You Can't Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction

Dennis T. Yokoyama

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
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 (2005)
Available at: https://via.library.depaul.edu/law-review/vol54/iss4/5

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
YOU CAN'T ALWAYS USE THE Zippo CODE:
THE FALLACY OF A UNIFORM THEORY OF
INTERNET PERSONAL JURISDICTION

Dennis T. Yokoyama*

INTRODUCTION

In 1995, International Shoe v. Washington1 celebrated its fiftieth anniversary. This seminal case brought the personal jurisdiction doctrine into the twentieth century by extricating the doctrine from the rigid formalism of Pennoyer v. Neff.2 While many commentators reflected upon the significance of what International Shoe had wrought,3 the computer world continued its rapid evolution. Computers became increasingly powerful and at the same time cheaper to buy, operating systems based on graphical interfaces were making computers easier to use, and rapid developments in software, especially browsers, made it easy for people to explore, inhabit, and profit from a new frontier of information and commercial possibilities—the Internet.4 Increasing numbers of people, at work and at home, logged onto the Internet,

* Associate Professor of Law, Director of the Legal Research and Writing Program, Southwestern University School of Law. I am grateful for the research stipend provided by the Board of Trustees of Southwestern University School of Law. I am also grateful for the advice and moral support of Southwestern's Dean, Leigh H. Taylor. I thank my Southwestern colleagues—Christopher Cameron, Michael Dorff, Danielle Hart, and Austen Parrish—for their thoughtful comments on earlier drafts. I am also thankful for the help of my research assistants, Lina Melidonian and Jason Rosen. Thanks also to the editors of the DePaul Law Review for their fine help. Finally, I express my gratitude to Janis K. Yokoyama and Denise K. Yokoyama for all that they do for me. I dedicate this Article to the memory of my parents, Herbert S. and Yayeko Mae Yokoyama.

1. 326 U.S. 310 (1945).
2. 95 U.S. 714 (1877).
3. The University of California Davis Law Review put together a symposium issue (Spring 1995 issue)—Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction—to commemorate the anniversary.
4. See Katherine C. Sheehan, Predicting the Future: Personal Jurisdiction for the Twenty-First Century, 66 U. CIN. L. REV. 385, 411 (1998) (noting that the convergence between increasingly sophisticated technology and inexpensive computers and software spurred the growth of the Internet). In 1996, one court, in reflecting upon the Internet's "extraordinary growth," observed that "[i]n 1981, fewer than 300 computers were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, over 1,000,000 computers were linked. Today, over 9,400,000 host computers, of which approximately 60 percent are located within the United States, are estimated to be linked to the Internet." ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1997), aff'd, Reno v. ACLU, 521 U.S. 844 (1997).

1147
using a variety of Internet features, such as downloading computer files, communicating via e-mail, and visiting websites on the World Wide Web.\(^5\) The Internet had not only arrived, it had taken root, unleashing permanent changes in information dissemination, communication, and commerce. Probably only a prescient few in 1995 foresaw that personal jurisdiction and the Internet would quickly converge, springing forth new issues that would challenge the applicability of the existing personal jurisdiction model embodied by \textit{International Shoe} and its progeny.\(^6\) Disputes involving Internet activities were arising in 1995 and litigation commencing soon thereafter would open the floodgate to issues involving Internet personal jurisdiction.\(^7\) The proliferation of cases involving Internet jurisdiction issues and their resolution quickly amassed into a sprawling, untidy, and inconsistent body of Internet jurisdiction law.

Now, ten years later, this Article examines the current state of Internet jurisdiction jurisprudence by examining the seminal decisions that marked this frontier of personal jurisdiction and that spawned a plethora of conflicting judicial decisions and commentary. The early cases dealing with Internet jurisdiction required courts to make sense of and to characterize the Internet activities at issue, to decide whether the traditional model of personal jurisdiction could accommodate the issues arising from activities in the seemingly borderless world of the Internet, and to pluck from their imaginations a way of dealing with Internet jurisdiction that would comport with the long-standing demands of due process.

A significant early line of cases examined the effect of the defendant's operation of a website on the personal jurisdiction issue. These courts broadly held that jurisdiction could be exercised in every state in which the website could be accessed, in effect, creating universal

---

\(^5\) \textit{Reno}, 521 U.S. at 851. About forty million people worldwide were Internet users in 1996. ACLU, 929 F. Supp. at 831.


The most influential test pertaining to Internet jurisdiction was set forth in a trademark infringement case, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* The *Zippo* decision eschewed the overly simplistic approach of finding jurisdiction wherever the defendant's website could be accessed. Instead, the court created a sliding scale of purposeful availment based on the interactivity of the defendant's Internet activities. The *Zippo* decision, which remains the most influential case in this area of law to date, provided a much-needed change of course in the evolution of Internet jurisdiction.

In *Zippo*'s wake, many courts, in their zealous and understandable quest to adopt a single standard for all Internet jurisdiction issues, have improvidently chosen to apply a unitary test based on *Zippo* to all Internet jurisdiction issues. These courts have mistakenly found the *Zippo* test is applicable simply because the defendant's conduct involved Internet activities. These courts, in applying the *Zippo* test, have failed to consider fully the factual and legal underpinnings of the lawsuit in their analysis of personal jurisdiction, a consideration essential to proper application of the traditional model of personal jurisdiction.

This Article maintains that principles governing Internet jurisdiction issues should be grounded in, rather than divorced from, the traditional model of personal jurisdiction. The exercise of personal jurisdiction arising from Internet activities should conform to first principles of jurisdiction. The jurisdictional analysis requires evaluating the defendant's contacts with the forum state in order to assess whether the defendant has minimum contacts with the forum state. In addition, the analysis requires determining whether the assertion of jurisdiction is reasonable. Even though any exercise of jurisdiction must conform with these first principles of jurisdiction, determining whether particular Internet activities constitute minimum contacts re-

---


12. For a fuller discussion of *Zippo*, see infra Part III.

quires sensitivity to the fact that some Internet activities may have no meaningful analogues to traditional forms of communication, and that these activities therefore must be assessed differently.\textsuperscript{14}

This Article is organized as follows: Part II describes the traditional model of personal jurisdiction, summarizing the Supreme Court’s articulation of the principles that govern general and specific jurisdiction. Part III enters the world of the Internet and Internet jurisdiction, first by sketching the development of the Internet and then by discussing the seminal cases and positions taken regarding Internet jurisdiction that continue to frame the debate today. Part III focuses on the \textit{Zippo} case by examining its rationale and its enormous significance. As Part III discusses, the \textit{Zippo} decision’s rationale and influence in many ways parallels that of the \textit{International Shoe} decision.

Part IV asserts that the search for a uniform test encompassing the whole of Internet jurisdiction issues is ultimately a misguided exercise, and one that has caused much of the disarray in Internet jurisdiction jurisprudence. Because the Internet hosts a multitudinous array of activities and communities that now mirrors all aspects of society,\textsuperscript{15} the resolution of Internet jurisdiction issues must be sensitive to the defendant’s specific Internet activities. Equally important in the context of specific jurisdiction is evaluating the defendant’s conduct, both Internet-related and otherwise, in light of the plaintiff’s specific claims asserted against the defendant. While this is axiomatic in resolving specific jurisdiction issues, it is surprising how frequently this principle is cast aside when the issue concerns Internet activities. What ultimately undermines any uniform theory of Internet jurisdiction is the fact that such theories focus far too much on the defendant’s Internet activities to the exclusion of how those activities relate to the substantive aspects of the plaintiff’s claim.

Part IV offers a framework for evaluating Internet jurisdiction issues that, while grounded in the traditional model of personal jurisdiction, takes into account the array of activities facilitated by, and occurring through, the Internet. Part IV also recommends a model of Internet jurisdiction that uses as examples the following key areas of substantive law where Internet activities have intersected: infringement,

\textsuperscript{14} Websites and e-mails, for example, are both analogous to, as well as distinguishable from, more traditional forms of communication.

\textsuperscript{15} In 1997, Professor Dan Burk predicted that “[a]s the community of Internet users grows increasingly diverse, and the range of on-line interaction expands, disputes of every kind may be expected to occur. On-line contracts will be breached, on-line torts will be committed, on-line crimes will be perpetrated.” Dan L. Burk, \textit{Jurisdiction in a World Without Borders}, 1 VA. J.L. & TECH. 3, 3 (1997).
INTERNET PERSONAL JURISDICTION

I. INTRODUCTION

The model's virtue is that it is anchored in first principles of personal jurisdiction while accommodating the nature of the Internet activities at issue. The model explicitly recognizes that resolving personal jurisdiction issues requires the assessment of the defendant's Internet contacts with the forum state in light of the factual and substantive legal underpinnings of the lawsuit.

II. THE TRADITIONAL MODEL OF PERSONAL JURISDICTION

The Supreme Court's decision in *International Shoe v. Washington* ushered in the modern era of personal jurisdiction jurisprudence. The decision freed this jurisprudence from the moorings of the wooden doctrine announced in *Pennoyer v. Neff*, which considered presence in the forum state to be the *sine qua non* standard for personal jurisdiction. As applied to corporations whose very existence is a fiction, the concept of presence, as well as other legal fictions, such as implied consent and doing business in the forum, proved difficult to apply to corporate activities in the forum state. In declaring a new rule for personal jurisdiction, the Court in *International Shoe* stated,

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Based on *International Shoe* and its progeny, personal jurisdiction analysis proceeds down a familiar doctrinal path. In the absence of a traditional basis of jurisdiction, such as waiver or consent, citizen-

17. 95 U.S. 714 (1877).
18. *See Pennoyer*, 95 U.S. at 722 (stating that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"). In *Hanson v. Denckla*, 357 U.S. 235, 251 (1958), the Court contrasted the *Pennoyer* rule, which it termed "rigid," with the *International Shoe* rule, which it characterized as a "flexible standard."
19. Twelve years after its decision in *International Shoe*, the Court noted that the *Pennoyer* doctrine proved particularly difficult to apply to nonresident corporations and ultimately led to the new approach taken in *International Shoe*. McGee v. *Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957); *see also* Christopher D. Cameron & David R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAvis L. REV. 769, 779 (1995) (noting that the Supreme Court in *International Shoe* "reached out to repair a doctrine in serious disarray").
20. *Int'l Shoe*, 326 U.S. at 316 (citations omitted).
ship or incorporation in the forum state, or service of process upon an individual in the forum state, a court will examine whether the forum state’s long-arm statute extends to the nonresident defendant in light of the plaintiff’s particular claims and the defendant’s activities in the forum. If the statute applies, the court determines whether the exercise of personal jurisdiction comports with the constitutional guarantee of due process. The due process analysis, in turn, requires examining whether the defendant has minimum contacts with the forum state and whether the assertion of personal jurisdiction is reasonable.

The contacts analysis will vary depending on which type of personal jurisdiction is at issue, general jurisdiction or specific jurisdiction. The applicability of either type depends on the relationship between the defendant’s contacts with the forum state and the plaintiff’s claims raised against the defendant. The exercise of general jurisdiction exists independently from the factual and legal underpinnings of the plaintiff’s claims and depends solely on the defendant’s contacts with the forum state. In contrast, the exercise of specific jurisdiction requires a sufficiently close nexus between the defendant’s contacts with the forum state and the plaintiff’s claims. For the exercise of either general or specific jurisdiction, the defendant’s contacts with the forum state must show that the defendant purposefully availed itself of the forum state’s benefits and protections.

Finally, even if the defendant has had minimum contacts with the forum state, the assertion of jurisdiction must comport with “traditional notions of fair play and substantial justice.” In other words, if

24. The notion of transient jurisdiction was considered constitutional in Pennoyer v. Neff, 95 U.S. 714, 733 (1877). In a post-International Shoe decision involving transient jurisdiction, the Supreme Court unanimously upheld personal jurisdiction over the defendant who was personally served in the forum. The Court, however, was evenly split as to whether the Pennoyer view of transient jurisdiction should be dispositive or whether the minimum contacts test should be applied. Burnham v. Superior Court, 495 U.S. 604 (1990).
25. For a fuller description of these traditional bases, see Sheehan, supra note 4, at 388–90.
28. See infra Part IV.
30. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (citing Int’l Shoe, 326 U.S. at 316). The notion of purposeful availment arose in Hanson, in which the Court stated that the defendant’s contacts with the forum state must include “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” Hanson v. Denckla, 357 U.S. 235, 252 (1958).
the purposeful availment requirement has been satisfied, the inquiry then turns to whether the exercise of personal jurisdiction is constitutionally reasonable.\textsuperscript{32} This aspect is satisfied when requiring the defendant to litigate in the forum state is a reasonable exercise of the forum state's power. The Court indicated that the inquiry into reasonableness requires an analysis of the following factors: (1) The burden on the defendant in litigating in the forum state; (2) "the forum state's interest in adjudicating the dispute"; (3) "the plaintiff's interest in obtaining convenient and effective relief"; (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (5) "the shared interest of the several States in furthering fundamental substantive social policies."\textsuperscript{33} This framework of personal jurisdiction forms the foundation from which all assertions of personal jurisdiction must be based, and which ought to include the exercise of jurisdiction over defendants whose contacts with the forum state arise from the Internet.

III. The Internet Jurisdiction Age

The Internet is a gigantic storehouse of information and immense commercial possibilities.\textsuperscript{34} Yet, the Internet is also an amorphous and intangible realm unencumbered by borders, a universe that reaches everywhere and is accessible at any time.\textsuperscript{35} Nevertheless, the hard wire underpinnings of the Internet, of course, are very much of the physical world.

A. A Brief Description of the Internet

The Internet, put simply, is a decentralized, networked series of computers through which people can communicate with one an-

\textsuperscript{32} See Asahi Metal Industry Co. v. Superior Court of Cal., 480 U.S. 102, 113–16 (1987) (holding that, even if the defendant had minimum contacts with the forum state (an issue that created a 4–4–1 split on the Court), it would be unreasonable to exercise jurisdiction over the defendant).

\textsuperscript{33} World-Wide Volkswagen, 444 U.S. at 292. The significance of the reasonableness prong is evidenced in the Court's decision in Asahi, 480 U.S. at 113–15, a case in which the Court was evenly divided on the minimum contacts prong but unanimous in finding that the exercise of jurisdiction was unreasonable.

