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Scott T. Jansen

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Comment

Oh, What a Tangled Web . . . The Continuing Evolution of Personal Jurisdiction Derived from Internet-Based Contacts

I. INTRODUCTION

Liberty D. Fender is an attorney working in a central Missouri law firm. Returning to his office one afternoon, Liberty finds an e-mail from the president of a new client, Mid-Missouri Boat Warehouse. The message asks Liberty to call the president as soon as possible regarding a lawsuit filed against her company. He calls immediately and she relates the following facts:

Boat Warehouse is being sued in a diversity action, filed in a Nevada federal district court, alleging a products liability claim. The plaintiff, a Nevada resident, visited relatives in Missouri last summer. One evening, the plaintiff took the family speedboat, which had been manufactured by Boat Warehouse, out on the Lake of the Ozarks. While cruising back to the dock, the boat's throttle allegedly stuck in a forward, or open, position. The boat hit the dock and the plaintiff was injured. He now claims that the throttle housing was defectively designed and that Boat Warehouse knew the throttle might stick, but failed to place an adequate warning where it would catch a boat operator's attention. The plaintiff has asserted that the Nevada court has general jurisdiction over Boat Warehouse based on a Web site maintained by the company, www.midmoboathouse.com. Boat Warehouse's toll-free telephone number, e-mail address, product information and a financing calculator all appear on the Web site. Boat Warehouse's only other advertising is done by television commercials and magazine ads that appear in Missouri and those states sharing a border with Missouri.

After discussing these facts with his client, Liberty does not have a strong feeling one way or the other about the merits of the case. His initial instinct, however, is to arrange for local counsel to make a special appearance and challenge the plaintiff's assertion of personal jurisdiction by filing a 12(b)(2) motion. How do you suppose the Nevada district court judge will rule on Liberty's motion?

This is just the sort of factual scenario that has become more and more prevalent as litigation turned the corner on, and now presses further into, the

2. The author knows of no similar lawyer, company, or lawsuit, real or fictional. Any similarity is purely unintentional.
twenty-first century. The explosive impact of the Internet has, by its very existence and lack of defining boundaries, opened the door to a fundamental shift in our traditional conceptions of commerce, interaction and accessibility to information. As the law struggles to address this medium of communication – as a realm unto itself requiring new law or simply as another method of communication to which we will apply traditional notions – technology continues to march forward. New conundrums seem to pop up each year, as the World Wide Web further invades daily life. Of course, the usual suspects are involved: free speech, privacy, free press. But other challenges arise in the very modern area of intellectual property law – for instance, does a Web site created specifically for consumers in New York infringe the rights of a trademark holder in California merely because she can see it on her home computer in Los Angeles? Or is an invention, described by a Miami inventor on his Italian-language home page but never physically created, considered published in Europe because someone in Milan read it on the Web site? Intellectual property aside, what of the ability of a man in Atlanta to harm a woman in Seattle by posting terrible lies about her Online, or even stalking her in Cyberspace?

These questions, though important, are purely exercises in academic theorizing unless they can be presented in a forum that has the power to decide their substantive issues. When parties resort to the legal system to settle their differences, each side will have a preference of where it wants those issues determined. When long distances between parties are involved, as is often the case in Internet-based disputes, one party will probably be unhappy with the choice. That is where Liberty D. Fender will make what may be his most vital contribution to the case – defeating or establishing the assertion of personal jurisdiction.

II. THE INTERNET

The United States government originally designed the Internet as a “communication system that could survive a nuclear war” because there was no single path through which information flowed. Because of its availability to the general public, the Internet has become a new realm within which to act and be acted upon:

When one enters cyberspace, one can abandon almost all things “real” about one’s self; name, face, gender, age, nationality, and religion all can be erased, hidden or changed. The inhibitions and restrictions that accompany one’s place and identity in the real world can vanish in the virtual one. . . . In the real world, one’s conduct is

governed largely by one’s location in space, which creates physical limitations on behavior and helps to determine applicable law.\textsuperscript{4}

The general benefits of the Internet, from convenience\textsuperscript{5} to information more serious endeavors,\textsuperscript{6} are numerous. Even the ability to be “anonymous” has an important role to play in the American Internet experience.\textsuperscript{7} But these benefits do not come without a price. Online pornography and fraud are among the higher-profile problems related to the Internet. For example, in March of 2002, the FBI announced the filing of criminal charges against eighty-nine people in over twenty states as a result of “Operation Candyman,” a “nationwide crackdown on the proliferation of child pornography via the Internet.”\textsuperscript{8} Those arrested included “Little League coaches, a teacher’s aide, a guidance counselor, school bus driver, foster care parent and professionals in the medical, educational, military and law enforcement fields.”\textsuperscript{9} Another recent investigation resulted in the arrest of an online pornography peddler who used common misspellings of popular children’s Web sites as domain names

\textsuperscript{4} Id. at 757-58.

\textsuperscript{5} See, e.g., Paige Norian, Comment, The Struggle to Keep Personal Data Personal: Attempts to Reform Online Privacy and How Congress Should Respond, 52 CATH. U. L. REV. 803, 803 (2003) (“Millions of Americans use the Internet for various activities everyday [sic]. We make travel plans, purchase gifts, pay bills, check our credit card and bank balances, and send e-mail messages to friends and co-workers.”).

\textsuperscript{6} See, e.g., The Ticker: The Internet, MEN’S HEALTH, May 2004, at 42 (“Patients who go online to find health information save their doctors time and are able to make better decisions about their health.” (citation omitted)).

\textsuperscript{7} See, e.g., Michael H. Spencer, Anonymous Internet Communication and the First Amendment: A Crack in the Dam of National Sovereignty, 3 VA. J.L. & TECH. 1, 31 (1998) (“From a policy standpoint, anonymity could also prove to be beneficial to internet communication. For instance, it could protect against actual retaliation or harm that may come to an individual who reports wrongdoing on the part of a colleague or a superior. Furthermore, one aerospace manufacturer encourages anonymous communication in order to gain insight to a broader range of ideas that may help the company. It can help hide the identity of those who were abused and want to discuss these issues in certain newsgroups. Anonymity has even been characterized as somewhat therapeutic. Such freedom can also be adventurous since an individual can pretend to be anyone they choose.” (citations omitted))


\textsuperscript{9} Id.
to direct unsuspecting kids to his own porn sites. Additionally, FBI agents travel the world pursuing Internet fraud cases.

Clearly the Internet offers opportunities for legitimate personal and commercial transactions, but opportunities for wrongful and criminal behavior are equally available. Whether certain Internet activity should or should not be curtailed is an argument that will become more and more important in society as access to the Web continues to grow. Such growth is likely considering that the President is stumping not for "a chicken in every pot", but "the internet in every house."!

As availability expands, the opportunity for civil disputes could expand proportionately, meaning that the American court system will be called upon to adjudicate an even greater number of cases. Since these cases will be predicated on Internet activity, the parties often will be from different parts of the country, or even from different countries. As a threshold issue, courts must decide whether such cases are properly before them.

