

**YOUTUBING DOWN THE STREAM OF
COMMERCE: ELIMINATING THE EXPRESS
AIMING REQUIREMENT FOR PERSONAL
JURISDICTION IN USER-GENERATED
INTERNET CONTENT CASES**

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ABSTRACT

The past few years have seen an explosion in the popularity of online social networks and availability of user-generated Internet content. The growing pervasiveness of user-generated Internet content combined with its potential to cause harm has created an urgent need for courts to reexamine the requirements for personal jurisdiction in Internet cases. Many courts require express aiming to the forum state to uphold personal jurisdiction in cases of harmful online communication. Under an express aiming requirement, the defendant must have purposely directed the harmful activity to the forum state. The unique nature of the Internet, however, gives instant access to potentially harmful communication anywhere in the world. Requiring express aiming in the context of user-generated Internet content does not adequately account for the technological reality that anyone can access the Internet from anywhere. Therefore, due process may allow personal jurisdiction in the forum state without express aiming of Internet content.

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I. INTRODUCTION

Imagine that you are a music teacher who maintains a profile on Facebook to connect with your friends and the parents of your students.² One day you discover that someone has changed your profile to include unflattering pictures and false statements about you.³ Parents who have viewed the profile cancel their children's music lessons.⁴ You want to seek damages; the problem is that the person responsible changed your profile from a computer in Florida, and you live in Connecticut.⁵ Can you file suit in Connecticut, where your reputation was damaged and where most of your evidence is, or must you travel to Florida?⁶ Should your ability to pursue your remedy hinge upon whether you have the resources to bring the litigation to the defendant's forum?⁷ Should it matter whether the defendant knew that you lived in Connecticut?⁸

The past few years have seen an explosion in the popularity of online social networks and availability of user-generated Internet

² Cf. *Davidoff v. Davidoff-Feld*, 819 N.Y.S.2d 209, 209 (N.Y. Sup. Ct. 2006) (describing plaintiff's use of the website to show pictures to family and provide résumé to clients); *Firsht v. Raphael* [2008] EWHC 1781, 2008 WL 2872534 ¶¶ 3, 79 (Q.B.D.) (U.K.) (awarding damages for defamation when defendant created a false Facebook profile in plaintiff's name).

³ See, e.g., *Davidoff*, 819 N.Y.S.2d at 209 (summarizing claim for damages when defendants replaced plaintiff's website files with an unflattering photo and statements).

⁴ Cf. *Medinah Mining, Inc. v. Amunategui*, 237 F. Supp. 2d 1132, 1135–36 (D. Nev. 2002) (describing plaintiff's allegation that defendant's defamatory Internet posting caused devaluation of plaintiff's stock).

⁵ See Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U.L. REV. 473, 473 (2004) (describing a common scenario in online defamation cases). "People write lots of nasty stuff about each other and publish it on the Internet. Sometimes the targets of these publications sue for defamation. Usually the targets want to sue at home and most of the time the defendants live elsewhere." *Id.*

⁶ See RICHARD D. FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS* 71 (4th ed. 2005) (noting the expense involved in shipping evidence to a distant forum).

⁷ See Jennifer Meredith Liebman, *Defamed by a Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U. ILL. J.L. TECH. & POL'Y 343, 365 (discussing the role of a party's financial strength in online defamation cases).

⁸ Cf. *Revell v. Lidov*, 317 F.3d 467, 475 (5th Cir. 2002) (noting that the defendant in an online defamation case did not know where the plaintiff lived). The court found that the defendant's general knowledge that the plaintiff would experience harm where the plaintiff lived was not enough to support jurisdiction in the forum state. See *id.* at 476 (requiring direct aim to forum state). For a discussion of *Revell*, see *infra* notes 162–64 and accompanying text.

content.⁹ Vast numbers of users now routinely create blogs, social networking profiles, and digital video clips.¹⁰ This user-generated Internet content, like any form of communication, may injure others.¹¹ Recent examples of such harm include defamation through online social networks, such as Facebook, and message boards, such as AutoAdmit.com, and even threats to public safety through digital video sharing websites, such as YouTube.¹² The growing pervasiveness of user-generated Internet content combined with its potential to cause harm has created an urgent need for courts to reexamine the requirements for personal jurisdiction in Internet cases.¹³

Courts must have personal jurisdiction over defendants to

⁹ See David Kirkpatrick, *Help Wanted: Adults on Facebook*, CNN MONEY, Mar. 21, 2008, http://money.cnn.com/2008/03/21/technology/kirkpatrick_facebook.fortune/index.htm (discussing expanding the demographic appeal of Facebook among different age groups and countries); Melanie Lindner, *What are People Actually Doing on the Web?*, FORBES, Aug. 20, 2008, http://www.forbes.com/2008/08/20/google-yahoo-microsoft-ent-tech-cx_ml_0820_wheregoweb.html (noting the rapid increase in use of online social networking).

¹⁰ See Lindner, *supra* note 9 (stating that YouTube was the sixth most visited website with 75 million visitors and Facebook was the sixteenth with 34 million visitors). This was an over eight-fold increase compared to the traffic on Facebook's precursor site in July 2005. *Id.*

¹¹ See, e.g., *Dailey v. Popma*, 662 S.E.2d 12, 14 (N.C. Ct. App. 2008) (summarizing allegedly defamatory Internet bulletin board postings). In *Dailey*, the complaint stated that the postings included an accusation that the plaintiff was "the equivalent of a molester of boys . . ." *Id.* See also Kyle D. Johnson, Note, *Measuring Minimum Contacts Over the Internet: How Courts Analyze Internet Communications to Acquire Personal Jurisdiction Over the Out-of-State Person*, 46 U. LOUISVILLE L. REV. 313, 314 (2007) (noting the current potential for torts to be committed entirely online).

¹² See, e.g., *Firsht v. Raphael* [2008] EWHC 1781, 2008 WL 2872534 ¶ ¶ 3, 79 (Q.B.D.) (U.K.) (awarding damages for a fake Facebook profile that damaged plaintiff's reputation); Ryan Singel, *Yale Students' Lawsuit Unmasks Anonymous Trolls, Opens Pandora's Box*, WIRED, July 30, 2008, <http://www.wired.com/politics/law/news/2008/07/autoadmit> (describing allegedly defamatory statements about female law students on a Web message board); Edith Honan, *New York Man Arrested for YouTube Baby Food Threat*, REUTERS, July 31, 2008, (Eric Walsh ed.) <http://www.reuters.com/article/InternetNews/idUSN3134933120080731?feedType=RSS%20target=> (describing threatening videos posted on YouTube). In YouTube videos, a man in a mask "claimed that Gerber employees acting at his direction had poisoned millions of bottles of baby food . . ." *Id.*

¹³ See C. Douglas Floyd & Shima Baradaran-Robison, *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, 602 (2006) (noting confusion among courts on the application and interpretation of personal jurisdiction tests in new contexts); Johnson, *supra* note 11, at 314 (noting the lack of Supreme Court guidance in determining jurisdiction pursuant to Internet communication).

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issue binding judgments on them.¹⁴ Due process requires that jurisdiction be reasonable.¹⁵ The borderless world of the Internet challenges the understanding and importance of state borders in jurisdictional analyses.¹⁶ Traditionally, because a state would not reach beyond its physical borders to assert jurisdiction over a non-resident defendant, due process additionally required that the defendant have a presence in the forum state.¹⁷ Modern approaches to personal jurisdiction have shifted to a minimum contacts-based analysis and no longer require presence within a state, although borders remain important.¹⁸ In today's society, however, blogs, online social networks, and YouTube dominate social interactions, reducing the impact of physical boundaries on how people interact and see the world.¹⁹

¹⁴ See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”). See also A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 621, 629 (2006) [hereinafter Spencer I] (summarizing the role of the Due Process Clause as both requiring jurisdiction and notice and also preventing states from exercising jurisdiction arbitrarily).

¹⁵ See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (requiring reasonableness as part of jurisdictional analysis); A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 73 (2006) [hereinafter Spencer II] (noting that traditional jurisdictional analysis includes a reasonableness element); 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, 1152 (2005) (noting the due process requirement of reasonableness for asserting personal jurisdiction).

¹⁶ See *Dailey*, 662 S.E.2d at 14 (“The internet presents unique considerations when it comes to issues of personal jurisdiction.”); Susan Nauss Exon, *Personal Jurisdiction: Lost in Cyberspace?*, 8 COMP. L. REV. & TECH J. 21, 22–23 (2003) (noting that the Internet has created a need to redefine space and to examine the application of jurisdictional frameworks that developed from traditional concepts of space and boundaries). Cf. *Kauffman Racing Equip., L.L.C. v. Roberts*, No. 07-CA-14, 2008 Ohio App. LEXIS 1695, at *13 (Ohio Ct. App. Apr. 18, 2008) (“A non-resident defendant who avails himself of the expansive reach of the Internet should not be able to use his non-residency as a shield against defending tortious activity against a plaintiff harmed in a different state.”).

¹⁷ See *Pennoyer v. Neff*, 95 U.S. 714, 722–23 (1877) (holding that non-residents must either be present in the forum or have property present in the forum for jurisdiction to be appropriate there). See also Yokoyama, *supra* note 15, at 1151, (stating that the *Pennoyer* decision “considered presence in the forum state to be the *sine qua non* standard for personal jurisdiction”).

¹⁸ See *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (noting that minimum contacts with the forum state can support jurisdiction over a non-resident defendant who is not present in the forum state). See also Exon, *supra* note 16, at 21–23 (noting the reduced importance of state borders in personal jurisdiction analyses).

¹⁹ See *Doe v. Geller*, 533 F. Supp. 2d 996, 1001 (N.D. Cal. 2008) (noting free,

User-generated Internet content is borderless, and courts must determine where to hold parties accountable for that content.²⁰ Many courts require express aiming to the forum state to uphold personal jurisdiction in cases of harmful online communication.²¹ Under an express aiming requirement, the defendant must have purposely directed the harmful activity to the forum state.²² The unique nature of the Internet, however, gives instant access to potentially harmful communication anywhere in the world.²³ Requiring express aiming in the context of user-generated Internet content does not adequately account for the technological reality that anyone can access the Internet from anywhere.²⁴ Additionally, express aiming does not uphold the

global availability of video files on YouTube). Individuals can upload family videos to YouTube to share with relatives across the country. *Id.* Also, organizations can use YouTube to provide cheap, efficient mass distribution for their ideas and messages. *Id.*

²⁰ See, e.g., *Minn. Pub. Radio v. Va. Beach Educ. Broad. Found., Inc.*, 519 F. Supp. 2d 970, 979 (D. Minn. 2007) (holding that accepting MySpace friends from Minnesota does not establish jurisdiction there); *Yokoyama*, *supra* note 15, at 1148 (noting that courts face difficulty in applying traditional jurisdictional analysis to Internet activities).

²¹ See *Young v. New Haven Advocate*, 315 F.3d. 256, 264 (4th Cir. 2002) (refusing to exercise jurisdiction over defendants who did not manifest an intent to target an audience in the forum state). For a discussion of *Young*, see *infra* note 124 and accompanying text. See also *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (noting that the Internet posting did not specifically target readers in the forum state). For a discussion of *Revell*, see *infra* notes 162–64 and accompanying text.

²² See *Young*, 315 F.3d. at 262–63 (requiring “proof that the out-of-state defendant’s Internet activity is expressly targeted at or directed to the forum state.”). For a discussion of *Young*, see *infra* note 124 and accompanying text. *But see* *Floyd & Baradaran-Robison*, *supra* note 13, at 618 (noting the ambiguity regarding the level of intent that express aiming requires to support jurisdiction in the forum state).

²³ See Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1347 (2001) (noting that website owners may subject themselves to the risk of jurisdiction outside of their forum due to instant worldwide access to information over the Internet).