\textsuperscript{34} Reno v. ACLU, 521 U.S. 844, 853 (1997) (stating that "[t]he Web is . . . comparable . . . to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services").

\textsuperscript{35} The Supreme Court noted that the various means of communication available through the Internet collectively "constitute a unique medium—known to its users as 'cyberspace'—located in no particular geographic location but available to anyone, anywhere in the world, with access to the Internet." Id. at 851.
In 1969, the precursor of today’s Internet was launched: The Advanced Research Projects Agency Network (ARPANET), a networked series of computers. The sole purpose of this research and development was for military uses. ARPANET was used primarily by scientists and other researchers to exchange military and national security data. Only a limited segment of researchers, scientists, government employees, and government contractors had access to and used ARPANET when it was launched.

The Advanced Research Projects Agency, an agency of the U.S. Department of Defense, created ARPANET as a communications system involving networked computers that would survive and function even if a nuclear attack were to destroy some of the networked computers. The Internet’s durability is based on the decentralized nature of numerous networked computers, which means that information can be transmitted and routed through innumerable channels.

Out of ARPANET emerged today’s Internet, which facilitates the exchange of information in a variety of ways. Perhaps the most outstanding feature of the Internet has been the creation and development of the now-familiar World Wide Web, which provides a significant way to send and retrieve information through the Internet. The World Wide Web consists of documents known as webpages, which are stored on and delivered through computer servers. A webpage is a document with a unique Internet online address—a Uniform Resource Locator, or “URL.” A webpage may be composed of any combination of text, images, and sounds, along with hypertext links that connect webpages.

The World Wide Web owes its existence to the development of these hypertext links, or more precisely, to the creation of the pro-

40. Id. at 5.
41. Gilster, supra note 37, at 16.
42. Information sent through the Internet is broken down into “packets.” Id. at 15. Each packet has a “header” specifying the destination of the packet. Id. As packets travel through the Internet to their intended destination, they go from networked computer to networked computer, and “computers routing this data can select alternate routes when a given link fails.” Id. at 18.
43. Id. at 15–16.
44. Conner-Sax & Krol, supra note 39, at 107.
45. Id. at 108.
gramming language Hypertext Markup Language (HTML). The HTML was developed in the late 1980s and early 1990s. A document written in HTML can be read and displayed on any computer that has a browser, which is software that can interpret and display HTML documents coming from Web servers. Documents written in HTML are embedded with programming code so that a person can click on a hyperlink to go from one webpage to another. As a result, the Internet has become something of a seamless web tying together information stored on the vast network of servers that make up the Internet.

A person or entity seeking to establish a website has to obtain a website address. Obtaining a website address requires the registration of a domain name (such as “ibm.com”), which would be assigned a specific Internet Protocol (IP) address. Registration is accomplished through a company operating as a domain name registrar. In processing the domain name registration application, the registrar verifies that the domain name being sought has not already been registered.

Having obtained a domain name, people can create a website or have one created for them. In addition, people will need the website hosted so that the site is accessible to Internet users. To help fill this need, website hosting companies have sprouted. Website hosting companies store websites on their server computers so that the website operator can have it continuously available and need not worry about maintaining its own server. Creating and having a website hosted has become much easier and more inexpensive, and has thus led to the proliferation of websites.

Because a website typically can be accessed by anyone with Internet access, a website has a ubiquitous electronic presence, viewable any-

46. Id. at 6.
47. Id. at 5–6.
48. Id. at 6.
49. Id.
50. Bird v. Parsons, 289 F.3d 865, 869 (6th Cir. 2002).
51. EFRAM TURBAN ET AL., ELECTRONIC COMMERCE 2004: A MANAGERIAL PERSPECTIVE 611 (2004). An Internet Protocol (IP) address is a unique numerical host address of the registered domain name and can be likened to a telephone number. Conner-Sax & Krol, supra note 39, at 17–18.
52. TURBAN ET AL., supra note 51, at 611.
53. Id.
54. Id. at 609–10 (describing the array of available website hosting options).
55. See id. (describing the comparative advantages and disadvantages of various website hosting options).
56. Id. at 610.
where and at any time. As the information available on the Internet has proliferated due to the ever-increasing number of website operators putting out an increasing amount of content, the World Wide Web has become a juggernaut of information. Unlike television and radio and magazines and newspapers, the Internet is not bound by a finite number of broadcasting channels or newsstand space and circulation. It is hardly surprising, then, that judges initially faced with personal jurisdiction issues intertwined with Internet activities were awed with the universal accessibility of information available on the Internet.

B. The Zippo Decision and the Sliding Scale of Interactivity

Operating a website accessible in a particular state most certainly constitutes a contact with that state. The question courts and commentators have grappled with is how to evaluate that contact for purposes of personal jurisdiction. By far, the most influential case involving Internet jurisdiction is *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* In appreciating the rationale and significance of the *Zippo* decision, it is important to understand the law of Internet jurisdiction at the time of the decision.

A significant precursor to *Zippo* is *Inset Systems, Inc. v. Instruction Set, Inc.*, which held that a website advertising the defendant’s goods or services sufficed to establish personal jurisdiction over the defendant wherever the website could be viewed. In *Inset*, *Inset* Systems, a Connecticut corporation, alleged that Instruction Set, a Massachusetts corporation, had infringed on *Inset*'s federally protected trademark when Instruction Set registered the domain name “Inset.com.” *Inset* filed its suit in a Connecticut federal district court, and Instruction Set moved to dismiss for lack of personal jurisdiction. Instruction Set had no offices or employees in Connecticut. Its one contact with Connecticut was that its website was accessible in Connecticut. In denying Instruction Set’s motion, the court distinguished website advertising from advertising through traditional media. The court reasoned that because website advertising is available any time to anyone with Internet access, businesses engaged in website advertising have manifested purposeful availment in virtually all fora in which In-

59. Id. at 163.
60. Id. at 162.
61. Id. at 162–63.
62. Id. at 165.
INTERNET PERSONAL JURISDICTION

INTERNET access is available. The court construed website advertising as marketing to the entire nation, and thus, with the potential of reaping sales nationwide, the website operator must assume the risks and burdens of being sued outside its home state. The rationale of Inset—that because a website can be viewed continuously in the forum, the website constitutes purposeful availment—quickly drew approval from other courts facing similar issues.

Thus, by the time Zippo came along, a growing body of case law had started taking root. This emerging body of law equated the operation of a website to purposeful availment anywhere the website could be accessed, which meant just about everywhere. An enduring hallmark of Zippo will be its incisive questioning and well-reasoned undermining of the Inset rationale and its thoughtfulness in creating an alternative approach to Internet jurisdiction. Zippo, like the Inset case, involved a trademark dispute in which the defendant's contacts with the forum state consisted almost exclusively of its Internet activities. In Zippo, Judge Sean J. McLaughlin, a federal district judge sitting in the Western District of Pennsylvania, announced that a better way to resolve the question of specific jurisdiction is to examine the nature and quality of the defendant's Internet activities on a sliding scale of purposeful availment. Judge McLaughlin stated that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." In Zippo, Zippo Manufacturing Corporation, the Pennsylvania-based maker of the world-famous Zippo tobacco lighters, sued Zippo Dot Com, Inc., alleging various claims based on federal and state trademark law. Zippo Dot Com, a California-based corporation, was operating a website through which it advertised its Internet news service. Zippo Dot Com's website gave subscribers to its service access to various Internet newsgroups. Zippo Dot Com offered three levels of subscription, ranging from a free subscription to two types of

63. Id. (reasoning that "once posted on the Internet, unlike television and radio advertising, the advertising is available continuously to any Internet user. [The defendant] has therefore purposely availed itself of the privilege of doing business in Connecticut.").
64. Inset, 937 F. Supp. at 165.
67. Id. at 1124.
68. Id.
69. Id.
70. Id.
71. Id.
paid subscriptions.\textsuperscript{72} To become a paid subscriber, a person had to submit his or her name and address on an online form and pay for the subscription with a credit card by way of telephone or directly through Zippo Dot Com’s website, which was designed to complete the transaction.\textsuperscript{73} Zippo Dot Com then sent the subscriber a password allowing access to Internet newsgroup messages archived on Zippo Dot Com’s server in California.\textsuperscript{74} In its lawsuit, Zippo Manufacturing objected to Zippo Dot Com’s registration of the domain names “zippo.com,” “zippo.net,” and “zipponews.com.”\textsuperscript{75} Zippo Manufacturing also objected to Zippo Dot Com’s use of “Zippo” throughout its website and in the headings of newsgroup messages that subscribers downloaded.\textsuperscript{76}

Zippo Dot Com’s contacts with Pennsylvania existed almost entirely through the Internet.\textsuperscript{77} Zippo Dot Com advertised its news service solely through its website.\textsuperscript{78} People paid for their subscriptions through either the telephone or Zippo Dot Com’s website.\textsuperscript{79} At the time of the lawsuit, Zippo Dot Com had about 140,000 subscribers, about 3,000 of whom were Pennsylvanians.\textsuperscript{80} In addition, Zippo Dot Com had contracted with several Internet service providers in Pennsylvania to allow their subscribers access to Zippo Dot Com’s news services.\textsuperscript{81}

In fashioning a novel personal jurisdiction framework for evaluating Internet activities, the court characterized Internet activities as running along a sliding scale of purposeful availment. The court stated that the purposeful availment pole is anchored whenever “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.”\textsuperscript{82} At the opposite end of the spectrum are passive websites “where a defendant has simply posted information . . . which is accessible to users in foreign jurisdictions.”\textsuperscript{83} In the middle of the spectrum are “interactive Websites where a user

\textsuperscript{72} Zippo, 952 F. Supp. at 1124.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 1121.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 1121–22.
\textsuperscript{77} Id. at 1121.
\textsuperscript{78} Zippo, 952 F. Supp. at 1121.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. (citing CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)).
\textsuperscript{83} Id. (citing Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996)).
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 of information that occurs on the Website." 84

In applying the sliding scale test to the facts before it, the court rejected Zippo Dot Com's argument that its contacts in Pennsylvania and the business it generated in Pennsylvania were "fortuitous." 85 The court concluded that Zippo Dot Com's activities in Pennsylvania reflected a well-reasoned decision to do business in Pennsylvania. 86 The court found that Zippo Dot Com's contacts with the forum state, which included contracts with several Pennsylvania Internet service providers and three thousand Pennsylvanians who subscribed to Zippo Dot Com's service, established that Zippo Dot Com had forged a substantial connection with Pennsylvania, 87 and that the lawsuit for trademark infringement arose out of the defendant's activities in Pennsylvania. 88 Furthermore, the court noted that if Zippo Dot Com had wanted to avoid being subject to the jurisdiction of Pennsylvania courts, it easily could have done so by declining to sell "its services to Pennsylvania residents." 89

Finally, addressing the second level of the due process analysis, the court held that jurisdiction over Zippo Dot Com was reasonable. 90 Emphasizing that Zippo Manufacturing was a Pennsylvania corporation, the court noted that Pennsylvania has a "strong interest in adjudicating disputes involving the alleged infringement of trademarks

84. Zippo, 952 F. Supp. at 1121 (citing Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996)). While diplomatically asserting that Inset "represents the outer limits of the exercise of personal jurisdiction based on the Internet," id. at 1125, the court, in applying its sliding scale test, would most certainly have found the defendant's website in Inset to be passive.

85. Id. at 1126.
86. Id. at 1126–27.
87. Id. at 1127.
88. The court remarked that under Third Circuit law, a trademark infringement claim arose "where the passing off occurs." Id. at 1127 (quoting Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1976)). Thus, if the defendant has sold substantial quantities of the infringing products in the forum, the infringement action has arisen in the forum state. Zippo, 952 F. Supp. at 1127.
89. Id. In one respect, Zippo illustrates the ease by which companies can engage in business via the Internet. It is just as easy on the Internet, and, of course, potentially much more profitable, to do business with residents in several states as it is to do business with residents of one state. Economies of scale are much easier to achieve with Internet-based businesses than with traditional bricks-and-mortar types of businesses. So, to some extent, it is understandable why many companies would choose to do business with anyone and everyone, regardless of where that customer resided, especially when services or goods can be provided through the Internet (as in Zippo Dot Com's Internet news service).
90. Id.
owned by resident corporations," and that the court must "give due regard to the Plaintiff's choice to seek relief in Pennsylvania."

C. Zippo's Legacy—A Necessary Change in Course for Internet Jurisdiction

Zippo rejected the notion of universal jurisdiction emanating from the Inset line of cases and Zippo's rationale better demarcated the intersection between Internet business practices and purposeful availment. Compared with Inset, the Zippo decision is much more consistent with the existing model of personal jurisdiction.

The premise in Inset that website advertising alone establishes personal jurisdiction contradicts the U.S. Supreme Court's view of purposeful availment in rulings such as World-Wide Volkswagen Corp. v. Woodson. In World-Wide Volkswagen, the plaintiffs, while living in New York, purchased a new Audi from a New York car dealer. The plaintiffs, having decided to move to Arizona, set out in their Audi to their new home. While driving through Oklahoma, their car was rear-ended and became engulfed in flames. Bringing a products liability suit in Oklahoma, the plaintiffs sued the car manufacturer (Audi), the national distributor (Volkswagen of America), the regional distributor of the car based in the New York tri-state area (World-Wide Volkswagen), and the car dealer (Seaway Volkswagen). World-Wide Volkswagen and Seaway Volkswagen moved to dismiss for lack of personal jurisdiction.