In making this determination, courts have recognized that there is nothing magical about the Internet. Cyberspace is not "a kingdom floating in the mysterious ether,"13 "capable of warding off the jurisdiction of courts built from bricks and mortar."14 It is simply a "rapidly developing means of mass communication and information exchange."15

Long before the advent of the Internet, the United States Supreme Court recognized that as knowledge evolves, so must the law: "As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase."16 Similarly, the Court has since noted that jurisdiction cannot be defeated "merely because the defendant did not physically enter the forum State."17 Despite these

10. Jailed For Targeting Kids, PEOPLE, Apr. 26, 2004, at 76. Among the 3,000 domain names owned by the suspect were Bobthebuilder.com, Dinsneyland.com and Teltubbies.com. Id. Prosecution was possible only after passage of the Truth in Domain Names Act, which made it a crime to knowingly use misleading domain name to lead minors to harmful material. Id.
11. Fed. Bureau of Investigation, Press Release, To Catch a Cyberthief (Apr. 4, 2005), http://www.fbi.gov/page2/april05/cyberthief040405.htm (federal agent traveled to Nigeria to help local authorities "track down cyber con artists who were preying on U.S. consumers and businesses through 'reshipping' scams").
12. See Bush Touts High-Speed Web Goal: President also lauds tax cuts during New Mexico speech, COLUMBIA DAILY TRIB., Mar. 27, 2004 at 12A (U.S. government "working toward wiring homes throughout the United States with high-speed Internet access by 2007").
14. Id. at 510.
determinations, United States courts still "labor[] over how to apply traditional notions of personal jurisdiction to activities on the Internet."18

III. PERSONAL JURISDICTION AND CYBERSPACE: WHERE WE'VE BEEN AND WHERE WE ARE

A. Traditional Notions of Personal Jurisdiction

For a state court to establish personal jurisdiction over a nonresident in an Internet-related case, just as any other, the court must engage in a two-part inquiry. First, the court must "examine whether jurisdiction is applicable under the state's long-arm statute." Second, the court must "determine whether a finding of jurisdiction satisfies the constitutional requirements of due process."19 So, "[e]ven when the literal terms of the long-arm statute have been satisfied, a plaintiff must still show that the exercise of personal jurisdiction is within the permissible bounds of the Due Process Clause."20 If the state's long-arm statute extends jurisdiction coextensively with the Due Process Clause, then the two inquiries coalesce into one.21 However, if the long-arm statute precludes jurisdiction, the court need not reach the constitutional question.22

Even with the introduction of Internet-related disputes, there remain just two basic types of personal jurisdiction as delineated by the Supreme Court: general jurisdiction and specific jurisdiction.23

"[W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant."24 These are "qualitatively significant contacts, those that a defendant purposefully initiates."25 To determine whether specific jurisdiction exists, a court considers the following:

20. Id.
22. See Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997) ("Because we believe that the exercise of personal jurisdiction in the instant case is proscribed by the law of New York, we do not address the issue of due process.").
24. Id. at 414 n.8.
(1) the extent to which the defendant "purposely avail[ed]" itself of the privilege of conducting activities in the State; (2) whether the plaintiffs’ claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally "reasonable."  

On the other hand, "[w]hen a State exercises personal jurisdiction . . . in a suit not arising out of or related to the defendant’s contacts with the forum, the State [is] . . . exercising ‘general jurisdiction.’" 27 General jurisdiction requires "qualitatively significant contacts," 28 which are often characterized as "continuous and systematic." 29 Simply put, determining general jurisdiction requires "a more demanding minimum contacts analysis than does specific jurisdiction." 30

Whether jurisdiction is general or specific, due process requirements are satisfied when the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’" 31 In either case, "the touchstone remains ‘purposeful availment’ . . . [t]he goal of [which] is to give the [defendant] ‘clear notice that it is subject to suit [in the forum State].’" 32

In recent years, as courts have been confronted with attempts to establish personal jurisdiction based on a defendant’s Internet activity, a pattern of jurisdictional analysis has emerged, centered on two primary tests that gauge how much activity satisfies the threshold of "minimum contacts." In other words, the tests determine when an out-of-state defendant "purposefully availed" itself of the forum state via the Internet.

Although there has been some dissatisfaction with "minimum contacts" as a test of personal jurisdiction, 33 it is the baseline from which courts must begin, and it is unrealistic to expect any meaningful change. Perhaps Professor Stein said it best: "[T]he Internet does not pose unique jurisdictional challenges. People have been inflicting injury on each other from afar for a long time. Al-

27. Helicopteros, 466 U.S. at 415 n.9.
28. Reid, supra note 25.
29. Helicopteros, 466 U.S. at 416.
32. Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1076 (9th Cir. 2003) (citations omitted).
33. See, e.g., Note, A "Category Specific" Legislative Approach to the Internet Personal Jurisdiction Problem in U.S. Law, 117 HARV. L. REV. 1617, 1621 (2004) [hereinafter A "Category Specific" Approach] ("The critique of Internet personal jurisdiction law as singularly unpredictable commits the basic fallacy of overlooking the larger legal milieu: the essential unpredictability of personal jurisdiction jurisprudence in general as governed by the constitutionally mandated ‘minimum contacts’ test.").
though the Internet may have increased the quantity of these occurrences, it has
not created problems that are qualitatively more difficult.  \(^{34}\)

**B. The "Zippo" Test**

One of the tests for establishing Internet-based jurisdiction gets its name from *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*  \(^{35}\) In *Zippo*, a manufacturer of tobacco lighters sued an Internet news service for trademark infringement based on the latter's registration of Internet domain names, including "zippo.com."  \(^{36}\) The plaintiff, a Pennsylvania corporation, brought suit against the defendant, a California corporation, in Pennsylvania federal district court.  \(^{37}\) Although the defendant had no physical presence in Pennsylvania, the plaintiff premised its jurisdiction argument on two essential facts: that Pennsylvania residents accessed the defendant's interactive Web site to sign up for the news service, and that the defendant had contracted with seven Internet access providers in Pennsylvania to allow those customers access to the news service.  \(^{38}\) Addressing the case in the context of specific jurisdiction,  \(^{39}\) the court reviewed previous Internet cases and determined "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."  \(^{40}\)

The court articulated a sliding scale of Internet activity, occupied at one end by "situations where a defendant clearly does business over the Internet."  \(^{41}\) This includes "enter[ing] into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files" via the Internet. At this end of the scale, an assertion of jurisdiction is proper  \(^{42}\) as this level of interactivity is seen as specifically intended interaction with residents of the forum state.  \(^{43}\)

The other end of the *Zippo* scale is occupied by "situations where a defendant has simply posted information" on "[a] passive Web site that does

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36. Id. at 1121.
37. Id.
38. Id. at 1126.
39. Id. at 1122.
42. Id.
little more than make information available to those who are interested in it." In these cases, jurisdiction does not exist.\footnote{44} In these cases, jurisdiction does not exist.\footnote{45}

In the middle of the scale are situations involving "interactive Web sites where a user can exchange information with the host computer."\footnote{46} The appropriateness of establishing jurisdiction in these cases "is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."\footnote{47} Courts have described this middle ground as the "troubling gray area on the continuum."\footnote{48}

\section*{C. The \textit{"Effects"} Test}

The "effects" test was articulated by the Supreme Court in a defamation case unrelated to the Internet, \textit{Calder v. Jones}.\footnote{49} An actress living and working in California sued a Florida-based magazine publisher for defamation in California state court based on an article that appeared in the magazine.\footnote{50} Two individual defendants\footnote{51} challenged California's jurisdiction, claiming that as mere employees of the paper, they could not control the paper's circulation in California, had no direct economic stake in California sales and could not control the paper's marketing activities.\footnote{52} The Court dismissed their argument by finding that both defendants knew the article "would have a potentially devastating impact" on the plaintiff and that "the brunt of [the] injury [to her reputation] would be felt by [her] in [California]."\footnote{53} Finally, the Court held that California jurisdiction was proper because the defendants' "intentional conduct in Florida [was] calculated to cause injury to [the plaintiff] in California."\footnote{54} This "targeting" of intentional and allegedly tortious activity toward a foreign state has come to be known as the "effects" test for establishing specific jurisdiction.