²⁴ See *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (holding that advertising on the Internet is an action directed at all states). In *Inset*, the plaintiff, a Connecticut corporation, alleged that the defendant, a Massachusetts corporation, had used the name “Inset” as its Internet domain name in violation of the plaintiff’s trademark. *Id.* at 162–63. The court found that jurisdiction in Connecticut was proper because the defendant’s Internet advertising was continually and purposefully directed there, and therefore, the defendant could reasonably foresee being haled into court there. *Id.* at 165. The court noted that “once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. [The defendant] has therefore, purposefully availed itself of the privilege of doing business within Connecticut.” *Id.*

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interest of a state to provide a forum for citizens who experience harm in the state.²⁵ Therefore, due process may allow personal jurisdiction in the forum state without express aiming of Internet content.²⁶

User-generated Internet content can harm individuals who have a strong interest in obtaining relief, but may not have the resources required to pursue litigation in a different forum.²⁷ If someone harms you through a defamatory communication, conventional wisdom dictates that you have a right to seek damages.²⁸ Should this be different if the communication is online?²⁹ The easy answer is that you have a right to seek a remedy regardless of the medium through which you were harmed.³⁰ In the case of user-generated Internet content, however, the defendant may have posted a harmful communication while sitting at a computer across the country.³¹ You may have a right to a remedy, but can you exercise that right where you were harmed, or must you go to the defendant's residence to seek justice?³² If you lack the resources to litigate in a forum across the country, your right to a remedy may be a right in name only.³³

²⁵ See Spencer I, *supra* note 14, at 645 (“Where a nonresident defendant acts in such a way so as to adversely affect affairs within a state, disputes arising therefrom are something that a state has a clear interest in resolving; such an interest justifies jurisdiction . . .”) (citations omitted).

²⁶ See *id.* at 618–20, 622–23 (criticizing current personal jurisdiction jurisprudence for its reliance on purposeful availment and reasonableness).

²⁷ See FREER & PERDUE, *supra* note 6, at 71–72 (noting that litigation in a distant forum can generate additional expenses for a litigant).

²⁸ See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS 932 (10th ed. 2000) (noting that damages are the main remedy for defamation).

²⁹ See Borchers, *supra* note 5, at 480 (“To say that jurisdiction exists when the publication is in the physical form and not over the Internet would be to attribute constitutional significance to the difference between making the information appear in printed form versus on a computer screen.”).

³⁰ See Spencer I, *supra* note 14, at 657 (noting that state interest in litigation of defamation claims does not vary based on the type of media used to defame).

³¹ See, e.g., *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) (holding that jurisdiction was not proper in Texas over a defendant who posted allegedly defamatory online material from Massachusetts). For a discussion of *Revell*, see *infra* notes 162–64 and accompanying text.

³² Cf. *Calder v. Jones*, 465 U.S. 783, 790 (1984) (“An 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.”). For a discussion of *Calder*, see *infra* note 122 and accompanying text.

³³ See Geist, *supra* note 23, at 1377 (recognizing that if local adjudication is not available, plaintiffs will encounter difficulty in pursuing litigation against Internet defamers).

This Comment discusses the current state of personal jurisdiction jurisprudence with respect to user-generated Internet content, and suggests that due process should not require express aiming of Internet content to support jurisdiction over a non-resident defendant.³⁴ Part II describes the current, potentially harmful phenomenon of user-generated Internet content through blogs, online social networks, such as Facebook, and digital video sharing websites, such as YouTube.³⁵ Part III discusses the development of personal jurisdiction jurisprudence in view of due process concerns and the Internet.³⁶ Part IV suggests that, due to current knowledge of the global reach of the Internet, courts should not require express aiming of user-generated Internet content to establish personal jurisdiction.³⁷ Instead, courts should charge defendants with the knowledge that harmful online communication is globally available and will harm the plaintiff in whatever forum the plaintiff is present, and therefore, a defendant should reasonably foresee the possibility of being haled into court in that forum.³⁸

II. USER-GENERATED INTERNET CONTENT AND ITS POTENTIAL FOR HARM

A. Introduction

The Internet changed the way that individuals communicate.³⁹ The recent explosion in user-generated Internet content has

³⁴ This Comment focuses primarily on publically available user-generated Internet content, rather than content restricted to private users.

³⁵ For a discussion of types of user-generated Internet content, *see infra* notes 45–74 and accompanying text. For a discussion of user-generated Internet content’s potential for harm, *see infra* notes 75–97 and accompanying text.

³⁶ For a discussion of the development of personal jurisdiction and the Internet, *see infra* notes 98–140 and accompanying text.

³⁷ For an analysis of the reasonable foreseeability of user-generated Internet content causing harm in a plaintiff’s forum, *see infra* notes 148–167 and accompanying text. For an analysis comparing Internet communication with products in the stream of commerce, *see infra* notes 168–186 and accompanying text. For a discussion of additional due process considerations, *see infra* notes 187–208 and accompanying text.

³⁸ *See* Spencer II, *supra* note 15, at 108 (“[W]rongdoers should anticipate being sued where their victims are located and suffer harm, whether they employ the Internet to do so or not.”).

³⁹ Yokoyama, *supra* note 15, at 1148 (stating that Internet “unleash[ed] permanent changes in information dissemination, communication, and commerce.”).

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changed the way that people view the Internet.⁴⁰ Rather than corporations or groups maintaining websites, now individuals have the ability to easily post content that users can view anywhere.⁴¹ The ease and speed with which individuals can now communicate has created a new era of social interactions through user-generated Internet content.⁴² Types of user-generated Internet content include blogs, online social networks, and digital video sharing websites.⁴³ As part of the fabric of everyday life of a new generation, these new forms of communication can bring dangers that are reminiscent of older forms of communication, but which raise unique jurisdictional implications through their manifestation in an online world without boundaries.⁴⁴

B. Blogs

One type of user-generated Internet content is the blog, which is a type of online journal that a blogger frequently updates with new content, and readers just as frequently check for such updates.⁴⁵ One commentator notes that individuals “use blogs as

⁴⁰ See Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 13 (2007) [hereinafter Abril I] (noting the role of online social networks as not merely a tool of communication, but also a place where communication occurs); Liebman, *supra* note 7, at 343 (noting the increased reliance on communication through blogs in comparison to other forms of media); Cf. Lev Grossman, *Time’s Person of the Year: You*, TIME, Dec. 13, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1569514,00.html> (comparing the new era of user-generated Internet content to previous Internet use). The reach of user-generated Internet content caused Time magazine to select “you” as its Person of the Year for 2006. See *In the Face of Danger: Facial Recognition and the Limits of Privacy Law*, Notes, 120 HARV. L. REV. 1870, 1873 (2007); *Time Says You’re the ‘Person of the Year,’* ABC NEWS, Dec. 17, 2006, <http://abcnews.go.com/GMA/Technology/story?id=2732601> (“In an age where MySpace, YouTube and blogs rule, Time chose to recognize the power of the common people who create and use content on the Internet.”).

⁴¹ See Abril I, *supra* note 40, at 5 (observing the role of online social networks in distributing user-generated content); Liebman, *supra* note 7, at 343 (noting individuals’ use of blogs as communication tools).

⁴² See Abril I, *supra* note 40, at 5 (“Uninhibited users of these social technologies . . . routinely post online titillating videos and photographs, disclose their personal information (and that of others), and document their daily lives and thoughts.”).

⁴³ See *id.* at 2–3 (describing three possible scenarios regarding individuals posting content on online social networks, blogs, and digital video sharing networks).

⁴⁴ See *id.* at 13 (noting the constant availability of online social networks, and the rapid growth attributed to users under thirty years old).

⁴⁵ See Liebman, *supra* note 7, at 353 (differentiating blogs from other types of online media due to the frequent updating of blog content).

a means of self-expression, social networking, and providing and receiving information.”⁴⁶ Blogs may be more or less interactive, depending on the extent to which the blogger allows comments posted by others to appear on the blog.⁴⁷ Some bloggers allow all comments, some screen comments, and some do not allow comments at all.⁴⁸

Although similar to other forms of communication, blogs have some distinctive aspects.⁴⁹ Unlike printed journals, blogs exist on the Internet; therefore, readers can access them anywhere at minimal cost.⁵⁰ Unlike traditional, static websites, blogs are predicated on their capacity for updating and adding information.⁵¹ Unlike traditional Internet chat rooms and bulletin boards, a single individual or group usually generates most of the content and exhibits some level of control over the material displayed.⁵²

Blogs raise some unique causes for concern.⁵³ Blogs, with low cost barriers to entry, little editing, and minimal access to legal advice, operate in stark contrast to print media.⁵⁴ Compared to newspapers, blogs may be quicker and cheaper to run, but are more likely to contain inaccurate material and less likely to account for potential liability for posting comments.⁵⁵

C. Online Social Networks

Online social networks, typified by MySpace and Facebook, are

⁴⁶ *Id.* at 343.

⁴⁷ *See id.* at 350 (noting that many blogs allow readers to generate responsive posts).

⁴⁸ *Id.* at 350–51 (describing the variety of editorial controls available to bloggers).

⁴⁹ *See id.* at 353 (summarizing the similarities and differences between blogs and other media forms).

⁵⁰ *See id.* at 351 (noting that blogs provide individuals with easy, cost-effective access to mass communication).

⁵¹ *See id.* at 353 (noting the increased likelihood of repeated reader visits to blogs compared to traditional websites).

⁵² *See id.* (noting bloggers’ creative and editorial control over content posted on a blog).

⁵³ *See id.* at 351–52 (discussing the potentially harmful attributes of blogs).

⁵⁴ *See id.* at 351 (summarizing the differences between blogs and print media).

⁵⁵ *See id.* at 351–52 (distinguishing between blogs and print media, and discussing the implications of both). Although some bloggers engage in similar fact-checking practices to print journalists, the average blogger is unlikely to meet as rigorous a standard. *See id.* at 352 (noting the absence of editorial review in most blogs).

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a second type of user-generated Internet content.⁵⁶ Online social networks are extremely popular, revolutionary communication tools in modern society.⁵⁷ Users easily create and maintain personal profiles, which include text and pictures.⁵⁸ Users can adjust privacy settings to determine which other users can view their profiles.⁵⁹ Through the network, users can join various social groups, engage in instant messaging with other users, and post comments on other users' profiles.⁶⁰ Users may establish social groups for any and all shared interests.⁶¹

Online social networks present a large potential for harm to individuals.⁶² For example, in the past, middle school students might spread rumors about their teachers by whispering in the lunchroom; now, they can create false MySpace profiles in their teachers' names and broadcast rumors to the world.⁶³ Moreover, in a generation where online social networks have replaced physical social networks, the easy exchange of information

⁵⁶ See Patricia Sanchez Abril, *Perspective: A (My)Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73, 73–74 (2007) [hereinafter Abril II] (noting the role of social networking sites in facilitating communication).

⁵⁷ See Abril I, *supra* note 40, at 15 (“MySpace . . . has revolutionized the way people of an entire generation self-identify, socialize, and communicate online and offline. Unlike earlier online communities where anonymous members came together to discuss topics of common interest, today’s [online social network] users create multimedia showcases of themselves to interact with others.”).

⁵⁸ See *id.* at 13–14 (describing the content of online social networking profiles); *Doe v. MySpace Inc.*, 528 F.3d 413, 415 (5th Cir. 2008) (listing the types of material found in MySpace profiles).

⁵⁹ *Doe*, 528 F.3d at 415 (noting that MySpace allows users to restrict access to their profiles); Abril I, *supra* note 40, at 14–15 (describing privacy settings on social networking profiles).