The Court ruled that the assertion of personal jurisdiction over the regional distributor and the car dealer violated the Due Process Clause of the Fourteenth Amendment. The Court reasoned that while it was foreseeable that the plaintiffs would operate the car outside of New York, that type of foreseeability does not satisfy due process. The Court noted that, even though the point of having a

91. Id.
92. "As many courts now recognize, the problem with the approach in Inset Systems is that it would allow anyone with a website to be sued anywhere in the world, even in jurisdictions to which the website was not expressly aimed, because access to a website is not limited geographically." Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154, 1159 (W.D. Wis. 2004) (citations omitted).
94. Id. at 288.
95. Id.
96. Id.
97. Id.
98. Id.
99. World-Wide Volkswagen, 444 U.S. at 299.
100. Id. at 295.
INTERNET PERSONAL JURISDICTION

A car is to transport people, often across great distances, the unilateral activity of a consumer in transporting a car across state lines would not exhibit purposeful availment of local distributors and retailers.\(^{101}\) Rather, the foreseeability critical to due process, according to the Court, is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."\(^{102}\) The Court found that a contrary holding would undermine a business's settled expectations borne ordinarily through careful planning of where potential litigation may take place.\(^{103}\)

The *World-Wide Volkswagen* decision is relevant to personal jurisdiction issues involving website advertising. In assessing purposeful availment when 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. The *Inset* rationale undermines settled doctrine because it neglects to address a significant aspect of personal jurisdiction: The principle that a defendant must purposefully direct its activities at, take deliberate action in, or create a substantial connection with the forum state so as to provide fair warning that its activities will most likely subject the defendant to jurisdiction in that forum.\(^{104}\) 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.\(^{105}\)

The *Inset* theory of jurisdiction, however, mistakenly conflates website advertising with the products or services that are marketed. Web-

---

101. *Id.* at 297 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).
102. *Id.* (citations omitted).
103. *Id.*
104. See *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987) (stating that "[t]he 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State" (citations omitted)); see also *Millennium Enters. v. Millennium Music, L.P.*, 33 F. Supp. 2d 907, 922 (D. Or. 1999) (stating that a website accessible to forum residents, by itself, fails to demonstrate direct action taken towards the forum).
site advertising should not be confused with what is being advertised, and the mere fact that the advertising may be viewed in a particular forum should not suffice to establish purposeful availment. Under World-Wide Volkswagen, a company that distributes or sells products in a particular state has most likely purposefully availed itself of that state.106 The purposeful availment requirement is satisfied if the defendant "regularly" sells its products to "customers or residents" of the forum state or if the defendant "indirectly, through others, serves or seeks to serve the [forum state's] market."107 However, a company's advertisements on a website alone cannot constitute purposeful availment. Although it is undoubtedly foreseeable that a website is accessible virtually anywhere, it is a mistake to conclude that a website operator has availed itself of the benefits and privileges in every jurisdiction. In the same way that it is foreseeable that a motorist will use a car to travel across state lines, it is foreseeable that people beyond the website operator's home state and states in which it does business may access the operator's website. The Court in World-Wide Volkswagen said that this type of foreseeability must give way to a determination as to whether the defendant had directed any activities towards the forum state.108 The Court emphasized that the defendant must be able to plan and direct its conduct in such a way that it can reasonably foresee in what fora it will be subject to suit.109 Website advertising generally will be a much more attenuated contact with a given state than the car sold by a New York car dealer and driven by a family into Oklahoma, a contact that the Court found insufficient for due process purposes.110

In significant ways, the Zippo decision parallels the International Shoe decision. Both cases confronted head-on a commercial environment that tested the limits of existing jurisdictional doctrine, that exposed the doctrine's flaws and inherent limitations, and that, therefore, demanded a new way of evaluating jurisdictional issues. The Court in International Shoe fashioned a new approach to personal jurisdiction in a world increasingly dominated by large companies engaging in interstate commerce. The court in Zippo took on the Internet, an emerging technological force with obvious enduring and widespread societal effects.111 In addition, the court had to address

106. World-Wide Volkswagen, 444 U.S. at 295.
107. Id.
108. Id. at 295–96.
109. Id. at 297.
110. Id. at 299.
111. Another noteworthy parallel linking International Shoe and Zippo is that while both decisions created a novel test for jurisdiction, both cases would have been easy to resolve under
the concept of universal jurisdiction spawned by the *Inset* line of cases. Both *International Shoe* and *Zippo* demonstrated judicial imagination in forging a new approach to personal jurisdiction,\textsuperscript{112} while intending to remain true to long-standing jurisdictional principles.\textsuperscript{113}

The Court in *International Shoe*, in reinventing the then-prevailing test of presence to determine personal jurisdiction, created a test that would remain viable in the modern economy, reflect the prolific growth of interstate commerce, and expand the reach of jurisdiction.\textsuperscript{114} Commentators have typically viewed the *International Shoe* decision as responding to an economic environment far different from the one when *Pennoyer* was decided, an economy that in 1945 was driven by radically improved modes of transportation and communication.\textsuperscript{115} The Court in *International Shoe* discounted the *Pennoyer* notion that the forum state could subject a corporation to jurisdiction if the corporation were present in the forum state as simply an exercise in circular reasoning, a rule that "beg[ged] the question to be de-


\textsuperscript{113} Asserting that the *International Shoe* and *Pennoyer* decisions are congruent, Professor Stein said, "When viewed from a broader perspective ... *International Shoe* is consistent with *Pennoyer*'s conceptual framework. After *International Shoe*, the relationship of the Constitution to state court personal jurisdiction remained intact; the Court refined and reworked, rather than rejected, its theories of the legitimate scope of state authority." Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689, 693–94 (1987).

\textsuperscript{114} See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 423 (1984) (Brennan, J., dissenting) ("The vast expansion of our national economy during the past several decades had provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause.")

\textsuperscript{115} See, e.g., Cameron & Johnson, *supra* note 19, at 779 ("[*International Shoe*] is a product of its times, an era of rapidly increasing interstate commerce, as demonstrated by large business' increasing use of traveling salesmen across the country."). Interestingly, however, the Court in *International Shoe* did not explicitly indicate that the minimum contacts test it created was driven by changes in the commercial world. Perhaps an explicit recognition of such changes would have been too obvious to state. Some years later, the Court did remark that the expansion of personal jurisdiction over nonresident corporations was "attributable to the fundamental transformation of our national economy." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957).
cided.”\textsuperscript{116} Instead, a corporation’s presence in the forum state should be determined by examining the “activities carried on in its behalf by those who are authorized to act for it.”\textsuperscript{117}

By the same token, the \textit{Zippo} decision, while honoring and rooting itself in the traditional model of jurisdiction,\textsuperscript{118} announced a new analytical model for assessing purposeful availment in the context of Internet activities. The \textit{Zippo} decision, as did \textit{International Shoe}, described a continuum upon which the defendant’s contacts with the forum state could be placed. The \textit{International Shoe} Court’s description of the minimum contacts test may be viewed as a type of sliding scale that requires examining the level and quality of the defendant’s activity in the forum state and the relationship of that activity to the plaintiff’s lawsuit.\textsuperscript{119} The Court described a continuum of contacts with the forum ranging from the single or occasional act to continuous and substantial acts.\textsuperscript{120} In elaborating upon its new paradigm for personal jurisdiction, the Court contrasted two situations, one that unquestionably would suffice to establish personal jurisdiction, and one that undoubtedly would not. Jurisdiction is proper when the corporation’s activities “have not only been continuous and systematic, but also give rise to the liabilities sued on.”\textsuperscript{121} On the other hand, jurisdiction defies due process when “the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf” are unrelated to the lawsuit.\textsuperscript{122} Similarly, in \textit{Zippo}, by placing websites on a continuum ranging from passive sites, which merely convey information, all the way to websites that function as highly interactive, self-contained profit centers, the court implicitly declared its allegiance to the minimum contacts model of jurisdiction. The \textit{Zippo} court extended the minimum contacts model to a new technology, and did so in a way that linked the novel, yet essential, aspects of the new medium to well established notions of purposeful availment.

Finally, the minimum contacts test adopted in \textit{International Shoe} and the sliding scale rule adopted in \textit{Zippo} are both extremely flexible rules. The \textit{Zippo} test places all Internet activity on its continuum of

\begin{itemize}
  \item \textsuperscript{116} \textit{Int’l Shoe}, 326 U.S. at 316.
  \item \textsuperscript{117} \textit{Id}.
  \item \textsuperscript{118} In setting forth the constitutional basis for its sliding scale test, the court observed that a defendant need not have “physically enter[ed] the forum state” to be subject to jurisdiction. \textit{Zippo}, 952 F. Supp. at 1123 (quoting \textit{Burger King Corp. v. Rudzewicz}, 471 U.S. 462, 475 (1985)).
  \item \textsuperscript{119} \textit{Int’l Shoe}, 326 U.S. at 317-18.
  \item \textsuperscript{120} \textit{Id.} at 317-19.
  \item \textsuperscript{121} \textit{Id.} at 317.
  \item \textsuperscript{122} \textit{Id}.
\end{itemize}
INTERNET PERSONAL JURISDICTION

interactivity. In *International Shoe*, the Court readily admitted that the minimum contacts test it had set forth would not lend itself to ready and certain application in many future cases. The inherent flexibility of each test has been assailed as being difficult to apply and far too capable of leading to inconsistent results. The minimum contacts standard would come to be criticized as creating and fostering uncertainty, since its flexibility, according to its critics, would make it a difficult standard to apply consistently. Nevertheless, *International Shoe* stands as a remarkably influential and durable decision that has survived for over half a century by establishing a flexible way of analyzing personal jurisdiction issues that generate from a commercial world shaped by revolutionary technological advances.

As the lightning rod of Internet jurisdiction, *Zippo*, while a district court decision, has also profoundly influenced personal jurisdiction, albeit in the narrower realm of Internet activities. The *Zippo* decision turned the tide on the *Inset* line of cases that seemingly promoted universal jurisdiction based on the accessibility of the defendant’s website. The exercise of personal jurisdiction over a defendant simply because the defendant has advertised on its website “would have a devastating impact on those who use this global service.” *Inset* and its progeny alarmed some commentators, fueling the fear that expan-

123. The Court stated:

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less.... Whether due process is satisfied must depend rather upon the quality and nature of the activity in question in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.

*Id.* at 319 (citations omitted).

124. See, e.g., Kevin C. McMunigal, Essay, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998) (contending that “[a]mbiguity and incoherence have plagued the minimum contacts test for the more than five decades during which it has served as the cornerstone of the Supreme Court’s personal jurisdiction doctrine”); Daniel Steurer, Comment, *The Shoe Fits and the Lighter Is Out of Gas: The Continuing Utility of International Shoe and the Misuse and Ineffectiveness of Zippo*, 74 U. COLO. L. REV. 319, 325 (2003) (asserting that “[t]he [minimum contacts] test, which can be described as one of reasonableness, left lower courts and commentators with little guidance as to how many contacts would support a finding of jurisdiction” (footnotes omitted)).

125. Playboy Enters., Inc. v. Chuckleberry Publ’g, Inc., 939 F. Supp. 1032, 1039–40 (S.D.N.Y. 1996); see also Millennium Enters., Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907, 922 (D. Or. 1999) (stating that expansive assertions of jurisdiction raise the problem of “dramatically chilling what may well be the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen”); Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097, at *20 (S.D.N.Y. Feb. 26, 1997) (observing that early decisions were based on websites accessible to all Internet users and thus finding universal jurisdiction).
sive findings of jurisdiction, like other forms of regulation, would stymie the commercial possibilities of the Internet. The impact of expansive jurisdictional rules would disproportionately harm smaller businesses operating on thinner margins or generating relatively small revenues. Expansive assertions of jurisdiction threaten the egalitarian nature of the Internet, which seemingly levels the commercial playing field by allowing businesses of modest means to compete in a regional, national, or even international marketplace, at a cost small in comparison to traditional bricks-and-mortar commerce. Whether Zippo's influence, or more precisely the Zippo rule itself, should extend for sixty years or more, as has the International Shoe doctrine, is the subject of the next section.

IV. REINVENTING ZIPPO: A RETURN TO BASIC PRINCIPLES

While courts and commentators alike initially found much to laud in the Zippo assertion that operating a passive website was an insufficient contact for purposes of personal jurisdiction, the Zippo rule has been attacked increasingly by a growing chorus of courts and commentators. The vast middle area of the Zippo spectrum—where the website enables users to exchange information with the website operator—has created a black hole of doubt and confusion, as courts have struggled with the question of whether an interactive site consti-

126. "By continuing to focus on the medium, continued court interference with online activity will stifle the growth of e-commerce because Website owners cannot tell in which forum their online behavior will subject them to suit." Bales & Van Wert, supra note 13, at 49.

127. See Christopher McWhinney et al., The "Sliding Scale" of Personal Jurisdiction via the Internet, 1999 STAN. TECH. L. REV. 1 (cautioning that "[s]maller start-up companies should be especially wary of the possibility of being named a defendant in a distant forum due to the company's Internet activity").

128. See Burk, supra note 15, at 60. Professor Burk argues:

But the prospect of multijurisdictional liability may very well raise the price of participation beyond the average citizen's reach. Much of the network's democratizing influence may be lost if liability deters all but the most heavily capitalized entrepreneurs from pursuing all but the most highly profitable ventures. The average user simply cannot afford the cost of defending multiple suits in multiple jurisdictions, or of complying with the regulatory requirements of every jurisdiction she might electronically touch.

Id.

129. One commentator stated that the Zippo test "has been cited as a mantra in almost every Internet jurisdiction decision that has followed Zippo." Jeremy Gilman, Personal Jurisdiction and the Internet: Traditional Jurisprudence for a New Medium, 56 BUS. LAW. 395, 399 (2000).

130. Some commentators have found that the Zippo rule, having stemmed what appeared to be a growing tide of universal jurisdiction based on mere website accessibility, has now outlived its usefulness. See Bales & Van Wert, supra note 13, at 49 (noting that "while [Zippo] provided an adequate starting point for analysis in 1996, technological advances and growing public familiarity with the intricate workings of the Internet have rendered this test obsolete" (footnote omitted)).
tutes purposeful availment. The rule has been denigrated as being
difficult to apply and incapable of consistent application. Com-
paring the problem is that, unlike the situation in 1997 when Zippo
was decided, most websites today have interactive features.

