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INTERNET WEB SITE JURISDICTION

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I. INTRODUCTION

The Internet has become a part of the lives of most Americans.¹ It is no longer a “new and exciting” frontier to explore, but a tool used by people and businesses nationwide.² As a result, litigation over issues such as domain name disputes,³ online trademark dilution,⁴ copyright infringement,⁵ and disputes over online commercial transactions are cases courts around the country hear more and more.⁶ Outside the commercial realm, the newfound ease of Internet communication has opened the door to defamation and libel cases stemming from such communications.⁷

Courts have scrambled in search of a solid framework or characterization for this medium with which they can work to apply consistent decisions that will allow Internet users to fashion their conduct. In determining personal jurisdiction, trying to set forth a uniform standard that can be applied by courts across the country has been an ongoing challenge, resulting in many different approaches with inconsistent out-

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². Id.
⁶. Id.
comes as to when the exercise of personal jurisdiction is proper and when it is not.

The problems with courts asserting jurisdiction in Internet-related cases arise when the courts attempt to define jurisdiction in relation to the degree of interaction between the Web site operator and the end user, often a consumer. In 1996, two similar cases in which the courts balanced the maintenance of a Web site with the stream-of-commerce test resulted in opposite outcomes. In 1997, the Ninth Circuit analyzed a Web site based on a sliding scale of interactivity, which previously had been created by a Pennsylvania district court. Since then, courts have unsuccessfully attempted to weave Web site interactivity analysis into their jurisdictional analyses by requiring activity based on minimum contacts, the effects test, or a combination of existing tests, in addition to Web site interactivity. However, courts have been unsuccessful in establishing a coherent standard, in large part because all Web sites are, to some degree, interactive. Because of this, predicting whether a Web site operator will be subject to jurisdiction in a particular forum is almost impossible, pointing out the need for a well-defined standard of review.

Part II of this article will discuss the background of personal jurisdiction analysis. Part III will discuss the key cases decided prior to and after the development of the Internet, highlighting the problems courts have had applying traditional personal jurisdiction analysis to post-Internet cases. Part IV will discuss five existing proposals that deal with those inconsistencies and suggest possible solutions to the courts' dilemma.

Part V suggests that the proposals that have been recommended can be combined to provide an adequate standard for courts to apply to achieve consistent results in personal jurisdiction cases. By incorporating the strengths of the proposed solutions, a single framework consisting of traditional tools can be applied by the courts in an area of constant change – the Internet. From these proposals, a three-part test can be established, which requires courts to consider three factors in determining whether personal jurisdiction is proper: (1) forum selection agree-

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12. See e.g. Lofton, 100 F. Supp. 2d 404.
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ments; (2) the effects of the defendant's conduct; and (3) the defendant's ability to use existing technology to determine the plaintiff's geographical location.

There are several advantages to such a standard. First, it can be used in both commercial and noncommercial cases because it does not rely solely on commercial activity. Second, the focus of the analysis is on the conduct of the parties rather than the medium, which will enable online actors to gauge whether their behavior will subject them to suit in a particular forum. This, in turn, will aid in fostering the growth of Internet development. Finally, this standard will survive technological changes and should continue to yield consistent results because the analysis is not technology-dependent.

II. BACKGROUND

Personal jurisdiction refers to the courts' legal authority "to render and enforce a judgment" over the parties in an action. The Fourteenth Amendment limits states' sovereignty over nonresident defendants in order to protect and enforce private rights.

A. TYPES OF PERSONAL JURISDICTION

There are two types of personal jurisdiction: general jurisdiction and specific jurisdiction. General jurisdiction is found when the defendant has continuous contacts with a state that are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealing entirely distinct from those activities." Specific... jurisdiction," refers to the power of the [ ] court [regarding] a particular cause of action based upon . . . 'minimum contacts' with the [ ] state [in which the plaintiff has filed suit] the forum state that relate to [the] cause of action." To establish specific jurisdiction, three elements must be satisfied: . . . (1) The defendant's activities must be purposely directed at the forum so that the defendant purposefully avails itself of the privilege of conducting such activities there; (2) the claim must arise from or relate to the defendant's activities in the forum; and (3) the exercise of jurisdic-

tion must" be reasonable.\textsuperscript{20}

\section*{B. Long Arm of the Law}

To decide if a court can assert personal jurisdiction over a defendant, the court must first consider the requirements of the long-arm statute in the forum state that would confer jurisdiction over the defendant in that state, even if the defendant has had little contact there.\textsuperscript{21} If a case does not meet the state's statutory requirements for the exercise of jurisdiction, that state's courts cannot assert personal jurisdiction.\textsuperscript{22} Once the elements of the statute have been met, the court must consider the due process requirement of the Constitution.\textsuperscript{23}

\section*{C. The Due Process Two-Step}

Courts use a two-step analysis to determine whether exerting jurisdiction over a nonresident defendant violates due process. Due process requires the defendant (1) to have established "certain minimum contacts with" the forum such that (2) the continuance "of a suit does not offend 'traditional notions of fair play and substantial justice.'"\textsuperscript{24} To establish that the defendant has satisfied the minimum contacts element of the due process test (also known as purposeful availment), the court will consider the nature of the contacts the defendant has had in the forum; it then will look to the correlation between those contacts and the cause of action.\textsuperscript{25}

The court then moves to the next step of the analysis in determining whether jurisdiction is reasonable.\textsuperscript{26} At this point, there are five factors for a court to consider: "[(1)] the burden on the defendant, [(2)] the forum's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient, [ ] effective relief, [(4) the interest] of the interstate judicial system... in obtaining the most effective resolution of the controversy, and [(5)] the shared interest of several [s]tates in furthering fundamental social policies."\textsuperscript{27}

\begin{thebibliography}{27}
\footnotesize
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Intl. Shoe, 326 U.S. at 316.
\item \textsuperscript{25} Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985); Burns, supra n. 16, at 34-35.
\item \textsuperscript{26} Burger King, 471 U.S. at 476.
\item \textsuperscript{27} Id. at 477.
\end{thebibliography}
D. Development of the Two-Part Test

**Pennoyer v. Neff.** The two part test used to determine personal jurisdiction was established over the course of a century of cases in which the Supreme Court fine-tuned the process of asserting personal jurisdiction in an ever-changing environment of technological advances and business practices.²⁸ This process began with the case of *Pennoyer v. Neff*, in which the Court determined that the defendant's physical presence in the forum was required, and, therefore, a state did not have jurisdiction over a defendant who was not a resident of the state and who did not voluntarily agree to be subject to the jurisdiction of the state.²⁹

*International Shoe Co. v. Washington.* *Pennoyer* was followed by *International Shoe v. Washington*, in which the Court established the minimum contacts element of the two-part due process test described above,³⁰ and distinguished "three types of relationships that a party may have" with the forum that would result in differing jurisdictional results.³¹ The first relationship consists of contacts so substantial in nature that general jurisdiction would apply.³² The second type, a limited relationship in which defendant has "some association with the forum" but contacts are not enough to constitute general jurisdiction, would require the court to look to "traditional notions of fair play and substantial justice" and apply specific jurisdiction.³³ Finally, a relationship in which the defendant has had no association whatsoever with the forum would render personal jurisdiction constitutionally unreasonable.³⁴

*Hanson v. Denckla.* Following *International Shoe*, the *Hanson*³⁵ Court attempted to clarify the types of contacts that would subject a defendant to personal jurisdiction.³⁶ The Court limited state court jurisdiction so that only acts in which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State" would invoke "the benefits and protections of [that forum's] laws."³⁷

*World-Wide Volkswagen Corp. v. Woodson* introduced the stream-of-commerce basis for personal jurisdiction and set forth the idea that the mere fact that a defendant's products find their way into a forum does

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²⁸. *Pennoyer*, 95 U.S. at 726.
²⁹. Id. at 732-33.
³¹. Id. at 316-17; Motty Shulman, HTTP://WWW.PERSONAL-JURISDICTION.COM, 23 Vill. L. Rev. 781, 786 (Winter 1999).
³⁴. Id. at 317; Shulman, *supra* n. 31, at 786.
³⁷. Id. at 253.
not necessarily satisfy the requirement for minimum contacts.\textsuperscript{38} The Court held that there must be an effort to target its activities within the forum so that the defendant “should reasonably anticipate being haled into court there.”\textsuperscript{39}

\textit{Calder v. Jones.} In \textit{Calder v. Jones}, the court established the “effects test,”\textsuperscript{40} under which “personal jurisdiction can be based upon: (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered . . . in the forum state.”\textsuperscript{41} The Court focused on foreseeability in such a case and determined that, even though the defendants wrote a libelous article in Florida, by using California sources and publishing the article in a publication whose largest circulation was in California, the defendants could reasonably have expected to be “haled into court in that forum” based on the foreseeable effects of their activities there.\textsuperscript{42}