⁶⁰ *Doe*, 528 F.3d at 416 (describing the interactive features of MySpace); Abril II, *supra* note 56, at 74 (summarizing the variety of communication types available through online social networks).

⁶¹ *Doe*, 528 F.3d at 416 (noting that MySpace users can join groups based on common interests); Facebook Groups, <http://www.new.facebook.com/apps/application.php?id=2361831622&b=> (last visited May 19, 2009) (“With Facebook Groups, you can join and create up to 200 groups. Groups can be based around shared interests, activities, or anything you like.”).

⁶² See Abril II, *supra* note 56, at 75 (“A person’s digital dossier can betray him in the physical world, resulting in harms like the denial or loss of employment, shame and embarrassment, denigration of reputation, or merely exposure in an unwanted light.”).

⁶³ See *J.S. v. Blue Mountain Sch. Dist.*, No. 307cv585, 2007 WL 954245, at *1 (M.D. Pa. Mar. 29, 2007) (involving middle school students who created a false MySpace profile of their school principal, claiming he was a sex addict who hit on students).

coupled with the permanence and pervasiveness of the Internet raises privacy concerns.⁶⁴ Indeed, one commentator states that the new online social networking landscape has the potential for “more noxious privacy and personality harms than ever before.”⁶⁵

D. Digital Video Sharing Websites

YouTube, an extremely popular website where users upload and share digital video clips, typifies the digital video sharing website, a final type of user-generated Internet content.⁶⁶ The practice of sharing among users and the global availability of video content are key attributes of YouTube.⁶⁷ Indeed, YouTube’s own website fact sheet states that “[a]s more people capture special moments on video, YouTube is empowering them to share their experiences, talents, and expertise with the world.”⁶⁸ YouTube hosts digital video content that spans many genres.⁶⁹ Types of posted content include personal videos, professional artistic performances, amateur films, and advertisements.⁷⁰ YouTube invites each Internet user to “Broadcast Yourself,” and that is just what millions of people are doing.⁷¹

Digital video sharing websites raise new privacy concerns because, unlike in the pre-Internet era when logistics limited the reach of an embarrassing moment caught on film, with the advent of YouTube, millions of video clips are viewable, searchable, and downloadable anywhere there is Internet access.⁷² Additionally, millions of people with digital cameras

⁶⁴ See Abril II, *supra* note 56, at 75 (discussing the qualities of digital media that make dissemination of potentially harmful information both permanent and easily accessible).

⁶⁵ *Id.*

⁶⁶ See Lindner, *supra* note 9 (observing the popularity of YouTube’s user-generated online video content).

⁶⁷ See YouTube Fact Sheet, http://www.youtube.com/t/fact_sheet (last visited May 19, 2009) (noting the role of YouTube in providing a global video sharing community).

⁶⁸ *Id.*

⁶⁹ See *id.* (“Everyone can participate in the YouTube community by watching, sharing, and commenting on videos. People can see first-hand accounts of current events, relive their favorite TV moments, find videos about their hobbies and interests, discover new artists and filmmakers, and even uncover the quirky and unusual.”).

⁷⁰ See *id.* (summarizing the variety of digital video clips available through YouTube).

⁷¹ See *id.* (noting the status of YouTube as the most popular video sharing site, with millions of users).

⁷² See Abril II, *supra* note 56, at 75 (noting that features of digital

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and cell phones have the capability to create digital videos at a moment's notice.⁷³ The combination of easy video creation and easy video sharing creates a vast, globally accessible library of digital clips that have the potential to inflict harm.⁷⁴

E. Implications of User-Generated Internet Content's Potential for Harm

Online communication, like any communication, can cause harm.⁷⁵ User-generated Internet content can generate many types of harm, including defamation and threats.⁷⁶ By nature, user-generated Internet content is ubiquitous, easily accessible, instant, and permanent; these attributes give the content a unique potential to cause harm.⁷⁷ Moreover, legislative limitations may prevent an individual from seeking a remedy against an intermediary Internet service provider for harmful user-generated Internet content.⁷⁸ If jurisdictional requirements

information, such as permanence and searchability, contribute to the privacy dangers of online sharing).

⁷³ See CTIA, 100 Wireless Facts, <http://www.ctia.org/content/index.cfm/AID/10386> (last visited May 19, 2009) (citing statistic that consumers in North America purchased over 100 million camera phones in 2006); Flickr, Tour: Upload, <http://www.flickr.com/tour/upload/> (last visited May 19, 2009) (inviting users who are away from computers to “[s]nap a photo or video on your mobile phone, email it to Flickr, and have it appear on the site in seconds.”).

⁷⁴ See Flickr, Tour: Share, <http://www.flickr.com/tour/share/> (last visited May 19, 2009) (describing the popularity and ease of video and photo sharing). “With millions of users, and hundreds of millions of photos and videos, Flickr is an amazing photographic community, with sharing at its heart. Groups are a way for people to come together around a common interest . . . [and] . . . it’s super-easy to start your own.” *Id.*

⁷⁵ See, e.g., *J.S. v. Blue Mountain Sch. Dist.*, No. 307cv585, 2007 WL 954245, at *1 (M.D. Pa. Mar. 29, 2007) (describing the false Facebook profile of a middle school principal). For an additional discussion of *J.S.*, see *supra* note 63 and accompanying text. See also Liebman, *supra* note 7, at 343 (noting that both blogs and traditional media can defame).

⁷⁶ See, e.g., *Firsht v. Raphael* [2008] EWHC 1781, 2008 WL 2872534 ¶¶ 3, 68, 78–79 (Q.B.D.) (U.K.) (finding defamation for a false Facebook profile); Honan, *supra* note 12 (describing video threats posted on YouTube).

⁷⁷ See *In the Face of Danger: Facial Recognition and the Limits of Privacy Law*, *supra* note 40, at 1873 (“What is celebrated about the Internet is the power it gives individuals to shape media and culture Since a strength of the Internet is its democratic, peer-to-peer nature, it is only logical that dangers would also emerge from that power.”); Singel, *supra* note 12 (describing the world of online commentary “where arguments live on for years in search-engine results and where reputations can be sullied nearly irreparably by anyone with a grudge, a laptop and a WiFi connection.”).

⁷⁸ See Communications Decency Act (CDA), 47 U.S.C. § 230(c)(1) (1996) (denying third party liability for Internet postings). For a discussion of the

bar such individuals from pursuing damages against non-resident defendants who initially posted the content, those individuals may be left without an adequate avenue for redress.⁷⁹

User-generated Internet content has created a variety of unique possibilities for harmful communication.⁸⁰ In a recent defamation case in England, a businessman prevailed in getting damages after an estranged friend posted a false Facebook profile of him.⁸¹ In one example of harm through digital video sharing, a man posted video threats on YouTube claiming that he had orchestrated a mass poisoning of baby food.⁸² In another example, a woman in the midst of a heated divorce posted a video describing a variety of intimate and embarrassing details of her marital life.⁸³

In addition to providing unique mechanisms to cause harm, user-generated Internet content can harm individuals through several factors related to its very nature.⁸⁴ First, Internet communication is accessible anywhere and, as such, has a reach

CDA, *see infra* note 94 and accompanying text. *See also* Liebman, *supra* note 7, at 372–73 (“[CDA] precludes many purveyors of online interactive media from liability for defamation in order to protect the free flow of information on the Internet. Nonetheless, this first interest competes with the interest that victims of defamatory online content have in seeking remedies.”) (citations omitted).

⁷⁹ *See* Liebman, *supra* note 7, at 364 (summarizing obstacles to bringing defamation claims against bloggers).

⁸⁰ *See id.* at 344 (noting the impact of interactive online content on interpretation of defamation torts).

⁸¹ *See Firsht*, EWHC 1781 ¶¶ 3, 78–79.

⁸² *See Honan*, *supra* note 12.

⁸³ *See Man Wins Divorce from Angry Wife in YouTube Video*, FOX NEWS, July 22, 2008, <http://www.foxnews.com/story/0,2933,388161,00.html> (describing circumstances of divorce and estranged wife’s YouTube video). The judge noted that the estranged wife used the digital video to embarrass and exert pressure on her husband. *See id.*

⁸⁴ *See In the Face of Danger: Facial Recognition and the Limits of Privacy Law*, *supra* note 40, at 1870 (discussing the impact of the Internet on the potential undesired spread of digital photos). “[B]illions of photos . . . would be of little concern if they were simply stored in shoeboxes. Before the Internet, ‘[p]rivate individuals did not possess or have access to instruments for widely disseminating information’; today, people can share news, messages, and photos instantaneously.” *Id.* (quoting Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 889 (2006)). *See also* Abril II, *supra* note 56, at 78 (describing the changing assumption of control in a “world where ubiquitous tiny cameras can easily capture and widely disseminate images without consent or bloggers can unilaterally defame individuals without opportunity for rebuttal or editorial restraint.”).

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far beyond traditional spoken or print communication.⁸⁵ Second, affordability and ease of production are hallmarks of user-generated Internet content that may facilitate harms.⁸⁶ In addition, user-generated Internet content's capability for instant communication may lead individuals to exercise less forethought prior to publishing material.⁸⁷ Finally, unlike paper, which can be destroyed, or speech, which can be forgotten, Internet communication is continuous and permanent.⁸⁸ One commentator emphasized the important implications that the nature of Internet content has for privacy issues, stating that "privacy harms are no longer short-lived and innocuous. The information's digital permanence, searchability, replicability, transformability, and multitude of often unintended audiences make its effects more damaging than ever. Lacking the relative transience of human memory, the digital record has increased the stakes of privacy today. . . ."⁸⁹

Through the mechanisms and factors described above, user-generated Internet content has the capacity to harm individuals in distant forums.⁹⁰ This capacity for harm is significant because user-generated Internet content has taken a prominent role in the lives of individuals.⁹¹ Notwithstanding their harms, these individuals may have trouble seeking redress.⁹² For example,

⁸⁵ See Borchers, *supra* note 5, at 484 (noting that speed and universal availability of Internet content increases the chances that subjects of defamation will experience harm in the forum).

⁸⁶ See Liebman, *supra* note 7, at 351 (noting that individuals starting blogs face very low barriers to entry).

⁸⁷ See *id.* at 351–52 (noting absent or minimal editing of blogs).

⁸⁸ See *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996) ("Unlike 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."); Abril II, *supra* note 56, at 75 (describing the damaging effects of digital, permanent media). For a discussion of *Inset Systems*, see *infra* note 129 and accompanying text.

⁸⁹ Abril II, *supra* note 56, at 75.

⁹⁰ See Borchers, *supra* note 5, at 473 (noting that, in Internet defamation cases, plaintiffs and defendants may be likely to live in different states).

⁹¹ See, e.g., *In the Face of Danger: Facial Recognition and the Limits of Privacy Law*, *supra* note 40, at 1870 (describing the role of Internet photo storage in defining individuals' lives); Liebman, *supra* note 7, at 343 (summarizing the ways in which many individuals use blogs); Lindner, *supra* note 9 (noting the increasing popularity of user-generated content including YouTube, online social networks, and blogs).

⁹² See Abril II, *supra* note 56, at 78–81 (noting the lack of available avenues of resolution for online reputational injuries).

First Amendment and impartiality concerns may prevent online service providers from removing user-generated defamatory material.⁹³ In addition, the Communications Decency Act (hereinafter “CDA”) protects online service providers from liability for third party user-generated content.⁹⁴ Therefore, when a blogger defames an individual or someone uploads a threatening video onto YouTube, liability only attaches to the original poster.⁹⁵ Citizens must be able to bring a claim against that individual to seek damages.⁹⁶ Individual online content posters may be harder to hale into the plaintiff’s forum than Internet service providers; so, although the CDA supports free speech concerns, it leaves a need for policies to protect individuals.⁹⁷

III. DEVELOPMENT OF PERSONAL JURISDICTION AND THE INTERNET

Personal jurisdiction, a foundational aspect of due process, has

⁹³ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (noting that allowing liability of Internet providers for third-party postings could potentially chill online speech); *Abril II*, *supra* note 56, at 82 (“[I]n the interest of the First Amendment and maintaining their own impartial role, [online social networks] will generally not take down material that is merely embarrassing, purportedly defamatory, or shameful to its subject.”).