\begin{itemize}
\item \footnote{44}{Zippo, 952 F. Supp. at 1124.}
\item \footnote{45}{Id.}
\item \footnote{46}{Id.}
\item \footnote{47}{Id.}
\item \footnote{48}{Reid, supra note 25, at 239.}
\item \footnote{49}{465 U.S. 783 (1984).}
\item \footnote{50}{Id. at 784-85. The actress was Shirley Jones, the paper was the National Enquirer; and "[t]he article alleged that [Jones] drank so heavily as to prevent her from fulfilling her professional obligations." \textit{Id.} at 784-85, 789 n.9.}
\item \footnote{51}{The two defendants were the reporter who wrote the story and his editor. \textit{Id.} at 785-86.}
\item \footnote{52}{Id. at 789. The implication of their challenge was that, as individuals, they had not purposefully availed themselves of the benefits of conducting activities in the state of California. \textit{See id.}}
\item \footnote{53}{Id. at 789-90.}
\item \footnote{54}{Id. at 791.}
\end{itemize}
D. The Federal Circuits’ Application of the Tests

Before exploring the downsides of these tests and potential alternatives, it is helpful to examine their current use in American jurisprudence. As the jurisdictional argument is of constitutional concern, the federal circuit courts of appeal provide examples of how these tests are currently being employed and/or modified. Lacking new direction from the Supreme Court, their application has neither been entirely inconsistent nor exactly uniform.

The Third Circuit leans toward the Zippo test, at least in cases of specific jurisdiction. In the trademark infringement case Toys “R” Us, Inc. v. Step Two, S.A., the court employed the Zippo sliding scale to find no jurisdiction over the defendant, although it did allow jurisdictional discovery. The court emphasized that merely operating an interactive Web site was insufficient to establish jurisdiction. Rather, the Third Circuit found that to establish jurisdiction, “there must be evidence that the defendant ‘purposefully availed’ itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts.” The defendant’s Web site fell into the middle ground of the scale, leading the court to conclude that such a site required “something more” — i.e. non-Internet related contacts — before a finding of specific jurisdiction: In the court’s words, “[t]his limited record does not provide an occasion for us to spell out the exact mix of Internet and non-Internet contacts required to support an exercise of personal jurisdiction. That determination should be made on a case-by-case basis by assessing the ‘nature and quality’ of the contacts.” The court seemed to be suggesting that a merely interactive sight, absent evidence of significant actual business conducted with the state through the site, would not support jurisdiction. In any event, the court looked upon the Zippo test with apparent approval.

The Fourth Circuit has expressly adopted the Zippo model in ALS Scan, Inc. v. Digital Services Consultants, Inc., but adapted it to be consistent with the effects test, thereby formulating its own “ALS Scan” test. In ALS Scan, a copyright infringement action, the court asked, when an out-of-state citizen “through electronic contacts, [be] conceptually [determined to have] ‘entered’ the State via the Internet.” The court concluded that

56. Id. at 454.
58. ALS Scan, Inc. v. Digital Services Consultants, Inc., 293 F.3d 707 (4th Cir. 2002); see Young v. New Haven Advocate, 315 F.3d 256, 262-63 (4th Cir. 2002).
59. Id. at 709.
60. ALS Scan, 293 F.3d at 713.
a State may . . . exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State’s courts. 61

Like the Third Circuit, the Fourth Circuit applied this Zippo/effects hybrid to cases of specific jurisdiction, 62 and similarly required the defendant to have acted intentionally. 63 In fact, the court specifically refused to extend this model to cases of general jurisdiction “over out-of-state persons who regularly and systematically transmit electronic signals into the State via the Internet based solely on those transmissions.” 64 This court determined that “something more” was needed to establish general jurisdiction, although it declined to decide of what “something more” might consist. 65

The Fifth Circuit likewise found the Zippo test ill-suited for questions of general jurisdiction. In Revell v. Lidov, the court examined a claim premised on the posting of an allegedly defamatory article on a Web site. The Texas plaintiff attempted to sue the Massachusetts-based writer and New York-based University that hosted the site by filing a claim in a Texas federal court. 66 This court, too, employed the Zippo scale in analyzing the claim of specific jurisdiction, but also expressly examined the claim under the effects test requirements. 67 Although, like Calder, this was a defamation action, the court used both the Zippo and effects tests as complementary inquiries, rather than as exclusive alternatives. Ultimately the court found specific jurisdiction was not warranted under either. 68

The Sixth Circuit appears to view the Zippo scale favorably in regard to specific jurisdiction, particularly one end of the continuum. In Neogen Corp. v. Neo Gen Screening, Inc., a trademark infringement case, the court applied Zippo, determining that “[a] defendant purposefully avails itself of the privilege of acting in a state through its website if the website is interactive to a degree that reveals specifically intended interaction with residents of the state.” 69 Consistent with the Third and Fourth Circuits, the court required

61. Id. at 714.
62. See id.
63. See id.
64. Id. at 715.
65. Id.
66. Revell v. Lidov, 317 F.3d 467, 469 (5th Cir. 2002).
67. Id. at 470.
68. Id. at 476.
some sort of intentional conduct. But unlike the Third and Fourth Circuits, the Sixth Circuit determined that the effects analysis could be applied consistently with Zippo: "'purposeful availment' is something akin to a deliberate undertaking to do or cause an act or thing to be done in [the forum] or conduct which can be properly regarded as a prime generating cause of the effects resulting in [the forum]."

Interestingly, the Sixth Circuit also found that an interactive Web site could result in a finding of general jurisdiction under the Zippo test; interactivity that turns into actual contracts between the defendant and forum residents could be continuous and systematic enough to warrant a finding of general jurisdiction. Were the assertion specific jurisdiction, this might be consistent with the other circuits' requirement for "something more." In addition, general jurisdiction based on those resulting contracts is determined not by the percentage of the defendant's overall business they represent, but rather by whether they are more than merely "random, fortuitous, or attenuated" when viewed in the context of the forum state. Essentially, the Sixth Circuit injected a quality analysis into what should be only a quantity requirement.

In Lakin v. Prudential Securities, Inc., the Eighth Circuit held that, while the Zippo sliding scale is an appropriate approach in cases of specific jurisdiction, the court would not presumptively apply it for cases of general jurisdiction. Instead, the court stuck with its own five-factor jurisdictional analysis, amalgamated from Supreme Court decisions, which weighs different factors depending on their relevance to the case. Thus, although an important factor in the analysis, interactivity of a Web site must be considered along with the "nature and quality of the contacts," and the "quantity of the contacts." In the courts words, "[u]nder the Zippo test, it is possible for a Web site to be very interactive, but to have no quantity of contacts. In other words, the contacts would be continuous, but not substantial. This is untenable in a general jurisdiction analysis."