\textit{Burger King v. Rudzewicz.} Following \textit{Calder}, the \textit{Burger King v. Rudzewicz} Court further narrowed the concept of minimum contacts and noted that even though the burden of defeating jurisdiction rests with the defendant who has purposefully directed his activities at a forum resident, “jurisdictional rules may not be employed in such a way as to make litigation ‘so gravely difficult and inconvenient’ that a party unfairly is at a ‘severe disadvantage’ in comparison to his opponent.”\textsuperscript{43} This ensures that a defendant’s “random, fortuitous, or attenuated” contacts are not the sole consideration for asserting personal jurisdiction over an out-of-state defendant.\textsuperscript{44} Thus, the Court created the modern two-part test which includes the reasonableness factors listed above.\textsuperscript{45}

The \textit{Burger King} Court reasoned that the defendant simply had to create a “substantial and continuing relationship” with a forum resident.\textsuperscript{46} Additionally, the Court in that case did not require the defendant to have actually entered the forum to assert personal jurisdiction.\textsuperscript{47}

\textit{Asahi Metal Industry Co. v. Superior Court.} Finally, in \textit{Asahi Metal Industry Co. v. Superior Court}, a sharply divided Court analyzed whether merely placing a product into the “stream of commerce” was

\begin{itemize}
  \item 39. \textit{Id.} at 297.
  \item 41. \textit{Id.} at 789-90; \textit{Tech Heads}, 105 F. Supp. 2d at 1148 (citing \textit{Panavision Intl.}, 141 F.3d at 1321).
  \item 42. Brian E. Daughdrill, \textit{Personal Jurisdiction and the Internet: Waiting For the Other Shoe to Drop on First Amendment Concerns}, 51 Mercer L. Rev. 919, 925 (2000).
  \item 43. \textit{Id.} at 462, 478 (1985).
  \item 44. \textit{Id.} at 478, 480 (internal quotations marks omitted).
  \item 45. \textit{See generally id.}
  \item 46. \textit{Id.} at 487.
  \item 47. \textit{Id.} at 479.
enough to satisfy the requirement for minimum contacts, or whether “something more” was necessary in order to assert personal jurisdiction over a nonresident defendant. Justice O'Connor reasoned that Asahi’s “placement of [its] product into the stream of commerce, without more, [was] not an act of the defendant purposefully directed toward the forum state.” According to Justice O'Connor, the “something more” that would establish purposeful availment could include “designing,” “advertising,” and “marketing the product” in the forum state as well as setting up a way to provide customers with advice about that product in the forum state.

Justice Brennan disagreed and found that stream of commerce referred to the regular and anticipated flow of products from manufacture to distribution to retail sale. According to Justice Brennan, merely placing a product into the stream of commerce was enough to establish personal jurisdiction over the nonresident defendant.

The opinions of Justices O'Connor and Brennan garnered four votes apiece. Justice Stevens, concurring, argued that the state's exercise of personal jurisdiction over the defendant was “unreasonable and unfair” by itself, and, therefore, the subject of minimum contacts need not be addressed at all. Additionally, Justice Stevens argued that the Court misapplied the “purposeful availment” test to the facts of the case, indicating that continuously supplying hundreds of thousands of units of a product “annually over a period of several years would constitute ‘purposeful availment.’”

This leads to the problem facing Web site operators today: the courts are split as to whether creating and maintaining a Web site is the same as putting a product into the stream of commerce. Much like the split in Asahi, courts deciding whether or not to assert personal jurisdiction based on a Web site are divided in their analyses and inconsistent in their consideration of criteria necessary to determine personal jurisdiction over a Web site operator.

III. WEB CASES

At the end of the year 2000, there were more than 400 million Internet users worldwide, and 134 million of those users were located in

49. Id.
50. Id. at 112.
51. Id.
52. Id. at 117.
53. Id.
54. Id. at 116.
55. Id. at 121-22.
56. Id. at 122.
the United States. It is projected that by the end of the year 2002, there will be approximately “673 million Internet users,” and by the end of 2005, over one billion people will regularly access the Internet. The United States will make up approximately 214 million of those users. With the increase in people accessing the Internet on a regular basis, there has been an abundance of litigation involving Internet issues to go along with it. Cases related to issues regarding the maintenance of a Web site and whether or not courts can subject a Web site owner/operator to personal jurisdiction have made up a large portion of that litigation.


58. Id. at ¶ 5. “Internet” is “a term used to reference a group of networked computers that are interconnected with other networked computers and the infrastructure that makes this possible.” Todd D. Leitstein, A Solution for Personal Jurisdiction on the Internet, 59 La. L. Rev. 565, 567-68 (Winter 1999). It was originally “designed to be a decentralized, self-maintaining series of redundant links between computer networks, capable of rapidly transmitting communications without human involvement.” ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996). The Internet was initially linked only to “government ‘think tanks’ and a few universities.” Internet 101.org, What Is the Internet? § The Internet <http://www.internet101.org/internet.html> (Apr. 2, 2002). Information is transmitted by a process known as Transmission Control Protocol/Internet Protocol (TCP/IP) whereby information is broken down into smaller, individual packets of information that are split up and independently sent to a unique address located on the network. Scot Finnie, 20 Questions. How the Net Works § How does the Net work? <http://www.scotfinnie.com/20quests/hownet.htm> (accessed Apr. 15, 2002). These packets travel over a series of linked computers through dedicated communication lines, which, if damaged, re-route the individual packet until it reaches its destination, where the receiving computer reassembles the message packets into the original message. Id. This insures that information remains secure and intact regardless of physical events that may occur. Id. Additionally, it guarantees that a Macintosh user can communicate with a Windows user. See id. Access to the Internet occurs in one of two ways. Id. Either an individual uses a computer that is directly connected to the Internet (as found at universities and large businesses) or the individual uses a personal computer and a telephone modem, cable modem, or DSL line to connect to an Internet Service Provider (ISP). See generally Fred Kemp, ACW Connections: Accessing the World Wide Web, or Enlightenment Regarding the Internet and Browsing from Home in a Few Easy Concepts <http://english.ttu.edu/acw/newsletter/Kemp26.html> (1995); see generally Reno, 929 F. Supp. 824; see infra n. 60 and accompanying text (providing information regarding the Web).

59. Petska, supra n. 57, at ¶ 5.

60. See Perry, Personal Jurisdiction, supra n. 17, § Common Factual Situations.

61. The Web is an illustrated version, or subset, of the Internet, consisting of a collection of interlinked documents that work together using a language called Hypertext Transfer Protocol (“HTTP”). Additionally, each document, has an Internet Protocol (IP) address which is a 4- to 12-digit number that identifies the specific computer connected to the Internet. Scott Cunningham, Internet 101 <http://www.wilpf.org/links/howto.htm> (accessed Apr. 15, 2002). The Web uses a series of individual pages, Web pages that are combined to make up Web sites. These pages are assigned domain names which “create a signal identity for a series of computers used by a company or institution.” The domain name identifies all
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A. BREAKING GROUND WHERE THERE IS NONE

Since 1996, the courts have struggled with the problem of characterizing Web sites for purpose of asserting personal jurisdiction. The mishmash of cases over the past five years has yielded inconsistent results at best. As a result, Web site owners and operators have been left the computers in a group. Every Web page has a unique address known as the Uniform Resource Locator ("URL") that is used to tell a browser exactly where to go on the server to find the page requested. This system was designed so that organizations with computers containing information can become part of it simply by attaching their computers to the Internet and running the appropriate software. Web pages are written in hyper-text markup language ("HTML") and have "links" that allow a user to move quickly from one document to another. HTML tells the Web browser how to display the page and its elements. See Finnie, supra at n. 59. For purposes of assessing jurisdiction, Web pages fall into three categories: passive, active, and interactive as per the court of Zippo Mfg., 952 F. Supp. at 1124.