⁹⁴ See CDA § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

⁹⁵ See *id.*; *Zeran*, 129 F.3d at 330–32 (noting that accountability for defamatory postings attaches to the original poster); *Liebman*, *supra* note 7, at 348 (noting that only original creators of defamatory online content are liable for that content).

⁹⁶ See *Doe v. MySpace Inc.*, 528 F.3d 413, 419 (5th Cir. 2008) (“Parties complaining that they were harmed by a Web site’s publication of user-generated content have recourse; they may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online.”).

⁹⁷ See *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006) (“We acknowledge that recognizing broad immunity for defamatory republications on the Internet has some troubling consequences. Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement.”); *Abril II*, *supra* note 56, at 79–80 (noting the lack of recourse for plaintiffs alleging damage to reputation through online social networks); Sonia K. Gupta, Comment, *Bulletin Board Systems and Personal Jurisdiction: What Comports with Fair Play and Substantial Justice?*, 1996 U. CHI. LEGAL F. 519, 520 (noting a greater potential for large-scale Internet bulletin board operators to be amenable to suit in a distant state than small-scale operators).

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evolved in response to the changing needs of the country.⁹⁸ The changing role of physical boundaries has driven this evolution, which is balanced against state sovereignty concerns.⁹⁹ Initially, physical boundaries were paramount to jurisdictional determinations.¹⁰⁰ Later, jurisdictional analysis shifted this focus to the contacts between a defendant and the forum state, as well as the foreseeability of being haled into the forum state as a result of those contacts.¹⁰¹ Courts have applied personal jurisdiction analyses to cases ranging from defective products in the stream of commerce to publication of defamatory material that enters the forum state.¹⁰² Recently, as the Internet has taken a central role in modern lives, physical boundaries have faded in importance.¹⁰³ Personal jurisdiction doctrines, which are still grounded in traditional notions of physical space, must respond to this change.¹⁰⁴

⁹⁸ See *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958) (noting that increased travel created a need for increased jurisdiction over nonresidents and mitigated the inconvenience of defending suit in a distant forum); *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (“[P]roceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.”); *Spencer I*, *supra* note 14, at 625 (observing that due process requires the existence of jurisdiction for judgments to be binding and enforceable).

⁹⁹ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–93 (1980) (noting that although jurisdictional limits have relaxed over time, state sovereignty considerations remain of prime importance). *But see* *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982) (arguing that personal jurisdiction is more concerned with individual liberty interests than with federalism and state sovereignty).

¹⁰⁰ See *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (citing *Pennoyer*, 95 U.S. at 733) (noting the historic importance of defendant’s presence in the forum in justifying the State asserting power of judgment).

¹⁰¹ See *World-Wide Volkswagen*, 444 U.S. at 297 (describing the role of foreseeability in due process analysis); *Int’l Shoe*, 326 U.S. at 316 (noting that due process allows personal jurisdiction pursuant to absent defendant’s contacts with the forum).

¹⁰² See, e.g., *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961) (analyzing personal jurisdiction over a foreign manufacturer). For a discussion of *Gray*, see *infra* note 108. See also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (analyzing personal jurisdiction over a magazine publisher). For a discussion of *Keeton*, see *infra* note 121 and accompanying text.

¹⁰³ See *Exon*, *supra* note 16, at 21–22 (noting that the Internet has redefined notions of physical, bounded space).

¹⁰⁴ See *id.* at 82 (“Activity in cyberspace can create the illusion of being lost in space, especially with regard to personal jurisdiction. The lack of boundaries in cyberspace creates a jurisdictional quandary inasmuch as the cyberjurisdiction analysis remains the same as the traditional basis of personal jurisdiction.”); *Borchers*, *supra* note 5, at 475–76 (observing the temporal gap between the

The doctrine of personal jurisdiction, which is an essential aspect of securing due process, has developed over time to reflect changing trends in society.¹⁰⁵ Initially, states exercised personal jurisdiction over individuals present in the state.¹⁰⁶ This practice followed the idea that a state had control over those individuals present within its boundaries, whereas attempting to exercise jurisdiction over citizens in another state might offend the sovereignty of that state.¹⁰⁷

As modern lifestyles became more mobile and communication methods became more advanced, personal jurisdiction jurisprudence evolved to support the due process rights of a party wronged in one state to bring a cause of action there, regardless of whether the defendant was present in that forum state.¹⁰⁸ This evolution reflected the changing nature of citizens' interactions.¹⁰⁹ Responding to modern trends in travel and communication, personal jurisdiction analysis shifted from a

most recent Supreme Court decision on the minimum contacts test and the advent of the Internet). Borchers notes that, given that the Supreme Court last evaluated the minimum contacts test in 1987, "[i]t is thus not surprising that some aspects of jurisdictional jurisprudence are ill-adapted to the Internet era." *Id.* at 476.

¹⁰⁵ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 308 (1980) (Brennan, J., dissenting) (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957)) (observing the trend of increasing flexibility in the Court's determination of personal jurisdiction); FREER & PERDUE, *supra* note 6, at 37–38 (noting the role of changes in society, such as the expansion of corporate activities beyond state borders, in shaping jurisdiction).

¹⁰⁶ See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (noting that each state can exercise jurisdiction over people and property within its borders).

¹⁰⁷ See *id.* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . an illegitimate assumption of power, and be resisted as mere abuse.") (quoting *D'Arcy v. Ketchum*, 11 How. 165, 174 (1851)).

¹⁰⁸ See, e.g., *Gray*, 176 N.E.2d at 766–67 (allowing jurisdiction in Illinois when Ohio manufacturer's product harmed plaintiff there). In *Gray*, the plaintiff, an Illinois resident, alleged that the defendant had negligently manufactured a water heater safety valve. The defendant manufactured the valve, which was subsequently used in Pennsylvania to manufacture a water heater, in Ohio. The water heater, which the plaintiff had purchased in Illinois, exploded and injured the plaintiff. The Court found that jurisdiction over the defendant was appropriate in Illinois, and noted that "today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States." *Id.* at 762, 764, 766–67.

¹⁰⁹ See *id.* at 766 (noting decreased economic significance of interstate borders); FREER & PERDUE, *supra* note 6, at 38 (discussing the effect of increased individual mobility on likelihood of causing injury in distant states).

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concentration on presence in the forum state to a framework based on the contact between the defendant and the forum state.¹¹⁰

In the contacts framework, if the cause of action arises from the contact, courts apply a specific jurisdiction analysis whereby due process will uphold jurisdiction over an absent, non-resident defendant if “he [has] certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”¹¹¹ Moreover, these minimum contacts establish that the defendant should reasonably anticipate the possibility of being haled into the forum state to litigate.¹¹² In this foreseeability analysis, unilateral activity of the plaintiff in bringing a product into the forum will not alone provide minimum contacts to support jurisdiction there; rather, courts require “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State. . . .”¹¹³ Even if the defendant has established minimum contacts with the forum state, jurisdiction must also be reasonable there to comport with due process.¹¹⁴

In one example of a personal jurisdiction analysis, *Asahi Metal Industry Co. v. Superior Court of California*,¹¹⁵ the Supreme Court examined whether personal jurisdiction could be

¹¹⁰ See *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (recognizing that personal jurisdiction no longer requires presence in forum state).

¹¹¹ *Id.* (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). If the contact did not give rise to the cause of action, courts apply a general jurisdiction analysis, whereby jurisdiction is only proper if the contacts were “continuous and systematic.” *Id.* See also *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984) (“[W]e hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State’s assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.”).

¹¹² See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (“[F]oreseeability [in] due process analysis 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.”); *Revell v. Lidov*, 317 F.3d 467, 475 (5th Cir. 2002) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)) (describing how due process requires a defendant’s conduct be such that he or she should reasonably anticipate litigation in a court in the forum state).

¹¹³ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

¹¹⁴ See *Yokoyama*, *supra* note 15, at 1152–53 (citing *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113–16 (1987)).

¹¹⁵ 480 U.S. 102 (1987).

appropriately exercised over a foreign manufacturer.¹¹⁶ The Court issued a plurality decision, setting forth two approaches under which placing a product in the stream of commerce can support jurisdiction in a foreign forum.¹¹⁷ Justice Brennan advocated an approach where a defendant need only place a product in the stream of commerce to be subject to jurisdiction in whichever state the product caused harm.¹¹⁸ Justice O'Connor advocated an approach whereby merely putting a product in the stream is not enough to support jurisdiction wherever it goes; rather, the defendant must have purposefully directed the product to the forum state.¹¹⁹

In addition to analyzing minimum contacts supporting personal jurisdiction for manufactured products, the Supreme Court has analyzed minimum contacts in determining jurisdiction for intentional torts such as libel and defamation.¹²⁰

¹¹⁶ See *Id.* at 105 (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)). In *Asahi*, the plaintiff alleged that the defendant, a Japanese manufacturer, had manufactured a defective tire tube valve. The defendant sold the valve assembly to a company in Taiwan. The Taiwanese company used the assembly as a component in tire tubes that it then sold in California. *Id.* at 105–06.

¹¹⁷ See *id.* at 112–17; see also Daniel E. Wanat, *Copyright Infringement Litigation and the Exercise of Personal Jurisdiction Within Due Process Limits: Judicial Application of Purposeful Availment, Purposeful Direction, or Purposeful Effects Requirements to Finding that a Plaintiff Has Established a Defendant's Minimum Contacts Within the Forum State*, 59 MERCER L. REV. 553, 565–68 (2008) (discussing Fifth Circuit decision that relied on Justice Brennan's stream of commerce approach and Sixth Circuit decision that relied on Justice O'Connor's stream of commerce approach); Gupta, *supra* note 97, at 524 (“[In *Asahi*,] 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. . . .”).

¹¹⁸ See *Asahi*, 480 U.S. at 117 (Brennan, J., concurring). “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.” *Id.*

¹¹⁹ See *Id.* at 112 (majority opinion). Justice O'Connor listed some examples of actions that might show intent to target the forum state, including: “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.” *Id.*

¹²⁰ See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773–74 (1984) (holding circulation of allegedly libelous magazine in New Hampshire established jurisdiction over publisher); see also *Calder v. Jones*, 465 U.S. 783, 789 (1984) (holding that jurisdiction in California was appropriate when plaintiff felt effects of harm in California).

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Jurisdiction may be appropriate if an allegedly defamatory magazine regularly circulated in the forum state because the corporation that produced the magazine availed itself of the benefits of that forum.¹²¹ Jurisdiction may also be appropriate under the effects test, whereby personal jurisdiction exists over a non-resident defendant when the plaintiff felt effects of harm in the forum state.¹²² Thus, one may consider the effect of the tortious activity as a contact in the minimum contacts analysis.¹²³ Additionally, courts may require express aiming, or intentional targeting, to the forum state to support jurisdiction there.¹²⁴

Currently, personal jurisdiction analysis continues to stir

¹²¹ See *Keeton*, 465 U.S. at 774 (upholding district court's finding that publishing magazines in forum state establishes purposeful direction of activities toward residents there). In *Keeton*, a New York citizen brought an action for libel in New Hampshire against *Hustler* magazine. *Id.* at 772. The court held that "[w]here, as in this case, respondent *Hustler Magazine, Inc.*, has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine." *Id.* at 781 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980)).

