and active intellectual property infringement.[160]

Impact Outside the Courts

The ambiguity of Internet jurisdiction also resonates outside the courtroom.[161] Recognizing the problems concerning personal jurisdiction and the Internet, websites have increasingly utilized choice of law and forum provisions to provide jurisdictional direction.[162] Often contained in a website's terms of use page,

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[155] *See* Zekos, *supra* note 2, at 36 (articulating "[t]here is a need to consider a cyberspace jurisdiction for cyberspace actions having not feasible effects on real world and the creation, execution and effects are felt only in cyberspace").

[156] *Id.* at 34–35; *see also ALS Scan*, 293 F.3d at 712–16 (finding no jurisdiction over an Internet Service Provider [ISP] where the ISP allowed operation of a website which had posted allegedly infringing photographs).

[157] *See supra* notes 149–55 and accompanying text.

[158] *See supra* notes 64–88 and accompanying text.

[159] *See* Floyd & Baradaran-Robinson, *supra* note 121, at 638.

[160] *See supra* notes 40–173 and accompanying text.

[161] Lester, *supra* note 81, at 431–72.

[162] Lisa D. Rosenthal et al., *Consumer Protection in the Electronic Marketplace: Looking Ahead*, at 1 (Sept. 2000), *available at* http://www.ftc.gov/bcp/icpw/lookingahead/global.shtm (urging online businesses to reveal forum and choice of law provisions on their websites). *See also* Jonathan D. Frieden, *Common Issues Facing E-Commerce Businesses* (May 9, 2006), *available at* http://ecommercelaw.typepad.com/ecommerce_law/2006/05/common_issues_f_1.html (last visited Feb. 23, 2008).

> Choice of Forum provisions permit the parties to a contract to select, with certain limitations, the jurisdiction in which any disputes pertaining to their relationship are resolved. In many instances, a website's Terms of Use purports to require any legal action pertaining to the website to be brought in the jurisdiction in which the publisher is located, which may be quite inconvenient for a distant user of the site. Choice of Law provisions permit the parties to a contract to select, with certain limitations, which jurisdiction's laws will be applicable to their relationship.

choice of law and choice of forum provisions permit the parties to choose which jurisdiction's laws will apply to their relationship.[163] A company's choice of law and forum provision may use law of: (1) the jurisdiction whose laws are most favorable to the publisher; (2) the jurisdiction in which the publisher is physically located; or (3) the jurisdiction whose laws are most familiar to the attorney who drafted the contract.[164]

These provisions may create problems for unsophisticated Internet users who generally access the Web without thinking about the legal implications of their usage.[165] Often, complex terms are included in a "clickwrap agreement" and hastily agreed to by a website user.[166] Should a dispute arise, sophisticated businesses may assert control of jurisdiction with the use of these provisions.[167] While the court in *Dudnikov* seemed concerned about the status of the plaintiffs as small time, "Mom & Pop" operators, this policy consideration remains threatened by continued use of choice of law and forum provisions.[168] The use of these provisions on websites leaves Internet users with little choice: either learn the complex law of jurisdiction as it relates to the Internet, or become subject to the one-sided control of sophisticated businesses.[169]

Since the problem extends around the globe, legal scholars act as perplexed as the courts in their projected solutions.[170] Some advocate unique cyberspace forums, promoting international conventions and treaties.[171] Advocates of

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> Generally, a website's Terms of Use will apply the law of: (1) the jurisdiction whose laws are most favorable to the publisher; (2) the jurisdiction in which the publisher is physically located; or (3) the jurisdiction whose laws are most familiar to the attorney who drafted the contract.

Id.

[163] Geist, *supra* note 70, at 1386–93.

[164] *See* Frieden, *supra* note 162, at 34.

[165] *See* Lester, *supra* note 81, at 460–72.

[166] Geist, *supra* note 70, at 1386–91 (stating that "[t]hese agreements typically involve clicking on an 'I agree' icon to indicate assent in the agreement").