In addition, even though the Zippo test arose from a trademark dis-
pute and the jurisdictional issue was squarely centered on specific ju-
risdiction, courts soon adopted and applied the Zippo test in
substantively divergent cases, as well as applying the test to general
jurisdiction issues. The result has been the inappropriate transfor-
mation of the Zippo test into an all-purpose test for Internet jurisdic-
tion issues. Simplicity is certainly a virtue, and a uniform solution to
the apparently perplexing issue of Internet jurisdiction undoubtedly
has allure. But a one-size-fits-all approach to Internet jurisdiction is
too simplistic, especially since the traditional model of personal juris-
diction encompasses a variety of approaches based on the substantive
and factual aspects of the lawsuit to determine purposeful availment.
The Supreme Court has developed a distinct personal jurisdiction test
for cases involving defective products, breach of contract, and
defamation, among others. In addition, the Court has described a
test—or at least broadly outlined a test—for general jurisdiction. Thus,
an analysis of personal jurisdiction involving Internet conduct
that is confined to one particular framework applicable to all kinds of

131. Zippo did provide some guidance in how courts should assess the middle ground: When
the defendant's website allows the user to exchange information with the defendant, the court
should consider the "level of interactivity and the commercial nature of the exchange of infor-
mation." Zippo, 952 F. Supp. at 1124.

132. Bales & Van Wert, supra note 13, at 32 (asserting that "because of the ambiguity of the
classification of an 'interactive' Website, courts were, and are, still forced to attempt to pigeon-
hole virtual presence into traditional rules requiring physical presence"); Reid, supra note 13, at
265 (stating that "this gray area on the continuum is troublesome because courts have few guide-
lines for assessing the quality and nature of these contacts"); Traynor & Pirri, supra note 111, at
113 (arguing that "[t]he Zippo framework is flawed because it gives significance to a concept of
interactivity about which neither the Zippo case itself, nor the cases that supposedly defined the
test, provide any guidance").

133. Titi Nguyen, Note, A Survey of Personal Jurisdiction Based on Internet Activity: A Return

134. See infra Parts IV.C & IV.D.

135. See Asahi Metal Industry Co. v. Superior Court of Cal., 480 U.S. 102 (1987); World-Wide

136. See Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); McGee v. Int'l Life Ins. Co.,


138. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Perkins v. Ben-
Internet activity and all types of claims conflicts with the traditional model.

A. Infringement Actions—Should the Middle Level of the Zippo Scale Be Abolished?

In trademark infringement actions, resolving personal jurisdiction issues is easy when defendants have engaged in cybersquatting, the practice of registering a domain name known to be another's trademark with the intent of selling the domain name to the trademark holder. In cybersquatting cases, the courts have had little difficulty in ruling that the defendant should be subject to personal jurisdiction in the plaintiff's home state because the defendant has essentially kidnapped the domain name to extort money from the rightful possessor.¹³⁹ Because cybersquatting is essentially an intentional tort, the proper test for determining personal jurisdiction is the effects test, rather than the Zippo test.

In infringement cases involving less egregious conduct, the personal jurisdiction issue may not be so easily resolved, as difficult issues often arise as to whether the alleged infringer has purposefully availed itself in a particular state. If the defendant's website targets the states in which the plaintiff conducts business, then such targeting supports a finding of personal jurisdiction in any of those states.¹⁴⁰ Thus, courts have found that, in the absence of sales to the forum state, the defendant has demonstrated purposeful availment by operating a website that targets the forum state in a bid to do business there.¹⁴¹ What constitutes targeting, however, has not been clearly delineated.¹⁴² Courts have held that seemingly innocuous, generic statements on a

---

¹³⁹ See, e.g., Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 621–22 (C.D. Cal. 1996). Maintaining that cybersquatting cases are akin to intentional tort cases, the court applied the "effects test" announced in Calder, 465 U.S. at 783. Id.


¹⁴² Stein, supra note 112, at 433 (predicting that "[i]t will be rare in the Internet context for a defendant to 'directly target' its website at a particular state if that requires a defendant to seek out forum business in a manner distinct from its web-marketing generally" (footnote omitted)). Some commentators have endorsed a test for targeting that involves a technologically and factually sophisticated analysis of targeting. See, e.g., Michael A. Geist, Is There a There There? Toward Greater Certainty for Internet Jurisdiction, 16 BERKELEY TECH. L.J. 1345, 1352 (2001).
website evidence targeting the forum state.\textsuperscript{143} Additionally, and more problematically, courts have sometimes equated targeting of the forum with the mere fact that the website is interactive.\textsuperscript{144}

For purposes of clarity and consistency in determining whether the defendant purposefully availed itself of the forum state, the dividing line separating passive from active websites should be whether forum residents have made purchases online. Under this proposed rule, Zippo's murky middle level of interactivity would be abolished. Instead of a sliding scale, a website should be placed in one of two categories: revenue-generating websites and all other websites. In infringement actions, websites generating revenue from the forum state would demonstrate purposeful availment, whereas non-revenue generating websites would not. Operating a website through which residents in the forum state have completed transactions should certainly constitute purposeful availment.\textsuperscript{145}

An active website is one that not only allows a consumer to initiate and complete a transaction directly through the website, but also one which forum state residents have actually used to complete transac-

\textsuperscript{143} The Sixth Circuit Court of Appeals, for example, ruled that a blood-testing company purposefully availed itself in Michigan when its website proclaimed that "it will 'do a genetic newborn screening test for any parent in any state,' and enable[d] Michigan residents to print out the testing form to send along with payment." \textit{Neogen}, 282 F.3d at 891 (citation omitted); \textit{see also} Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 45 (D. Mass. 1997) (finding significant that the defendant's website mentioned that the defendant had performed services for a company located in the forum state). The necessity, and inherent ambiguity, of scrutinizing a website for clues evidencing targeting of the forum would be eliminated under my proposed rule. Thus, the personal jurisdiction issue in \textit{Neogen}, under my proposal, could be resolved by determining whether and to what extent the defendant had provided services to consumers in Michigan.

\textsuperscript{144} Some courts have emphasized the potential for forum residents to complete transactions online as overriding whether forum residents actually have completed transactions. \textit{See, e.g.}, First Tenn. Nat'l Corp. v. Horizon Nat'l Bank, 225 F. Supp. 2d 816, 821 (W.D. Tenn. 2002) (ruling that the defendant's maintenance of a website that allows forum residents to transact business sufficed to establish purposeful availment, even though the plaintiff failed to allege that the defendant had ever transacted business with forum residents); Stomp, Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074, 1078-81 (C.D. Cal. 1999) (finding that the defendant purposefully availed itself of forum by operating a website that allowed consumers to purchase the defendant's products, even though there was no proof that a forum resident had ever transacted business with defendant). \textit{But see, e.g.}, Transcraft Corp. v. Doonan Trailer Corp., No. 97 C 4943, 1997 WL 733905, at *9 (N.D. Ill. Nov. 17, 1997) (finding defendant's website insufficient to establish specific jurisdiction because plaintiff did not allege that defendant conducted business with forum residents via its website).

\textsuperscript{145} Bird v. Parsons, 289 F.3d 865, 875 (6th Cir. 2002) (holding that the defendant, a domain name registration company, had purposefully availed itself of the forum state because forum state consumers had completed transactions via the company's website); Arista Records, Inc. v. Sukfield Holding Co. S.L., 314 F. Supp. 2d 27, 31-34 (D.D.C. 2004) (holding that defendant's subscription-based music download service constituted purposeful availment of the forum).
tions. On the other hand, if the website lacks the ability for consumers to engage in an online transaction, then the courts should conclude that the website is passive.

Even those websites that offer more than just information about the defendant’s goods or services yet stop short of having consumers consummate transactions online should be considered passive. For example, a website should be considered passive even when the site provides contact information, such as mailing addresses, toll-free numbers, and e-mail addresses, or allows users to print out order forms, so long as purchases cannot be electronically executed via the site. This level of interactivity is analogous to advertising in national publications and thus should be insufficient to demonstrate purposeful availment. Of course, if, after receiving more information

146. See, e.g., Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 512-13 (D.C. Cir. 2002) (concluding that online brokerage firm’s website was active when website allowed forum residents to conduct a host of financial online activities). In one case, in which the defendant published a satirical publication, known as the *Annals of Improbable Research*, the court found that the defendant’s activities in the forum state were insufficient for specific jurisdiction, even though the defendant had sixty subscribers in the forum and sold on average fewer than sixty issues per month at newsstands. Scherr v. Abrahams, No. 97 C 5453, 1997 WL 299678 (N.D. Ill. May 29, 1998). In examining the defendant’s website, which allowed users to subscribe to a “mini” version of the publication sent by e-mail, the court found the website insufficiently interactive since the e-mail subscription was free and the only advertising in the mini-version was for defendant’s own products. *Id.* at *5.

147. See, e.g., Caterpillar, Inc. v. Miskin Scraper Works, Inc., 256 F. Supp. 849, 853 (C.D. Ill. 2003) (concluding, in a trade dress action, that a website was passive when the site provided product and contact information but did not facilitate online purchasing); David White Instruments, LLC v. TLZ, Inc., No. 02 C 7156, 2003 WL 21148224, at *6 (N.D. Ill. May 16, 2003) (concluding that defendant’s website was passive since consumers could not purchase products directly from the site but could through an “unaffiliated” website); Haggerty Enters., Inc. v. Lipan Indus. Co., No. 00 C 766, 2001 WL 968592, at *6 (N.D. Ill. Aug. 23, 2001) (ruling defendant not subject to specific jurisdiction because its website, while providing information about defendant’s products, did not list prices and because there was no proof that the defendant ever transacted business directly from its website); Resnick v. Manfredy, 52 F. Supp. 2d 462, 466 (E.D. Pa. 1999); Desktop Tech., Inc. v. Colorworks Reprod. & Design, Inc., No. CIV.A.98-5029, 1999 WL 98572 (E.D. Pa. Feb. 25, 1999); Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), aff’d, 126 F.3d 25 (2d Cir. 1997).

148. See, e.g., Mink v. AAAA Dev. LLC, 190 F.3d 333, 336-37 (5th Cir. 1999). Passive websites should also include those websites that allow users to enter their address prompting the website to list local stores selling the defendant’s products. See, e.g., *David White Instruments*, 2003 WL 21148224, at *6; *Desktop Tech.*, 1999 WL 98572, at *6.

149. Generally, Internet advertising ought to be likened to advertising in national publications, and a few courts, in extending the analogy beyond specific jurisdiction, have found that Internet advertising cannot subject a defendant to general jurisdiction. See, e.g., *David White Instruments*, 2003 WL 21148224, at *6; *Aero Prods. Int’l*, Inc. v. Intex Corp., 64 U.S.P.Q.2d 1772, 1777 (N.D. Ill. 2002). The analogy is sensible in that both forms of advertising typically do not target residents in any particular state. On the other hand, the Internet has been distinguished from television and radio broadcasting, in that the geographic scope of broadcasting is limited, whereas a website’s accessibility knows no borders. *Caterpillar, Inc.*, 256 F. Supp. 2d at 852 (stating that “given the nature of the internet
through the website, forum residents make purchases through traditional methods like telephone and mail, those sales should be factored as contacts within the existing model of personal jurisdiction.

A thoughtful decision where a court pointed out the deficiencies in equating purposeful availment with interactivity is *Millennium Enterprises, Inc. v. Millennium Music, LP*, which involved a trademark dispute between music retailers on opposite coasts of the United States. The defendant owned retail music stores in South Carolina known as "Millennium Music,"¹⁵⁰ which was the dispute's focal point. Both the plaintiff and the defendant operated websites and both sold products through their websites.¹⁵¹ The defendant, however, generated scant revenue from its website.¹⁵²

In ruling that it lacked jurisdiction over the defendant, the court decided that the defendant's capability of selling compact discs through its website did not satisfy the requirement of "doing business" over the Internet because the requirement can only be satisfied when the defendant conducts a significant portion of its business through ongoing Internet relationships.¹⁵³ The court stated that an example of "doing business" is when a company enters "into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet."¹⁵⁴

The court concluded that the defendant did nothing more than publish an interactive website.¹⁵⁵ The defendant did not purposefully transact business with Oregon residents through the Internet, other than in one instance,¹⁵⁶ nor did the defendant otherwise exchange files

and the inability to place geographical restrictions on its use as we can do with a radio or television broadcast, it does not necessarily follow that every internet entry into the forum state should give rise to personal jurisdiction").

Another distinction sometimes made between websites and traditional advertising media, such as newspapers, magazines, and broadcasting, is that a person browsing the web must take "affirmative action to access either a passive or interactive Website." *Millennium Enterprises, Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 922 (D. Or. 1999). Thus, the mere possibility that a website, whether passive or interactive, may be viewed in the forum, by itself, fails to rise to the level of purposeful availment. A "Website is not automatically projected to a user's computer without invitation as are advertisements in a newspaper or on the television and radio. Rather, the user must take affirmative action to access either a passive or interactive Website." *Id.*

¹⁵⁰. *Id.*

¹⁵¹. *Id.* at 908.

¹⁵². *Id.* Virtually all of the defendant's sales were from its retail store operations. In the six months prior to the lawsuit, the defendant's Website garnered only $225, compared with its overall retail sales of $2,180,000. *Id.* at 909.


¹⁵⁴. *Id.*

¹⁵⁵. *Id.*

¹⁵⁶. The one and only sale arose when the plaintiff's attorney asked a fellow Oregonian to purchase a product from the defendant's website. *Id.* at 911. The plaintiff claimed that the
electronically with forum residents so as to create "repeated" or "ongoing obligations."\textsuperscript{157}

According to the court, defendant's website could not be considered simply passive because the website allowed the defendant and interested visitors to exchange information.\textsuperscript{158} Thus, the defendant's website fell into the middle category, requiring inquiry into the "level of interactivity and commercial nature of the exchange of information" to determine whether jurisdiction should be exercised.\textsuperscript{159} The court correctly noted that the possibility that forum residents could complete transactions through the defendant's website would not, by itself, constitute purposeful availment.

As typified by the \textit{Millennium} view, the type of activity that constitutes targeting may either consist of transactions completed in the forum state or other acts tending to show the defendant directly or indirectly sought to serve the forum state.\textsuperscript{160} Under my proposed bright-line rule, however, the \textit{Millennium} court's analysis into the level of interactivity and targeting would be unnecessary. The defendant's website would be considered passive because no forum citizen, other than the one prompted by the plaintiff's attorney, had purchased products from the website. As interactive websites become the norm, my proposal will result in more consistent decisions because the proposal avoids judicial examination of the nature and quality of the website's interactive features.

---

\textsuperscript{157} Millennium, 33 F. Supp. 2d 907, 920 (D. Or. 1999).

\textsuperscript{158} Id.

