

## ZIPPO MANUFACTURING CO. V. ZIPPO DOT COM, INC.

By Anindita Dutta

Because a substantial number of commercial transactions occur over the Internet,<sup>1</sup> courts must refine personal jurisdiction analysis to account for these new non-physical interactions between a defendant and a forum state. Unfortunately, recent Internet case law has failed to reach a consistent standard so that Internet users can tailor their actions on the World Wide Web to avoid litigation in distant courts across the United States and even the world. In establishing personal jurisdiction over a defendant, the defendant must have sufficient contacts with the forum state.<sup>2</sup> However, courts have failed to achieve a uniform understanding of what "sufficient" contacts means on the Internet. Also, in their attempts to redefine the traditional framework of personal jurisdiction to apply to the Internet, courts have to a large extent ignored the unique nature of the World Wide Web.

In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,<sup>3</sup> the court did not alter its personal jurisdiction analysis, although the defendant's business existed almost exclusively on the Internet. Moreover, the court failed to address certain inherent characteristics of the Internet, such as cost effectiveness and time savings, when considering whether the exercise of jurisdiction over the defendant would be reasonable. The *Zippo* court should have examined more closely the nature of Dot Com's business on the Internet before it decided to exercise personal jurisdiction.

### I. PROCEDURAL HISTORY

In *Zippo*, the United States District Court for the Western District of Pennsylvania held that Pennsylvania's long-arm statute<sup>4</sup> could permissibly reach Zippo Dot Com, a California corporation with contacts in Pennsylvania through the Internet, and that the court had personal jurisdiction over the defendant.<sup>5</sup>

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1. See, e.g., *Reno v. American Civil Liberties Union*, \_\_ U.S. \_\_, 117 S. Ct. 2329, 2335 (1997) (describing the Internet as a "sprawling mall offering goods and services").

2. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

3. 952 F. Supp. 1119 (W.D. Pa. 1997).

4. See 42 PA. CONS. STAT. ANN. § 5322 (1981).

5. See *Zippo*, 952 F. Supp. at 1128.

The plaintiff, Zippo Manufacturing (Manufacturing), filed a complaint against the defendant, Zippo Dot Com (Dot Com), alleging trademark dilution, infringement, false designation, a cause of action based on state law trademark dilution, and seeking an equitable accounting and imposition of a constructive trust.<sup>6</sup> The defendant moved to dismiss for lack of personal jurisdiction and improper venue pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure.<sup>7</sup> The court denied the defendant's motion.<sup>8</sup>

## II. FACTUAL BACKGROUND

Manufacturing, a producer of "Zippo" tobacco lighters, is a Pennsylvania corporation with its principal place of business in Pennsylvania.<sup>9</sup> Dot Com operates an Internet Web site and news service and registered with Network Solutions, Inc. the domain names "zippo.com," "zippo.net," and "zippone.com" for use on the Internet.<sup>10</sup>

Dot Com's Web site contains information about the company, advertisements, and an application for its Internet news service.<sup>11</sup> This service consists of a three-tiered membership: public/free, "Original," and "Super."<sup>12</sup> A customer who would like to subscribe to either the "Original" or "Super" level of service can complete an on-line application and pay by credit card over the Internet or by telephone.<sup>13</sup> Once the application is processed, the subscriber is assigned a password so that she can view or download messages stored on defendant's server in California.<sup>14</sup>

Dot Com's contacts with Pennsylvania occur almost exclusively over the Internet. Defendant's offices, employees, and servers are all located in California.<sup>15</sup> Advertising in Pennsylvania consists of posting information about its service on its Web page, accessible to any Pennsylvania resident via the Internet.<sup>16</sup> Among the 140,000 paying subscribers worldwide, Pennsylvania residents carve out only two percent (3000 subscribers) of Dot Com's pool of customers.<sup>17</sup> Also, Dot Com entered into agreements

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6. *See id.* at 1121.

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See Zippo*, 952 F. Supp. at 1121.

15. *See id.*

16. *See id.*

17. *See id.*

with seven Internet access providers in Pennsylvania to permit its subscribers to access Dot Com's news service, two of which are located in the Western District of Pennsylvania.<sup>18</sup>

Manufacturing bases its trademark claims on Dot Com's use of the word "Zippo" in many locations in its Web site and in the headings of Internet newsgroup messages that have been posted by Dot Com subscribers. When a subscriber views or downloads a message, the word "Zippo" appears in various sections of the heading.

### III. JURISDICTIONAL BORDERS ON THE INTERNET

In seeking to assert jurisdiction over a non-resident defendant, a federal district court must comply with the long-arm statute of the state in which the district court sits.<sup>19</sup> The Pennsylvania long-arm statute permits the exercise of jurisdiction over non-resident defendants to the "fullest extent allowed under the Constitution of the United States."<sup>20</sup> Under the traditional personal jurisdiction framework, a court's constitutional ability to exercise jurisdiction over a non-resident depends upon three factors: (1) the non-resident must have sufficient contacts with the state; (2) the claim against the defendant must arise out of such contacts; and (3) the exercise of jurisdiction must be reasonable.<sup>21</sup> The court in *Zippo* states that the scope of personal jurisdiction on the Internet is "directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."<sup>22</sup> In determining this scope, the court utilizes a sliding scale analysis based upon previous case law regarding personal jurisdiction over the Internet.

