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Bulletin Board Systems and Personal Jurisdiction: What Comports with Fair Play and Substantial Justice?

Sonia K. Gupta†

Imagine you have set up a computer Bulletin Board System ("BBS") on the Internet from your California home, and a user in Tennessee dials into your BBS. The user is legally wronged by some occurrence on the BBS and files suit against you in a Tennessee court. Does that Tennessee court have personal jurisdiction over you, a California resident? Is your establishment of a BBS a purposeful availment of the privilege of conducting activities¹ in the forum state of Tennessee?

A similar situation arose in a criminal context in a recent controversial decision, *United States v Thomas*.² A California couple was convicted of the interstate transport of obscenity in Tennessee after a Tennessee postal inspector downloaded pornographic information from their California-based BBS.³ Although *Thomas's* criminal context may distinguish it from the civil issues explored in this Comment, courts are soon likely to face similar fact situations in the civil arena.⁴

In the past fifteen years, BBS use has grown exponentially. The number of BBSs was recently estimated at over 120,000,⁵

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¹ In order to establish personal jurisdiction over a nonresident defendant, it is "essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v Denckla*, 357 US 235, 253 (1958).

² 74 F.3d 701 (6th Cir 1996), discussed in Comment, *Cyber-Porn Obscenity: The Viability of Local Community Standards and the Federal Venue Rules in the Computer Network Age*, 15 Loyola LA Enter L J 415, 439-41 (1995).

³ Comment, 15 Loyola LA Enter L J at 440 (cited in note 2).

⁴ Some academics already recognize that the personal jurisdiction inquiry is likely to change with the growth of the information superhighway. See, for example, Diana J.P. McKenzie, *A Lawyer's Roadmap of the Information Superhighway*, 13 John Marshall J Computer & Info L 177, 203 (1995) (arguing that as the number of transactions or associated activity on the information superhighway increases between parties, whether the "minimum contacts" requirement is met becomes less clear); Edward Cavazos, *Litigation On-Line: Cyber Issues Loom*, *The American Lawyer* 54 (May 1995); and Comment, 15 Loyola LA Enter L J at 434 (cited in note 2).

⁵ See Edward A. Cavazos and Gavino Morin, *Cyberspace and the Law: Your Rights*

and the number of users has been estimated at over ten million.⁶ BBSs provide an ideal forum for individuals to communicate conveniently over long distances.⁷ The size of BBSs ranges from large commercial networks to small sites catering to hobbyists.⁸ Most BBSs are operated on small computers with a single phone line and a small number of users.⁹

Although a BBS operator knows that individuals from all fifty states could access her BBS, should this knowledge subject the BBS operator to personal jurisdiction in all fifty states? The answer under current personal jurisdiction law is not clear. Under the Fourteenth Amendment's Due Process Clause, a defendant must have had certain minimum contacts with a forum state for the maintenance of a suit not to offend "traditional notions of fair play and substantial justice."¹⁰ In cyberspace, interpretation of these standards might depend on the size of the BBS.

On the one hand, the situation of a small BBS operator who is dragged across the country to defend a lawsuit arguably offends "traditional notions of fair play and substantial justice." On the other hand, the same standard may require large BBS operators to travel across the country to defend an action. Large BBS operators likely conduct other substantial activities in the forum state, such that requiring the BBS operator to defend suit away from home is not an unreasonable burden which offends the Due Process Clause. For example, IBM solicits participation in its BBS through national advertising,¹¹ whereas a small BBS operator's activity in the forum state is likely limited to establishing the BBS.

This Comment argues that traditional factors of foreseeability, defendant's control, purposefulness, reciprocity, and mere unilateral activity are unhelpful to the personal jurisdiction inquiry a court must make with respect to BBS operators. This Comment proposes the use of an alternative framework similar to Justice O'Connor's stream-of-commerce theory¹² to assess whether a BBS operator should be subject to the jurisdiction of

and *Duties in the On-line World* 9 (MIT Press, 1994).

⁶ See Comment, 15 *Loyola LA Enter L J* at 419 (cited in note 2).

⁷ *Id.*

⁸ *Id.* at 420.

⁹ Cavazos & Morin, *Cyberspace and the Law* at 3 (cited in note 5).

¹⁰ *International Shoe Co. v Washington*, 326 US 310, 316 (1945).