\textsuperscript{159} Id. (quoting Zippo, 952 F. Supp. at 1124).

\textsuperscript{160} The test was advocated by Justice O'Connor in \textit{Asahi}, 480 U.S. 102. In \textit{Millennium}, the court held that the defendant's website failed to demonstrate that the defendant intentionally or purposefully targeted its activities at the forum state of Oregon. Millennium, 33 F. Supp. 2d at 922. The website says "Come Visit Us!" and has a map showing the location of the defendant's stores in South Carolina and local cross-streets. Id. The website plainly shows that the defendant did not intend to target Oregon residents, some 3,000 miles away. Id. Therefore, the court found that "something more" than just the website was required to extend jurisdiction over the defendant. Id.
This bright-line rule will better integrate the Zippo test into the existing model of personal jurisdiction. Adoption of the rule will better advance significant policy interests recognized by the Supreme Court. A company always must decide how it will market its wares, how it will have consumers make purchases, and to whom it will sell. Each of these decisions ordinarily comes about through deliberation and planning. A bright-line rule separating passive from active websites based on whether consumers have completed transactions through a website would allow companies engaged in Internet activity to better predict where they may be sued, and thus would comport with the Supreme Court's goal of making personal jurisdiction more predictable as an essential aspect of due process. Companies that seek to avoid jurisdiction by operating websites that do not facilitate online purchases but that nevertheless allow consumers to complete transactions through more traditional means will not be able to circumvent jurisdiction as courts can analyze those contacts using the traditional model of jurisdiction.

A bright-line rule would promote certainty as to where a defendant would be subject to personal jurisdiction. Ambiguous or overreaching standards of personal jurisdiction will stifle companies from setting up business on the Internet and stall commercial growth on the Internet.

B. The Fallacy of a Uniform Solution to Internet Jurisdiction—Recognizing the Limitations of Zippo

The cyberspace world, like the physical world, is host to a wide variety of communities and activities, the forms and quantity of which will continue to proliferate. Despite the heterogeneity of Internet activity, as well as the diversity of claims involving Internet-related con-

161. The Court in World-Wide Volkswagen said, "The Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." 444 U.S. at 297 (citation omitted).

162. Note, A Category-Specific Legislative Approach to the Internet Personal Jurisdiction Problem in U.S. Law, 117 Harv. L. Rev. 1617, 1619 (2004) (noting that "[b]ecause website owners have traditionally had to accept virtual entrance into every forum linked to the Internet as part and parcel of the nature of their enterprise, they have also felt an acute need for predictability in the personal jurisdiction laws of these forums" (footnote omitted)).

163. See, e.g., Stuart Biegel, Beyond Our Control: Confronting the Limits of Our Legal System in the Age of Cyberspace 51 (2001) (stating that "cyberspace can no longer be viewed as a monolithic entity. There are in fact many different cyberspaces. Some of these spaces are analogous to offline neighborhoods, such as shopping districts or red light districts. Others may resemble insular offline communities and reflect a range of carefully defined social norms.")
duct, the courts have looked for an all-encompassing rule for Internet jurisdiction.\textsuperscript{164} And the one rule looked to more than any other as the panacea for resolving all Internet jurisdiction issues is the sliding scale test of Internet interactivity announced in \textit{Zippo Manufacturing Co. v. Zippo Dot Com, Inc.}\textsuperscript{165}

Despite the understandable desire of those seeking a uniform rule governing all Internet jurisdicational issues, the traditional model of personal jurisdiction itself fails to support the notion that one test for specific jurisdiction should be applied to all claims. A single standard for Internet jurisdiction that would encompass all possible claims and cyberspace activities is an aspiration neither sought nor realized for jurisdiction based on less ethereal conduct. Rather, for specific jurisdiction, the Court has refined and tailored personal jurisdiction analysis to assess the defendant’s contacts with the forum state in light of the plaintiff’s claim.\textsuperscript{166} Thus, for example, the Court’s decision in \textit{Bur-
ger King Corp. v. Rudzewicz\textsuperscript{167} is the seminal case examining personal jurisdiction in a breach of contract case. Also, World-Wide Volkswagen and Asahi Metal Industry Co. v. Superior Court of California\textsuperscript{168} are the seminal cases examining personal jurisdiction in tort claims involving defective products. In addition, the Court's opinions in Calder v. Jones\textsuperscript{169} and Keeton v. Hustler Magazine, Inc.\textsuperscript{170} are authoritative in assessing personal jurisdiction in defamation cases, and perhaps in all intentional tort cases.\textsuperscript{171} Any consideration of specific jurisdiction, therefore, must take into account the defendant's contacts with the forum state and their connection, or lack thereof, with the factual and legal crux of the lawsuit.

For an example of a case that explicitly linked the substantive and factual basis of the plaintiff's claim with the defendant's Internet activities in the forum state, one need look no further than Zippo itself. Zippo Manufacturing sued Zippo Dot Com over the latter's use of "Zippo" in its various domain names, in its website, and in the headers of the newsgroup messages accessed by its subscribers.\textsuperscript{172} The court explicitly found that "the cause of action arises out of Dot Com's forum-related conduct" in this case.\textsuperscript{173} The court noted that because Pennsylvania subscribers to the defendant's service retrieve newsgroup messages with "Zippo" prominently featured in the headers, "both a significant amount of the alleged infringement and dilution, and resulting injury have occurred in Pennsylvania."\textsuperscript{174} The court further noted that because Zippo Manufacturing was based in Pennsylvania, "a substantial amount of the injury from the alleged wrongdoing is likely to occur in Pennsylvania."\textsuperscript{175} Thus, the court had little difficulty in concluding that Zippo Manufacturing's claims of

\textsuperscript{167} 471 U.S. 462 (1985).
\textsuperscript{168} 480 U.S. 102 (1987).
\textsuperscript{171} One court explained that

\[ \text{[t]he effects test is satisfied when the plaintiff alleges that the defendant committed an intentional tort expressly aimed at the forum state; the actions caused harm, the brunt of which was suffered in the forum state; and the defendant knew that the effects of its actions would be suffered primarily in the forum state.} \]

Hy Cite Corp. v. Badbusinessbureau.com, 297 F. Supp. 2d 1154, 1165 (W.D. Wis. 2004) (citing Calder, 465 U.S. at 788--98; Wallace v. Herron, 778 F.2d 391, 394 (7th Cir. 1985)).

\textsuperscript{172} Zippo, 952 F. Supp. at 1121.
\textsuperscript{173} Id. at 1127.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
trademark violation arose directly from Zippo Dot Com's systematic contacts with the forum state.\textsuperscript{176}

As useful as the Zippo sliding scale test may be in infringement actions,\textsuperscript{177} it is imprudent to apply the test to all personal jurisdiction issues in all claims that hinge solely or partly on the defendant's Internet activities. For example, the inappropriate extension of the Zippo test is illustrated in cases where the plaintiff alleges that the defendant's website has defamed the plaintiff.\textsuperscript{178} Many websites are devoted solely to providing information or opinions and do not solicit or transact business of any kind. In the parlance of Zippo, these sites are purely passive. If a passive site contains defamatory statements, how should an analysis of personal jurisdiction proceed? A straightforward application of Zippo presumably would conclude that a non-resident defendant website author would not be subject to personal jurisdiction. Yet, the Zippo test is inappropriate because the interactivity of the site, or lack thereof, may have little or nothing to do with the harm suffered by the plaintiff and thus should have little or no relevance in determining personal jurisdiction in a defamation case.\textsuperscript{179} Rather, the effects test as described in Calder and Keeton should be the applicable test. The website, for defamation purposes, can legitimately be analogized with traditional means of communication, such as the print media, radio, and television. Despite the apparent obviousness of these assertions, in cases involving Internet libel, courts have relied more often on the Zippo test than on the Supreme Court decisions.\textsuperscript{180}

\textsuperscript{176} Id.

\textsuperscript{177} The utility of the Zippo test in its current form may be debatable. See supra Part IV.A.


\textsuperscript{179} Moreover, the proper test for jurisdiction would not be based on the defendant's commercial activities directed toward the state or whether a contract entered into between the plaintiff and the defendant has a substantial nexus with the forum state.

\textsuperscript{180} In his excellent article that delves deep into Internet libel jurisdiction, Dean Borchers said, "When one stops to consider that in these cases a district court opinion in a trademark dispute is commanding more attention than a Supreme Court opinion on libel jurisdiction, one sees that there is fertile soil for confusion." Borchers, supra note 164, at 481. Not all courts, however, have found Zippo applicable in defamation cases. See, e.g., Planet Beach Franchising Corp. v. C3ubit, Inc., No. Civ. A. 02-1859, 2002 WL 1870007, at *4 (E.D. La. Aug. 12, 2002) (observing that "[t]here is good reason to maintain the same jurisdictional standard for Internet communications as that which applies to print communications: to hold otherwise would give publishers an incentive to disseminate libelous speech via the medium with the more restrictive standard"). This Article will go no further in plumbing the mystery surrounding the odd and misplaced reliance on the Zippo test in Internet libel cases, except to assert that this reliance simply bolsters the contention that courts often fail to take into account the relationship between the claim and the defendant's contacts with the forum state.
C. Contracting Over the Internet

In breach of contract cases, courts have had some difficulty in assessing the impact of Internet conduct on the personal jurisdiction issue. One tendency is to overinflate the significance of the Internet activity at issue rather than appropriately weighing the Internet conduct in the context of the transaction as a whole. For example, in Resuscitation Technologies, Inc. v. Continental Health Care Corp., the plaintiff sought a declaratory judgment that no contractual relationship existed between the plaintiff and the defendants. The action arose when the defendants responded to a solicitation for capital on plaintiff's website for a company that the plaintiff was starting in Indiana. The parties communicated and negotiated with each other in the following ways: telephone, ordinary mail, and e-mail. Because the parties exchanged over eighty e-mails with one another, the court seemed eager to apply the Zippo test. The court found that the "numerous and continuous" communication through e-mail in the parties' negotiations relating to a startup corporation that would be chartered in Indiana subjected the defendants to personal jurisdiction in Indiana. The court's enthusiasm in using the Zippo test may be inferred from the court's analysis of jurisdiction, which focuses almost solely on the e-mail communications, even though the parties' negotiations also took place through the faxing of documents, meetings in person, and conference calls. While the court correctly decided the issue, its zeal in applying the Zippo test was certainly an over-enthusiastic response given the nature of the negotiations.

182. Id. at *1.
183. Id. at *2.
184. Id. at *4.
185. Id. at *6.
186. Id. at *2.
187. In other situations, the fact that a contract was entered into directly through the defendant's website was held to be insufficient evidence of website interactivity. For example, one court interpreted the Zippo sliding scale test so literally that the court held that the defendant did not purposefully avail itself of the forum state, even though the defendant had sold nearly $40,000 worth of beer to forum residents via its website. Butler v. Beer Across Am., 83 F. Supp. 2d 1261, 1268 (N.D. Ala. 2000). In Butler, the defendant, an Illinois vendor, was sued in Alabama for allegedly selling beer through its website to a minor. Id. at 1262–63. The court seemingly interpreted the Zippo standard regarding the exchange of information through the defendant's website, which would establish that the site is interactive, as differing from the completion of a sale via the site, which the court implied would not be an interactive feature of a website. Id. at 1268. The court said, "[The defendant's] site does not even anticipate the regular exchange of information across the Internet, much less provide for such interaction. Rather, it is closer to an electronic version of a postal reply card; the limited degree of interactivity available on the defendants' website is certainly insufficient" to subject the defendants to personal jurisdiction. Id.
Rather than using Zippo as the framework for assessing personal jurisdiction in contract actions, courts should turn to Burger King Corp. v. Rudzewicz, which embodies the U.S. Supreme Court’s most extensive analysis of personal jurisdiction in a breach of contract lawsuit. The Court noted that the analysis of purposeful availment hinges on whether the contract at issue has a substantial nexus to the forum state. Burger King Corp., a restaurant franchiser, sued two defendants operating one of its franchises for breach of contract. Even though the franchise in question was in Michigan, Burger King filed the lawsuit in Florida, where its corporate headquarters were located.

The Court initially noted that a nonresident’s contractual relationship with a party residing in the forum state would not, by itself, lead to personal jurisdiction. Echoing the International Shoe incantation that jurisdiction cannot be determined by rigid rules, the Court stated, “Instead, we have emphasized the need for a ‘highly realistic’ approach that recognizes that a ‘contract’ is ‘ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.’” The Court listed several specific factors that should be assessed in determining whether the contractual relationship establishes that the defendant had purposefully availed itself of the forum state. The Court emphasized these factors—“prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing”—as the ones courts should evaluate in determining “whether [the] defendant purposefully established minimum contacts within the forum.”