The court was very interested in quantity, looking for numbers: the number of times that resident consumers accessed a site; the number of consumers who requested information through the site or used an online applica-

70. Id.
71. Id. at 891 (emphasis added) (quoting Khalaf v. Bankers & Shippers Ins. Co., 273 N.W.2d 811, 819 (Mich. 1978)).
72. See id. at 890-91.
73. Id. at 891-92 (citation omitted).
75. Id. (citing Aftanase v. Econ. Baler Co., 343 F.2d 187, 197 (8th Cir. 1965)). The five factors are (1) quantity of the contacts, (2) nature and quality of the contacts, (3) source and connection of the cause of action with the contacts, and, to a lesser degree, (4) interest of the forum state and (5) convenience. Id. at 711-12 (citing Aftanase, 343 F.2d. at 197).
76. See id. at 711-12.
77. Id. at 712.
tion; the number of responses by defendant’s representatives; and the number of contracts resulting from the online contacts. 78 Thus, in the Eighth Circuit, even a Web site falling into Zippo’s middle ground might still, in light of the quantity and quality of contacts, result in a finding of general jurisdiction. Although agreeing that a defendant’s overall percentage of business represented by the contacts is irrelevant, the court required those contacts to be “continuous and systematic,” not just more than merely random or fortuitous. 79

The Ninth Circuit applied the Zippo test to find general jurisdiction when the defendant’s website was so interactive as to function as a “virtual store.” In Gator.com Corp. v. L.L. Bean, Inc., the court reviewed Gator’s attempt to obtain general jurisdiction over L.L. Bean under a petition for declaratory judgment in a trademark infringement case. 80 Finding that the nature of L.L. Bean’s Web site was the functional equivalent of a physical, brick-and-mortar store, the court stated that, even if the Web site was Bean’s only contact with the forum state, there would still be general jurisdiction. 81 The court placed this level of Web site interactivity firmly at the end of the Zippo scale constituting “clearly do[ing] business over the internet.” 82 According to the Ninth Circuit, the “millions of dollars in sales, driven by an extensive, ongoing, and sophisticated sales effort involving very large numbers of direct email solicitations and millions of catalog sales, qualify[ed] as ‘substantial’ or ‘continuous and systematic’ commercial activity.” 83 However, just a year earlier, the same court explicitly used the effects test to analyze “purposeful availment” of an essentially passive Web site in context of determining specific jurisdiction in a trademark infringement case. 84

In Soma Medical International v. Standard Charter Bank, the Tenth Circuit used the Zippo sliding scale to analyze a purely passive Web site’s application to a claim of general jurisdiction, but the court did not expressly use the scale to determine specific jurisdiction. 85 Though the plaintiff characterized it as “soliciting business,” the court found that the Web site did nothing more than make information available to interested users. 86 Although ostensibly applying Utah law, the circuit court held that general jurisdiction was not appropriate under the Zippo scale because the defendant’s other con-

78. Id. at 712-13.
79. Id. at 709.
80. Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003).
81. Id. at 1079.
83. Id. (citation omitted).
84. See Rio Props., Inc. v. Rio Int’l Interlink, 284 F.3d 1007, 1019-20 (9th Cir. 2002) (“purposeful availment” requirement satisfied under effects doctrine when passive Web site combined with “something more” – print and radio advertising campaign directed towards forum state).
85. 196 F.3d 1292 (10th Cir. 1999).
86. Id. at 1297 (citation omitted).
tacts with Utah were so insignificant. As for specific jurisdiction, the court also used a due process analysis, dismissing the Web site as too passive to constitute "minimum contacts," but never expressly re-mentioned or cited Zippo in its specific jurisdiction analysis.

The Federal Circuit appears to have impliedly accepted the rationale of the Zippo scale for cases of specific jurisdiction. In 3D Systems, Inc. v. Aarotech Laboratories, Inc., a patent infringement case, the court found that a Web site that forwarded reply e-mails to another site was passive and, thus, did not implicate specific jurisdiction. Without directly mentioning Zippo, the court favorably cited an earlier Ninth Circuit decision that had employed the sliding scale.

Finally, the Court of Appeals for the District of Columbia has apparently endorsed the Zippo scale for questions of both general and specific jurisdiction. In Gorman v. Ameritrade Holding Corp., the court found that a defendant could do business within a forum both continuously and systematically by entering into contracts involving "the knowing and repeated transmission of computer files over the Internet" with forum residents. Drawing this language directly from Zippo, the court nonetheless required an analysis of the actual volume of contacts before it could determine the jurisdiction question. Yet the court seemed to generally approve of the scale itself.

The First, Second, Seventh and Eleventh Circuits have yet to officially comment on the application of these tests to Internet-related jurisdictional questions, but some of their cases and/or cases from district courts in these circuits shed light on their positions. The First Circuit, for instance, might limit the "effects" test to cases of defamation only, but could also be receptive to the Zippo scale. The Seventh Circuit may look favorably on the

87. Id. at 1296-97 (defendant filed a few UCC financing statements, recorded several security interest instruments, and filed five civil actions to recover monies on foreclosures).
88. Id. at 1297.
89. 3D Sys., Inc. v. Aarotech Labs., Inc., 160 F.3d 1373, 1380 (Fed. Cir. 1998).
90. See id. (citing Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419-20 (9th Cir. 1997)).
92. Id.
93. Id.
94. See United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 624 (1st Cir. 2001) ("As we have previously noted, Calder's 'effects' test was specifically designed for use in a defamation case. Thus, whether Calder was ever intended to apply to numerous other torts, such as conversion or breach of contract, is unclear." (citations omitted)).
95. See generally Metcalf v. Lawson, 802 A.2d 1221, 1226 (N.H. 2002) (The New Hampshire Supreme Court analyzes the Zippo framework but found it unhelpful because the case at bar involved the defendant's Internet activity through an auction site rather than its own Web site).
Zippo analytical framework, as evidenced by its application in Indiana district courts. The same may be true for the Eleventh Circuit, and for the Second Circuit as well.

E. Summary of the Current State of the Law

Clearly, the waters are muddy. Circuits are currently split on whether the Zippo scale can be used to establish general jurisdiction, whether the effects test is appropriate as an alternative, and, more fundamentally, how exactly to characterize Web sites. In fact, not every court agrees such tests are even necessary. At least one district court in the Seventh Circuit has questioned why adopting a specialized test for Internet cases is even necessary, noting Judge Easterbrook’s contention that, regarding technology, specialized tests are often “‘doomed to be shallow and to miss unifying principles.’”

Although one commentator has suggested that in 2001 courts were moving away from Zippo to a broader, effects-based analysis, it is clear that the sliding scale framework is alive and well, although perhaps more frequently complemented by the effects doctrine. And as a practical matter, jurisdiction based on a defendant’s Internet activity is still, like it or not, at its heart, an analysis of “minimum contacts.” Although many of the circuits endorse the analytical framework of the Zippo continuum, none of them (with the possible exception of the First Circuit) would likely ignore a well-argued application of the Calder effects test; in fact, the Fourth Circuit has explicitly blended the two.

96. See generally Jennings v. AC Hydraulic A/S, 383 F.3d 546, 549 (7th Cir. 2004) (noting that other circuits recognize both general and specific jurisdiction conferred by the operation of an interactive Web site, including a citation to Gorman, but stating that “[w]e need not decide in this case what level of ‘interactivity’ is sufficient to establish personal jurisdiction based on the operation of an interactive website” because a passive site will not support such exercise of jurisdiction).


103. See supra notes 55-99 and accompanying text.

104. See supra note 94 and accompanying text.

105. See supra notes 58-65 and accompanying text.
Whichever approach is used, the key in Internet cases seems to boil down to "targeting." Under the "effects" test for specific jurisdiction, the Web site content must be intentionally directed at the forum state with knowledge that any injury will occur primarily in that state.106 Under Zippo, which was formulated originally for specific jurisdiction, a Web site must also be targeted at the forum state to some extent.107 If the targeting rises to the level of doing business in the state, then the courts appear willing to find specific jurisdiction,108 and if the quantity of those targeted activities is sufficiently high, some are even willing to find general jurisdiction.109 Thus, while American jurisprudence may lack a uniform test for determining jurisdiction of Internet-based activity, the concept of targeting underlies each of the various approaches.