¹¹ IBM frequently advertises its BBS in the *Wall Street Journal*.

¹² *Asahi Metal Industry v Superior Court*, 480 US 102, 111-112 (1987).

the user's forum state. Justice O'Connor's approach holds that placing a product into the stream of commerce does not constitute purposeful availment of the forum state.¹³ Under this theory, the BBS operator must do more than merely set up a BBS that can be accessed from the forum state for her activity to constitute purposeful availment. The extent and type of her additional conduct will be decisive.

I. SUMMARY OF CURRENT PERSONAL JURISDICTION LAW

A. The Two-Prong Test

Courts apply a two-prong test to assess whether a state can exercise personal jurisdiction over a party. First, the exercise of personal jurisdiction must be authorized by the state's long-arm statute.¹⁴ Second, the exercise of personal jurisdiction must be consistent with the Due Process Clause of the Fourteenth Amendment.¹⁵ Most long-arm statutes, however, extend jurisdiction to the full limits of the Due Process Clause.¹⁶ For example, the Illinois long-arm statute states: "... a court may also exercise jurisdiction on any other basis now or hereafter permitted by ... the Constitution of the United States ..."¹⁷ Therefore, cases often turn on the court's determination of the maximum reach allowed by the Due Process Clause.¹⁸

B. The Due Process Standard

The standard for determining whether a state's assertion of jurisdiction complies with the Due Process Clause derives from the Supreme Court's decision in *International Shoe Co. v Washington* ("*Shoe*").¹⁹ The Court held that

in order to subject a defendant to a judgment in personam, if he be not present within the territory of the

¹³ *Id.* at 112.

¹⁴ See, for example, *Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v Medfit Intl, Inc.*, 982 F2d 686, 690 (1st Cir 1993).

¹⁵ *International Shoe v Washington*, 326 US 310, 316 (1945).

¹⁶ See 735 ILCS 5/2-209 (West 1995); *Damian Serv. Corp. v PLC Serv., Inc.*, 763 F Supp 369, 371 (N D Ill 1991).

¹⁷ 735 ILCS 5/2-209(c) (West 1995).

¹⁸ This Comment assumes the requirements of the long-arm statute are satisfied; but, in any particular case, the language of the State's long-arm statute must be examined to ensure compliance. See Timothy J. Howard, *Personal Jurisdiction Gets Personal: A Fact-Specific Approach*, 6:2 Corp Counsel Rev 87, 87 n 1 (Nov 1987).

¹⁹ 326 US 310 (1945).

forum, he 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."²⁰

The *Shoe* standard has two parts. First, there must be some act by which "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."²¹ Second, it must be fair and reasonable for jurisdiction to be asserted over the defendant.²² Stated differently, "'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'"²³

1. *The purposeful availment requirement.*

In analyzing whether a party has met the "purposeful availment" requirement, courts take into account factors such as the foreseeability of being haled into court in the forum state, purposefulness, control over jurisdiction, and reciprocity between the defendant and the forum state.²⁴ The stream-of-commerce test provides another theory of determining purposeful availment.²⁵

The foreseeability test asks whether the defendant had notice of being haled into court in the forum state.²⁶ Notice "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."²⁷ For example, in *World-Wide Volkswagen*, it was foreseeable that the plaintiff-purchaser of the automobile might take the car to Oklahoma from the defendant-dealer's state because a car is mobile.²⁸ It was not foreseeable, however, that the defendant would be haled into court in Oklahoma on

²⁰ *Id.* at 316 (quoting *Milliken v Meyer*, 311 US 457, 463 (1940)). See also *Plus System, Inc. v New England Network, Inc.*, 804 F Supp 111, 117 (D Colo 1992).

²¹ *Hanson v Denckla*, 357 US 235, 253 (1958). See also *Burger King v Rudzewicz*, 471 US 462, 474-75 (1985); *Asahi Metal Industry v Superior Court*, 480 US 102, 109 (1987).

²² *Burger King*, 471 US at 486. See also *Asahi Metal Industry*, 480 US at 113.

²³ *Burger King*, 471 US at 485-86 (quoting *Kulko v California Superior Court*, 436 US 84, 92 (1978)).

²⁴ Howard, 6:2 Corporate Counsel Review at 97 (cited in note 18).

²⁵ *Asahi Metal Industry*, 480 US at 105.