62. See infra n. 64 and accompanying text.
63. See generally e.g. Bensusan Restaurant, 937 F. Supp. at 301, aff'd, 126 F.3d 25 (2d Cir. 1997) (holding that merely creating a site and permitting access without more is not an act purposefully directed toward the forum state); CompuServe, Inc. v. Patterson, 89 F. 3d 1257, 1268 (6th Cir. 1996) (holding that purposefully contracting and utilizing services of the plaintiff in the forum state was enough to find purposeful availment, and personal jurisdiction was appropriate); Edias Software Int'l., L.L.C. v. Basis Int'l. Ltd., 947 F. Supp. 413, 421 (D. Ariz. 1996) (holding that a contract between the parties and forum-based customers, defendant's visits to the forum during business relationship with plaintiff, and an interactive Web site, fulfilled the requirement for purposeful availment and personal jurisdiction was proper); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997 (holding that the defendant's posting of "essentially passive" Web site was not enough to assert jurisdiction); Inset Systems, Inc. v. Instruction Set, Inc. 937 F. Supp. 161 (D. Conn. 1996) (holding that the defendant did have minimum contacts and personal jurisdiction was proper); Maritz, Inc. v. Cybergold, Inc. 947 F. Supp. 1328, 1333-34 (E.D. Mo. 1996) (holding that a Web site that could be accessed by any Internet user, for the purpose of same, fulfills requisite minimum contacts requirement); Panavision Int'l., 938 F. Supp. at 621 (holding that registration of an Internet domain name coupled with a subjective scheme having an effect in the forum state was sufficient contact for the court to exercise personal jurisdiction); Hasbro, 994 F. Supp. at 45 (holding that use of a Web site address was enough to assert personal jurisdiction); Zippo Mfg., 952 F. Supp. at 1124 (holding that personal jurisdiction proper for active Web sites involved in commercial activity; jurisdiction not proper for passive Web site); Blumenthal v. Drudge, 992 F. Supp. 44, 56 (D.D.C. 1998) (holding that a Web site with activity directed at forum state enough to assert jurisdiction); Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 731 (E.D. Pa. 1999) (holding that alleged defamatory statements over the Internet that targeted plaintiff in his national capacity, not in the forum state, did not warrant exercise of personal jurisdiction); Stomp, Inc. v. Neato, LLC, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1999) (holding that the forum state was so important in terms of technology and population that it should be granted the power or authority to reach out and pull anyone into its circle of personal jurisdiction); Am. Info. Corp. v. Am. Infometrics, Inc., 139 F. Supp. 2d 696 (D. Md. 2001) (holding that a company's sales activities focusing generally on customers located throughout the United States and Canada without focusing on and targeting the forum state do not yield personal jurisdiction) Bath & Body Works, Inc. v. Wal-Mart Stores, Inc., 2000 WL 1810478 (S.D. Ohio Sept. 12, 2000) (holding that by operating a Web site which advertised a toll-free number, provided infor-
stranded in the morass, not knowing if, or where, they might be subject to jurisdiction. This section will explore some groundbreaking cases in personal jurisdiction and the Internet, particularly focusing on the courts' limited application of traditional personal jurisdiction rules to cyberspace in those cases. Following that discussion, the focus will shift to more recent cases in which courts have adopted the procedure of applying more than one traditional test to the assertion of personal jurisdiction in Internet cases.

1. Stream of Commerce

In 1996, the Bensusan Restaurant Corp. v. King case introduced Internet-related litigation to the courts. In that case, Bensusan, the plaintiff and owner of "The Blue Note," a famous jazz club in New York, sued the defendant, the owner of a similarly-named small club in Columbia, Missouri. King's Web site informed viewers of upcoming events at the club, and featured an advertisement for the club and a telephone number customers could call to purchase tickets. Bensusan sued King in New York State, and the issue for the court was whether it could exercise personal jurisdiction over King. The United States District Court for the Southern District of New York used a line of reasoning similar to Justice O'Connor's stream-of-commerce reasoning of Asahi and ruled that merely creating a site and permitting access that "may be felt nationwide - or even worldwide - but, without more, it is not an act purposefully directed toward the forum state."

In contrast, the court in Inset Systems, Inc. v. Instruction Set, Inc. used a similar method of reasoning to determine that the defendant's Web site, which was like the site in Bensusan, did satisfy the criteria for personal jurisdiction. The United States District Court for the District of Connecticut reasoned that Instruction Set's usage of Web site advertisement for making wholesale purchases, maintained an e-mail list, and displayed a link for ordering online fulfilled the purposeful availment requirement and personal jurisdiction was appropriate).

65. "Cyberspace" is a term coined by William Gibson, a science fiction writer, who used it in his novel Neuromancer to "describe a computer generated 'virtual' space that looked and felt like physical space." Id.
66. 937 F. Supp. at 295.
67. Id. at 297.
68. Id.; Matthew Oetker, Personal Jurisdiction & the Internet, 47 Drake L. Rev. 613, 627 (1999).
70. Id. at 301 (citing Asahi Metal, 480 U.S. at 112).
71. 937 F. Supp. at 162, 166.
tisement was more durable than an advertisement in a periodical simply because of the medium employed.\textsuperscript{72} According to the court, the use of that advertisement, along with providing a toll free number, satisfied the constitutional principles regarding due process and therefore personal jurisdiction was proper.\textsuperscript{73} Bensusan and Inset Systems demonstrate that attempting to determine personal jurisdiction simply by likening a Web site to a product being placed into the stream of commerce is too limiting because that approach does not take into account the character of the Internet or Web sites. Furthermore, the approach does not answer the question of whether creating and maintaining a Web site is enough to confer jurisdiction everywhere from which the site is accessed.

2. \textit{Sliding Scale}

\textit{Zippo Manufacturing Co. v. Zippo Dot Com, Inc.} introduced the concept of the "sliding scale" in the exercise of personal jurisdiction.\textsuperscript{74} In that case, a district court in the Western District of Pennsylvania determined that "the likelihood that personal jurisdiction can be constitutionally exercised is \textit{directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet},"\textsuperscript{75} and developed a scale on which to measure such contacts.\textsuperscript{76} At one end of the scale are active Web sites in which the "defendant clearly does business over the Internet," such as entering into contracts or continually and knowingly transmitting files over the Internet.\textsuperscript{77} If a site falls into this category, the exercise of personal jurisdiction is appropriate.\textsuperscript{78} At the opposite end of the scale are passive Web sites where the defendant merely posts information on a Web site "that is accessible to users in foreign jurisdictions."\textsuperscript{79} In such a case, because of the commercial inactivity of the site,\textsuperscript{80} jurisdiction would not be proper. Finally, in the center of the spectrum are "interactive" sites in which users "can exchange information with the host computer."\textsuperscript{81} In that category, personal jurisdiction is determined based upon the nature of the contacts weighed against the level of interactivity of the site.\textsuperscript{82}

\textsuperscript{72} \textit{Id.} at 165.
\textsuperscript{73} \textit{Id.;} see Marie D’Amico, \textit{A Survey of the Current Cases of Personal Jurisdiction & the Internet,} \textit{1 J. Int. Law,} § II Defendant Posts Information on an Internet Web site (Feb. 1998) (available at <http://www.madcapps.com/Topics/asurvey.htm>).
\textsuperscript{74} 952 F. Supp. at 1124.
\textsuperscript{75} \textit{Id.} (emphasis added).
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
This sliding scale was adopted by the Ninth Circuit in the case of Cybersell, Inc. v. Cybersell, Inc. in which the court held that maintenance of a Web site containing an advertisement alone was not sufficient to subject a defendant to personal jurisdiction. In that case, the Arizona plaintiffs ("Cybersell AZ") and Florida defendants ("Cybersell FL") formed companies named "Cybersell." Cybersell FL created a Web site in an effort to market its business consulting services. The Web site contained the Cybersell logo, a Florida telephone number, and an invitation for customers to contact the owners via e-mail. The site also included a link which allowed users to post information about themselves. Cybersell AZ filed suit against Cybersell FL in an Arizona court for trademark infringement. In discussing the purposeful availment issue, the court considered the commercial activity of the defendant's Web site and found that no commercial activity had been conducted via its Web site. Additionally, the only contacts Cybersell FL had with the forum consisted of contacts by the plaintiff. Therefore, the court held the exercise of jurisdiction by the Arizona court was not appropriate.

The Ninth Circuit's adoption of the sliding scale became the standard in future Internet jurisdiction cases. However, because of the ambiguity of the classification of an "interactive" Web site, courts were, and are, still forced to attempt to pigeonhole virtual presence into traditional rules requiring physical presence. The sliding scale of Zippo, although widely used, still falls short of supplying the courts with a means of assessing the true nature of Web site activity. The following cases demonstrate the point.

3. Minimum Contacts

Whether an interactive Web site alone is enough to establish the requisite minimum contacts, required by International Shoe was addressed in the case of Maritz, Inc. v. Cybergold, Inc. In that case, Cybergold, a California company created a Web site informing users of the company's upcoming service in which Cybergold would maintain a database listing users' interests and send related advertisements to

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83. 130 F.3d at 420.
84. Id. at 415.
85. Id.
86. Id.
87. Id. at 416.
88. Id.
89. Id. at 419.
90. Id.
91. Id. at 419-20.
92. 947 F. Supp. at 1328.
those users via electronic mailboxes provided by Cybergold. Maritz, Inc., a Missouri corporation, sued Cybergold in Missouri for copyright infringement. Despite the fact that Cybergold had no contacts with the state of Missouri other than user-initiated contacts via the Web site, the court determined that by maintaining an interactive Web site and deciding to transmit advertisements to users who joined a mailing list, regardless of the user's geographical location, Cybergold purposefully availed itself of the privilege of doing business in Missouri and that personal jurisdiction was proper.

In contrast, in the case of Scherr v. Abrahams, the United States District Court for the Northern District of Illinois found that a defendant's Web site was interactive because it was one in which the user exchanged information with the site. However, the court determined that interactivity alone was not sufficient to satisfy the minimum contacts requisite.

In addition to considering the interactivity of a Web site, courts have also attempted to incorporate other activities of defendants into their analyses. For instance, in Hasbro Inc. v. Clue Computing, Inc., a federal district court in Massachusetts determined that the defendant, a Colorado corporation, maintained an interactive Web site because it allowed users to contact the company via e-mail regarding the corporation's consulting services. In addition, the court took into account Clue's non-Internet related activities in which the consultants actually provided services for companies in the forum state of Massachusetts. The court reasoned that the exercise of personal jurisdiction was appropriate based on the interactive Web site and non-Internet related activities.