¹²² See *Calder*, 465 U.S. at 789 (holding that jurisdiction is appropriate when forum state is focal point of harm suffered). In *Calder*, the plaintiff filed suit in California alleging defamation against a writer and editor in Florida. *Id.* at 784. In upholding jurisdiction in California, the court distinguished the intentional conduct of the petitioners in Florida expressly targeting California from a hypothetical negligent act in Florida causing an injury in California. The Court found that the effects felt in California supported jurisdiction there because "[t]he allegedly libelous story concerned the California activities of a California resident The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California." *Id.* at 788–89.

¹²³ See *Allred v. Moore & Peterson*, 117 F.3d 278, 287 (5th Cir. 1997) ("[T]he key to *Calder* is that the effects of an alleged intentional tort are to be assessed as part of the analysis of the defendant's relevant contacts with the forum").

¹²⁴ See *Young v. New Haven Advocate*, 315 F.3d 256, 262–63 (4th Cir. 2002) (requiring Internet activity be targeted at forum state to render effects test applicable). In *Young*, a prison warden in Virginia filed suit against two Connecticut newspapers that had published allegedly defamatory articles about him in print and online. The articles mentioned Virginia, and the reporters made phone calls to Virginia during their investigation and knew that the warden resided there. Despite these contacts, the court held that jurisdiction in Virginia was not proper because the articles were intended for a Connecticut audience and not readers in Virginia. The court rejected the plaintiff's argument "that personal jurisdiction is proper in Virginia because the newspapers understood that their defamatory articles, which were available to Virginia residents on the Internet, would expose Young to public hatred, contempt, and ridicule in Virginia, where he lived and worked." The court found that posting material online without the intent to target readers in Virginia would not lead the newspapers to reasonably anticipate being haled into court there. *Id.* at 259, 261–62, 264 (quoting *Calder*, 465 U.S. at 790).

debate and to develop.¹²⁵ The recent explosion of online social networks and video sharing sites has altered the legal landscape.¹²⁶ Internet communication enables defendants outside a forum state's borders to harm a plaintiff within the forum state.¹²⁷ In *Inset Systems, Inc. v. Instruction Set, Inc.*,¹²⁸ an early Internet case, the court held that simply posting an advertisement online supported personal jurisdiction over a non-resident defendant.¹²⁹ Commentators have criticized this

¹²⁵ See, e.g., Floyd & Baradaran-Robison, *supra* note 13, at 604 (listing examples of questions about personal jurisdiction jurisprudence); Spencer II, *supra* note 15, at 73 ("Many courts and scholars have grappled with how best to evaluate for constitutionality assertions of personal jurisdiction based on network-mediated contacts, reaching a wide range of conclusions about proper standards.").

¹²⁶ See, e.g., Abril I, *supra* note 40, at 3 (noting difficulty of reconciling traditional concept of public disclosure tort with online social networking); Liebman, *supra* note 7, at 344 (noting the role of interactive Internet media in changing interpretation of defamation tort).

¹²⁷ See Geist, *supra* note 23, at 1377 (noting that defamatory website chat room speech may target subject in jurisdiction distinct from locations of both poster and website).

¹²⁸ 937 F. Supp. 161 (D. Conn. 1996).

¹²⁹ *Id.* at 165. See also *Telco Commc'ns v. An Apple A Day*, 977 F. Supp. 404, 408 (E.D. Va. 1997) (holding that defendants' actions posting press releases on Internet supported jurisdiction in plaintiff's forum). The court in *Telco* discussed the *Inset* holding that maintenance of a website can meet a purposeful availment requirement, stating that "[this court] agrees with the interpretation of Internet sites and information present in *Inset Systems*." *Id.* at 406 (citing *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 161 (D. Conn. 1996)). See also *Edias Software Int'l v. Basis Int'l*, 947 F. Supp. 413, 420 (D. Ariz. 1996) (finding that posting allegedly defamatory material online met express aiming criteria when defendant had foreseeable knowledge of harm in forum state); *but see Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (advocating sliding scale approach to determining personal jurisdiction in Internet cases). In *Zippo*, the court found that the appropriateness of exercising personal jurisdiction over a non-resident defendant was proportional to the "nature and quality" of the defendant's commercial Internet activities. The court advanced a sliding scale approach, which it explained:

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

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approach, in part for its perceived potential to allow jurisdiction anywhere, generating universal jurisdiction.¹³⁰ More commonly, courts have applied the requirement of express aiming to the Internet setting, such that personal jurisdiction may only be established upon a showing that the defendant specifically directed his conduct to the forum state by posting the material in question.¹³¹

Recently, some courts have allowed jurisdiction over a non-resident defendant without express aiming of Internet content to the forum state.¹³² In *Epstein v. Gray Television, Inc.*,¹³³ a Texas district court allowed jurisdiction without express aiming of

of information that occurs on the Web site.

Id. (citations omitted). The court noted that the *Inset* holding fit within this framework, albeit as a representation of “the outer limits of the exercise of personal jurisdiction based on the Internet.” *Id.* at 1124–25.

¹³⁰ See Geist, *supra* note 23, at 1362 (arguing that *Inset* holding would allow courts to establish jurisdiction anywhere based on website availability); Yokoyama, *supra* note 15, at 1161 (“A website exists electronically and its accessibility is unconstrained by state or even international borders. Thus, a website potentially exists everywhere. The *Inset* line of cases essentially mandates universal jurisdiction by having courts exercise personal jurisdiction wherever a website is accessible.”). Courts have also criticized this approach. See, e.g., *Medinah Mining, Inc. v. Amunategui*, 237 F. Supp. 2d 1132, 1137 (D. Nev. 2002) (criticizing *Edias* and requiring more individualized targeting of forum to support jurisdiction); *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790, 796 (W.D. Tenn. 2000) (holding that Internet postings alone did not show intent to target the forum and that finding otherwise “would be to subscribe to the notion that anyone who posted information on the Internet is subject to nationwide jurisdiction, a leap this court is not prepared to make”).

¹³¹ See *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (“The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers.”); see also *Medinah Mining*, 237 F. Supp. 2d at 1138 (“[We hold] that a showing that residents of a forum had access to a website is insufficient to prove that defamatory statements were aimed at the forum.”); *Bailey*, 86 F. Supp. 2d at 796 (holding that statements on Internet were not expressly aimed at plaintiff’s forum because “the alleged defamatory comments had nothing to do with plaintiff’s state of residence”); *Novak v. Benn*, 896 So.2d 513, 520–21 (Ala. Civ. App. 2004) (finding that posting statements on Internet forum did not constitute express aiming to Alabama and that personal jurisdiction over non-resident defendant was not proper there); *Dailey v. Popma*, 662 S.E.2d 12, 19 (N.C. Ct. App. 2008) (requiring showing of intent to target content on Internet bulletin board to audience in forum state to support jurisdiction).

¹³² See, e.g., *Kauffman Racing Equip., L.L.C. v. Roberts*, No. 07-CA-14, 2008 Ohio App. LEXIS 1695, at *13–14 (Ohio Ct. App. Apr. 18, 2008) (holding that jurisdiction was appropriate in forum state because plaintiff felt effects of harm there); see also *Epstein v. Gray Television, Inc.*, 474 F. Supp. 2d 835, 841–42 (W.D. Tex. 2007) (holding that defendants’ offline contacts with forum state supported jurisdiction there despite no express aiming of online content).

¹³³ 474 F. Supp. 2d 835 (W.D. Tex. 2007).

allegedly defamatory Internet content when the defendant had directed other conduct to the forum state.¹³⁴ In *Kauffman Racing Equipment, L.L.C. v. Roberts*,¹³⁵ the Ohio Court of Appeals acknowledged the ubiquity of the Internet and held that jurisdiction was proper in the state where the plaintiff's business was located, despite a lack of deliberate targeting of residents there.¹³⁶

Like the *Inset* approach, the court's approach in *Kauffman* does not require express aiming of Internet content to establish jurisdiction.¹³⁷ The court recognized that, in the current era of widespread Internet use, parties may reasonably be charged with the knowledge that online material can be accessed anywhere.¹³⁸ This approach would not necessarily result in universal jurisdiction because jurisdiction must still be reasonable in light

¹³⁴ See *Id.* at 842. In *Epstein*, a television station in Georgia aired an allegedly defamatory story about a doctor who had moved to Texas prior to the broadcast. The television station also posted the report on its website. Although the court noted that the online posting of the story without express aiming may not alone support jurisdiction in Texas, the court held that other contacts, such as mailing videotapes there, showed a direct intent to target Texas. Moreover, the court found that some of the defendant's interactions with Texas, including research of Texas law on consent to record telephone conversations, amounted to purposeful availment of the benefits of Texas law and, as such, supported jurisdiction there. See *Id.* at 837–42.

¹³⁵ 2008 Ohio App. LEXIS 1695.

¹³⁶ See *Id.* at *13. The plaintiff, an automotive equipment retailer, claimed that the defendant had posted defamatory comments on Internet message boards regarding the plaintiff's business practices. The defendant argued that there was no evidence of targeting the messages to Ohio residents, and that the business of the defendant was not limited to Ohio. The court found the defendant's argument unpersuasive, due to the defendant's knowledge that the plaintiff's business was focused in Ohio. The court held that jurisdiction in Ohio was proper because the plaintiff felt the effects of the harm there. *Id.* at *2–14.

¹³⁷ See *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (upholding jurisdiction based on website operation); *Kauffman*, 2008 Ohio App. LEXIS 1695, at *13–14 (relying on awareness of effects of harm, rather than express aiming, to support jurisdiction over non-resident defendant).

¹³⁸ *Kauffman Racing Equip., L.L.C. v. Roberts*, No. 07-CA-14, 2008 Ohio App. LEXIS 1695, at *32 (Ohio Ct. App. Apr. 18, 2008). The court maintained that individuals who use the Internet to harm plaintiffs in different states should not be able to rely upon their status as non-residents as a shield from accountability. *Id.* See also *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 820 (E.D. Mich. 2006) (“Internet forums such as eBay expand the seller's market literally to the world and sellers know that”); *Spencer II*, *supra* note 15, at 94 (“[T]he global reach of Web-based activity is not merely foreseeable, it is a well-understood fact.”).

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of traditional notions of fair play and substantial justice.¹³⁹ Nevertheless, many courts continue to require express aiming of Internet content to support jurisdiction in the forum state, and consequently, some plaintiffs may be unable to bring claims in the forums in which they suffered damages.¹⁴⁰

IV. ANALYSIS

As a continuation of personal jurisdiction's historical responsiveness to changing societal practices, courts should eliminate an express aiming requirement to establish minimum contacts in cases of user-generated Internet content.¹⁴¹ Requiring express aiming as part of a minimum contacts analysis may effectively insulate defendants who post defamatory material online from litigation in the forum where the plaintiff suffered harm.¹⁴² Personal jurisdiction jurisprudence should evolve to

¹³⁹ See Spencer II, *supra* note 15, at 76 (noting that despite presumption of purposeful availment in Internet cases, reasonableness requirement of traditional jurisdictional analysis will prevent universal jurisdiction).

¹⁴⁰ See, e.g., *Minn. Pub. Radio v. Va. Beach Educ. Broad. Found., Inc.*, 519 F. Supp. 2d 970, 981 (D. Minn. 2007) (holding that plaintiff's forum cannot establish personal jurisdiction over defendant and recommending transfer of case to defendant's forum); *Dailey v. Popma*, 662 S.E.2d 12, 19 (N.C. Ct. App. 2008) (holding that personal jurisdiction based on Internet posting requires intent to direct posting to forum state and dismissing case).