²⁶ *World-Wide Volkswagen v Woodson*, 444 US 286, 297 (1980).

²⁷ *Id.*

²⁸ *Id.* at 298.

account of this car sale. It is "not the mere likelihood that a product will find its way into the forum State" that is critical to due process.²⁹

Purposefulness depends on whether the contacts arise from deliberate efforts of the defendant.³⁰ An element of intent is required; there must be some "act" by which the defendant "purposefully avails" herself of the privilege of conducting activities within the forum state, "invoking the benefits and protections of its laws."³¹

Control and reciprocity are two other relevant factors. Control concerns whether the defendant herself can alleviate the "risk of burdensome litigation."³² The defendant should be able to act to alleviate the risk of burdensome litigation in some manner.³³ The defendant may do so by procuring insurance or passing the costs on to customers, or if necessary, by severing her connection to the forum state.³⁴ Reciprocity concerns whether the defendant benefits substantially from the contacts. For example, in *World-Wide Volkswagen*, the Supreme Court explained that "whatever marginal revenues [the defendants] may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify" the exercise of jurisdiction by that state.³⁵

Courts weigh the above factors in assessing personal jurisdiction. In doing so, they will not recognize the "mere unilateral activity of those who claim some relationship with a nonresident defendant" as sufficient for personal jurisdiction.³⁶ In *World-Wide Volkswagen*, the plaintiff's transportation of the automobile to Oklahoma was a "unilateral" act, and the Court therefore found no personal jurisdiction.³⁷

The "stream-of-commerce" test is another theory of purposeful availment. *Gray v American Radiator & Standard Sanitary Corp.*³⁸ is the seminal stream-of-commerce case. There, the Illinois Supreme Court held that significant sales in Illinois of a heater containing the defendant's valve were sufficient to sub-

²⁹ *Id.* at 297.

³⁰ *Asahi Metal Industry*, 480 US at 109. See also *Hanson*, 357 US at 253.

³¹ *Asahi Metal Industry*, 480 US at 109.

³² *Id.* at 110.

³³ *Id.*

³⁴ *Id.*

³⁵ *World-Wide Volkswagen*, 444 US at 299.

³⁶ *Id.* at 298.

³⁷ *Id.*

³⁸ 22 Ill 2d 432, 176 NE2d 761 (1961).

ject the nonresident defendant to the personal jurisdiction of Illinois.³⁹ The United States Supreme Court later endorsed Gray's stream-of-commerce theory in *World-Wide Volkswagen*.⁴⁰ The Supreme Court explained that a forum state may assert 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."⁴¹ Subsequently, in *Asahi Metal Industry v Superior Court*,⁴² the Supreme Court departed from the stream-of-commerce test.

The facts of *Asahi* are somewhat unusual. The case involved two foreign manufacturers, Asahi Metal Industry, a manufacturer of tire valves, and Cheng Shin Rubber Industrial Co., a manufacturer of components in tire tubes. The original plaintiff was a California resident who, as a motorcycle passenger, was injured by a sudden explosion in the vehicle's tire. The plaintiff filed suit against Cheng Shin in California. Cheng Shin then sought indemnity from co-defendant Asahi. The plaintiff settled so that the remaining parties were Cheng Shin and Asahi. Asahi moved to dismiss for lack of personal jurisdiction. Asahi's only contacts with California were the indirect sales of its valve assemblies in tire tubes.⁴³

While a majority of the Court held that the exercise of personal jurisdiction violated "traditional notions of fair play and substantial justice,"⁴⁴ the Court split on the exact meaning of the stream-of-commerce theory. The Court disagreed on the question of whether the placement of products into the stream of commerce with knowledge that they would be sold in the forum satisfied the purposeful availment prong of the personal jurisdiction inquiry.⁴⁵

The Court expressed three divergent views on purposeful availment. Justices Brennan, White, Marshall, and Blackmun supported a broad version⁴⁶ of the stream-of-commerce theory while Justices O'Connor, Rehnquist, Powell, and Scalia advocated a narrow version.⁴⁷ Justice Stevens refused to join either

³⁹ Id at 766.

⁴⁰ 444 US at 297-98.

⁴¹ Id at 298.

⁴² 480 US 102 (1987).

⁴³ Id at 105-07.

⁴⁴ Id at 113-116.