The Court held that the franchise agreement did have a substantial connection to Florida. The Court found it significant that the franchisee had initiated the contact with Burger King that led to the negotiations and the execution of the franchise agreement, and that the agreement, while lacking a forum selection clause, contained a choice-of-law clause specifying that Florida law would govern disputes arising

---

189. Burger King, 471 U.S. at 478 (noting that the split among lower courts was “whether and to what extent a contract can constitute a ‘contact’ for purposes of due process analysis” (footnote omitted)).
190. Id. at 478 (stating that “[i]f the question is whether an individual’s contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party’s home forum, we believe the answer clearly is that it cannot”).
191. Id. at 479 (quoting Hoopeson Canning Co. v. Cullen, 318 U.S. 313, 316–17 (1943)).
192. Id.
193. Id.
from the contract.\textsuperscript{194} The Court also emphasized that the contract created a long-term relationship between Burger King and the franchisee potentially lasting up to twenty years,\textsuperscript{195} and that the franchisee routinely sent payments to Burger King in Florida.\textsuperscript{196}

Similarly, \textit{Pres-Kap, Inc. v. System One, Direct Access, Inc.}\textsuperscript{197} exemplifies how a court can correctly apply the traditional model of personal jurisdiction in a breach of contract action involving cyberspace activities. In \textit{Pres-Kap}, the plaintiff, who owned and operated a computer database containing updated airline reservation information, sued a New York travel agency for breach of contract in a Florida state court.\textsuperscript{198} The plaintiff's operations and computer system were in Florida. The only contacts between the defendant and Florida were that the defendant sent its payments to Florida and that the defendant electronically accessed airline reservation information stored on the plaintiff's computer system in Florida.\textsuperscript{199} The court found these contacts insufficient to establish specific jurisdiction over the defendant.\textsuperscript{200}

The court found that the nexus of the contractual dispute was clearly in New York, rather than Florida.\textsuperscript{201} The court stated that, even though the contract contained a Florida choice-of-law provision, the transaction was based in New York.\textsuperscript{202} The plaintiff had made the sales pitch to the defendant in New York, the parties negotiated and executed the contract in New York, and the plaintiff serviced the contract in New York.\textsuperscript{203} While the record failed to establish whether the defendant knew that it was accessing a computer system in Florida, the court found that this knowledge "clearly would have been of little importance to [the defendant]."\textsuperscript{204}

The court cited public policy in support of its holding. Finding jurisdiction solely because the defendant had accessed a computer database in the forum state, according to the court, would be an over-expansive assertion of jurisdiction.\textsuperscript{205} Significantly, the court characterized the defendant as a consumer of information rather than as an

\textsuperscript{194} \textit{Id.} at 481--82.
\textsuperscript{195} \textit{Burger King}, 471 U.S. at 479--80.
\textsuperscript{196} \textit{Id.} at 480.
\textsuperscript{197} 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994).
\textsuperscript{198} \textit{Id.} at 1352.
\textsuperscript{199} \textit{Id.} at 1353.
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.}
\textsuperscript{203} \textit{Pres-Kap}, 636 So. 2d at 1353.
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{Id.}
entrepreneur using the database for profit. The court justified its characterization by noting society’s extensive and growing reliance on computer-assisted research. The court stated that a contrary holding would mean that consumers of online databases would be subject to personal jurisdiction wherever the computer databases are located, “even if such users, as here, are solicited, engaged, and serviced entirely in-state by the supplier’s local representatives.”

CompuServe Corp. v. Patterson is another significant case decided early in the evolution of Internet jurisdiction law. In CompuServe, however, the court improperly invoked and applied the Burger King breach of contract analysis in a case where the cause of action did not involve breach of contract. CompuServe involved a trademark dispute case initiated by CompuServe Corp., an Internet service provider based in Ohio, against its customer, Patterson, a Texas software developer. CompuServe sought a judicial declaration that the software it had begun selling did not infringe upon Patterson’s trademark rights in his own software that he was marketing, selling, and distributing through CompuServe. CompuServe was not only the conduit through which Patterson sold his software, but also Patterson’s Internet service provider. Patterson had been using CompuServe’s services to sell his software for three years, when he learned that CompuServe had begun selling software similar to his. Patterson communicated through e-mail with CompuServe, complaining that CompuServe’s software infringed upon his software. CompuServe then filed a declaratory relief action against Patterson in a federal district court in Ohio. Patterson succeeded in having the case dismissed for lack of personal jurisdiction.

The United States Court of Appeals for the Sixth Circuit reversed, holding that Patterson was subject to personal jurisdiction in Ohio be-

206. Id.
207. Id. (noting that “[l]awyers, journalists, teachers, physicians, courts, universities, and business people throughout the country daily conduct various types of computer-assisted research over telephone lines linked to supplier databases located in other states”).
208. Id. One commentator, however, has taken the Pres-Kap decision to task for its failure to recognize that the defendant’s continuous use of the plaintiff’s Florida computer system constituted purposeful availment. Santisi, supra note 6, at 444–45. In addition, the fact that the defendant sent its monthly payment to plaintiff’s office in Florida, and did so over a nine-year period, demonstrated the additional conduct necessary to satisfy Justice O’Connor’s awareness plus test in Asahi. Id. at 446–47.
209. 89 F. 3d 1257 (6th Cir. 1996).
210. Id. at 1260.
211. Id.
212. Id. at 1261.
213. Id.
214. Id.
cause of his contacts with Ohio-based CompuServe. In holding that jurisdiction was proper in Ohio, the court found that Patterson's contacts with CompuServe, though taking place almost exclusively through the Internet, demonstrated that he had purposefully availed himself of Ohio. Patterson's shareware contract with CompuServe, which was executed online, indicated that the contract was "entered into in Ohio" and that Ohio law would govern any disputes. Patterson had to assent to the contractual provisions by typing "AGREE." Patterson used CompuServe's computer system in Ohio for virtually all aspects of his shareware enterprise. His reliance on CompuServe transformed Patterson from a consumer of CompuServe's services into an entrepreneur who used CompuServe's computer system to further his business. In addition, Patterson's business relationship with CompuServe was ongoing, since he had been selling his shareware via CompuServe's system for the three years leading up to the lawsuit. Moreover, Patterson repeatedly communicated with CompuServe by e-mail.

With a nod towards World-Wide Volkswagen and Asahi Metal, the court noted that Patterson's injection of his shareware into the stream of commerce was not enough to render him amenable to the personal jurisdiction of Ohio. For additional guidance, the court turned to Burger King. The court noted that it is not enough that a nonresident enter into a contract with a forum resident to subject the nonresident to personal jurisdiction. Nevertheless, the court emphasized that Patterson's relationship with CompuServe went beyond that of merely contracting with a forum corporation and of sending his shareware into the stream of commerce. Patterson used CompuServe's computer operations in Ohio to handle virtually all aspects of his software business from the distribution of the software to the payment his customers made to him. Patterson's contacts with CompuServe demonstrated that he had purposefully availed himself

215. CompuServe, 89 F.3d at 1269.
216. Id. at 1266.
217. Id. at 1260.
218. Id. at 1260–61.
219. Id. at 1267.
220. Id. at 1268.
221. CompuServe, 89 F.3d at 1265.
222. Id. at 1261.
223. Id. at 1265.
224. Id. at 1266.
225. Id. at 1265–66.
226. Id. at 1265.
227. CompuServe, 89 F.3d at 1255–56.
of the privileges and benefits of conducting his business through Ohio.\textsuperscript{228}

Most commentators complimented the \textit{CompuServe} decision as correctly applying the traditional model of jurisdiction in assessing the contacts between Patterson and CompuServe.\textsuperscript{229} It is true that, even though all of the meaningful contacts between CompuServe and Patterson took place in cyberspace, the court attempted to remain faithful to the traditional model by applying traditional principles of jurisdiction to these virtual contacts.\textsuperscript{230}

The problem with the \textit{CompuServe} decision, however, is that the court applied the wrong test. The court's reliance on \textit{Burger King} was misplaced in that the issue before the court was not whether Patterson had breached his contract with CompuServe. The issue was whether CompuServe, based upon its own software that it was marketing, had infringed upon any trademarks belonging to Patterson as to the names of his software products.\textsuperscript{231} CompuServe's claim, therefore, was not connected with its Shareware Registration agreement with Patterson.\textsuperscript{232} Significantly, the agreement did "not mention Patterson's software by name; in fact, it leaves the content and identification of

\begin{itemize}
\item \textsuperscript{228} \textit{Id.} at 1266.
\item \textsuperscript{229} See, e.g., Joanna B. Bossin, Note, \textit{What Constitutes Minimum Contacts in Cyberspace After CompuServe, Inc. v. Patterson: Are New Rules Necessary for a New Regime?}, 13 GA. ST. U. L. REv. 521, 538 (1997). Ms. Bossin asserted that although \textit{CompuServe} involved personal jurisdiction issues occurring in virtual reality, the court correctly chose to apply traditional jurisdictional rules and principles to the facts. This decision reinforces the notion that courts can successfully use a traditional minimum contacts analysis to determine whether a defendant has directed his activities toward a forum state via the Internet. \textit{Id.}
\item \textsuperscript{230} \textit{Id.} at 544-45 (lauding the \textit{CompuServe} decision and noting that "[]just because the Internet may be replacing traditional mediums of communication does not mean that courts can and will do away with deeply rooted traditional notions of fair play and substantial justice"). On the other hand, the \textit{CompuServe} decision has been criticized on the basis that there was little evidence showing that Patterson knew the following: (1) that CompuServe was based in Ohio and (2) that CompuServe's computer system, which facilitated Patterson's shareware business, was in Ohio. Thus, while Patterson certainly did business with CompuServe, without proof that he knew where CompuServe's operations were physically located, it cannot be established that Patterson purposefully availed himself of doing business in Ohio. Jason L. Brodsky, \textit{Recent Decision, Civil Procedure—Surfin' the Stream of Commerce: CompuServe v. Patterson, 89 F.3d 1257 (6th Cir. 1996), 70 TEMP. L. REV. 825, 851 (1997) (arguing that "neither the court nor the reader of the CompuServe opinion may infer that because Patterson connected to the CompuServe network, he knew where the network was located, where his e-mail was being sent, or where his software might be purchased").
\item \textsuperscript{231} CompuServe sought declaratory relief that it had not infringed upon Patterson's trademarks and that it had not engaged in unfair business practices. \textit{CompuServe, 89 F.3d at 1261.}
\item \textsuperscript{232} Professor Burk called \textit{CompuServe} a "profoundly flawed opinion." Burk, \textit{supra} note 15, at 36. He further stated that "the presence of a contract in \textit{CompuServe} was entirely irrelevant to the due process calculation." \textit{Id.} at 37.
\end{itemize}
that software to Patterson.” Thus, the agreement itself lacked a substantial nexus to the trademark issue.

The court, apparently sensing that its rationale analogizing the case to *Burger King* was tenuous, found that Patterson’s mail and e-mail communications to CompuServe asserting that the company had infringed upon his trademarks demonstrated that he had “purposefully availed himself of the privilege of doing business in Ohio.” The court, seemingly aware that these communications by themselves were perhaps too thin to establish purposeful availment, clearly bootstrapped Patterson’s allegations of infringement onto his contract with CompuServe and his selling of shareware through CompuServe.

While the *CompuServe* decision “demonstrate[s] the difficulty that courts will have extending the indistinct criteria of minimum contacts into an electronic environment,” the decision is more remarkable for its misguided reliance upon *Burger King* and the court’s unyielding insistence that the infringement action arose from Patterson’s execution of the shareware agreement and his selling of shareware through CompuServe. The court in *CompuServe* placed undue emphasis on Patterson’s use of CompuServe’s computer system to sell and distribute his software. Patterson’s reliance on CompuServe’s services had a trivial relationship with CompuServe’s claim that its software did not infringe upon Patterson’s trademark rights.

Thus, the crucial question that the *CompuServe* decision resolved unsatisfactorily is whether the defendant’s contacts with the forum state are sufficiently related to the lawsuit to support specific jurisdiction. This nexus requirement cannot be satisfied simply on a showing that the defendant has contacts with the forum state arising from Internet activity. The contacts must be evaluated in light of the substantive and factual allegations made in the complaint.

A nonresident defendant, for example, that solicits business and negotiates a contract through e-mail with a forum state resident may have purposefully availed itself of the forum when the lawsuit arises out of that solicitation or contract. In this situation, the *Burger King*

---

233. *CompuServe*, 89 F.3d at 1260.

234. *Id.* at 1266. Discounting this contact, Professor Burk observed, “A jurisdictional rule that discourages pre-litigation notification and possible settlements seems ill-considered at best, and hardly in keeping with the Supreme Court’s due process jurisprudence.” Burk, supra note 15, at 38.

235. The court concluded its analysis of purposeful availment by returning to Patterson’s contract and selling activities, stating that Patterson “knowingly reached out to CompuServe’s Ohio home, and he benefited from CompuServe’s handling of his software and the fees that it generated.” *CompuServe*, 89 F.3d at 1266-67.

236. Burk, supra note 15, at 34.
framework should be applied, and it is sensible to analogize e-mail communications with traditional forms of communication such as the sending of letters, communicating over the telephone, or the transmitting of facsimiles. Thus, in cases involving claims of fraud, where the fraudulent statements were made in e-mail messages, the defendant should be considered to have purposefully availed itself of the forum state. In other cases where the defendant and the plaintiff exchange information by e-mail, the defendant knows where the plaintiff resides, and the exchange leads to the execution of a contract, the defendant has purposefully availed itself of the state where the plaintiff resides when the plaintiff's claim arises from the e-mail exchange.

D. General Jurisdiction

Courts have improperly applied the Zippo test to issues involving general jurisdiction. Some decisions have mistakenly evaluated or overemphasized a website's capacity for interactivity as a proxy in determining general jurisdiction. The exercise of general jurisdiction requires not just continuous and systematic activity but substantial activity as well. Thus, the fact that a website is interactive should have little relevance to the question of general jurisdiction.

1. The Supreme Court's Recognition of General Jurisdiction

General jurisdiction, rather than specific jurisdiction, may be asserted when the defendant's contacts with the forum state are unrelated to the plaintiff's claims. The Supreme Court in International Shoe recognized the concept of general jurisdiction when it remarked that a corporation's contacts with, and activities in, the forum state can give rise to personal jurisdiction where the corporation's contacts


238. See, e.g., Cody v. Ward, 954 F. Supp. 43, 47 (D. Conn. 1997) (holding that defendant's repeated telephone and e-mail communications with plaintiff regarding securities that defendant had sold to plaintiff established purposeful availment).

239. See, e.g., Edwards v. Erdey, 770 N.E.2d 672, 679 (Ohio Ct. Comm. PIs. 2001) (holding, in a medical malpractice action, that the defendant surgical group, located in the Cayman Islands, had purposefully availed itself of the forum state when defendant and plaintiff exchanged a series of e-mails leading to plaintiff's decision to have defendant perform surgery on her).
are continuous and substantial even when the claims against the corporation are "entirely distinct from those activities." Nearly forty years later, the Court reaffirmed the existence of general jurisdiction. General jurisdiction can only be asserted over a defendant when the defendant has continuous and systematic contacts with the forum state. Because the defendant can be sued in the forum state for claims that are unconnected to its activities in the forum, the test for general jurisdiction must be much more stringent than the test for specific jurisdiction. Federal courts, generally, "are reluctant to assert general jurisdiction." This judicial reluctance may be based on two reasons. First, the ramifications in finding general jurisdiction are great in that the defendant can be sued in the forum state for any matter. Second, the contours of specific jurisdiction have so expanded over the years that a state forum is practically assured for plaintiffs on the basis of specific jurisdiction.