In other cases, the courts have found that the maintenance of an interactive Web site and related contacts with the forum state satisfied the minimum contacts requirement and personal jurisdiction was appropriate. In short, based on these cases, the mere act of maintaining an interactive site may or may not subject an owner/operator to jurisdiction in another forum.

93. Id. at 1330.
94. Id. at 1329.
95. Id. at 1333-34.
97. Id. (noting that "the level of interactivity [was] rather low" and that the defendant did not specifically target the forum state).
98. 994 F. Supp. at 45.
99. Id. at 44.
100. Id. at 47.
4. Effects

Panavision International, L.P. v. Toeppen. Another traditional test that is typically used by the courts in assessing personal jurisdiction is the effects test of Calder v. Jones.102 Some courts have used reasoning similar to that of Calder in assessing personal jurisdiction. For instance, in Panavision v. Toeppen, the United States District Court for the Central District of California asserted personal jurisdiction based on the defendant's intentional activities directed at the forum state.103 Panavision International was a Delaware company with a primary place of business in California.104 The defendant, an Illinois resident, was a “cybersquatter.”105 When Panavision tried to register a Web site in its own name, it found that it could not because the Toeppen had already registered that name.106 The plaintiff contacted the defendant and requested that he stop using “Panavision,” which was a trademark of the company.107 Toeppen refused, then attempted to sell that domain name to the corporation.108 When Panavision refused to pay, Toeppen then registered another trademark name owned by the corporation.109 The court, in its analysis, reasoned that “under the ‘effects doctrine,’ Toeppen [was] subject to personal jurisdiction in California.”110 The court further reasoned that the defendant registered the trademarks as domain names, knowing that they belonged to the plaintiff and “intent[ing] to interfere with Panavision’s business.”111 Because Toeppen directly targeted the forum, the harm “was intended to, and did, result in harmful effects in [the forum]”112 and since the defendant knew that the harm would be felt there, jurisdiction was proper.113

Barrett v. Catacombs Press. In Barrett v. Catacombs Press, the United States District Court for the Eastern District of Pennsylvania declined to find personal jurisdiction after analyzing the effects of the de-

102. 465 U.S. at 787.
103. 938 F. Supp. at 622.
104. Id. at 618.
107. Id.
108. Id.
111. Id.
112. Id. at 622.
113. Barrett, 44 F. Supp. 2d at 730; see D’Amico, supra n. 73, at § I Defendant Does Business on the Internet.
The plaintiff was a psychiatrist and consumer health advocate with a Web site called "Quackwatch" that provided information about various healthcare issues, including issues regarding fluoridation. Defendant, Darlene Sherrell, was the host of a competing Web site and a member of a health-fraud discussion group co-sponsored by Quackwatch. The parties had opposing views regarding the issue of fluoridation. Sherrell actively opposed fluoridation through the discussion group forum and attempted to discuss the issue with Barrett via e-mail. When Barrett did not respond, Sherrell posted allegedly defamatory comments about him on her own Web site.

Barrett sued for defamation in Pennsylvania, even though Sherrell had modified the content of the site after plaintiff's threat of a lawsuit. The district court granted Sherrell's motion to dismiss for lack of personal jurisdiction, because it reasoned Sherrell had not purposefully availed herself of the privilege of acting, nor had the plaintiff been harmed by the tortious conduct of Sherrell, in the forum state. The court focused on the noncommercial nature of Sherrell's Web site, pointing out that "the exercise of personal jurisdiction over non-commercial on-line speech that does not target any forum would result in hindering the wide range of discussions permissible on . . . [Web sites] that are informational in nature." Additionally, Sherrell successfully argued that because she had not visited the forum state since a fluoridation lawsuit which she attended in the 1980s and because her activities on the Internet were directed to the "world at large," they were not specifically targeted at the forum state and she therefore should not be subject to jurisdiction there.

The preceding cases show a range of court decisions in deciding whether or not to exercise personal jurisdiction in Internet-related cases. In addition, they demonstrate the ineffectiveness of attempting to apply traditional personal jurisdiction rules to interactive Web sites, and show...
the need for an application that will yield consistency among court decisions on which Web site owner/operators can rely.

*Blumenthal v. Drudge* is a good example of how the current jumble of court analyses is lagging behind the ever-changing technological advances of the virtual world.\(^{125}\) Blumenthal, a presidential aide, alleged that the defendant published defamatory material about him in “The Drudge Report,” an online publication featured on the defendant’s Web site.\(^{126}\) Drudge also distributed the report to America Online (“AOL”), which re-published the report for viewing by its members and then withdrew the report after receiving a letter from the plaintiff’s attorney.\(^{127}\)

As in most Web site cases, the first step in the court’s analysis, after evaluating the long-arm statue, was to classify the site using the *Zippo* scale.\(^{128}\) In this case, the court determined that the site was interactive.\(^{129}\) The analysis then turned to the due process requirement.\(^{130}\)

The *Blumenthal* court only briefly addressed the fact that Drudge specifically targeted the forum state “by virtue of the subjects he cover[ed],”\(^{131}\) and that he knew the effects of his statement would be felt in the forum state.\(^{132}\) However, that was the extent of the court’s effects analysis.\(^{133}\) The court recognized the effects of Drudge’s behavior and the harm felt in the forum, but then the court punted and moved on to a more familiar traditional approach—minimum contacts.\(^{134}\)

The court ultimately asserted personal jurisdiction not based on the harm caused by the defendant, but based on a combination of Internet and non-Internet contacts in addition to the maintenance of an interactive Web site.\(^{135}\) Had the court pursued the effects avenue, the result would have been identical, but it may have provided a more straightforward way of reaching that same conclusion.

**B. Recent Developments**

The recent trend appears to be moving away from the limited application, traditional personal jurisdiction rules toward a broader analysis of Web site cases. Whereas earlier courts limited their analyses to one main approach, mostly minimum contacts, the following cases demon-

\(^{125}\) 992 F. Supp. at 44.
\(^{126}\) Id. at 47.
\(^{127}\) Id. at 47-48.
\(^{128}\) Id. at 55.
\(^{129}\) Id.
\(^{130}\) Id. at 56.
\(^{131}\) Id. at 57.
\(^{132}\) Id.
\(^{133}\) Id.
\(^{134}\) Id.
\(^{135}\) Id. at 57-58.
strate a wider analysis and the courts’ recognition that technology and widespread Internet usage dictates a new approach to personal jurisdiction issues.

1. **Personal Jurisdiction Not Asserted: Millennium Enterprises, Inc. v. Millennium Music, LP.**

   In 1999, a federal district court in Oregon took a giant step toward changing the way courts across the nation address the issue of jurisdiction in relation to Web sites. In the case of *Millennium Enterprises, Inc. v. Millennium Music*, the court broadened its analysis and took into consideration the totality of contacts by the defendant in the forum state, as well as the effects of the defendant’s conduct within the forum in relation to the interactivity of the site maintained by the defendants. In *Millennium*, an Oregon-based music retailer sued a South Carolina-based music retailer for trademark infringement and unfair competition. The court considered the three factors previously discussed: the interactivity of the Web site based on the Zippo sliding scale, the contacts the defendant had with the forum state, and the effects of the defendant’s conduct on the forum state per *Calder*.

   First, the court analyzed the contacts the defendant, Millennium Music, had with the forum state. The only Oregon contact came from the sale of one compact disk sold by the defendant to an acquaintance of plaintiff’s counsel. Because the contact was initiated by the forum state and not the defendant, the district court reasoned that “only those contacts... created by the defendant, rather than those manufactured by the unilateral acts of the plaintiff, should be considered for due process purposes.” Additionally, the court looked at defendant’s purchases from an Oregon supplier who mistakenly sent an invoice to Millennium Enterprises credited Millennium Music’s account and found that defendant’s conduct had not caused actual harm in the forum and therefore failed to satisfy the requirements of the *Calder* effects test.

   After reviewing several Internet-related cases, the court discussed the reliance of courts on the Zippo sliding scale. This court concluded that Zippo fell short of providing a guide tailored narrowly enough to fit the character of Web sites and modified the scale to include what they dubbed the “fundamental requirement” necessary to exercise personal

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137. Id. at 908-09.
138. Id. at 921.
139. Id. at 910.
140. Id.
141. Id. at 911 (quoting Edberg v. Neogen, 17 F. Supp. 2d 104, 112 (Dist. Conn. 1998)).
143. Id. at 916.
jurisdiction "'deliberate' action within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state." Addressing the purposeful availment issue, the court refused to assert personal jurisdiction over the defendant because the defendant had not, based on the facts at hand, purposefully availed itself of the benefits of doing business in the forum. Holding fast to traditional notions of personal jurisdiction, the court expounded, "[t]he timeless and fundamental bedrock of personal jurisdiction assures us all that a defendant will not be 'haled' into a court of a foreign jurisdiction based on nothing more than the foreseeability or potentiality of commercial activity with the forum state."