⁴⁵ Id at 116-17.

⁴⁶ *Asahi Metal Industry*, 480 US at 116-121.

⁴⁷ Id at 112.

opinion of the Court on the stream-of-commerce theory, arguing that it was unnecessary to the decision.⁴⁸ Justice Stevens did, however, add that the stream-of-commerce assessment would be affected by “volume, value and the hazardous character of the components.”⁴⁹

Justice Brennan’s concurrence articulated the broad version of the stream-of-commerce test. This version holds that awareness that a product will reach the forum state on a regular basis is sufficient to establish purposeful availment.⁵⁰ Justice Brennan explained:

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. . . . [M]ost courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause. . . .⁵¹

The Illinois Supreme Court further explained this version of the theory in *Wiles v Morita Iron Works Co.*:⁵²

[S]o long as the defendant participates in the “regular and anticipated flow of products from manufacture to distribution to retail sale” in the forum State, and so long as the defendant is “aware that the final product is being marketed in the forum State,” minimum contacts . . . have been established.⁵³

Justice O’Connor, joined by three other justices, articulated the narrow version of the stream-of-commerce test. This version requires more than “awareness” and a continual flow of the product into the forum State.⁵⁴ Justice O’Connor explained:

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

⁴⁸ Id at 121-122 (Stevens concurring).

⁴⁹ Id at 122.

⁵⁰ *Asahi Metal Industry*, 480 US at 116-121 (Brennan concurring).

⁵¹ Id at 117.

⁵² 125 Ill 2d 144, 157, 530 NE2d 1382, 1388 (1988).

⁵³ Id (explaining *Asahi Metal Industry*).

⁵⁴ *Asahi Metal Industry*, 480 US at 112.

or purpose to serve the market 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 [constitute] an act purposefully directed toward the forum State.⁵⁵

The Illinois Supreme Court explained this theory in *Wiles*:⁵⁶

A defendant does not establish minimum contacts with the forum State unless it engages in "additional conduct" beyond merely placing products into the stream of commerce and knowing that the products will make their way into the forum State.⁵⁷

Examples of "additional conduct" which indicate an intent or purpose to serve the market in the forum State include

designing the product for the 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.⁵⁸

Lower courts have interpreted the *Asahi* decision differently. Some courts have viewed the case as rejecting the stream-of-commerce theory of personal jurisdiction.⁵⁹ Perhaps more remarkably, Texas courts simply ignored *Asahi's* pronouncements and relied on earlier Supreme Court decisions which endorse the broad version of the stream of commerce theory.⁶⁰ Other courts tried to limit *Asahi's* effect by confining the holding to *Asahi's* specific facts.⁶¹ Finally, many courts acknowledged *Asahi's* ambiguity.⁶²

⁵⁵ *Id.*

⁵⁶ *Wiles*, 125 Ill 2d at 156-57, 530 NE2d at 1388.

⁵⁷ *Id.*

⁵⁸ *Asahi Metal Industry*, 480 US at 112.

⁵⁹ Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 Rev Litig 239, 245 (1988)(citing *Sollinger v Nasco Intl.*, 655 F Supp 1385, 1388-89 (D Vt 1987); *Witbeck v Bill Cody's Ranch Inn.*, 428 Mich 659, 411 NW2d 439 (1987)).

⁶⁰ *Id.* at 245 (citing *Keen v Ashot Ashkelon, Ltd.*, 748 SW2d 91 (Tex 1988)).

⁶¹ *Id.* at 245-46 (citing *Dittman v Code-a-Phone Corp.*, 666 F Supp 1269, 1272 (N D Ind 1987) and *McBead Drilling Co. v Kremco, Ltd.*, 509 So2d 429, 433 n 7 (La 1987)).

⁶² *Id.* at 246 n 25 (citing *Hall v Zambelli*, 669 F Supp 753 (S D WVa 1987); *Ag-Chem Equipment Co. v Avco Corp.*, 666 F Supp 1010 (W D Mich 1987), *vacated* 701 F Supp 603 (W D Mich); and *Poole and Kent Co. v Equilease Associates*, 71 Md App 9, 523 A2d 1018 (1987)).