IV. PERSONAL JURISDICTION AND CYBERSPACE: WHERE WE SHOULD GO

A. Criticism of the Tests

The popularity of the Zippo scale and the application of the effects doctrine to Internet cases evolved out of criticism of an early line of cases best represented by the decision in Inset Systems, Inc. v. Instruction Set, Inc.110 In that case, a Connecticut plaintiff asserted jurisdiction over a Massachusetts defendant based on a purely passive Web site containing advertising and a toll-free telephone number.111 The plaintiff alleged that such a Web site amounted to "try[ing] to conduct business within the state of Connecticut."112 The defendant asserted that its residence and principal place of business were in Massachusetts and that it had no offices or employees in Connecticut.113 The court found general jurisdiction, stating that the defendant’s use of its Web site meant it had directed its advertising, on a continuous basis, not only at Connecticut but at every state.114 The clear implication of the court’s holding was that merely posting a Web site in any way analogous to an advertisement conferred jurisdictional power on every state whose residents could

106. See generally supra Part III.C.
107. See supra notes 40-48 and accompanying text.
108. See supra notes 41-43 and accompanying text.
109. Under general jurisdiction, courts tend to draw a distinction between doing business in a forum (insufficient) and doing business with a forum (sufficient). "This is because engaging in commerce with residents of the forum state is not in and of itself the kind of activity that approximates physical presence within the state’s borders." Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) (citation omitted).
111. Id. at 163, 165.
112. Id. at 164.
113. Id.
114. Id. at 165.
access that site. By posting to the Web the defendant could reasonably anticipate being sued anywhere the Web reached. A logical extension of that reasoning would also subject the defendant to jurisdiction in any foreign nation where its site could be accessed.

After Inset, and subsequent approving opinions, courts realized the tremendous impact such a holding could have: "[t]his approach would stifle future Internet growth, as would-be Internet participants would be forced to weigh the advantages of the Internet with the potential of being subject to legal jurisdiction throughout the world." As a matter of common sense, people and businesses would choose not to become Internet participants rather than expose themselves in such a manner, and any societal policy goals encouraging the growth of e-commerce would be shattered. Instead, courts turned to the Zippo framework and the effects doctrine to tailor a more palatable inquiry for jurisdiction.

Unfortunately, neither the Zippo nor the effects test has offered the level of certainty or predictability that such rules should ideally provide – perhaps because they are too shallow, and they are definitely not unifying. The effects test has come under fire for essentially the same reason as the Inset decision: it is "the source of considerable uncertainty because Internet-based activity can ordinarily be said to cause effects in most jurisdictions." This analysis, however, is far too broad a criticism because true "effects" analysis essentially requires conduct "calculated to cause injury" and a "focal point" where the "brunt" of the injury is felt. While the effects of Internet conduct may be felt in many forums, the intent requirement allows a court to find a particular focal point. Those other effects are presumably random, fortuitous and attenuated and, thus, are an insufficient basis for a finding of jurisdiction. Although speaking in terms of product liability, the Ninth Circuit provided an apt description of the present state of Internet-based personal jurisdiction: "We accept the risk that words and ideas have wings we cannot clip and which carry them we know not where."

Both the effects analysis and the Zippo scale have been criticized because they "are highly fact-dependent, [and] their application is likely to yield

116. Geist, supra note 102, at 1362.
117. See Easterbrook, supra note 101.
118. Geist, supra note 102, at 1381.
120. Winter v. G.P. Putnam’s Sons, 938 F.2d 1033, 1035 (9th Cir. 1991); accord Walter v. Bauer, 439 N.Y.S.2d 821, 823 (N.Y. Sup. Ct. 1981) (“Would any author wish to be exposed to liability for writing on a topic which might result in physical injury? e.g. How to cut trees; How to keep bees?”). Just as apropos, would any author wish to be exposed to liability for writing on any topic which might affect anybody, anywhere?
inconsistent results." ¹²¹ Though undoubtedly true on some level, this criticism also oversteps. It is as much an indictment of the entire "minimum contacts" test as anything ¹²² – the only qualifier being that the factual scenarios presented to courts in the physical world have become repetitious and lend themselves more easily to analogizing than the situations involving Web sites.

Certainly the focal point for the brunt of the criticism leveled at the Zippo sliding scale is the middle ground, "interactivity" portion of the continuum:

The majority of websites fall into Zippo's middle category. As formulated and developed, Zippo provides little guidance for determining how to deal with such sites. It merely states that the extent to which the website is interactive and commercial will determine the outcome. It does not specify how much interactivity or commercialism suffices, nor even how those two characteristics ought to interact. Moreover, the Zippo test does nothing to limit the number of jurisdictions with which a website operator would be deemed to have made contact once her website is held sufficiently interactive and commercial. Regardless of the level of interactivity or commercialism that a court chooses as its threshold, once a website crosses it, purposeful availment would be established with every state in the country. ¹²³

Though accurate, the criticism once again sweeps too broadly. Courts have tended to mitigate the potential breadth of this middle ground by their requirement, even in the context of specific jurisdiction, of "something more." ¹²⁴

Indeed, the middle ground of Zippo may not be so troubling as it first appears. In practice, judges have dealt with different sorts of interactivity without having their heads explode. Pennsylvania, where Zippo originated, may be leading the way. ¹²⁵ In Mar-Eco, Inc. v. T&R & Sons Towing & Re-

¹²² Criticism of "minimum contacts" in general may or may not be warranted, but because of its constitutional roots, alternatives that do not operate within the confines of "minimum contacts" are useless to judges and litigators.
¹²³ Note, No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet, 116 HARV. L. REV. 1821, 1834 (2003) [hereinafter No Bad Puns]; see also Reid, supra note 25, at 265 ("Under Zippo, this gray area on the continuum is troublesome because courts have few guidelines for assessing the quality and nature of these contacts.").
¹²⁵ Also in spite of Zippo's initial limited application to specific jurisdiction, Pennsylvania courts, both state and federal, appear willing to extend its application to
Zippo trend Connectic virtual made you site parts apply of sophisticated interactivity. There tive,' references Web fused to sites actually follow and against court's jurisdiction. Seem this Web site could allow for e-mail purchase of vehicle certificates and contain an e-mail link through which to correspond. The court noted a trend against letting e-mail links alone confer jurisdiction, but insinuated that Web sites allowing users to actually make travel reservations by inputting preferences could do so. The court's language is illuminating because it characterized the travel Web sites that offered the latter feature as "truly interactive," while finding no jurisdiction based on the defendant's particular site. There seems to be an implication that this judge, at least, distinguished levels of interactivity into some sort of normative pattern. As the public becomes more sophisticated with regard to the Internet in general, surely the judicial ranks will follow suit and the "troubling gray area" will continue to dissipate. So, in spite of Zippo's criticism as being too unpredictable or fact-intensive, the test may actually establish a solid foundation in this respect.

Courts also require "something more" under the effects test, as illustrated by the Ninth Circuit:

[Courts] have struggled somewhat with Calder's import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We have said that there must be "something more," but have not spelled out what that something more must be. We now conclude that "something more" is what

cords, Inc., a Pennsylvania state court found general jurisdiction under the Zippo framework's middle ground. The Web site at issue allowed customers "to apply for employment, search the new and used vehicle inventory, apply for financing to purchase a vehicle, calculate payment schedules, order parts and schedule service appointments." Additionally, the defendant's site did not help its argument by including this statement: "[t]his page allows you to handle nearly all of the financial aspects of a vehicle purchase. We've made shopping for a car much easier for you by allowing you to shop and virtually complete the entire transaction via your computer."