Other courts followed suit after Millennium and broadened their analysis to consider many aspects of Web-related contacts. The trend in the courts has been to add an analysis based upon the effects test after considering the interactivity of the defendant's Web site based on the Zippo sliding scale. Some courts have gone as far as to consider the defendant's intent to cause harm in the forum in addition to the interactivity of the Web site. In Lofton v. Turbine Design, the Federal District Court for the Northern District of Mississippi required more than a showing that harm was caused in the forum requiring in addition that the defendant "possess[ ] the intent to target residents of the forum state." These cases show how the courts are moving toward a willingness to step back and look at Web site cases in a broader context and see that the virtual world and the physical world are, perhaps, not so far apart.


In Tech Heads v. Desktop Service Center, Inc., the United States District Court for the District of Oregon relied heavily on the concepts brought forth by the Millennium and Stomp. The Tech Heads court pointed out that "[t]raditional notions of jurisdiction . . . must re-

144. Id. at 921.
145. Id. at 922.
146. Id. at 923.
148. Id. at 790. Personal jurisdiction was not asserted in this case because there was no evidence suggesting defendant targeted the forum directly and no evidence of harmful effect in forum. Id.; see generally Lofton, 100 F. Supp. 2d 404; Am. Info., 139 F. Supp. 2d 696.
149. 100 F. Supp. 2d 404.
151. Tech Heads, 105 F. Supp. 2d at 1146; see Millennium Enter., 33 F. Supp. 2d at 909.
152. Tech Heads, 105 F. Supp. 2d at 1149; see Stomp, 61 F. Supp. 2d at 1076.
main flexible in the context of a constantly changing society where technological innovations have transformed the interactions that serve as the basis for personal jurisdiction. Then the court went on to analyze minimum contacts, a notion set forth half a century ago in *International Shoe*, by establishment and maintenance of a Web site. Applying the Zippo scale, the *Tech Heads* court placed the defendant's Web site in the middle of the scale, classifying it as "highly interactive." As in *Stomp*, Desktop maintained a Web site that encouraged users to exchange information of varying degrees. In such a case, the *Tech Heads* court deemed the minimum contacts requirement had been satisfied. The court determined that it was not the quantity of contacts, but the quality that constituted purposeful availedment as in *Stomp*. Even though the court found that personal jurisdiction failed under the effects test of *Calder* because Desktop did not intentionally direct their activities at the forum, the court came close to following in the footsteps of the *Maritz* court by allowing the least possible number of contacts with the forum, one, to qualify as minimum contacts sufficient to exercise jurisdiction. However, the "something more" element of *Cybersell* was satisfied because of Desktop's additional contacts with Oregon.

Even though the court took a broad look at various elements before exercising personal jurisdiction, the analysis still fell short of setting a precedent that would lead to consistent judicial decisions in personal jurisdiction of Internet Web sites, as evidenced by the opposing decisions in similar cases decided after *Tech Heads*. However, the court's decision to move away from relying on a sliding scale analysis may well be the best way to go, as the following proposals show.

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154. *Id.* at 1142, 1151.
155. *Id.* at 1150.
156. *Id.*
157. *Id.* at 1151.
158. *Id.* at 1149.
159. *Id.* at 1148 (quoting *Stomp*, 61 F. Supp. 2d at 1080).
160. 947 F. Supp. at 1333 (asserting jurisdiction based solely on the maintenance of a Web site).
161. *Id.* at 1332.
163. *Id.*
164. See e.g. *ALS Scan, Inc. v. Wilkins*, 142 F. Supp. 2d 703, 710 (D. Md. 2001) (rejecting the notion that one contact was enough to satisfy the minimum contacts element and finding of personal jurisdiction was not proper); *Online Partners.com, Inc. v. Atlanticnet Media Corp.*, 2000 WL 101242 at *2 (N.D. Cal. Jan. 20, 2000) (finding jurisdiction proper based on one contact with the forum state after looking at the business generated in the forum state).
IV. ACADEMIC PROPOSALS

Along with the inconsistencies of court decisions in post-Internet cases, there has been a barrage of proposed solutions designed to tackle this issue. This section will discuss the pros and cons of five such proposals. The first proposal discussed suggests a modification to the effects test and the minimum contacts test based on commercial activity versus intentional tortious activity of the defendant. The second proposal focuses on the Zippo scale and redefines the scale while offering assurance that a defendant can only be subjected to jurisdiction in one place at a time. The third is an approach focusing on the Calder effects test in relation to the element of knowledge. The fourth proposal considers the nature of the Internet with respect to jurisdictional issues and proposes an integration of physical location with "cyber" presence. Finally, a recent proposal recommending a three-part, technologically neutral approach will be discussed.

A. MINOR MODIFICATIONS

In 1999, Todd Leitstein proposed a standard of review for courts to use in evaluating personal jurisdiction issues with regard to Internet conflicts.\(^{166}\) Relying on the definition set forth in Zippo, describing interactive Web sites,\(^{167}\) Leitstein's approach addresses the problem courts have had in determining interactivity.\(^{168}\) According to Leitstein, use of the effects test\(^{169}\) in determining applicability of personal jurisdiction theoretically would yield more consistent results because court which have adopted this test have a tendency to focus on where the harm was felt and whether the defendant should have anticipated where harm would be felt, which appears to be easier to ascertain than purposeful availment based on contacts with the forum.\(^{170}\)

Additionally, Leitstein proposes redefining the sliding scale to reflect issues courts regularly address: intentional torts and commercial versus noncommercial activity.\(^{171}\) The first category under which the defendant's actions should fall is one in which the commission of an intentional tort will confer personal jurisdiction where harm from those activities is felt.\(^{172}\) Second, the act of engaging in commercial activity online would most likely result in assertion of personal jurisdiction for a

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166. Leitstein, supra n. 58, at 585.
168. 59 La. L. Rev. at 565.
170. Leitstein, supra n. 58, at 565.
171. Id. at 584-85.
172. Id. at 585.
cause arising out of that activity.\textsuperscript{173} Finally, Leitstein would do away with passivity and replace it with noncommercial activity which would not normally subject a Web site owner to jurisdiction in a foreign court.\textsuperscript{174}

The next part of the proposal is a modified effects test that incorporates the foreseeability element of \textit{World Wide Volkswagen} with the test from \textit{Calder} to allow for a more localized analysis of personal jurisdiction issues.\textsuperscript{175} The test is modified to focus on the defendant's intentional actions.\textsuperscript{176} Theoretically, personal jurisdiction should be asserted if the following elements are satisfied: (1) the defendant has "committed an intentional act" that (2) "causes significant harm" to an individual that (3) the defendant \textit{knows or should know} will be harmed by the activity, (4) thereby making suit on the harmful result of that conduct \textit{foreseeable}.\textsuperscript{177}

By proposing modifications to both the sliding scale and effects tests, Leitstein posits that this approach will yield more consistency when determining personal jurisdiction and would give Web site owners some idea of what to expect as far as being haled into court in a particular forum.\textsuperscript{178}

However, Leitstein, by relying on the idea that "[b]y its nature the Internet is antithetical to principles of federalism, neither knowing nor respecting borders and states,"\textsuperscript{179} simply compounds the existing problems courts face of not knowing how to characterize the nature of the Internet.\textsuperscript{180} By not addressing various methods of ascertaining geographical location from Internet contacts, Leitstein's proposal fails to clear the muddied waters of Internet personal jurisdiction by failing to direct the court away from the media and back to traditional notions of personal jurisdiction in which the stream itself is not analyzed, but the defendant's conduct of placing a product in that stream is.\textsuperscript{181}

\subsection*{B. Highways and Hierarchies}

Richard Bales and Joseph Burns have proposed that the personal jurisdiction analysis begin with the "highway approach."\textsuperscript{182} With this approach, the defendant, by its Web site, can only be in one place at a time, rather than being legally physically present in every place the site

\begin{thebibliography}{99}
\bibitem{173} \textit{Id.}
\bibitem{174} \textit{Id.}
\bibitem{175} \textit{Id.} at 567.
\bibitem{176} \textit{Id.}
\bibitem{177} \textit{Id.}
\bibitem{178} \textit{Id.}
\bibitem{179} \textit{Id.} at 566.
\bibitem{180} \textit{Id.} at 565.
\bibitem{181} \textit{See generally id.}
\bibitem{182} Burns, \textit{supra} n. 16, at 44.
\end{thebibliography}
reaches or has the potential to reach (dubbed the “spider web approach”).

In addition, Bales and Burns have proposed that the courts adopt a three-tiered hierarchy of contacts in determining purposeful avail-

ment. Level One would consist of passive browsing or simply viewing passive Web sites. There are two subcategories in this level. First, there are passive sites that merely offer information rather than the sale of goods. There may be advertisements on the site, but a user cannot purchase those goods or services without leaving that site. On such sites, no transactions would occur and, hypothetically, there is no exchange of information between the site operator and the user. The second subcategory consists of Web sites that are more than passive, but the facts of the case at hand show that it has only been passively browsed by users in the forum. If a Web site fits into either of the Level One subcategories, Bales and Burns argue that the court should find no personal jurisdiction.