2. *The reasonableness requirement.*

For the second prong of the "reasonableness" inquiry, the burden on the defendant is "always a primary concern" but will "be considered in light of other relevant factors."⁶³ Some of these other factors are the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.⁶⁴

II. BBS OPERATORS AND PERSONAL JURISDICTION

The issue of whether a BBS operator is subject to the jurisdiction of a user's forum state remains open. *United States v Thomas*⁶⁵ poses a similar question, but the case's criminal context may limit its applicability to personal jurisdiction in civil cases.

One court addressed the converse question—whether a user should be required to defend a suit in a database operator's forum state.⁶⁶ This court held that the user does not have to defend suit in the database operator's forum state. This decision provides some insight into how courts may decide the question posed by this Comment—whether a BBS operator should be required to defend suit in the user's forum State.

In *Pres-Kap, Inc. v System One, Direct Access, Inc.*,⁶⁷ System One, a Florida-based plaintiff, owned and operated a computer airline reservation system, and Pres-Kap, a New York-based defendant, was a user of System One's computer system.⁶⁸ The plaintiff here is analogous to a BBS operator, and the defendant is analogous to a BBS user.

The court held that users subscribing to the plaintiff's Florida database were not subject to personal jurisdiction in Florida.⁶⁹ The court expressed concern about subjecting ordinary online service users to jurisdiction in the database operator's

⁶³ *World-Wide Volkswagen*, 444 US at 292.

⁶⁴ *Id.*

⁶⁵ 74 F3d 701 (6th Cir 1996).

⁶⁶ *Pres-Kap, Inc. v System One, Direct Access, Inc.*, 636 S2d 1351 (Fla Dist Ct App 1994), review denied, *System One, Direct Access, Inc. v Pres-Kap, Inc.*, 645 S2d 455 (Fla 1994).

⁶⁷ *Id.* at 1353.

⁶⁸ *Id.* at 1351-52.

⁶⁹ *Id.* at 1353.

home state given that these users are often "solicited, engaged, and serviced entirely in [their home] state."⁷⁰

Using the *Pres-Kap* court's reasoning, the BBS operator may be able to escape personal jurisdiction in the user's forum state. The *Pres-Kap* court's concerns about subjecting the ordinary online service user to personal jurisdiction across the country may protect the small BBS operator. The small BBS operator is essentially an ordinary user of the information superhighway. The BBS operator may set up the system entirely from her home state, which makes the BBS operator like the ordinary user who operates entirely out of his home state.

While criticism surrounds *Pres-Kap*,⁷¹ the decision provides some guidance as to how courts may react to a suit brought against an out-of-state BBS operator.

III. THE TRADITIONAL LEGAL FRAMEWORK IS INADEQUATE FOR DETERMINING PERSONAL JURISDICTION WITH RESPECT TO BBS OPERATORS

This section will apply the purposeful availment test to BBSs using the factors of foreseeability, purposefulness, defendant's control, reciprocity, and mere unilateral activity. The uncertainty of that framework for BBSs will be demonstrated. This section will then argue that the user's forum state should probably have jurisdiction over the large BBS operator but not over the small operator. Finally, this section argues that Justice O'Connor's version of the stream-of-commerce theory is the best framework to use for the personal jurisdiction inquiry in the BBS context.

A. The Uncertainty of the Purposeful Availment Test

While the purposeful availment factors may result in personal jurisdiction over the large BBS operator but not the small, the framework allows the arguments to go both ways. Following is an application and analysis of the foreseeability, purposefulness, control, and reciprocity factors to BBSs.

A court could resolve the foreseeability issue either way. Foreseeability of being haled into court in the forum state may

⁷⁰ *Pres-Kap, Inc.*, 636 S2d at 1353.

⁷¹ See Note, *Pres-Kap, Inc. v System One, Direct Access, Inc.: Extending the Reach of the Long-Arm Statute through the Internet?*, 13 *John Marshall J Computer & Info L* 433, 437 (1995) (asserting "that the *Pres-Kap* court erroneously held that the Internet connection did not satisfy the two prongs of the personal jurisdiction analysis").

exist. When an operator sets up a BBS, small or large, the operator knows individuals from fifty states can dial into the system. The operator may well be aware of the possibility of suit in a distant jurisdiction. This connection to the forum state and awareness of the possibility of suit may be enough to establish personal jurisdiction.