242. The *Helicopteros* Court stated that the defendant's contacts with the forum should be examined "to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in Perkins [v. Benguet Consol. Mining Co.]." *Helicopteros*, 466 U.S. at 415-16.

243. *Id.* at 415 n.9 ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." (citing Calder v. Jones, 465 U.S. 783, 786 (1984))); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-81; von Mehren & Trautman, *supra* note 27, at 1136-44).

244. See Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) (citations omitted) ("The standard for establishing general jurisdiction is 'fairly high' . . . and requires that the defendant's contacts be of the sort that approximates physical presence."); see also ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 715 (4th Cir. 2002) (quoting ESAB Group, Inc. v. Centricut, LLC, 126 F.3d 617, 623 (4th Cir. 1997) ("the threshold level of minimum contacts sufficient to confer general jurisdiction is significantly higher than for specific jurisdiction"); Bell v. Imperial Palace Hotel/Casino, Inc., 200 F. Supp. 2d 1082, 1090 (E.D. Mo. 2001) ("Considering that the consequences of general jurisdiction are so significant—the party may be hauled into the forum state to defend any cause of action—the bar to show minimum contacts is set even higher than that required for specific jurisdiction.").

245. Bell, 200 F. Supp. 2d at 1090.

246. See Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1200 (4th Cir. 1993). The court observed:

[B]ecause specific jurisdiction has expanded tremendously, plaintiffs now may generally bring their claims in the forum in which they arose. As a result, obsolescing notions of general jurisdiction, which functioned primarily to ensure that a forum was
While the Supreme Court, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, mentioned that the assertion of general jurisdiction would be proper when the defendant's contacts with the forum state are continuous and systematic, an additional requirement should be made explicit—the defendant's contacts with the forum state should be substantial. A substantiality requirement is consistent with the Supreme Court's prior discussions of general jurisdiction. The Court in *International Shoe* indicated that when a lawsuit was unrelated to the defendant's contacts in the forum state, personal jurisdiction could be asserted when the defendant had substantial contacts with the forum state. The Court reaffirmed the requirement of substantiality in *Perkins v. Benguet Consol. Mining Co.*

Making the requirement of substantiality explicit will help ensure that a defendant could not be subject to general jurisdiction simply on the basis of continuous and systematic conduct in the forum state that was trivial. In assessing the appropriateness of general jurisdiction, courts will often look to see whether the defendant has established what amounts to a physical presence in the forum state, which may be shown by such activities as being headquartered in the forum state, having a license to do business in the forum state, having a bank account in the forum state, owning property in the forum state, visiting

---

available for plaintiffs to bring their claims, have been rendered largely unnecessary. Thus, broad constructions of general jurisdiction should be generally disfavored.

Id. (citations omitted).


248. Many courts have explicitly required that the contacts be substantial. See, e.g., Submersible Sys., Inc. v. Perforadora Cent., S.A. de C.V., 249 F.3d 413, 419 (5th Cir. 2001) (requiring "extensive" contacts); *Bancroft & Masters*, 223 F.3d at 1086; *Asset Allocation and Mgmt. Co. v. Western Employers Ins. Co.*, 892 F.2d 566, 570 (7th Cir. 1989) (stating that Illinois law requires for the assertion of general jurisdiction that the defendant's business in Illinois be "intentional, substantial, and continuous"); *Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987) ("The nonresident's contacts must be continuous and substantial.").

249. The Court in *International Shoe*, describing the concept that years later would be called general jurisdiction, stated that personal jurisdiction over a corporation can be asserted only when the "continuous corporate operations within a state [are] thought so substantial and of such a nature as to justify suit against [the corporation] on causes of action entirely distinct from those activities." *Int'l Shoe*, 326 U.S. at 318.

250. 342 U.S. 437, 446 (1952) (stating that the exercise of general jurisdiction is warranted when the "continuous corporate operations within a state [are] thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities" (quoting *Int'l Shoe*, 326 U.S. at 318)).

251. See *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1295 (10th Cir. 1999); *Crane v. Carr*, 814 F.2d 758, 763 (D.C. Cir. 1987) (requiring that general jurisdiction can only be asserted when the defendant's commercial activity in the forum is "continuous and substantial").

252. See, e.g., *Bancroft & Masters*, 223 F.3d at 1086 (stating that a finding of general jurisdiction "requires that defendant's contacts be of the sort that approximate physical presence").
the forum state, or having agents in the forum state.\textsuperscript{253} Thus, courts have tended to reject the exercise of general jurisdiction when the defendant has engaged in continuous and systematic conduct in the forum state, but such conduct was insubstantial.\textsuperscript{254}

2. General Jurisdiction and Internet Activities

General jurisdiction should not be exercised over defendants solely because their websites can be accessed and viewed virtually anywhere.\textsuperscript{255} Thus, even though all websites can potentially be accessed at any time and anywhere by anyone with Internet access, that in itself should not be considered continuous, systematic, and substantial activity.\textsuperscript{256} It is in the Internet context where the requirement of substantiality ought to take on greater import in the general jurisdiction analysis. A person can easily have his or her website accessible throughout the world. If continuous and systematic activity were the lone requirement, then that person would be subject to general jurisdiction anywhere.\textsuperscript{257} A requirement of substantiality, therefore,


\textsuperscript{254} See, e.g., William Rosenstein & Sons Co. v. BBI Produce, Inc., 123 F. Supp. 2d 268, 274–75 (M.D. Pa. 2000) (holding a strawberry seller's sales to forum residents amounting to .05% of its total sales insufficient for general jurisdiction).


\textsuperscript{256} See, e.g., ALS Scan, 293 F.3d at 715 (stating that "[e]ven though electronic transmissions from maintenance of a website on the Internet may have resulted in numerous and repeated electronic connections with persons in Maryland, such transmissions do not add up to the quality of contacts necessary for a State to have jurisdiction over the person for all purposes").

\textsuperscript{257} For example, the Federal Circuit Court of Appeals rejected the plaintiff's argument that because the defendant operated a website through which it generated sales every month in the forum state, the defendant's contacts constituted continuous and systematic contacts with the forum state sufficient to subject the defendant to general jurisdiction. Hockerson-Halberstadt, Inc. v. Propet USA, Inc., Nos. 012-1259, 02-1304, 02-1341, 2003 WL 1795641, at *13 (Fed. Cir. Apr. 1, 2003). The total sales in the forum state amounted to less than 0.0008 percent of the defendant's total revenues. Id. at 13. The court emphasized that while the defendant's sales through its website may have constituted continuous and systematic contact, the defendant's
would require the court to assess the significance of that website activity that goes beyond mere accessibility.

In addressing general jurisdiction issues arising out of Internet activity, courts should avoid relying on decisions resolving specific jurisdiction issues. While this may seem obvious, several decisions have relied mistakenly on the *Zippo* sliding scale test of interactivity in analyzing general jurisdiction issues. However interactive the defendant’s website happens to be, interactivity alone cannot reasonably serve as the basis for determining general jurisdiction. If an interactive website constitutes purposeful availment of a forum simply by being accessible to Internet users, then contacts arising from the website would be considered continuous, systematic, and substantial for purposes of general jurisdiction. Therefore, under this misguided view, a plaintiff could sue a nonresident defendant in any forum and claim jurisdiction based on the defendant’s interactive website, even if the cause of action is unrelated to the website. Such a result would hardly conform to notions of “fair play and substantial justice.”

Typical of cases in which the sliding scale test was improvidently applied to general jurisdiction is the opinion of the United States Court of Appeals for the Fifth Circuit in *Mink v. AAAA Development LLC*. The Fifth Circuit held that the *Zippo* test is appropriate in determining general jurisdiction when the defendant has few or no other contacts with the forum state. While the court correctly decided that the defendant could not be subject to general jurisdiction in the forum, the court’s rationale, based as it was on the sliding scale

*contacts [in the forum state] were not so substantial and of such a nature as to justify the exercise of general jurisdiction over it.* *Id.*

258. See, e.g., *Mink v. AAAA Dev. LLC*, 190 F.3d 333 (5th Cir. 1999); *MJC-A World of Quality, Inc. v. Wishpets Co., Ltd.*, No. 00 C 6803, 2001 WL 987890 (N.D. Ill. Aug. 27, 2001); *Desktop Tech., Inc.*, 1999 WL 98572, at *3–5. For a discussion of the *Zippo* sliding scale, see *supra* Part III.B.

259. See, e.g., *Bell v. Imperial Palace Hotel/Casino, Inc.*, 200 F. Supp. 2d 1082, 1091 (E.D. Mo. 2001); *ESAB Group*, 34 F. Supp. 2d at 330 (stating that “[g]eneral in personam jurisdiction must be based on more than a defendant’s mere presence on the Internet even if it is an ‘interactive’ presence”).


261. *Id.*

262. *Id.*

263. *Id.*

264. 190 F.3d 333 (5th Cir. 1999).

265. *Id.* at 336.

266. *Id.*
of interactivity, rests on a shaky foundation. The court emphasized that the crucial factor was whether the defendant’s website was passive or one in which the defendant “conducted business.”\textsuperscript{267} The court concluded that, even though the website allowed users to print an order form and posted various ways in which the defendant could be contacted (a toll-free telephone number and mailing and e-mail addresses), the website was passive.\textsuperscript{268}

While few cases have found that a defendant’s operation of a website was sufficient to justify general jurisdiction,\textsuperscript{269} one case in particular requires close examination for its misguided reliance on the \textit{Zippo} test. In \textit{Gator.com Corp. v. L.L. Bean, Inc.},\textsuperscript{270} the United States

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{267} \textit{Id.} at 337.
\item \textsuperscript{268} \textit{Id.} Interestingly, the Fifth Circuit did not cite an Eastern District of Texas case decided in the previous year that held that the defendant was subject to general jurisdiction, partly based on the interactivity of the defendant’s website. \textit{See} Mieczkowski v. Masco Corp., 997 F. Supp. 782 (E.D. Tex. 1998). The Mieczkowski court found that the combination of defendant’s sales in Texas and the defendant’s website supplied the necessary contacts to establish general jurisdiction. \textit{Id.} at 788. The website advertised the defendant’s product line and prices and also provided an order form for customers to complete purchases and a feature that would allow customers to check the status of their order. \textit{Id.} at 787. In addition, customers could deal with sales representatives via e-mail. \textit{Id.} at 787. In much the same way that the Fifth Circuit would a year later in \textit{Mink}, the district court found applicable the \textit{Zippo} sliding scale test in its analysis of general jurisdiction.
\item \textsuperscript{269} \textit{See}, \textit{e.g.}, Decker v. Circus Circus Hotel, 49 F. Supp. 2d 743, 748 (D.N.J. 1999) (stating that the defendant hotel’s acceptance of room reservations through its Internet site is insufficient for the assertion of general jurisdiction).
\item \textsuperscript{270} 341 F.3d 1072 (9th Cir. 2003), \textit{vacated by}, \textit{rehearing en banc granted by}, 366 F.3d 789 (9th Cir. 2004).
\end{itemize}
\end{footnotesize}
Court of Appeals for the Ninth Circuit stated that California courts could exercise general jurisdiction over L.L. Bean solely on the basis of the company’s interactive website. Gator.com Corp. created and sold software known as a “digital wallet,” which makes it handy for individuals to shop and make purchases on the Internet. The software serves as a personal database, in which the software user can store “passwords to various websites, user personal information, and credit card information.” The software also monitors the websites that the user visits, and when the user accesses certain websites, the software “displays a pop-up window offering a coupon for a competitor. Gator users who visit L.L. Bean’s website are offered coupons for one of L.L. Bean’s competitors, Eddie Bauer, via a pop-up window that at least partially obscures L.L. Bean’s website.”

In response, L.L. Bean’s counsel sent Gator a letter demanding that Gator stop its pop-up windows on L.L. Bean’s website, asserting that Gator’s pop-up windows would mislead users into thinking that Gator and Eddie Bauer were affiliated with L.L. Bean, and concluding that L.L. Bean would be entitled to injunctive relief. Taking the judicial initiative, Gator brought suit for declaratory relief against L.L. Bean in the federal district court for the Northern District of California.

The dissent found that the settlement, by putting $10,000 at stake on the personal jurisdiction issue, saved the appeal from being mooted. The dissent noted that, even after the three-judge panel decision was vacated, L.L. Bean legitimately had much riding on the appeal as the “panel decision is in the Federal Reporter for anyone to read.” Gator.com, 341 F.3d at 1142. Because the decision plainly indicates that L.L. Bean is subject to general jurisdiction in California, “L.L. Bean has been anxious to preserve its right of appeal to the en banc panel, and... it specifically structured its partial settlement with Gator in order to achieve that result.” Id. at 1143.

Coinciding with L.L. Bean’s anxiety about a vacated decision that remains “on the books” is the more global concern that the decision links general jurisdiction to the Zippo sliding scale of interactivity. Thus, the three-judge panel decision, while vacated, is available for anyone to see and ponder, including courts and present and future litigants. While the decision has been divested of precedential authority, it would be naïve to think that a litigant or judge would overlook the decision in crafting a brief or an opinion. Heightening the potential influence of the decision is the panel’s unanimity. With no counterbalancing dissent, the decision may become an exemplar of reasoning, perhaps invisibly guiding the analyses of future cases.

Whether the court correctly decided the mootness issue is beyond the scope of this Article. What cannot be questioned is that a significant question regarding general jurisdiction remains unresolved. The majority and dissent both agreed that the appeal raised significant issues involving personal jurisdiction. The majority concededly called these issues “important.” Id. at 1132. The dissent stated that “this appeal presents a question of ‘continuing public importance’” in that the law of the Ninth Circuit with respect to general jurisdiction was in disarray and that resolution of the appeal would have helped “[a]ll potential litigants in this circuit.” Id. at 1142.

271. Id.
272. Gator.com, 341 F.3d at 1075.
273. Id.
274. Id.
seeking judgment that its software does not violate any trademark rights of L.L. Bean and "does not constitute unfair competition, a deceptive or unfair trade or sales practice, false advertising, fraud or any other violation of either federal or state law." L.L. Bean responded by moving to dismiss for lack of personal jurisdiction. The district court granted the motion, ruling that it lacked both general and specific jurisdiction. Gator appealed to the Ninth Circuit.