¹⁴¹ See Spencer I, *supra* note 14, at 657 (advocating state interest analysis rather than targeting analysis for jurisdiction in Internet cases); see also Spencer II, *supra* note 15, at 75 ("[Prevalent jurisdictional analyses] wrongly presume that Internet activity is directed at no particular place simply because it is accessible globally. Thus, courts have required additional indicia of state-specific targeting before they permit a finding of purposeful availment. This stringent requirement is inappropriate given the ordinarily ubiquitous nature of Internet activity."). Cf. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) (noting that "perpetuation of ancient forms that are no longer justified" can offend traditional notions of fair play and substantial justice); *Telco Commc'ns v. An Apple A Day*, 977 F. Supp. 404, 408 (E.D. Va. 1997) (allowing personal jurisdiction in forum state without express aiming of conduct there). In *Telco*, the plaintiff, a Virginia corporation, sued a Missouri corporation and two individuals for issuing allegedly defamatory press releases on the Internet. *Id.* at 405–07. The court stated that the plaintiff, because it was located in Virginia, felt harm there. *Id.* at 408. It characterized the defendants' actions in placing the press releases on the Internet as specific and purposeful; therefore, the actions supported jurisdiction in Virginia. *Id.* Additionally, the court found that the defendants could reasonably foresee being haled into court in Virginia, because the "[d]efendants should have reasonably known that their press releases would be disseminated . . . [in Virginia], and they certainly knew that . . . [the plaintiff] is based in Virginia." *Id.* Therefore, the court held that personal jurisdiction was proper in Virginia. *Id.*

¹⁴² See, e.g., *Young v. New Haven Advocate*, 315 F.3d. 256, 264 (4th Cir.

recognize that users have the knowledge that anything they post online is accessible anywhere.¹⁴³ As with products in the stream of commerce, due process should not require that defendants with this knowledge show additional intent to target the forum state.¹⁴⁴ Rather, courts should find that a defendant who posts harmful content on the Internet should reasonably anticipate being called to answer for that content in any forum where it harms the plaintiff.¹⁴⁵ Courts can then apply the effects test to ensure that jurisdiction over the defendant would be limited to a forum where the plaintiff actually experiences harm.¹⁴⁶ Additionally, even if the defendant's harmful Internet

2002) (holding jurisdiction is not proper in Virginia when articles posted online in Connecticut did not target readers in Virginia); *Internet Solutions Corp. v. Marshall*, No. 6:07-cv-1740-Orl-22KRS, 2008 U.S. Dist. LEXIS 28261, at *10 (M.D. Fla. Apr. 7, 2008) (holding that jurisdiction is not proper in Florida over Washington resident who posted allegedly defamatory comments on her website, because the website was accessible everywhere and not specifically directed at Florida).

¹⁴³ See *Spencer II*, *supra* note 15, at 75 (“[U]ndue restriction of personal jurisdiction in the Internet context ultimately results from courts’ decisions to discount the ubiquitous nature of Internet activity and their reluctance to embrace the consequences of the Internet’s omnipresence under traditional standards of personal jurisdiction.”); see also *Borchers*, *supra* note 5, at 484 (noting one commentator’s observation of the role of the ubiquity of the Internet in *Young*, stating that “[g]iven the universal availability of information on the Internet, almost any interested Virginian could have found the articles in a matter of minutes”); cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311 (1980) (Brennan, J., dissenting) (arguing that modern notions of jurisdiction must accept fairness of haling nonresidents into distant forums when residents experience harm there). “[T]here is nothing unreasonable or unfair . . . about recognizing commercial reality.” *Id.* But see *Geist*, *supra* note 23, at 1362 (stating that allowing jurisdiction on basis of continuous website advertising “would stifle future Internet growth, as would-be participants would be forced to weigh the advantages of the Internet with the potential of being subject to legal jurisdiction throughout the world”).

¹⁴⁴ See *Spencer II*, *supra* note 15, at 75 (maintaining that, in the context of Internet content, courts should not require evidence of targeting of forum state to support jurisdiction there); cf. *Asahi*, 480 U.S. at 117 (Brennan, J., concurring) (maintaining that placing product in stream of commerce can support jurisdiction in forum state without intent to target forum).

¹⁴⁵ See *Telco Comm’ns*, 977 F. Supp. at 408 (holding that defendants could have reasonably anticipated the possibility of being haled into forum state); see also *Geist*, *supra* note 23, at 1377 (remarking that posters of defamatory chat room content know or should know that its subject will experience effects in his home forum).

¹⁴⁶ See *Spencer II*, *supra* note 15, at 74 (noting that *Calder* precedent “permits states to exercise jurisdiction when the defendants intentionally harm forum residents”); see also *Calder v. Jones*, 465 U.S. 783, 789 (1984) (holding that jurisdiction is appropriate in forum where plaintiff experienced harmful effects).

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communication establishes minimum contacts, due process considerations will ensure that jurisdiction is reasonable by balancing the burden on the defendant against the burden on the plaintiff and the interest of the state in the litigation.¹⁴⁷

A. Reasonable Foreseeability Without Express Aiming

Personal jurisdiction over a non-resident defendant will be appropriate if the defendant has minimum contacts with the forum state so as to reasonably foresee the potential of “being haled into court there.”¹⁴⁸ Regarding causes of action arising from manufactured products, this inquiry is of the foreseeability of the defendant being called into court in the state, not of the product coming into the state.¹⁴⁹ Thus, unilateral activity of a consumer bringing the product into the forum state will not establish jurisdiction there.¹⁵⁰ In the context of harmful communication, this foreseeability inquiry becomes whether the defendant, as a result of the communication, would reasonably foresee being called into court in the forum state.¹⁵¹

Under an express aiming requirement, minimum contacts are only established upon some indication that the defendant purposefully directed the communication to the forum state.¹⁵² This requirement, however, should not be necessary for user-generated Internet content because the viewing of posted material in the forum is the direct result of the posting, rather

¹⁴⁷ See Spencer II, *supra* note 15, at 107 (“[T]he reasonableness prong of the personal jurisdiction test . . . should enable courts to protect defendants against having to litigate in burdensome or inappropriate forums.”).

¹⁴⁸ See *World-Wide Volkswagen*, 444 U.S. at 297 (describing role of foreseeability in due process inquiry).

¹⁴⁹ See *id.* (noting foreseeability applies not to whether product was likely to get to forum, but rather to whether defendant reasonably anticipated being haled into court there).

¹⁵⁰ See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (“The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.”).

¹⁵¹ See *Yokoyama*, *supra* note 15, at 1161 (“[W]hen the defendant operates a website, the crucial question of foreseeability is not whether it is foreseeable that a person can access the defendant’s website in the forum state, but whether the defendant could reasonably foresee being haled into the forum state to defend itself in a lawsuit.”). Cf. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773–74 (1984) (allowing jurisdiction over defamatory communication in forum where communication was published).

¹⁵² See, e.g., *Young v. New Haven Advocate*, 315 F.3d. 256, 264 (4th Cir. 2002) (holding that Internet posting without expressly targeting audience in forum state did not provide sufficient contacts to support jurisdiction there).

than unilateral activity of the plaintiff.¹⁵³ Therefore, the defendant should reasonably foresee being haled into the forum state as a result of the communication.¹⁵⁴

In determining the foreseeability of jurisdiction in a state, courts evaluate the geographic focus of the alleged harm.¹⁵⁵ Communication that harms someone will focus on that person; so, by necessity, the harm will focus geographically on that individual's location.¹⁵⁶ Therefore, courts should view the geographic focus of harmful user-generated Internet content as wherever the plaintiff experiences harm.¹⁵⁷

When applied to consideration of the geographic focus of harm, the express aiming requirement fails to account for the omnipresence of the Internet.¹⁵⁸ Indeed, this omnipresence is one of the most essential aspects of the Internet.¹⁵⁹ The Internet is

¹⁵³ See, e.g., *Hanson*, 357 U.S. at 253 (holding that trust owner's unilateral activity of moving to Florida could not establish personal jurisdiction in Florida over Delaware trustee); *Telco Commc'ns v. An Apple A Day*, 977 F. Supp. 404, 408 (E.D. Va. 1997) (finding that defendants' actions in posting press releases online were specific and purposeful); *Kauffman Racing Equip., L.L.C. v. Roberts*, No. 07-CA-14, 2008 Ohio App. LEXIS 1695, at *13-14 (Ohio Ct. App. Apr. 18, 2008) (holding that jurisdiction is appropriate in forum state despite no evidence that defendant expressly aimed Internet postings there).

¹⁵⁴ Cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 316 (1980) (Marshall, J., dissenting) ("[A] distributor of automobiles to a multistate market and a local automobile dealer who makes himself part of a nationwide network of dealerships can fairly expect that the cars they sell may cause injury in distant States and that they may be called on to defend a resulting lawsuit there.").

¹⁵⁵ See *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) (requiring examination of geographic focus of online article to determine jurisdictional fairness).

¹⁵⁶ See *Calder v. Jones*, 465 U.S. 783, 788 (1984) ("Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises."); *Revell*, 317 F.3d at 476 (noting that alleged defamer must have known plaintiff would suffer harm in plaintiff's residence, though requiring more direct aim to forum state to support jurisdiction there); *Telco Commc'ns*, 977 F. Supp. at 408 ("[D]efamation, like libel, occurs wherever the offensive material is circulated or distributed.").

¹⁵⁷ See, e.g., *Calder*, 465 U.S. at 789 (allowing jurisdiction in California when plaintiff experienced effects of harm there); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984) (allowing jurisdiction in forum where defamatory magazines circulated); *Kauffman*, 2008 Ohio App. LEXIS 1695, at *13-14 (allowing jurisdiction in Ohio when Ohio was focus of harm to plaintiff).

¹⁵⁸ See *Kauffman*, 2008 Ohio App. LEXIS 1695, at *12-13 ("The Internet knows no state boundaries. The Internet has also become accessible at virtually every coffee shop in the world."); *Spencer II*, *supra* note 15, at 75 (noting that courts do not acknowledge ubiquity of Internet).

¹⁵⁹ See *Spencer II*, *supra* note 15, at 87 (remarking that ubiquity both "defines the Internet and leads businesses and individuals to avail themselves of the medium").

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everywhere at once and accessible from everywhere.¹⁶⁰ In 2009, individuals are cyber-savvy and know that when they post something online it is universal.¹⁶¹

In a case evaluating the geographic focus of online content, *Revell v. Lidov*,¹⁶² the Fifth Circuit Court of Appeals held that jurisdiction was not appropriate in Texas when an online poster of allegedly defamatory material did not know that the subject of the posting lived there.¹⁶³ To establish foreseeability, the court required knowledge of the forum where the harm would be felt.¹⁶⁴ This assessment of foreseeability must evolve, however, because the pervasive role of user-generated Internet content in modern communication creates new standards of reasonableness.¹⁶⁵ People know that their online postings can be viewed anywhere, therefore logic suggests that they know that the plaintiff may experience harm from those postings in any forum with Internet access.¹⁶⁶ Therefore, courts should not require express aiming of

¹⁶⁰ See *Kauffman Racing Equip., L.L.C. v. Roberts*, No. 07-CA-14, 2008 Ohio App. LEXIS 1695, at *13 (Ohio Ct. App. Apr. 18, 2008) (stating that the Internet is accessible worldwide); *Spencer II*, *supra* note 15, at 78 (noting in reference to websites on Internet that the term “World Wide Web” is “a moniker that expressly announces the medium’s global reach”).

¹⁶¹ See *Abril II*, *supra* note 56, at 76 (observing that people raised in Internet culture are knowledgeable about online technology); Mary Madden et al., *Digital Footprints: Online Identity Management and Search in the Age of Transparency*, PEW INTERNET & AMERICAN LIFE PROJECT, 2007, <http://www.pewinternet.org/Reports/2007/Digital-Footprints.aspx> (noting an increase in user-posted online material and corresponding increase in awareness of online material’s accessibility). The report states that Internet users have “become more aware of the information that remains connected to their name online. Nearly half of all Internet users (47%) have searched for information about themselves online, up from just 22%, as reported by the Pew Internet Project in 2002.”