In Hlavac v. DGG Properties, the Eastern District of Pennsylvania refused to find general jurisdiction based on Internet contacts. In that case, a Connecticut resort's Web site allowed customers to purchase gift certificates and contained an e-mail link through which to correspond. The court noted a trend against letting e-mail links alone confer jurisdiction, but insinuated that Web sites allowing users to actually make travel reservations by inputting preferences could do so. The court's language is illuminating because it characterized the travel Web sites that offered the latter feature as "truly interactive," while finding no jurisdiction based on the defendant's particular site. There seems to be an implication that this judge, at least, distinguished levels of interactivity into some sort of normative pattern. As the public becomes more sophisticated with regard to the Internet in general, surely the judicial ranks will follow suit and the "troubling gray area" will continue to dissipate. So, in spite of Zippo's criticism as being too unpredictable or fact-intensive, the test may actually establish a solid foundation in this respect.

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127. Id. at 517.
128. Id.
130. Id. at *5.
131. Id.
132. Id. Examples cited by the court in note 6 of the opinion included hotels.com, expedia.com and orbitz.com. Id. at *5 n.6.
133. Id. at *5.
the Supreme Court described as “express aiming” at the forum state.\textsuperscript{134}

The “something more” under the effects analysis and the “something more” under Zippo’s middle ground are simply parallels of the same concept.

In Toys “R” Us, Inc., the Third Circuit characterized the “more” as non-Internet contacts – traditional, real-world activity coupled with the electronic activity on a Web site.\textsuperscript{135} These real-world activities offer a picture of the defendant’s intent; if virtual activity leads to tangible activity, a court can be more certain a defendant knows with whom it is dealing and, therefore, \textit{where}.

Finding “something more” is generally easy to do in a defamation, “effects” test context. The content of the Internet posting is generally fairly obviously directed at a particular person or persons.\textsuperscript{136} Whether this is true in the context of other passive Web sites, (for example a fraudulent posting, a negligent misrepresentation or a trademark infringement) is not so clear. Recall, though, that “effects” and “intentionality” are two separate issues. Just because the passive site causes effects in a forum does not mean it was purposely directed there – that is the risk we are willing to accept, words carried “we know not where.” But as soon as prospective defendants acknowledge that they know with whom they are dealing, the threshold is crossed. In these situations, traditional contacts serving as a sort of “follow-up” to the electronic contact may well confer jurisdiction because, at that point, defendants know their “target.” \textit{Bancroft & Masters v. Augusta National Inc.} exemplifies this point.\textsuperscript{137}

In \textit{Bancroft}, a California computer company sued a Georgia corporation in California over trademark issues.\textsuperscript{138} The plaintiff owned the Web site domain name “masters.com,” while the defendant owned the name “masters.org.”\textsuperscript{139} The defendant sent a letter to the domain name registrar in Virginia initiating a domain name dispute resolution policy.\textsuperscript{140} The plaintiff filed an action for a declaratory judgment in California, seeking a finding that its domain name did not constitute infringement\textsuperscript{141} and contending that the defendant’s letter to the Virginia registrar was calculated to wrongfully interfere with the plaintiff’s use of the domain name and to misappropriate that

\textsuperscript{134} Bancroft & Masters, Inc. v. Augusta Nat’l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000) (citations omitted).
\textsuperscript{135} Toys “R” Us, Inc. v. Step Two, S.A., 318 F.3d 446, 454 (3d Cir. 2003).
\textsuperscript{136} This is probably also true for some actions like harassment or stalking.
\textsuperscript{137} 223 F.3d 1082 (9th Cir. 2000).
\textsuperscript{138} Id. at 1084-85.
\textsuperscript{139} Id. at 1084. The term “masters” in the context of this case refers to a major championship golf tournament, “The Masters” held each year in Augusta, Georgia. \textit{Id.}
\textsuperscript{140} Id. at 1085 (“Under this policy, B & M had three options: (1) voluntarily transfer the master.com domain name to ANI; (2) allow the domain name to be placed ‘on hold,’ meaning that it could not be used by either party; or (3) obtain a declaratory judgment establishing its right to use the masters.com domain name.”).
\textsuperscript{141} Id.
name. In the Ninth Circuit held that, under the effects test, a finding of "purposeful availment" was appropriate because the letter, although addressed to Virginia, was expressly aimed at the California plaintiff with knowledge that its effects would be felt in California. Such a holding is consistent with other cases, especially those decided in the Ninth Circuit.

In contrast, the Fourth Circuit found that specific jurisdiction was lacking in Young v. New Haven Advocate. In that case, the warden of a Virginia prison sued two Connecticut newspapers in a Virginia court. Reporters for the papers had written stories about the state of Connecticut's contract with the state of Virginia, which called for the transfer of prisoners to Virginia to alleviate prison overcrowding in Connecticut. One of the stories included information regarding alleged harsh treatment of prisoners in the Virginia prison, the difficulty of Connecticut families in visiting their incarcerated family members in Virginia, and a Connecticut senator's statements expressing concern about Confederate memorabilia in the Virginia warden's office. The other article questioned the transfers and reported on letters written by the inmates to their families alleging cruel treatment. The warden sued for defamation, claiming Virginia could exercise personal specific jurisdiction because the papers had published the articles on their Web sites, for any Virginia reader to see, and because the content of the articles caused harm to the warden in Virginia. The court, using the ALS Scan test, determined specific jurisdiction was inappropriate because the Web sites were directed to a Connecticut audience and intended to provide information to a local market only. The articles themselves were also directed at local readers, discussing the effects of the situation in Connecticut.

With the ALS Scan test, the Fourth Circuit combined the Zippo scale and the effects doctrine into a comprehensive analysis. That court, however,

142. Id. at 1087.
143. Id. at 1088. Viewing the facts in the light most favorable to the plaintiff, at least as far as jurisdiction was concerned, the court had to assume the letter itself was wrongful. See id. at 1087.
144. See, e.g., Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998) (jurisdiction deemed proper in domain name dispute when the defendant posted a passive Web site but followed with letters to the plaintiff demanding money to relinquish names).
145. 315 F.3d 256 (4th Cir. 2002).
146. Id. at 259. The plaintiff also sued the two newspapers' editors and the two reporters. Id.
147. Id.
148. Id.
149. Id.
150. Id. at 260.
151. Id. at 263.
152. Id. at 263-64.
153. See supra notes 58-65 and accompanying text.
did not do anything unusual. In reality, Zippo already wraps at least part of the effects test into the bottom two-thirds of the sliding scale. Indeed, courts applying Zippo have no problem finding passive Web sites (although not enough to confer jurisdiction by themselves, according to Zippo) as a basis for jurisdiction when combined with "something more." This "something more" (otherwise known as express aiming) is found by looking for either non-Internet contacts or knowledge of the content's "focal point." The same goes for interactive sites; add "something more" and jurisdiction, especially specific jurisdiction, is acceptable.

Looking beyond the issue of "passive" sites, the real problem with the upper two-thirds of the Zippo test's sliding scale is that quality of contacts has become a proxy for quantity of contacts. Although certainly not true in every case, it appears that the Zippo sliding scale has become a test of necessity rather than a test of sufficiency.