[167] *See* Lester, *supra* note 81, at 467–69. Courts in the United States and Canada have been generally supportive of Internet forum selection clauses and clickwrap agreements. *See, e.g.*, Kilgallen v. Network Solutions, 99 F. Supp. 2d 125 (D. Mass. 2000); Rudder v. Microsoft Corp. [1999] 2 C.P.R. (4th) 474 (Ont.).

[168] *See Dudnikov*, 514 F.3d at 1063. From the language of the opinion, the court appears to support and protect small businesses, referring to the petitioners as: "A husband-wife team, operat[ing] a small and unincorporated Internet-based business from their home in Colorado . . . a majority of their income is derived from selling [craft-type] products on eBay."

[169] *See* Rosenthal, *supra* note 162, at 25.

[170] *See* Zeckos, *supra* note 2, at 35–37; *see also* Lester, *supra* note 81, at 468–72.

[171] *See* Zeckos, *supra* note 2, at 36–37.

> Cyber courts and cyber arbitral tribunals should have jurisdiction to solve all actions taking place on the net and the enforcement of their awards and decisions will be

cyberspace forums recognize the issue of Internet boundaries and urge an exclusive Internet jurisdiction with its own laws.[172] However, creating harmony within the vast realm of international law and policy presents significant problems.[173] Others look to a solution using an evolved combination of existing tests.[174] As seen in *Dudnikov*, the addition of more tests could create confusion for courts and practitioners.[175] Additionally, more tests do not create a global solution to Internet jurisdiction problems.[176] Still others advocate a "targeting test" which would focus on the place of intended harm or action.[177] However, success of the "targeting test" remains subject to problems of international acceptance and issues of consistency in application.[178] Given the problems of each, no perfect solution exists.[179]

CONCLUSION

In *Dudnikov*, the United States Court of Appeals for the Tenth Circuit Court examined whether the effects of a notice intended to cancel an Internet auction, sent to a third-party via electronic transmission, would support a finding of specific personal jurisdiction in the forum of Colorado.[180] Using the "effects test" set forth in *Calder v. Jones*, the United States Supreme Court determined the intent and effects of the notice created jurisdiction, not the manner in which it was sent.[181] Therefore, if a cause of action arises from an Internet or electronic communication, the effects of that action must serve to determine if personal

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> made according to international conventions on recognition and enforcement of foreign awards and e-awards. Of course, courts and arbitral tribunals have to be regarded as equal and independent forms of dispute resolutions.

Id. See also Lester, *supra* note 81, at 23.

[172] Geist, *supra* note 70, at 1393–97.

[173] Lester, *supra* note 81, at 458 (discussing that "[e]ven if the United States ratifies the proposed [Hague] Convention, it is not certain that the United States courts would be compelled to follow its rules").

[174] *See* Floyd & Baradaran-Robinson, *supra* note 121, at 601–66.

[175] *See supra* notes 119–44 and accompanying text; *see also* Yokoyama, *supra* note 69, at 1195 (articulating that "[j]urisdictional issues involving Internet activity, like issues involving more traditional activity, should be resolved according to the defendant's overall contacts with the forum state and in relation to the substantive and factual underpinnings of the lawsuit").

[176] *See Yahoo!,* 433 F.3d at 1208.

[177] *See* Geist, *supra* note 70, at 1392–1406.

[178] *See id*. at 1384 (stating "[w]ithout universally applicable standards for assessment of target in the online environment, a targeting test is likely to leave further uncertainty in its wake").

[179] *Id.* (acknowledging the shortfalls of each proposed solution, including shortfalls of the "targeting test" which the author advocates).

[180] *See supra* notes 89–115 and accompanying text.

[181] *Id.*

jurisdiction appropriately exists.[182] While the outcome of the "effects test" in future cases in the Tenth Circuit is presently undeterminable, the test will unlikely serve as a concrete determinant of personal jurisdiction cases involving the Internet.[183]

[182] *Id.*

[183] *See supra* notes 1–182 and accompanying text.