On the other hand, "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction.⁷² Foreseeability of where the product may end up is not by itself dispositive. The Court in *World-Wide Volkswagen* explained that if personal jurisdiction were based on foreseeability of where a product may end up, a defendant's amenability to suit would travel with the product.⁷³

[t]he foreseeability that is critical to due process . . . is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.⁷⁴

Just as the manufacturer's amenability to suit does not travel with the product, the BBS operator's amenability to suit should not travel with the BBS user's ability to access the BBS from a distant location. It is not the likelihood of the BBS being accessed in the forum state which is relevant, but instead the likelihood of the BBS operator being sued in the forum state based on its conduct and connection with that state.

The purposefulness argument goes both ways as well. The main issue here is whether the establishment of the BBS in and of itself is a deliberate "purposeful availment." On one hand, the BBS operator sets up the system with the knowledge and hope that individuals from across the country will access the BBS. This act is certainly deliberate.

On the other hand, in the personal jurisdiction inquiry an individual may take many purposeful actions with a forum state and still be free from the exercise of personal jurisdiction. For example, "contracting with a resident of the forum state does not alone justify the exercise of personal jurisdiction [over a non-resident defendant.]"⁷⁵ Perhaps setting up a BBS should not

⁷² *World-Wide Volkswagen v Woodson*, 444 US 286, 295 (1980).

⁷³ *Id.* at 296.

⁷⁴ *Id.* at 297.

⁷⁵ *Specific Personal Jurisdiction—Purposeful Availment Requirement*, 8 No 7 Fed

alone justify the exercise of personal jurisdiction over the BBS operator.

Whether the defendant has control over the "risk of burdensome litigation" is another factor that can be easily argued both ways. A BBS operator, small or large, could exercise some control over where it is subject to personal jurisdiction or the cost of being subject to personal jurisdiction. For example, a potential defendant can "procur[e] insurance, pass[] the expected costs on to customers, or, if the risks are too great, sever[] its connection with the State."⁷⁶ A BBS operator can take any of these measures. A BBS operator may also place a forum selection clause on the system or monitor the users' locations with a caller identification system.

On the other hand, control over jurisdiction and its effects may be difficult. A BBS operator may be unaware of the distribution of material on the system due to the BBS's automatic operation.⁷⁷ Further, constant surveillance is often impracticable due to high costs,⁷⁸ and requiring users to display their names will compromise their anonymity, which is often an essential of BBS services.⁷⁹

The reciprocity argument is easily flipped as well. Reciprocity exists because the BBS operator benefits substantially from the contacts with the user in the forum state. One main attraction of a BBS is that it makes communications over long distances cheaper. By making the BBS available to individuals from diverse geographic locations, the BBS operator benefits. The user also benefits from being able to participate in a wider range of BBSs. On the other hand, the user-operator relationship is not necessarily an ongoing, interdependent relationship as compared with long-term contracting parties. The relationship between a BBS operator and a BBS user can be ended instantaneously.

Finally, whether the user's conduct is mere unilateral activity is also unclear. "[T]he mere 'unilateral activity of those who claim some relationship with a nonresident defendant cannot

Litigator 188, 189 (Oct. 1993) (quoting *Mellon Bank (East) v DiVeronica Bros. Inc.*, 983 F2d 551, 557 (3d Cir 1993)).

⁷⁶ *World-Wide Volkswagen*, 444 US at 297.

⁷⁷ Comment, *Cyber-Porn Obscenity: The Viability of Local Community Standards and the Federal Venue Rules in the Computer Network Age*, 15 *Loyola LA Enter L J* 415, 422 (1995) (cited in note 2).

⁷⁸ *Id.*

⁷⁹ *Id.* at 423.

satisfy the requirement of contact with the forum State.”⁸⁰ The BBS user’s call into the BBS may be a unilateral act. One may analogize the BBS user’s call to the plaintiff’s unilateral act in *World-Wide Volkswagen*. Just as the Volkswagen dealer made the product available to all retail customers,⁸¹ the BBS operator makes the BBS available to Internet participants. Just as the plaintiffs in *World-Wide Volkswagen* drove the automobile to the forum state,⁸² the BBS user brings the product to the forum state. The BBS user establishes the initial connection between the two states by dialing into the BBS.