¹⁶² 317 F.3d 467 (5th Cir. 2002).

¹⁶³ See *Id.* at 475.

¹⁶⁴ See *Id.* (“The defendant must be chargeable with knowledge of the forum at which his conduct is directed in order to reasonably anticipate being haled into court in that forum . . .”).

¹⁶⁵ See *Abril II*, *supra* note 56, at 85 (noting change in reasonableness of attempts to control online information when Internet “technology becomes ubiquitous and central to the way society functions”); see also Clive Thompson, *The See-Through CEO*, WIRED, March 2007, http://www.wired.com/wired/archive/15.04/wired40_ceo.html (noting decline in expectation of secrecy). “[Secrecy is] probably already dead. In a world where . . . Paris Hilton’s phonecam images, Enron’s emails, and even the governor of California’s private conversations can be instantly forwarded across the planet, trying to hide something illicit –trying to hide anything, really –is an unwise gamble.”

¹⁶⁶ See *Kauffman Racing Equip., L.L.C. v. Roberts*, No. 07-CA-14, 2008 Ohio App. LEXIS 1695, at *13 (Ohio Ct. App. Apr. 18, 2008) (rejecting defendant’s

user-generated Internet content to a specific state to support jurisdiction there, because defendants can reasonably foresee access of the content in any state.¹⁶⁷

B. The Stream of Commerce, Express Aiming and Internet Communication

Products in the stream of commerce provide the foundation of much personal jurisdiction jurisprudence and another framework for examining the express aiming requirement.¹⁶⁸ According to Justice Brennan, “[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale.”¹⁶⁹ The Internet is similar in some ways to the stream of commerce, in that users disseminate information and may have some idea of where it will end up, but not total control.¹⁷⁰ Unlike products in the stream of commerce, however, user-generated Internet content has no physical component or limits.¹⁷¹ With fewer barriers such as transportation costs and

argument that jurisdiction was not proper because defendant did not know that residents of plaintiff’s forum would access the alleged defamatory postings). “The alleged defamation concerned a business located in Ohio and the business practices of an Ohio resident The brunt of the harm, in terms of the injury to [plaintiff’s] professional reputation and business, was suffered in Ohio.” *Id.* See also *Spencer II*, *supra* note 15, at 87 (“[T]hose who post information on the Internet - by placing material on a globally accessible medium - arguably direct that material at all potential users of the Internet, wherever they may be found.”); *Geist*, *supra* note 23, at 1402 (noting that in defamation cases, users posting defamatory material know that the subject of the defamation will experience harm in the subject’s forum).

¹⁶⁷ See, e.g., *Telco Commc’ns v. An Apple A Day*, 977 F. Supp. 404, 408 (E.D. Va. 1997) (finding that posting press releases online was purposeful conduct that supported jurisdiction in plaintiff’s forum); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (ruling that personal jurisdiction was appropriate based on defendant’s posting of material on Internet); *Kauffman*, 2008 Ohio App. LEXIS 1695, at *12-14 (upholding personal jurisdiction without showing of express aiming); *Spencer II*, *supra* note 15, at 75 (noting that ubiquity of Internet renders state-specific targeting of online content unnecessary to finding purposeful availment).

¹⁶⁸ See, e.g., *Asahi*, 480 U.S. at 105 (describing product’s arrival in forum state through stream of commerce); *Gray*, 176 N.E.2d at 766 (determining jurisdiction over manufacturer when product arrived in plaintiff’s forum through stream of commerce). See also discussion *supra* notes 115-18 and accompanying text.

¹⁶⁹ *Asahi*, 480 U.S. at 117.

¹⁷⁰ See *Abril I*, *supra* note 40, at 2-3 (noting potential for content posted on social networking sites to reach unintended audiences).

¹⁷¹ See *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996) (“The Internet is

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travel time, information posted on the Internet can spread more unpredictably from its source than can products in the stream of commerce.¹⁷²

Justice Brennan has argued that people are responsible for their products wherever those products go.¹⁷³ This argument has even higher applicability in the context of Internet information because, in contrast to a product in the stream of commerce that must arrive at a destination and then act or be acted on to harm a plaintiff in some way, content on the Internet can harm a plaintiff without transport.¹⁷⁴ Unlike harmful communication, which embodies harm itself, physical products require intermediate steps to harm others.¹⁷⁵

Express aiming, in contrast to Justice Brennan's approach, follows Justice O'Connor's position that there should be an additional factor to indicate a direction to the forum state.¹⁷⁶ This approach is better applicable to products than to

not a physical or tangible entity."); Spencer II, *supra* note 15, at 90–91 (contrasting features of Internet with stream of commerce).

¹⁷² See Madden et al., *supra* note 161, at 4 (noting ease with which online content can be separated from its original context). Online content can travel to unintended audiences without regard to time and space. For example, "[a] contentious comment posted as part of a debate taking place on a community association blog may be written with neighbors in mind, but may in fact be viewed by a range of friends, family or professional colleagues for years after it is published . . ." *Id.*

¹⁷³ See *Asahi*, 480 U.S. at 117 (Brennan, J., concurring) ("[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, and have not required a showing of additional conduct."); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311 (1980) (Brennan, J., dissenting) ("People should understand that they are held responsible for the consequences of their actions and that in our society most actions have consequences affecting many States.").

¹⁷⁴ See generally, Geist, *supra* note 23, at 1364–65 (citing *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996)). In *Bensusan*, the court distinguished between the availability of information on a product in the forum state and activities actively targeting a product to the state. In contrast to the immediate availability of information on a product online, an actual product requires steps to come into the state. *Id.*

¹⁷⁵ Cf. *World-Wide Volkswagen*, 444 U.S. at 296 ("Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.").

¹⁷⁶ See *Asahi*, 480 U.S. at 112 ("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."); *Young v. New Haven Advocate*, 315 F.3d. 256, 263 (4th Cir. 2002) (requiring determination of whether defendants showed intent to direct online content to the forum state). See also discussion *supra* notes 115–18 and accompanying text.

information because products typically follow a predictable distribution path.¹⁷⁷ A party may try to control its product flow, not intending for a product to go outside the desired channel.¹⁷⁸ If the stream of commerce flows in a typical path, and a product lands outside of that path, it may be unjust to hold a party responsible for not foreseeing that result.¹⁷⁹ In such a situation, Justice O'Connor's approach would safeguard a party from being haled into court without showing intent to send a product there.¹⁸⁰

In contrast to products in the stream of commerce that may unexpectedly travel outside a planned distribution channel, user-generated Internet content is universally distributed.¹⁸¹ In

¹⁷⁷ See *Asahi*, 480 U.S. at 117 (Brennan, J., concurring) (noting predictable nature of flow of products in stream of commerce); Spencer II, *supra* note 15, at 90 (noting that Internet is unlike stream of commerce and should not require showing of purposeful availment).

The conventional, real world stream of commerce is a distribution network connecting producers of raw materials, component parts, and finished goods with wholesalers, regional distributors, and retail outlets. Entities participating at one point in the network cannot always or necessarily control or predict where their product will be transported once it is has left them . . . There is thus good reason not to equate mere participation in this distribution network with purposeful availment in a particular state. Contrast these attributes of the stream of commerce with the Internet. The Internet is not a complex distribution network moving products through a chain of producers, manufacturers, and purveyors of goods; rather, the Internet is a ubiquitous medium that facilitates global communication, data transmission, interaction, and financial/commercial transactions. Publishing a Web site on the Internet does not infuse it into an uncontrollable and unpredictable stream that can sweep the site hither and yon. To the contrary, simple Web site publication instantly makes the information on the Web site available globally.

Id. at 90–91 (citations omitted).

¹⁷⁸ Cf. *World-Wide Volkswagen*, 444 U.S. at 297 (noting that corporations not wishing to be subject to suit in forum “can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State”).

¹⁷⁹ See *id.* at 298 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (holding that personal jurisdiction is not appropriate in forum state when defendant's product came there through unilateral act of consumer). See also *Asahi*, 480 U.S. at 109 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 286–98 (1980)) (describing rationale of *World-Wide Volkswagen* decision). In *Asahi*, the Court noted its rejection in *World-Wide Volkswagen* of the argument that “because an automobile retailer and its wholesale distributor sold a product mobile by design and purpose, they could foresee being haled into court in the distant States into which their customers might drive.” *Id.*

¹⁸⁰ See *Asahi*, 480 U.S. at 112 (requiring intent to target forum state to support jurisdiction there).

¹⁸¹ See *Kauffman Racing Equip., L.L.C. v. Roberts*, No. 07-CA-14, 2008 Ohio

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today's world, people know about and avail themselves of that global reach.¹⁸² Unlike a physical product, user-generated Internet content can be simultaneously available everywhere, at any time.¹⁸³ This global availability does not, however, support a presumption that the content is directed nowhere.¹⁸⁴ Rather, the initial intentional act of posting harmful content online should satisfy any requirement for purposeful direction.¹⁸⁵ Therefore, even under Justice O'Connor's formulation of the stream of commerce, express aiming of user-generated Internet content should be unnecessary to establish minimum contacts.¹⁸⁶

App. LEXIS 1695, at *12–13 (Ohio Ct. App. Apr. 18, 2008) (noting that Internet is globally accessible); Spencer II, *supra* note 15, at 78 (“The suggestion that one who places information on something called the World Wide Web can at least be presumed to intend that the information be accessible by everyone in the world with Internet access is rational.”).

¹⁸² See *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 820 (E.D. Mich. 2006) (maintaining that eBay sellers are accountable for availing themselves of global Internet marketplace); Holger P. Hestermeyer, *Personal Jurisdiction for Internet Torts: Towards an International Solution?*, 26 NW. J. INT'L L. & BUS. 267, 276 (noting that online content providers know that Web content is globally accessible).

¹⁸³ See *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996) (noting that Internet advertisements are available continuously); Yokoyama, *supra* note 15, at 1153 (“[T]he Internet is . . . an amorphous and intangible realm unencumbered by borders, a universe that reaches everywhere and is accessible at any time.”).

¹⁸⁴ See Spencer II, *supra* note 15, at 87 (arguing against “the presumption that Internet activity targets no particular place because it is broadcast everywhere indiscriminately”). Cf. *Inset Sys.*, 937 F. Supp. at 163 (“[Defendant] directed its advertising activities via the Internet . . . to all states. The Internet . . . [is] designed to communicate with people and their businesses in every state Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user.”).

¹⁸⁵ See *Inset Sys.*, 937 F. Supp. at 165 (finding that defendant's posting of Internet advertisement was purposeful availment of forum). See also Floyd & Baradaran-Robison, *supra* note 13, at 658 (noting that access to harmful postings in Internet cases does not occur “by means of the unilateral act of a third party. It is true that the intervening act of another is involved, but the likelihood of such an act is the intended (in the sense that it is substantially certain to result), natural, and entirely foreseeable result of the posting itself”).

¹⁸⁶ See *Telco Commc'ns v. An Apple A Day*, 977 F. Supp. 404, 408 (E.D. Va. 1997) (finding that placement of press releases on Internet was specific and purposeful action). See also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473–74 (1985) (quoting *Kulko v. CA*, 436 U.S. 84, 96 (1978)) (“[W]here individuals ‘purposefully derive benefit’ from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities”); Spencer II, *supra* note 15, at 87 (“[T]hose who post information on the Internet – by placing material on a globally accessible medium – arguably direct that material at all

C. Additional Due Process Considerations

Once a court establishes that minimum contacts exist through the defendant's posting of harmful Internet content and the effects of harm in the forum, the court must still determine whether jurisdiction is reasonable under traditional notions of fair play and substantial justice.¹⁸⁷ This requirement of reasonableness provides a defendant with an opportunity to show that jurisdiction in the plaintiff's forum would be an inappropriately heavy burden.¹⁸⁸ Due process requires balancing this burden with both the state's interest in providing a forum for its citizens and the burden on the plaintiff.¹⁸⁹ Although reasonableness is a case-by-case determination, elimination of the express aiming requirement will enable the jurisdictional analysis to move beyond the threshold of minimum contacts, thereby ensuring proper consideration of both the state interest in the litigation and the goal of balancing burdens on plaintiffs and defendants.¹⁹⁰

potential users of the Internet, wherever they may be found.”).