According to the scale, an interactive, middle-ground Web site allows a user to "exchange information with the host computer."\(^\text{154}\) Whether this includes sites that simply have hyperlinks to other sites is unclear. Have users who clicked on a hyperlink that took them to another basically passive site "exchanged" anything with the host computer? From a common sense standpoint, probably not, and there is no logical difficulty with such a conclusion. Presumably interactivity includes things like sending and receiving e-mail, inputting a credit card number and/or placing an order, and perhaps even something like a financing calculator.\(^\text{155}\) Certainly it would be unacceptable to say that the mere availability of such interactive features pushes the site to the next level of the scale, as that is no better than saying that mere access to a site by anyone in the world means jurisdiction anywhere in the world. Clearly, somebody has to use the interactive features before it is appropriate to look at their nature and quality. This too is a logical conclusion, since the definition of "contacts" includes not only "[a] coming together or touching, as of objects or surfaces," but an "[a]ssociation; relationship."\(^\text{156}\) Regardless of where a site falls on the Zippo continuum, it is the nature and quality of the relationship arising as a result of the interactive features that drives the analysis, and this is equally true at the top of the scale. Web sites that seek to do business over the Internet are no different from purely "passive" sites unless business is being done – that is, unless relationships have resulted.

The difficulty becomes clear when courts make statements like the following in the context of specific jurisdiction:


\(^{155}\) For instance, returning to Liberty D. Fender's scenario, his client might use such a calculator in this way: the user chooses the boat she likes plus any additional extras and accessories; inputs her amount of down payment; chooses how many months she wants to finance; and receives a calculation of the corresponding monthly payment.

Courts in the Third Circuit have not specifically stated whether a defendant’s single purchase of an item via the Internet, without more, suffices as a premise upon which a state may exercise personal jurisdiction over that defendant. However, decisions in this area of law indicate that commercial activity via the Internet must be substantially more regular and pervasive to constitute “purposeful availing of doing business” within a given state. \(^\text{157}\)

If the plaintiff’s claim arises out of the single contact, then why is there any requirement for “more regular and pervasive” activity? Is not the point of specific jurisdiction to allow even a single contact to confer the necessary jurisdictional power? If one chooses to drive a car from Missouri to Florida, then one can (realistically) choose a route through either Illinois or Arkansas; and if one’s negligence causes a car accident in one of those states, then specific jurisdiction would be proper there. The fact that the car was present in the forum state shows all the intent needed: the driver purposely drove it there.

But when contacts are discussed in terms of relationships, especially \textit{electronic} relationships, rather than tangible touching, courts seem to become very uncomfortable. This is the true tension – the disconnect – between Internet cases and more traditional cases. When the relationships are the result of an Internet Web site, the requirement of “something more,” or “express aiming” becomes the method of assuaging the discomfort, and it does so by emphasizing quantity as a measure of quality, blurring the line between specific and general jurisdiction. Real world drivers who cause accidents in Arkansas can easily be said to have intentionally directed their cars into the state because that is where they had to have driven it. But in the case of virtual drivers who cause virtual accidents, it is less clear where they “drove.” Figuratively speaking, virtual drivers can drive through Illinois and Arkansas \textit{at the same time}. To counter this jurisdictional uncertainty, courts seem to require virtual drivers to cause that virtual car wreck over and over again. That way, courts know the virtual drivers were in fact aiming for virtual Arkansas.

This is no different than the top of the \textit{Zippo} scale, where the “clearly doing business over the Internet” standard is supposed to require the “knowing and repeated transmission of computer files over the Internet.”\(^\text{158}\) In the context of specific jurisdiction, this requires the “virtual car-wreck” to happen over and over. Quantity has usurped quality in the top two-thirds of the scale. Of course, this may be merely a philosophical argument. After all, even in specific jurisdiction, the benchmark is “minimum” contacts, which implies \textit{at least} one, and which can certainly mean more than one. The troubling aspect, however, is that many courts seem to view \textit{Zippo} as a benchmark itself – that is, the plaintiff must demonstrate “something more” by showing a quantity of


\(^{158}\) \textit{Zippo}, 952 F. Supp. at 1124.
contacts. But Zippo is really just a test of sufficiency, illustrating that if a case achieves those levels of contacts, then jurisdiction is likely proper.

Not all courts see Zippo this way. For example, in Directory Dividends, Inc. v. SBC Communications, Inc. a federal trial court held general jurisdiction proper purely on the “express aiming” aspect, without questioning whether actual relationships resulted.159 The defendant operated a Web site that the court determined was directed at Pennsylvania residents because a user could choose “Pennsylvania” from a pull-down menu or enter a Pennsylvania zip code and see a list of products for sale in that state.160 “This specifically intended internet contact with Pennsylvania [was] sufficiently systematic and continuous that the website alone [could] be used as the basis for a finding of general personal jurisdiction.”161 This from a court in the very state where Zippo was first decided.

Would the Eighth or Ninth Circuits have reached this result? The Directory Dividends court reached its determination without any question as to how many people, if any, actually used this feature, how many people purchased such products, or how many contracts resulted. Apparently this court equated the Internet activity to directly aiming advertising into the state, which may be a very rational conclusion. But other circuits, particularly when dealing with general jurisdiction, would almost certainly need to see whether this activity resulted in relationships and the quantity thereof.

Thus, different courts across the country use different analysis to reach different results on the basic, threshold issue of personal jurisdiction. In light of the explosive growth of the Internet and the looming specter of increased disputes it brings; however, clear rules and predictability would better serve the judicial system.

B. Proposed Alternatives to the Tests

Commentators offer a variety of alternatives to the Zippo and effects tests for determining personal jurisdiction. One such test expounds on the “something more”/“express aiming” requirement already frequently present in courts’ analyses.162 This test asks whether “the targeting of a specific jurisdiction was itself foreseeable” with foreseeability dependent on three factors: “contracts, technology, and actual or implied knowledge.”163 In considering these factors, a court should take into account “whether either party has used a contractual arrangement to specify which law should govern,”164 whether

160. Id. at *7.
161. Id.
162. See generally Geist, supra note 102, at 1384.
163. Id. at 1385.
164. Id. at 1386.
the site operator has used some sort of available technology to either target or avoid a particular jurisdiction, and "the knowledge the parties had or ought to have had about the geographic location of the online activity." The three factors are analyzed in combination, with no single factor being determinative, to decide "whether the party knowingly targeted the particular jurisdiction and could reasonably foresee being haled into court there." Whether this test really adds anything to the issue is questionable. The first factor simply asks if there is a forum-selection clause, while the second and third merely facilitate a more detailed "something more" analysis.

Another commentator offers a two-pronged test styled as a "Web-contacts test." In the first prong, using the same Zippo scale, a rebuttable presumption of purposeful availment arises as the Web site moves along the continuum from passive to clearly doing business. The second prong asks whether the defendant targeted the forum state. This test sounds good in theory, but, again, the second prong is merely a restatement of the "something more"/"express aiming" requirement. Additionally, the test bogs down when one questions the practicality of the first prong. A presumption, after all, is merely a procedural device for shifting the burden of proof to a party who does not already bear it. The test, then, only leads to more questions: How would this presumption function in practice? When exactly would the burden shift? Does the plaintiff merely have to present some evidence of interactivity to put the burden on the defendant? Presumptions are either in operation or they are not. The author describes this prong as, "the more interactive the Web contacts, the more likely it is the person has purposefully availed himself or herself." To be an actual rebuttable presumption, however, there must be some basic, threshold fact from which the presumed fact (here, purposeful availment) may be found. This prong is not a presumption but a linear inference – the higher on the scale, the more likely it is true. Thus, the test offers nothing beyond what Zippo already offers.