On the other hand, the BBS user’s act here is not quite as unilateral as the plaintiffs’ act in *World-Wide Volkswagen*. In *World-Wide Volkswagen*, the plaintiffs traveled from New York to Oklahoma—the plaintiffs physically moved the chattel.⁸³ The BBS user dials into the system. The BBS operator’s act of establishing the system does more to reach the user than the user does to reach the BBS.

The preceding analysis of the purposeful availment test displays how the personal jurisdiction inquiry for BBS operators is highly uncertain.⁸⁴ Courts could easily tell the story either way. Furthermore, defendants rarely escape personal jurisdiction once they meet the purposeful availment requirements.⁸⁵

It may be that under the purposeful availment test courts would end up where they intuitively should be and allow personal jurisdiction over large BBS operators but not small BBS operators; however, a framework similar to Justice O’Connor’s stream-of-commerce test provides a better tool for the analysis.

⁸⁰ *World-Wide Volkswagen*, 444 US at 298.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 288.

⁸⁴ The Supreme Court’s explanations of purposeful availment exacerbate the uncertainty. See Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 *Rev Litig* 239, 251-58 (1988) (explaining the Supreme Court’s vacillation on the exact meaning and role of purposeful availment) (cited in note 59). Dayton points out: “The three *Asahi* opinions are suggestive of a fundamental disagreement among the justices concerning the meaning of purposeful availment and its relevance to jurisdictional analysis.” *Id.* at 268.

⁸⁵ *Asahi Metal Industry v Superior Court of California*, 480 US 102, 115-16 (1987) (Justice Brennan explained this is “one of those rare cases in which ‘minimum requirements . . .’ defeat the reasonableness of jurisdiction even though the defendant purposefully engaged in forum activities.”).

B. The Reasonableness Inquiry

When we apply the reasonableness test's factors, personal jurisdiction over the small BBS operator offends "traditional notions of fair play and substantial justice." In contrast, jurisdiction seems proper in the case of the large BBS operator.

The main reason personal jurisdiction over the small BBS operator offends fair play and substantial justice is the extent of the "burden on the defendant." As noted in *World-Wide Volkswagen*, the burden on the defendant is "always a primary concern."⁸⁶

The Supreme Court elaborated on the burden issue in *Burger King v Rudzewicz*.⁸⁷ The Court expressed concern about asserting personal jurisdiction over out-of-state consumer defendants.⁸⁸ The Court commented on the perceived impropriety of exercising jurisdiction over "out-of-state consumers" to collect payments on "modest personal purchases."⁸⁹ The Court explained that the Due Process Clause is sufficiently flexible to "prevent rules that would unfairly enable [plaintiffs] to obtain default judgments against unwitting customers."⁹⁰

The *Pres-Kap* court applied this concern for "out-of-state consumer" defendants to out-of-state computer database users. The *Pres-Kap* court, in denying the forum state personal jurisdiction over the defendant computer-system user,⁹¹ explained: "Such a result . . . is wildly beyond the reasonable expectations of such computer-information users, and, accordingly, the result offends traditional notions of fair play and substantial justice."⁹²

The small BBS operator is analogous to the "out-of-state consumer" discussed in *Burger King*, and the "out-of-state computer-system user" discussed in *Pres-Kap*. The BBS operator may establish a BBS easily from her home personal computer⁹³ without realizing the implications of what she has done. The BBS

⁸⁶ 444 US at 292.

⁸⁷ 471 US 462 (1985).

⁸⁸ Id at 485.

⁸⁹ Id.

⁹⁰ Id at 486.

⁹¹ *Pres-Kap, Inc. v System One, Direct Access, Inc.*, 636 So2d 1351, 1353 (Fla Dist Ct App 1994), review denied, *System One, Direct Access, Inc. v Pres-Kap, Inc.*, 645 So2d 455 (Fla 1994).

⁹² Id.

⁹³ Edward A. Cavazos and Gavino Morin, *Cyberspace and the Law: Your Rights and Duties in the Online World* 3 (MIT Press, 1994) (cited in note 5).

operator is as "unwitting" as the out-of-state consumer who makes small purchases.

It is unreasonable to require the small BBS operator to defend suit in the user's forum state.⁹⁴ The Due Process Clause should protect ordinary BBS operators just as it protects out-of-state consumers and out-of-state computer-system users.