The court observed preliminarily that the "standard for establishing general jurisdiction is 'fairly high.'" To meet this standard, according to the court, "[t]he contacts with the forum state must be of a sort that 'approximate physical presence.'" Two types of contacts must be considered. One type of contact requires a court to examine whether the defendant has established a "'presence' in the forum state, including physical facilities, bank accounts, agents, registration, or incorporation." The other type of contact a court should consider is the defendant's economic activity in the forum state. Relevant here would be "whether the company has engaged in active solicitation toward and participation in the state's markets."

Applying those standards, the court concluded that L.L. Bean lacked the traditional indicia of physical presence, in that, for example, L.L. Bean was not incorporated in California and did not have an official agent in California. The court then assessed L.L. Bean's economic activity in California and found that its economic activity, taken as a whole, constituted continuous and systematic contact with California.

In reaching its holding, the court broadly interpreted the continuous and systematic contact requirement by wholly relying upon Gator's allegations and summarily concluding that L.L. Bean "meets the first set of factors set out in these cases: it makes sales, solicits business in the state, and serves the state's markets." The court further noted that L.L. Bean targets California through its operation of a "highly interactive website . . . from which very large numbers of California

275. Id.
276. Id.
277. Id. at 1076 (quoting Bancroft & Masters, 228 F.3d at 1086).
278. Gator.com, 341 F.3d at 1076 (quoting Bancroft & Masters, 228 F.3d at 1086).
279. Id. at 1077 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952)).
280. Id.
281. Id. at 1078.
282. Id. ("[W]e find that there is general jurisdiction in light of L.L. Bean's extensive marketing and sales in California, its extensive contacts with California vendors, and the fact that, as alleged by Gator, its website is clearly and deliberately structured as a sophisticated virtual store in California.").
283. Id.
consumers regularly make purchases and interact with L.L. Bean sales representatives.\textsuperscript{284}

More far reaching was the court’s assertion that L.L. Bean’s business activities on the Internet—alone—would suffice to subject it to general jurisdiction. The court applied the \textit{Zippo} sliding scale test.\textsuperscript{285} The court, cobbling together federal case law in other jurisdictions, stated that general jurisdiction would obtain when the defendant conducts business on the Internet and “the internet business contacts with the forum state” are “substantial or continuous and systematic.”\textsuperscript{286} Noting that L.L. Bean generated “millions of dollars” worth of sales in California,\textsuperscript{287} the court found that L.L. Bean’s contacts with California satisfied the test for general jurisdiction, even though its total sales in California generated from all types of transactions amounted to only six percent of its overall sales.\textsuperscript{288}

Given the court’s conclusion that L.L. Bean’s Internet activities alone would subject it to general jurisdiction,\textsuperscript{289} the decision is vulnerable to attack because of its failure to indicate how much of L.L. Bean’s sales in California are derived through Internet transactions. In lieu of that gaping omission, the decision conflates the interactivity of L.L. Bean’s website, through which it generated revenue, and L.L. Bean’s other marketing and sales practices, such as catalog transactions, that it most certainly directed towards Californians.\textsuperscript{290}

\begin{flushright}
\textsuperscript{284} \textit{Gator.com}, 341 F.3d at 1078 (citation omitted).
\textsuperscript{285} \textit{Id.} at 1079. The Ninth Circuit had adopted the \textit{Zippo} test in a trademark dispute case. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 417–19 (9th Cir. 1997).
\textsuperscript{286} \textit{Gator.com}, 341 F.3d at 1079 (citing Revell v. Lidov, 317 F.3d 467, 470–71 (5th Cir. 2002); Coastal Video Communications Corp. v. Staywell Corp., 59 F. Supp. 2d 562, 571 (E.D. Va. 1999)).
\textsuperscript{287} \textit{Id.} at 1080.
\textsuperscript{288} \textit{Id.} at 1074. After its evaluation of minimum contacts, the court concluded that jurisdiction over L.L. Bean would be reasonable. \textit{Id.} at 1080–81.
\textsuperscript{289} Note that the court’s observation that L.L. Bean’s Internet sales and activities alone would suffice to subject the company to general jurisdiction is dictum.
\textsuperscript{290} \textit{Gator.com}, 341 F.3d at 1080. Even if a majority of L.L. Bean’s sales in California were through its website, at the very most, its sales would amount to no more than six percent of its total sales. In other cases, such a small percentage of sales made in the forum state did not amount to general jurisdiction. \textit{See, e.g.}, William Rosenstein & Sons Co. v. BBI Produce, Inc., 123 F. Supp. 2d 268, 274 (M.D. Pa. 2000) (holding that sales to forum state that amounted to less than ten percent of total sales insufficient to support general jurisdiction); Stairmaster Sports/Med. Prods, Inc v. Pacific Fitness Corp., 916 F. Supp. 1049 (W.D. Wash. 1995, \textit{aff’d}, 78 F.3d 602 (Fed. Cir. 1996) (holding that forum state’s sales that amounted to three percent of total sales insufficient to support general jurisdiction). However, if the total revenue continuously generated from the forum state were great, then general jurisdiction would most likely be appropriate. Additionally, a finding that the forum state constituted the largest market for the defendant should support general jurisdiction. \textit{See, e.g.}, Seltzer Sister Bottling Co. v. Source Perrier, S.A., No. C-90-1468 MHP, 1991 WL 279273 (N.D. Cal. May 1, 1991).
\end{flushright}
The court’s reliance on the *Zippo* sliding scale test is analytically flawed, since the court applied the test to help resolve the question of general jurisdiction. The sliding scale test should be used only to assess whether the defendant’s website constituted purposeful availment when the issue involves specific jurisdiction, not general jurisdiction. Rather than determine whether the defendant had transacted business with forum residents, the *Gator* court went down an analytical dead end in applying the sliding scale test. The interactivity of the defendant’s website, viewed apart from forum-directed activity, should have nothing to do with whether the defendant has engaged in continuous, systematic, and substantial activities in the forum state. A website’s capacity for interactivity should have no weight in determining general jurisdiction.²⁹¹

Applying the *Zippo* test to general jurisdiction issues is mistaken. First, the issue in *Zippo* related not to general jurisdiction, which the plaintiff conceded was lacking, but to specific jurisdiction.²⁹² Second, establishing general jurisdiction simply because the defendant’s website is accessible in the forum state and interactive would essentially establish universal jurisdiction.²⁹³ The application of the sliding scale test to general jurisdiction would unreasonably equate interactivity with continuous and systematic activities in the forum state. It is as if the potential of completing transactions online means the same thing

²⁹¹ One district court, bound as it was by the Fifth Circuit’s ruling in *Mink*, applied the *Zippo* test and correctly decided that it could not exercise general jurisdiction, even though the defendant’s website was interactive. Planet Beach Franchising Corp. v. C3ubit, Inc., No. Civ. A. 02-1859, 2002 WL 1870007 (E.D. La. Aug. 12, 2002). The court looked beyond the fact that the website’s interactive features potentially could lead to a great number of forum citizens subscribing to defendant’s service and thereby generate large revenues. Instead, the court found that the plaintiffs’ assertion of general jurisdiction was an empty vessel, since they “made no showing of the extent to which defendants’ Internet activities penetrated Louisiana, whether measured by subscriber data, hits on the website, or sales of products and advertisements.” *Id.* at *6. Rather than engage in a lengthy analysis of the website’s interactivity, the court could have simply concluded that it could not exercise general jurisdiction because no evidence pointed towards the defendant transacting any business in the forum. *See also* LaSalle Nat’l Bank v. Vitro, Sociedad Anonima, 85 F. Supp. 2d 857, 862–63 (N.D. Ill. 2000) (applying the *Zippo* test to general jurisdiction issue and concluding defendant’s website, because it did not allow for sales to be completed online, was insufficient to establish general jurisdiction).

²⁹² *Zippo*, 952 F. Supp. at 1122.

²⁹³ *Bell*, 200 F. Supp. 2d at 1091. The *Bell* court stated that

[unlike most media, an internet website requires little expenditure of resources, it is not directly targeted to any particular group of individuals or geographic area, persons through their own impetus must seek out the site, and yet a website has the potential to reach millions throughout the country and even the world. With seemingly inconsequential effort, and without any contacts directed toward any particular forum, the medium could subject persons or companies who maintain websites to personal jurisdiction in every forum.]

*Id.*
as operating a bricks-and-mortar storefront in the forum. This fallacy is similar to the premise of universal jurisdiction in which the accessibility of a website, in and of itself, demonstrates purposeful availment for purposes of specific jurisdiction. Universal jurisdiction, in Internet jurisdiction cases involving specific jurisdiction, has been roundly criticized. Regardless of how interactive a website happens to be, the level of interactivity cannot be the proxy in determining general jurisdiction. The interactivity of a website is simply an option available to users, a feature of the website that gives users the choice of whether to interact or not. A user, in other words, must take the first step to exchange information with the website operator. Cases dealing with general jurisdiction issues take the wrong path when relying on the Zippo test in merely focusing on the website’s interactivity.

Rather, the general jurisdiction issue must turn on the evaluation of all of the defendant’s activities in the forum state. And the defendant’s activities in the forum state, for purposes of general jurisdiction, must rise beyond the mere potential for marketing and sales that an interactive website may provide. Thus, a “more traditional gen-

294. See Mink, 190 F.3d at 337 (finding significant for general jurisdiction purposes that the defendant’s website did not allow for the completion of transactions online).

295. See supra Part III.C.

296. Inset and its progeny have been called “anomalies in the world of cyber-jurisdiction.” Yvonne Beshany & Sean Shirley, Cyber-Jurisdiction: When Does Use of the Internet Establish Personal Jurisdiction?, 63 ALA. L.J. 36, 38 (2002); see also Christopher McWhinney et al., supra note 127, at 1 (“Inset has suffered a great deal of criticism because it appears that Inset casts too broad a net in the arena of personal jurisdiction. Further the ruling lacks serious minimum contacts analysis characterized by other personal jurisdiction decisions. The case has received minimal support.”).

297. Bell, 200 F. Supp. 2d at 1091 (asserting that “[t]he [general jurisdiction] analysis cannot begin and end with the ‘active’ and ‘passive’ labels”).

298. See, e.g., Bird v. Parsons, 289 F.3d 865, 874 (6th Cir. 2002) (stating that “unlike direct marketing,” those seeking to do business with the defendant via its website “must initiate the contact” with the defendant).


300. See, e.g., Publ’ns Int’l, Ltd. v. Burke/Triolo, Inc., 121 F. Supp. 2d 1178, 1182–83 (N.D. Ill. 2000) (finding significant for general jurisdiction purposes that the defendant’s website allows users to request defendant’s catalog, even though “no actual sales [were] transacted on line”).

301. One court quickly dismissed the idea that it could exert general jurisdiction over the defendant, because the defendant—whose contacts with the forum state consisted of the selling of one music CD to one Oregon resident, the purchasing of a tiny fraction of its inventory from an Oregon distributor, and the maintaining of its website—clearly lacked continuous and systematic contacts with Oregon. Millennium Enters., Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907, 910 (D. Or. 1999); see also Bird, 289 F.3d at 874 (holding that just because customers could complete domain name registrations via the defendant domain registrar’s website could not justify a finding of general jurisdiction); Bell, 200 F. Supp. 2d at 1092 (stating that “[w]hile the maintenance of a fully interactive website may, but does not necessarily, provide sufficient minimum contacts with the forum to support specific jurisdiction for a cause of action that arises
eral jurisdiction analysis" is warranted: An inquiry that taps into the quantum of business that the defendant does in the forum state.\textsuperscript{302}

Moreover, whether a website targets the forum state should make no difference in determining general jurisdiction.\textsuperscript{303} A website that targets residents of a particular state but fails to generate substantial revenue from that state should not subject the website operator to general jurisdiction.\textsuperscript{304} By the same token, a website that does not target the residents of a particular state but generates continuous and substantial revenue from that state's residents should suffice to establish general jurisdiction over the operator.

V. Conclusion

While the Internet has opened new frontiers of information, communication, and commerce, issues involving Internet jurisdiction must be resolved in ways that are faithful to first principles of due process as set forth by the Supreme Court. Jurisdictional issues involving Internet activity, like issues involving more traditional activity, should be resolved according to the defendant's overall contacts with the forum state and in relation to the substantive and factual underpinnings of the lawsuit. The decision in \textit{Zippo}, while a significant and desirable change in the evolution of Internet jurisdiction, should not be applied to all personal jurisdiction issues involving the Internet. The adoption of a single test for Internet jurisdiction should be resisted given the vast array of activities taking place through the Internet, the wide va-

\textsuperscript{302.} \textit{Arriaga}, 252 F. Supp. 2d at 386. Nevertheless, the general principle for general jurisdiction remains, even when the defendant's contacts with the forum state are only Internet-related: A defendant that engages in continuous, systematic, and substantial business in a forum state will be subject to general jurisdiction, even if those transactions take place solely through the defendant's website. See, e.g., Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 513 (D.C. Cir. 2002) (remarking that a brokerage firm's online business may constitute the basis for the exercise of general jurisdiction).

\textsuperscript{303.} Some decisions have looked—mistakenly—to whether the defendant's website has targeted the forum state as one factor in assessing the general jurisdiction question. See, e.g., \textit{Arriaga}, 252 F. Supp. 2d at 386; \textit{Bell}, 200 F. Supp. 2d at 1092 (commenting that "[n]or have the plaintiffs endeavored to show by inference that residents of Missouri are using the site by, for example, showing that the site is targeted to users from Missouri"); see also Snyder v. Dolphin Encounters, Inc., 235 F. Supp. 2d 433, 441 (E.D. Pa. 2002).

\textsuperscript{304.} "The fact that a site is classified as 'interactive' is irrelevant to the analysis of general jurisdiction if no one from the forum state has ever used the site." \textit{Bell}, 200 F. Supp. 2d at 1091–92 (citing Coastal Video Communications Corp. v. Staywell Corp., 59 F. Supp. 2d 562 (E.D. Va. 1999)).
riety of substantive claims arising from those activities, and the prevailing principles of Supreme Court jurisprudence in which the test for personal jurisdiction varies based on the specific claims being asserted or whether general or specific jurisdiction is at issue.