Level Two consists of purchasing. This would cover contracts that occur when a user accesses a site to “purchase information, goods or services.” At this level, the user may provide such information as a credit card number, billing or shipping address, or other personal information. Bales and Burns argue that at this level personal jurisdiction should be asserted by the court unless the Web site owner can show that it had no intention to seek contacts in the forum state, and she had no anticipation to sell goods or services offered in the forum. The defendant must also show that it did not and could not be expected to know that purchases were being made from the forum state.

Bales and Burns then place large-scale financial transactions, including buying and selling of stock or transferring of funds via the Internet, at the third and highest level. At this level, personal jurisdiction would be per se.

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183. Id. at 39.
184. Id. at 47.
185. Id. at 48.
186. Id.
187. Id. at 40.
188. Id. at 47.
189. Id. at 47-48.
190. Id.
191. Id. at 48.
192. Id. at 49.
193. Id.
194. Id. at 48-49.
195. Id.
196. Id. at 49.
197. Id.
There are two drawbacks to the Bales and Burns approach. First, it fails to address the fact that there is always interaction between the Web site and its supporting server. Because the scripts that are written to run on a Web page are purposely created to perform a function desired by the operator, there is always the argument of an intent manifested in the site operator's activity of merely creating a Web site, to contact other forums. Second, the fact that the geographical location of the user's Internet Service Provider ("ISP") can be ascertained from the user's IP address, thereby creating a contact at the very least with a predictable forum, is not addressed by this proposal. Rather, the focus remains on the defendant's purposeful availing of the privileges and benefits of the forum state. Such a focus leads to unpredictable and inconsistent decisions concerning personal jurisdiction of Internet-related issues.

C. NONCOMMERCIAL NUANCES

Katherine Neikirk advocates the use of the effects test set forth in Calder v. Jones with regard to analyzing personal jurisdiction issues in Internet-related cases. She argues that the effects test is better suited to these types of cases than is the test for purposeful availing because the outcome is based on "the harm the plaintiff actually suffers within the forum state." She further argues that it would be easier for courts to determine whether a defendant knew (or should have known) that its actions online would cause harm than it is to determine whether or not the defendant "purposefully availed" itself of the benefit of acting in the forum through the Internet.

Because of the intangible nature of the Internet, when evaluating the activity of Web sites, courts find that they have to somehow stretch Internet activities that are at issue to include non-Internet activities so the situation fits into the established guidelines for purposeful availing. At a basic level, though, Web sites are never really passive because there is a continuous transmission of information passed between the user and the site operator that occurs with every "hit" on a Web site, regardless of whether the hit results in a transaction. Moreover, since the Internet does not contain geographical boundaries, it is impossible to

198. See generally id.
199. Webopedia.com, script ¶ 1 <http://www.wedopedia.com/TERMS/S/script.html> (last updated Feb. 21, 2002) (defining script as a list of commands that can be executed without user interaction).
200. Neikirk, supra n. 121, at 382.
201. Id.
202. Id. at 383.
203. Id. at 379.
204. Id. at 379-80.
keep users from a specific geographical forum from accessing a site.\textsuperscript{205}

In the case of asserting personal jurisdiction over a noncommercial site, the effects test appears to be ideal because it allows room to evaluate the repercussions across the Internet of asserting jurisdiction in non-commercial cases.\textsuperscript{206} By looking to the tortious activity and effects of that activity on the plaintiff, the courts can prevent overreaching their jurisdiction that could ultimately result in restricting the freedom of online discussion and negatively affecting the continuing creation of Web sites. Because of this, courts are reluctant to hold noncommercial Internet activity to the same standard as commercial activity.\textsuperscript{207} Essentially, this approach places noncommercial Web sites at the same level as passive Web sites, and suggests that without actual harm to the plaintiff in the forum, personal jurisdiction is not proper.\textsuperscript{208}

Approaching jurisdictional issues by looking at the effects of the harm felt in the forum would ideally result in more consistent outcomes than the use of the Zippo scale.\textsuperscript{209} The defendant should be able to foresee being haled into court in a jurisdiction in which its activities have harmful effects.\textsuperscript{210} This line of reasoning is supported by case law in which courts have favored use of the effects test in determining purposeful availment.\textsuperscript{211} However, recent case law has held that the effects test is not satisfied merely because the effects of the defendant's tortious activity were felt in the forum.\textsuperscript{212} These cases require something more.\textsuperscript{213} Judicial inconsistencies remain, regardless of the more flexible line of reasoning as that proposed by Neikirk.\textsuperscript{214}

\section{D. Interactivity Explored}

Brian Daughdrill contends that the first step in proposing a better formula for courts to use in addressing the issue of personal jurisdiction is to recognize that every "Web site [is] interactive."\textsuperscript{215} Through the use of cookies\textsuperscript{216} and various other types of scripts, "[a]ll Web sites require"

\begin{itemize}
\item 205. \textit{Id.} at 380.
\item 206. \textit{Id.} at 384.
\item 207. \textit{Id.} at 385-86.
\item 208. \textit{Id.}
\item 209. \textit{Id.}
\item 210. \textit{Id.}
\item 211. \textit{See} \textit{e.g.} \textit{Am. Info.}, 139 F. Supp. 2d 696; \textit{Tech Heads}, 105 F. Supp. 2d 1142; \textit{Lofton}, 100 F. Supp. 2d 404; \textit{Bailey}, 86 F. Supp. 2d 790; \textit{Millennium Enter.}, 33 F. Supp. 2d 907.
\item 212. \textit{See Bailey}, 86 F. Supp. 2d at 796-97.
\item 213. \textit{See Cybersell}, 130 F.3d at 418.
\item 214. \textit{See generally} Neikirk, \textit{supra} n. 121.
\item 215. Daughdrill, \textit{supra} n. 42, at 938.
\item 216. \textit{Webopedia.com}, \textit{Cookies} \textless \texttt{http://www.webopedia.com/TERM/C/cookie.html} \textgreater (accessed Apr. 16, 2002). A cookie is a message a Web server sends to a Web browser. \textit{Id.} at \S 1. The message is stored on the browser in a text file and then sent to the server every time
\end{itemize}
the user's and operator's computers to transmit information back and forth in order "to activate delivery of the data packets." Therefore, the focus must turn to the "nature and quality of the commercial activity" involved, as suggested by the court in Zippo, and "what opportunity the Web site publisher has to learn or discover the geographical location of the Web site user" based on that activity.

Daughdrill suggests that the more commercial the exchange of information between the Web site and the user, the more the operator of that site can learn about the user with whom information is being exchanged. He recommends that a court weigh five factors in deciding the suitability of asserting personal jurisdiction. The factors (in order of highest to lowest relevance) are as follows: (1) the "geographical home address" of the user; (2) the user's "home telephone number"; (3) the user's "credit card numbers"; (4) the user's actual name, not screen name or nickname; and (5) the user's "server information." According to Daughdrill, the lower the gathered information is on this hierarchy, the "less proper the assertion of personal jurisdiction" because the operator is availing himself less of the forum state.

Similarly, Daugdrill argues courts must also recognize that "all Web site operators have transmitted files to a [true] geographical location, the location of their host server, and entered into contracts" with those hosts in that geographical area. Therefore, their contacts with that forum fall into "the commercial end of the [sliding] scale" and "assertion of jurisdiction [in that forum] [would be] proper." Daughdrill also proposes that in cases "[w]hen the Web site has the capability [to] receiv[e] information . . . that would identify] the geographical location of that user," a two-part test should be utilized to determine that fact. In that situation, the burden of proof would fall on

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217. Daughdrill, supra n. 42, at 938.
218. Id.
219. Id. at 938-39.
220. Id. at 938.
221. Id. at 938-39.
222. Id. at 939.
223. Id.
224. Id.
225. Id. at 940.
the plaintiff to “establish not just that the [Web] site” in question (1) had the “capability of receiving [identifying] information” from the user, but that (2) the “information was actually received.” This is important because many Web sites are equipped with counters that are designed to count the number of hits that a page has received, but that is an inaccurate depiction of the number of users who have accessed a Web site and it does not necessarily indicate an intentional exchange of information. If a site is “designed for multiple layers of interactivity,” purposeful contact should only arise when geographical information is intentionally exchanged, and the contacts by the operator continue over a period of time. According to Daughdrill, in situations when traditional geographic information has not been registered, the court should look to the server addresses to find a “suitable court in which to assert personal jurisdiction.”

Relating the degree of commercial nature of a Web site to the amount of information gleaned from a user’s access to the site provides one means of assessing geographical location and jurisdiction in Internet cases. In addition, as commerciality increases, the knowledge of the user’s whereabouts increases in proportion to it, thus eliminating the need for the ambiguous interactive scale set forth in Zippo.