C. Justice O'Connor's Stream-of-Commerce Framework

Courts should recognize that setting up a BBS without any other action is not sufficient to establish purposeful availment. This idea is based on Justice O'Connor's recognition that placing a product in the stream of commerce is not sufficient to establish minimum contacts.⁹⁵ Additional conduct should be required to meet the purposeful availment requirements. Only then will the purposeful availment inquiry produce reasonable results.

The stream-of-commerce theory is applicable to the BBS operator scenario. Just as a manufacturer injects goods into the stream of commerce, a BBS operator injects the BBS into the stream of cyberspace. A manufacturer may be unaware of exactly where the goods will end up. Likewise, the BBS operator may be unaware of the locations of users who access the BBS. The manufacturer knows, however, that its goods may end up in other jurisdictions. Similarly, the BBS operator knows her BBS may be accessed by users in other states.

Applying Justice O'Connor's version of the stream-of-commerce theory, courts can focus on the extent of "additional conduct" and easily separate the personal jurisdiction inquiry as it applies to small or large BBS operators. A large operator will likely possess sufficient "additional conduct" to constitute purposeful availment. This includes anything from advertising in the forum state to marketing through a sales agent in the forum state.⁹⁶ A small operator will likely lack the necessary "additional conduct." A small BBS operator sets up the system at his computer terminal at home and stops at that point.

⁹⁴ However, some scholars disagree with the notion that compelling a defendant to litigate away from the defendant's home state could ever offend due process. See David Seidelson, *Jurisdiction Over Nonresident Defendants: Reprise*, 4 *Widener J Pub L* 199, 226-27 (1994) (arguing that the "inconvenience" should be placed on the defendant since, as a result of the defendant's action or inaction the plaintiff has suffered an actionable wrong.).

⁹⁵ *Asahi Metal Industry*, 480 US at 112.

⁹⁶ See the examples of additional conduct, listed in Part I.B.1 of this Comment.

While Justice O'Connor's version of the stream-of-commerce theory has been criticized,⁹⁷ her framework still is best for this situation. The criticism rests primarily on the fact that plaintiffs have been unable to obtain personal jurisdiction over foreign⁹⁸ and United States⁹⁹ manufacturers.¹⁰⁰ Keeping ordinary BBS operators free from defending suit in a another forum state, however, is desirable to encourage the establishment of more BBSs and the free flow of such communications. The user plaintiff would not be denied the right to file an action, but could only do so in the BBS operator's forum.

CONCLUSION

United States v Thomas provides an example of a personal jurisdiction issue that will likely arise with some frequency for BBS operators in civil suits. The notion of small BBS operators being dragged across the country to defend suit arguably offends notions of fair play and substantial justice.

The courts should use Justice O'Connor's version of the stream-of-commerce theory to assess whether a BBS operator purposefully availed herself of the BBS user's forum state. The Due Process Clause protects those small BBS operators who do nothing else but establish a BBS system while seated at their home computer terminals. By focusing on the "additional conduct" of a BBS operator, a court would protect the ordinary computer user. It may be that the second prong, the reasonableness analysis, saves those small BBS operators where the purposeful availment prong of the analysis fails. If courts use an initial framework which better fits the situation, however, the analysis will be much more sound.

⁹⁷ See Russell J. Weintraub, *Symposium: Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction: A Map Out of the Personal Jurisdiction Labyrinth*, 28 UC Davis L Rev 531, 554-55 (1995).

⁹⁸ See, for example, *Parry v Ernst Home Center*, 779 P2d 659 (Utah 1989) (holding that exercise of personal jurisdiction over a Japanese manufacturer would violate due process); *Wiles v Morita Iron Works Co.*, 125 Ill 2d 144, 530 NE2d 1382 (Ill 1988) (holding that a Japanese manufacturer is not subject to long-arm jurisdiction in Illinois).

⁹⁹ See, for example, *Lesnick v Hollingsworth & Vose Co.*, 35 F3d 939 (4th Cir 1994), *cert denied*, 115 S Ct 1103 (1995) (holding that a federal district court in Maryland did not have jurisdiction over a Massachusetts corporation which manufactured cigarette filters containing asbestos); *Boit v Gar-Tec Products, Inc.*, 967 F2d 671 (1st Cir 1992) (holding "mere awareness" that product may end up in forum state did not permit district court to exercise personal jurisdiction over out-of-state manufacturer under Maine long-arm statute).

¹⁰⁰ *Id.*