¹⁸⁷ See *Yokoyama*, *supra* note 15, at 1152–53 (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 310 (1985)) (“[I]f the purposeful availment requirement has been satisfied, the inquiry then turns to whether the exercise of personal jurisdiction is constitutionally reasonable.”).

¹⁸⁸ See *Spencer II*, *supra* note 15, at 106–07 (“For many defendants, defending in terribly distant locales may be deemed so ‘gravely difficult’ that they suffer a constitutionally significant disadvantage in presenting their case compared to their opponents . . . in such a case, the reasonableness analysis can serve to prevent the assertion of jurisdiction.”).

¹⁸⁹ See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (listing traditional notions of fair play and substantial justice).

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; 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.

Id. (citations omitted).

¹⁹⁰ See *Calder v. Jones*, 465 U.S. 783, 790 (1984) (stating that plaintiff seeking redress should not have to travel to defendants' forum when defendants intentionally injured plaintiff in state of plaintiff's residence); *World-Wide Volkswagen*, 444 U.S. at 292 (including interests of state, plaintiff, defendant and social policy among traditional notions of fair play and substantial justice); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (“When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum thus in effect making the company

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Personal jurisdiction in a state is only reasonable if the state has an interest in the litigation.¹⁹¹ Every state has an interest in providing a forum for litigation to a resident of the state who has experienced harm there, regardless of whether the resident can show express aiming of harm to the state.¹⁹² Additionally, states have an interest in deterring tortious conduct that impacts their citizens.¹⁹³

Elimination of the requirement for express aiming would signal a return to the *Inset* approach to Internet cases, wherein posting material online alone supported jurisdiction in the forum.¹⁹⁴ One criticism of this approach was the perceived potential to generate universal jurisdiction.¹⁹⁵ The requirement of a state interest in determining the reasonableness of jurisdiction rebuts this perception because only certain states will have an interest in the litigation.¹⁹⁶ For example, if the plaintiff lives in Connecticut and suffered harm only there,

judgment proof.”).

¹⁹¹ See Spencer I, *supra* note 14, at 637–43 (quoting *Int'l Shoe*, 326 U.S. at 317; *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313–14 (1950)).

¹⁹² See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 723 (1877) (“Every State owes protection to its own citizens.”); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. a (1988) (“A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere.”); Spencer I, *supra* note 14, at 645–46 (Viewing minimum contacts analysis from a state interest perspective leads to framing the inquiry as “whether a defendant acted in a way that implicates a state’s interests such that it may adjudicate any resultant dispute. Purposefulness recedes from the scene under this formulation, as the intentionality of the defendant in so implicating a state’s interest is not relevant to a state interest analysis”); see also *McGee*, 355 U.S. at 223 (noting that defendants may be free from judgment if residents cannot pursue damages in forum state).

¹⁹³ See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (quoting *Leeper v. Leeper*, 319 A.2d 626, 629 (N.H. 1974)).

¹⁹⁴ See *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (holding that posting content online allows jurisdiction over non-resident defendant in forum state); see also *Yokoyama*, *supra* note 15, at 1148–49 (noting that early Internet jurisdiction cases allowed jurisdiction where website was accessible).

¹⁹⁵ See, e.g., *Bailey*, 86 F. Supp. 2d at 795–96 (finding that establishment of personal jurisdiction based solely on Internet posting would allow national personal jurisdiction); *Yokoyama*, *supra* note 15, at 1161 (noting that *Inset* decision may require universal jurisdiction).

¹⁹⁶ See Spencer II, *supra* note 15, at 106 (quoting *Christian Sci. Bd. of Dirs. v. Nolan*, 259 F.3d 209, 217 (4th Cir. 2001)) (maintaining that reasonableness requirement of personal jurisdiction analysis would prevent universal jurisdiction in Internet cases).

Connecticut would have an interest in the litigation, and jurisdiction may be appropriate there, but not in a state that had no interest in the litigation.¹⁹⁷ Therefore, state interest both supports the elimination of express aiming to provide a forum for citizens harmed in the state and also ensures that universal jurisdiction would not occur as a result of that elimination.¹⁹⁸

E. Burdens on Plaintiffs and Defendants

In assessing the reasonableness of jurisdiction, courts should make an effort to balance the burdens to the parties involved.¹⁹⁹ In cases of harm through user-generated Internet content, applying this balance to the pertinent barriers to entry shows that defendants can publish injurious material online at little or no cost.²⁰⁰ In contrast, plaintiffs face a burden of trying to litigate outside of the forum where they experienced harm.²⁰¹ If users can with minimal cost and effort post harmful online material from where they live, it seems unreasonable to suggest that a defendant should also get the benefit of forcing a plaintiff to go to the defendant's forum to litigate.²⁰² Individuals may have no

¹⁹⁷ See Spencer I, *supra* note 14, at 651–52 (illustrating relationship between state interest and location of harm). Cf. Kauffman Racing Equip., L.L.C. v. Roberts, No. 07-CA-14, 2008 Ohio App. LEXIS 1695, at *13–14 (Ohio Ct. App. Apr. 18, 2008) (allowing jurisdiction in state where plaintiff felt harm of allegedly defamatory Internet postings).

¹⁹⁸ See Spencer II, *supra* note 15, at 111 (“Only those states where the Internet activity gives rise to a claim would potentially be permitted to exercise jurisdiction”); see also McGee v. Int’l Life Ins. Co., 355 U.S. 220, 223 (1957) (noting importance of state providing forum for residents’ litigation, due to disadvantages of traveling to distant forum).

¹⁹⁹ See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (quoting Int’l Shoe Co. v. Wash., 326 U.S. 310, 316–17 (1945)) (considering both burden on defendant and interest of plaintiff as traditional notions of fair play and substantial justice); Minn. Pub. Radio v. Va. Beach Educ. Broad. Found., Inc., 519 F. Supp. 2d 970, 979 (D. Minn. 2007) (finding that convenience of parties was balanced when each party relied primarily on witnesses and evidence in its own state).

²⁰⁰ See *In the Face of Danger: Facial Recognition and the Limits of Privacy Law*, *supra* note 40, at 1874 (noting that users can publish photos cheaply and easily online); Liebman, *supra* note 7, at 351 (noting that individuals can blog for free).

²⁰¹ See Borchers, *supra* note 5, at 490 (noting that potential rule requiring plaintiffs in libel actions to always go to defendant’s forum to litigate would subject plaintiffs to hardship).

²⁰² See *World-Wide Volkswagen*, 444 U.S. at 311 (Brennan, J., dissenting) (“Given the tremendous mobility of goods and people, and the inability of businessmen to control where goods are taken by customers (or retailers), I do not think that the defendant should be in complete control of the geographical

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remedy if they do not have the resources to pursue litigation in the poster's forum.²⁰³

Moreover, jurisdictional issues go beyond mere convenience and expense; they also implicate choice of law.²⁰⁴ The law of the plaintiff's forum may provide advantages to the plaintiff, but those advantages may be meaningless without personal jurisdiction over the defendant in that forum.²⁰⁵ Additionally, legislation limits individuals to seeking damages against the original poster of the content, rather than Internet service providers.²⁰⁶ If the original poster is anonymous or insolvent, plaintiffs may have no redress for damages.²⁰⁷ Therefore, allowing plaintiffs the right to bring suit in the forum where they experienced harm would balance the ease with which they can be harmed from beyond the border of their states and the legislative limitation of their claims.²⁰⁸

stretch of his amenability to suit."); *In the Face of Danger: Facial Recognition and the Limits of Privacy Law*, *supra* note 40, at 1874 (observing that people can be harmed by photos posted online from anywhere in world).

²⁰³ See Geist, *supra* note 23, at 1347–48 (noting that effectiveness of online consumer protection laws "is severely undermined if consumers do not have recourse within their local court system or if enforcing a judgment requires further proceedings in another jurisdiction"); *but see* Liebman, *supra* note 7, at 365 (noting that, in some cases, victims of online defamation have greater resources to pursue legal action than defendant bloggers).

²⁰⁴ See FREER & PERDUE, *supra* note 6, at 72 ("Probably the most common reason that litigants care about the location of jurisdiction has nothing to do with inconvenience or bias—it has to do with what law will be applied. We are a nation of 50 states, and the laws of those states vary.").

²⁰⁵ See *id.* at 73 ("Personal jurisdiction imposes significant limitations on the plaintiff's choice of forum and therefore limits the plaintiff's ability to choose a forum that will apply the most advantageous law.").

²⁰⁶ See CDA 47 U.S.C.A § 230(c)(1) (West 2000) (limiting third party liability for online posting).

²⁰⁷ See generally Liebman, *supra* note 7, at 364 (noting that individuals filing defamation claims against bloggers face obstacles including blogger anonymity and third party immunity).

²⁰⁸ See *Kauffman Racing Equip., L.L.C. v. Roberts*, No. 07-CA-14, 2008 Ohio App. LEXIS 1695, at *14 (Ohio Ct. App. Apr. 18, 2008) ("Today, thanks to the accessibility of the Internet, the barriers to generating publicity are slight, and the ethical standards regarding the acceptability of certain discourse have been lowered. As the ability to do harm has grown, so must the law's ability to protect the innocent."); Liebman, *supra* note 7, at 373 ("[Although] bloggers enjoy immunity from liability under [47 U.S.C.] § 230 if the content at issue is provided by a third party, and immunity from discovery if the content is posted anonymously, the harm caused by libelous speech is real to the injured parties.").

V. CONCLUSION

The explosion of user-generated Internet content through blogs, online social networks, and digital video sharing websites has brought unique risks of harm to individuals.²⁰⁹ A victim without the resources to travel to a poster's forum to seek justice may be unable to pursue damages.²¹⁰ Users who generate public Internet content know that anyone with Internet access can view that content.²¹¹ It is, therefore, reasonable to charge those users with foreseeing that they will be responsible for their harmful Internet communication, regardless of any express aiming to a specific location.²¹² As user-generated Internet content, with its high potential for harm, grows in popularity, courts should eliminate the express aiming requirement and hold users accountable for their Internet communication wherever it causes harm.²¹³

²⁰⁹ See Singel, *supra* note 12 (quoting Professor Ann Bartow) (“We have never had such a way to lie and distort facts about people – to spread lies and distortions in a way that is attached to them.”).

²¹⁰ See, e.g., FREER & PERDUE, *supra* note 6, at 71–72 (noting that parties may incur additional expenses litigating in distant forum).

²¹¹ Spencer II, *supra* note 15, at 105.

²¹² See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311 (1980) (Brennan, J., dissenting) (“When an action in fact causes injury in another State, the actor should be prepared to answer for it there unless defending in that State would be unfair for some reason other than that a state boundary must be crossed.”).

²¹³ See Spencer I, *supra* note 14, at 646 (noting that even without purposeful direction requirement, defendants will reasonably anticipate being haled into forum state because “defendants will anticipate being ‘haled into court’ wherever the law says that they are subject to suit”); *World-Wide Volkswagen*, 444 U.S. at 311 (Brennan, J., dissenting) (arguing that individuals must be prepared to answer for their actions in forums where the actions cause harm).