Finally, Daughdrill proposes that courts be aware of the many layers of Web sites so that when they analyze a case, they can focus on which layer is being “blamed for the injury.” Is the contact limited to a listserv that automatically sends information out to a group of users? In that case, the intent element of purposeful availment is weakened. Or is the contact more reciprocal between the operator and the user, in which case purposeful availment is per se? Daughdrill’s suggestion that commercial sites are passive until an affirmative action has been taken by a user to exchange information with that site dictates that each contact must be carefully analyzed in order to determine which level of the

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226. Id. (emphasis added).
227. A hit means that the page was accessed, but does not necessarily mean that there was a commercial transaction. See There Is Hope, ComputerHope.com, § Dictionary, Hit <http://www.computerhope.com/jargon/h-hit.html> (accessed Apr. 17, 2002). Essentially, Web sites are not capable of distinguishing between a “fresh” hit in which a new user enters the site, and a repeat hit in which the same user either returns to the page through the use of the “back” button in their browser or by some other means. See id.
228. Daughdrill, supra n. 42, at 940.
229. Id.
230. Id. at 942-43.
231. Id. at 939.
232. Id. at 942.
233. Id. at 943.
234. See id. at 940-42 (discussing how use of a listserv affects purposeful availment).
235. Id.
site "is responsible for and available to the assertion of personal jurisdiction." Because Daughdrill leaves this portion of his proposed solution open for interpretation, one is left to wonder what the purpose of such an exercise would be. The Web site owner is still liable for harm caused by the site's actions, regardless of the responsible layer. This simply emphasizes the nature of the Internet and does not provide guidance for how courts should proceed in this portion of the analysis.

E. A Neighbor's Advice

In a recent report to the Uniform Law Conference of Canada, Professor Michael Geist of the University of Ottawa, proposed a three-step analysis for "cyber" jurisdictional issues. His analysis can be neatly summed up as follows. First, the court must determine if the parties have agreed to the forum by contract. Second, the court analyzes whether the defendant targeted the forum through the use of technology. Finally, the court ascertains whether the defendant had knowledge about the geographical location of its online activity. Each fact must be considered by the court, but "no single factor [is] determinative" to establish personal jurisdiction.

In determining whether or not there is a valid contract between parties, Geist recommends that the court look at whether the agreement is a "clickwrap" agreement, a "terms of use agreement," or a forum selection agreement. In addition to determining the type of contract at issue, the court must then determine the reasonableness of the terms of the contract, which entails "analysis of how consent was obtained as well as considering the reasonableness of the terms" of the contract under

236. Id. at 943.
237. See id.
239. Id. at 1386.
240. Id. at 1393.
241. Id. at 1402.
242. Id. at 1386.
243. Id. A clickwrap agreement is one in which the user must choose the "accept" icon under the terms of use agreement before entering a Web site. Id.
244. Id. at 1387. A terms-of-use agreement is an agreement located on a Web site that states that by utilizing the features on that site, a user submits to the terms within that agreement. Id. Usually the agreement is located on a separate page and is accessed through a link on the home page, typically found in small print at the bottom of a Web page. Id.
245. Id. at 1386. In a forum selection agreement, the parties acknowledge and agree that any disputes arising from the Web site will be subject to a particular jurisdiction. Id. at 1386-87. There are additional issues related to this type of agreement which Geist addresses, including the issue of the parties choosing a jurisdiction that is not reasonably related to the cause. Id. However, this will not be discussed in this paper.
After this, the second issue for the court to consider is whether the defendant targeted the forum through "the use of technology" designed to determine the user's geographical location. Did the defendant identify the user based on an IP address, a self-identification through certification, or an offline certification, such as the use of credit cards? Technology is available, albeit imperfect, for commercial entities to identify a user's location based upon that user's IP address. E-businesses also potentially have the capability of requiring users to provide proof of their identity through certification, which raises additional concerns regarding privacy issues and users' ability to obtain such certification. Currently, it appears that the use of credit card information is the most accurate and economical method of obtaining a user's true identification and, therefore, geographic location, while online. Geist maintains that the geographical location technology is flexible enough to conform to the needs of any level of commercial Web site and should be a key factor in asserting personal jurisdiction.

Geist's third step requires the court to ascertain the defendant's knowledge of the geographical location of her online activity. In evaluating this factor, the court must determine whether the defendant should have been aware that its activities would cause harm in that particular forum (in which case knowledge of geographical location should be implied); if the defendant was "willfully blind" about knowledge of the user's geographic location; or whether the defendant obtained information about the user's geographical location through fulfilling the user's order.

Professor Geist argues that his three-part test will take into account four major policy issues that must be weighed in order to develop a test...
that will continue to provide consistent results as technologies continue to change: (1) foreseeability that the defendant will be haled into the forum because of activities there; (2) bias toward asserting jurisdiction where the harm was felt; (3) "jurisdictional quid pro quo"; and (4) technological impartiality.258

The advantage of this test is that it moves the focus of the courts' analyses away from the medium itself, to the behavior of the litigants. This takes the burden of analyzing a constantly changing technology off the courts. However, by abandoning the analysis of the effects test, Professor Geist limits application of this test to commercial Web sites. Without considering this crucial factor, the standard fails to apply to noncommercial cases because the defendant’s intentional conduct is not considered and effects of that conduct on the plaintiff are only briefly addressed. As such, applying this test fails to supply courts with a standard which they can apply to noncommercial Internet-related cases, such as those involving issues of libel or slander. Neglecting the importance of the effects test will not relieve the courts of the inconsistence of decisions in such cases.

V. TYING IT ALL TOGETHER

A. NO MORE SLIDING SCALE

While the court in 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.259 Interactivity should no longer be a factor for the courts to consider in personal jurisdiction cases.260 It is time to retire Zippo’s sliding scale and move the focus of online personal jurisdiction issues away from the medium on which activities are conducted and back to the conduct of the parties.261

Public policy presents one reason for retiring the sliding scale analysis.262 In the Telecommunications Act of 1996, Congress established a policy to promote development of the Internet without government interference.263 By continuing to focus on the medium, continued court inter-

258. Id. at 1353.
260. Geist, supra n. 239, at 1369.
261. Id. at 1352.
262. Id. at 1377.
It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.
ference with online activity will stifle the growth of e-commerce because Web site owners cannot tell in which forum their online behavior will subject them to suit.\textsuperscript{264} By focusing on analyzing the medium, courts are, in effect, acting inconsistently with the intent of Congress to promote the development of the Internet.\textsuperscript{265} However, if the sliding scale analysis is eliminated and courts focus on the conduct of the parties, courts can render more consistent results based on traditional law that will set forth guidelines for online conduct without such interference.

The proposals above recognize that Zippo was the best attempt at providing an adequate standard for the analysis of Web site cases when it was decided in 1996.\textsuperscript{266} However, now a standard of review that could withstand the rapid changes in technology should be developed.\textsuperscript{267} It is imperative that this standard be realistic to allow operators at all levels, from large corporations to small “mom and pop” businesses, a standard by which they will be able to conform their online behavior.\textsuperscript{268} Such a standard can be achieved by combining the various proposals discussed in this paper through the creation of a three-part test.

B. Three-Part Test

Using Professor Geist's three-part test as the framework, the remaining proposals can be woven together to set forth a rule to govern both commercial and noncommercial activity that is conducted in the virtual world. Three areas must be addressed by courts in analyzing personal jurisdiction issues: (1) whether the parties agreed in advance to the forum; (2) whether the conduct of the defendant satisfied the elements of the modified effects test; and (3) whether the defendant used targeting technology to ascertain the user's geographic location.\textsuperscript{269}

1. Agreement to Forum

A court should begin with an analysis of whether a contract containing a forum-selection clause exists between the parties.\textsuperscript{270} First, the type of contract must be analyzed.\textsuperscript{271} If a valid forum-selection clause exists, personal jurisdiction should be per se.

\textsuperscript{264} Geist, \textit{supra} n. 239, at 1378.
\textsuperscript{265} 47 U.S.C. § 230 (b).
\textsuperscript{266} Geist, \textit{supra} n. 239, at 1378.
\textsuperscript{267} \textit{Id.} at 1380.
\textsuperscript{268} \textit{Id.} at 1359.
\textsuperscript{269} \textit{Id.} at 1352.
\textsuperscript{270} \textit{Id.}
\textsuperscript{271} \textit{Id.} at 1385.
\textsuperscript{272} \textit{Id.} at 1386-87.
A traditional, offline contract containing a forum-selection clause should automatically trigger jurisdiction if the terms are not unconscionable. Terms-of-service and clickwrap agreements should be upheld and personal jurisdiction should be asserted in those cases. Terms-of-service agreements that do not require users to take an affirmative action (such as clicking an “agree” button before proceeding to the next layer) should be suspect and should be given little weight. In that case, personal jurisdiction is not proper and the court should move on to the next part of the analysis.