Other commentators have taken a more comprehensive view. For example, one author suggests a general reformation of the "purposeful availment" inquiry, but admits this is unlikely to happen. Another commentator rec-

165. Id. at 1393-1401.
166. Id. at 1402.
167. Id. at 1404.
168. This forum selection clause inquiry opens up its own can of worms, which is beyond the scope of this Comment.
169. Reid, supra note 25, at 260.
170. Id. at 260-61.
171. Id. at 262.
172. Id. at 261.
173. See No Bad Puns, supra note 123, at 1835 ("A broad conception of purposeful availment is too well established in the case law for one to expect any significant overhaul . . . . More importantly, while the Supreme Court has been rather vague about how strict [the "arising out of" prong] should be, it has been somewhat more
ommends shifting from the post hoc analysis of “minimum contacts” to an ex ante assessment of jurisdiction by category-specific legislation. Yet another suggests scrapping the entire “minimum contacts” analysis, along with notions of general versus specific jurisdiction, and replacing it with an “intentional transactional entry,” bright-line test for specific jurisdiction. This test requires that (1) the defendants know, or be substantially certain, that their actions will “pierce the borders” of the forum state, (2) the claim arises out of the defendant’s entry into the state; and (3) the defendants enter the state. Reasonableness is not at issue in this test, as “[a] single act that gives rise to a claim will always provide jurisdiction.”

According to its proponent, this intentional transactional entry test would “blaze” a path through the “hodgepodge” of Internet jurisdiction cases. The test would maintain the distinction between merely posting information and taking directed action. For instance, shipping products to the forum state, posting or maintaining interactive sites that send individualized responses with knowledge of the state where the recipient is located, and sending e-mail to a person in a known location would all confer jurisdiction. Conversely, merely accepting an order, or simply setting up an interactive site, would not. What this test actually does is take quantity out of the Zippo scale analysis of contacts in the form of relationships. A single contact is sufficient. This is what Zippo should be.

Rather than discarding the entire progeny of “minimum contacts” cases, or casting the same test in new language, the Supreme Court should solidify, and slightly expand, the current analytical framework by combining the Zippo scale, the effects doctrine, and the concept of targeting into a single test. Such an “Interactive Web site Test” would require a court to first compare the claim asserted with the interactivity of the Web site. If the site has no interactive features, then jurisdiction would depend on a traditional effects analysis, requiring the plaintiff to clearly show both express aiming and a focal point for the injury. If the site does have interactive features, then the court must ask whether the tangible or relational contacts that result from those features are the basis for the claim. If not, the court would also defer to traditional effects analysis. If so, then the inferential thresholds of express aiming and focal point are lower, and the plaintiff need only show that the defendant

decisive about [purposeful availment], suggesting that the loose approach that lower courts have embraced is appropriate.”).

174. See generally A “Category Specific” Approach, supra note 33, at 1617.
175. See Douglas D. McFarland, Drop the Shoe: A Law of Personal Jurisdiction, 68 Mo. L. Rev. 753, 796 (2003). The test abolishes general jurisdiction. Id. at 797.
176. Id. at 796-98.
177. Id. at 798.
178. Id. at 809.
179. Id. at 810.
180. Id.
181. Id.
knew or should have known with whom it was interacting and that it intended that interaction. The interaction itself implies the defendant’s intent, just as the presence of the car in Arkansas shows the driver’s intent. Defendants who create Web sites would therefore have the onus and opportunity to protect themselves. After all, they choose their level of interactivity and could require an indication of location before entering into any electronic relationship. The defendant’s ability to show deception by the consumer as to such location should be, in effect, an affirmative defense to jurisdiction.

Thus the Interactive Web Site Test involves only two inquiries, thereby taking the focus on “quantity” out of the Zippo analysis. If the relationship resulting from an interactive feature is the basis of the claim, then the contact is of sufficient quality to support specific jurisdiction.\(^{182}\) In some cases, the quantity of the contacts may have a direct correlation to a decision on the merits, for instance, in a trademark infringement case where “likelihood of confusion” is at issue. The fact that a single intentional contact with the forum probably will not be sufficient to support a finding of a “likelihood of confusion” should not defeat rightful jurisdiction. If the plaintiff subsequently loses on a summary judgment motion by the defendant, perhaps an equity argument exists that would favor awarding attorney’s fees to the non-resident defendant.\(^{183}\)

The Interactive Web Site Test also supports a general jurisdiction inquiry, under which the court would examine the quantity of tangible and relational contacts that have resulted from the site’s interactive features. If the quantity is high enough, general jurisdiction would be proper. In the context of general jurisdiction, quantity serves as a substitute for specific jurisdiction’s express aiming and focal point. If the virtual car wreck happens over and over again, there is a clear inference that the defendants know with whom and where they are interacting.

Such a test does not alter any existing jurisdictional landscape. It merely melds the Zippo scale and the effects doctrine into a more workable, simpler analytical framework. In specific jurisdiction cases, courts would still be able to infer express aiming from multiple contacts, but would no longer have to demand these multiple contacts. Rather, plaintiffs could rely on quality of contacts, by demonstrating knowledge and intent. Defendants could insulate themselves by making technological choices, but they would not be completely free to post harmful material. General and specific jurisdiction in Internet cases would no longer be blurred but would once again comport with our traditional notions of the two different concepts.

\(^{182}\) This Comment deals with the “purposeful avowal” aspect of “minimum contacts.” The “reasonableness” prong, as laid out in Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987), is beyond its scope.

\(^{183}\) See, e.g., City of Cotterville v. St. Charles County, 91 S.W.3d 148, 150 (Mo. Ct. App. 2002) (“very unusual circumstances” may demand an equitable balancing of the benefits) (citation omitted)).
V. Conclusion

So, what of Liberty D. Fender and Mid-Missouri Boat Warehouse? Since the Nevada long-arm statute "permits the exercise of jurisdiction to the same extent as the Constitution,"184 the inquiry under the current state of Internet-based jurisdictional analysis would depend entirely on whether the Web site constitutes "minimum contacts" with the forum state. The personal injury claim does not arise out of any feature of the Web site, so our plaintiff needs to establish general jurisdiction and the Ninth Circuit would apply the Zippo scale.

The Boat Warehouse Web site almost certainly falls into the middle of the scale, with at least a minimum level of interactivity in its e-mail system and financing calculator. The site probably does not, however, rise to the level of doing business in Nevada. It does not appear to be a "virtual store," taking orders and payments for any boats, let alone a large quantity of boats, in Nevada. This site leans more toward the passive side of the scale, thus, a federal district court operating under the Ninth Circuit's standard would most likely not find general jurisdiction under these facts. Since specific jurisdiction is not in issue, no effects test analysis would be necessary.

Under the Interactive Web Site Test, the result would be the same, but the analysis would be different. First, the claim does not arise out of any interactive feature of the site, so the analysis falls, by definition, under general jurisdiction. The court would then look at any relationships that have resulted from those interactive features. Because the plaintiff has not shown any quantity of contacts at all, but only the availability of the features, general jurisdiction is not appropriate.

This scenario exemplifies the goal of combining the tests: an easy, predictable outcome. The parties argue express aiming and resulting effects in each case, rather than getting bogged down in levels of interactivity and "repeated transmissions." Quality of contacts can mean a single showing of knowledge and intent. Thus, quality and quantity would no longer be synonymous.

The Zippo analytical framework demands respect and carries weight in courts in this country. While some courts might also use Calder's effects doctrine to examine questions of jurisdiction based on a defendant's Internet activity, there is no certainty as to what conclusions different courts might reach in any given case. A simpler test that combines the important aspects of the two distinct tests could offer a much cleaner and more predictable outcome in these situations.

SCOTT T. JANSEN