2. Effects Test

The next step is an analysis of the effects of the defendant's conduct on the forum state based on the modified test proposed by Leitstein. If the court finds that the defendant committed an intentional act that caused significant harm to the plaintiff and that the defendant knew or had reason to know the plaintiff would be harmed by that activity thereby making suit of the harmful result of that conduct foreseeable, then this factor should be given considerable weight and the court should go on to evaluate the defendant's use of technology to determine the plaintiff's geographic location.

While relying on the effects test alone has yielded inconsistent results in the past, evaluating effects in conjunction with these additional factors will assist the courts in rendering consistent opinions, because it will allow courts to use this test as an analysis tool rather than as a determining factor of assertion of jurisdiction. After considering the modified effects test (wherein the defendant has committed an intentional act that causes significant harm to an individual that the defendant knows or should know will be harmed, thereby making suit of the harmful result of that conduct foreseeable), if the court finds that the defendant's conduct resulted in significant harm (as in Blumenthal), its analysis should not end here. Rather, the court should go on to next step in this test and, after considering all the factors, should balance the result of the effects test against the them before asserting jurisdiction.

273. Id. at 1387.
274. Id.
275. Id.
276. Id.
277. Leitstein, supra n. 58, at 585.
278. Id. at 565, 584.
279. Id.
280. Id. at 589.
281. Id.
3. Use of Technology to Ascertain Geographic Location

While Professor Geist separated targeting technology and defendant's knowledge of the user's geographic location, these two factors are so closely related that they should be combined into one element used to determine a defendant's requisite knowledge for foreseeability of being haled into court in the forum because of online conduct and to determine the requisite intent for the effects test.

Because the Internet is no longer a new and novel media, Internet users are more familiar with the medium and the tools available to create Web sites. Additionally, the Internet is so user-friendly, even the most amateur of Web site developers can find out how to use tools that aid in determining the geographic location of users accessing sites. It is relatively simple for a Web site operator to obtain basic geographical targeting technology. Therefore, the plaintiff should not be the one to bear the burden of proving that the defendant's Web site contains and uses such capability, as suggested by Daughdrill. Instead, courts should presume that the defendant has used the most basic available technology to determine users' locations based on the hierarchy of contacts presented in Daughdrill's proposal: the user's home address; telephone number; credit card number; actual name; and/or server information. By using this presumption, the court still avoids an analysis of the Web site itself, and the defendant must prove that it could not determine even the most general of geographical information—the user's server location.

Therefore, if a commercial Web site operator fails to use for even the most basic locating technology, the court should assume that operator was willfully blind about the geographical location of users accessing that site and that the operator purposefully availed itself of the rights and privileges of doing business in the forum. This element should

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283. To show just how easy it is to learn about targeting technology, this theory was tested by going to Ask.com and choosing "Browse by Subject." After clicking on the subject heading "computers," then choosing "Internet," another subdirectory, called "Statistics and Demographics" was offered, where links to various online articles dealing with creating Web sites and using software to analyze hits can be found. See e.g. Charlie Morris, Amateur Websites - The Top Ten Signs <http://www.webdevelopersjournal.com/columns/abc_mistakes.html> (Oct. 6, 1999) (containing a link to a Web site by Bruce Morris called Software For Analyzing Your Web Site Traffic <http://www.webdevelopersjournal.com/columns/analysis.html> (Jan. 1998), which discusses what traffic-analysis programs can do and lists some programs Web site developers might try).
284. Draughill, supra n. 42, at 940.
285. Id. at 938-39.
286. Id. at 940.
287. Id. at 923-924.
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weigh heavily in deciding whether to assert jurisdiction.\textsuperscript{288}

By evaluating these three elements, courts may not only apply this
test to commercial Web sites, but can also use the test to determine per-
sonal jurisdiction in noncommercial cases.\textsuperscript{289} The inclusion of the effects
test rounds out the analysis to allow this, as discussed above.

C. ADVANTAGES AND DISADVANTAGES

There are several benefits to analyzing personal jurisdiction with a
test that includes contract analysis, effects of the defendant’s behavior,
and the defendant’s use of technology to determine users’ geographical
location. To begin with, a well-rounded analysis will alleviate the confu-
sion courts have faced in attempting to determine Web site interactivity
by totally eliminating that analysis from the equation, thereby yielding
more consistent court decisions.\textsuperscript{290} Also, by eliminating the sliding scale
analysis, courts will remain consistent with legislative intent to promote
the development of the Internet “unfettered by Federal or State regula-
tion”\textsuperscript{291} by moving the focus away from the medium and back to the par-
ties’ conduct and the effect of that conduct. Courts will be able to use
traditional law without having to create new law specifically for online
activities.

This test lays out a standard that can be used by Web site owner/
operators to aid them in anticipating in which forum they could be sued.
Additionally, it can be applied to large scale businesses as well as the
smallest of commercial transactions. However, it is not a test limited
only to commercial enterprises. It can also be applied to noncommercial
online conduct because of the effects analysis.

This analysis may prove to be complicated and tedious, requiring a
good portion of the court’s time to analyze each aspect of the test, but by
doing so, courts will be able to use a common standard for all personal
jurisdiction issues that come before them. In time, a test that examines
all of these aspects will prove to yield consistent results across the board,
and jurisdictional issues will no longer be the thorn in the side of the
court.

D. APPLICATION TO ZIPPO

If this test had been used in the \textit{Zippo} case, the court would have
been able to analyze the facts of the case without ever having to catego-
rize the actual Web site and, ultimately, would have avoided the ensuing

\textsuperscript{288} \textit{Id.} at 939.
\textsuperscript{289} \textit{Id.} at 942.
\textsuperscript{290} Leitstein, \textit{supra} n. 58, at 584.
\textsuperscript{291} 47 U.S.C. § 230(b)(2).
confusion that the sliding scale created.\textsuperscript{292} This test does not require courts to have knowledge of how the Internet works or how Web sites work. Rather, it merely requires the ability to analyze contracts, effects, and knowledge.

Had the Zippo court used this test, there would have been no need for contract analysis because there was no contract between the parties that contained a forum-selection clause to which the parties agreed. Even though the defendant had contracted with several Internet access providers in Pennsylvania, because the contracts were with third parties not related to the case, they would not come under scrutiny at this part of the analysis.\textsuperscript{293}

Thus, the court's analysis of whether or not personal jurisdiction was proper would begin with the effect of the defendant's conduct based on the modified effects test. In that case, the defendant committed the intentional act of using the Zippo name in its news page header and by registering the Zippo.com and Zippo.net domain names. Zippo Manufacturing would then have to show trademark dilution to establish that it had been significantly harmed.

In determining whether the plaintiff knew or should have know that the defendant would be harmed by Zippo.com's activities, the court could have considered the history of Zippo Manufacturing. Zippo Manufacturing had made the famous lighter for many years and its name was known and associated with that product nationwide.\textsuperscript{294} Therefore, Zippo.com should have known that its activities in Pennsylvania, such as entering into contracts with Pennsylvania ISPs and selling products to customers in Pennsylvania where Zippo Manufacturing maintained its principal place of business, would harm the plaintiff.\textsuperscript{295} These activities thereby made the possibility of a lawsuit in Pennsylvania foreseeable.\textsuperscript{296}

Next, beginning with the presumption that Zippo.com used the most basic geographical locating technology, the court could assume that the defendant knew or should have known the geographical location of the plaintiffs. It would then be up to the defendants to prove otherwise. However, because the defendants had required users to fill out a form containing their geographical and personal information, as well as the use of credit card technology, would prove that defendants had the requisite knowledge of the geographical location of users and therefore personal jurisdiction was proper.

\begin{itemize}
\item \textsuperscript{292} \textit{Zippo Mfg.}, 952 F. Supp. at 1124.
\item \textsuperscript{293} \textit{Id.} at 1121.
\item \textsuperscript{294} \textit{Id.}
\item \textsuperscript{295} \textit{Id.}
\item \textsuperscript{296} \textit{Id.}
\end{itemize}
By utilizing this three-part test, the court would have reached the same conclusion as it did in the original case. However, by not factoring in the interactivity of the Web site itself, the court could have determined the appropriateness of asserting personal jurisdiction without muddying the waters by creating the legal confusion that ensued from courts attempting to categorize Web sites into levels of interactivity in order to determine personal jurisdiction.

VI. CONCLUSION

With the familiarization of the Internet comes the idea that while the medium itself is always changing, traditional law can still be applied to the conduct of litigating parties. It is time to focus on conduct rather than medium and retire the sliding scale of Zippo.

Courts should first look to see if the parties have a valid agreement selecting the forum for litigation. Second, a modified effects test should be applied, analyzing the defendant's intentional act which causes significant harm to the plaintiff in the forum that the defendant knew or should have known would have resulted from its activity thereby making suit on the harmful result of that conduct foreseeable. Finally, an analysis of the targeting technology used to determine geographical location of users should ensue, wherein the court should presume the defendant has made use of the most basic targeting technology, knowledge of the user's server location based on the IP address, and therefore knows or should have geographical knowledge. Use of this three-part test will result in greater consistency in courts across the country and will provide a standard which parties can base their online conduct.