At one end of the scale are situations where the defendant simply posts information on a Web site. In *Bensusan Restaurant Corp., v. King*,<sup>23</sup> the operator of a New York jazz club sued the operator of a Missouri jazz club of the same name for trademark infringement based upon his use of the name on a Web site. The Web site at issue contained information about the defendant's club, as well as events and ticket information.<sup>24</sup> However, the site was not interactive, and the court declined to assert personal juris-

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18. *See id.*

19. *See* FED. R. CIV. P. 4(e).

20. 42 PA. CONS. STAT. ANN. § 5332(b) (1981).

21. *See, e.g.,* Mellon Bank (East) PSFS, N.A. v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992).

22. *Zippo*, 952 F. Supp. at 1124.

23. 126 F.3d 25 (2d Cir. 1997).

24. *See* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 297 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

diction over the non-resident.<sup>25</sup> The court reasoned that passive Web sites do not meet the standard of purposeful availment established under the traditional personal jurisdiction framework.<sup>26</sup>

At the other end of the scale are situations where the defendant is clearly engaged in business over the Internet. In *Compuserve, Inc. v. Patterson*,<sup>27</sup> the Sixth Circuit addressed the significance of engaging in commercial transactions over the Internet. In that case, the defendant, a Texas resident, entered into a contract to distribute shareware through Compuserve's Internet server located in Ohio.<sup>28</sup> When Compuserve later began to market a software product similar to that of the defendant's, the defendant threatened to sue.<sup>29</sup> However, Compuserve sought a declaratory judgment in the state of Ohio.<sup>30</sup> The Sixth Circuit reversed the district court's decision to dismiss for lack of personal jurisdiction, holding that the defendant had purposefully directed his business activities toward Ohio by knowingly entering into a contract with an Ohio resident and then "deliberately and repeatedly" transmitting files to Ohio.<sup>31</sup>

The middle ground between the two outer ends of the scale is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, jurisdiction is determined by examining the level of interactivity and the commercial nature of the exchange of information that occurs on the Web site. In *Maritz, Inc. v. Cybergold, Inc.*,<sup>32</sup> the defendant used a Web site as a promotion for its upcoming service. The defendant intended to charge advertisers and provide users with incentives to view the advertisements.<sup>33</sup> Even though the service was not yet in operation, users were encouraged to add their address to a mailing list to receive work-in-progress reports.<sup>34</sup> In this case, the court held that jurisdiction was valid because the defendant's conduct was equivalent to active solicitations and promotional activities designed to develop a mailing list of users.<sup>35</sup> Also, the court reasoned that because the defendant in-

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25. *See id.* at 297.

26. *See id.* at 299.

27. 89 F.3d 1257 (6th Cir. 1996).

28. *See id.* at 1260.

29. *See id.* at 1261.

30. *See id.* at 1259.

31. *See id.* at 1264-66.

32. 947 F. Supp. 1328 (E.D. Mo. 1996).

33. *See id.* at 1330.

34. *See id.*

35. *See id.* at 1333-35.

discriminately responded to every user who accessed the site, the defendant should be subject to its jurisdiction.<sup>36</sup>

Among the existing case law, *Inset Systems, Inc. v. Instruction Set*<sup>37</sup> symbolizes the high water mark of the exercise of personal jurisdiction in cases involving the Internet. In *Inset*, a Connecticut corporation sued a Massachusetts corporation in Connecticut for trademark infringement based upon the use of a domain name.<sup>38</sup> The non-resident's contacts with Connecticut involved a toll-free number and the posting of a Web site that was accessible to approximately 10,000 Connecticut residents.<sup>39</sup> The court held that personal jurisdiction was nonetheless valid because the defendant's advertisements on the Internet constituted the purposeful doing of business in Connecticut.<sup>40</sup> The court reasoned that unlike television or radio, advertisements on the Internet are continuously available to any user.<sup>41</sup>

#### IV. THE DISTRICT COURT'S RATIONALE

The court in *Zippo* found that this case was most analogous to *Compu-serve*, because like *Patterson*, *Dot Com* had purposefully directed its business activities toward the forum state.<sup>42</sup> The court reasoned that because *Dot Com* contracted with approximately 3000 subscribers and seven access providers in Pennsylvania, *Dot Com*'s electronic commerce constituted the purposeful availment of the privilege of doing business in Pennsylvania.<sup>43</sup> The court allowed specific jurisdiction over *Dot Com* because *Manufacturing's* cause of action arose out of such contacts.

The court also determined that *Dot Com*'s contacts with Pennsylvania were not fortuitous because *Dot Com* repeatedly and consciously chose to process Pennsylvania residents' applications and accept their payments.<sup>44</sup> It was under no obligation to sell its services to Pennsylvania residents. Jurisdiction was reasonable because if *Dot Com* determined that the risk of being subject to jurisdiction in Pennsylvania was too great, it could

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36. *See id.* at 1333.

37. 937 F. Supp. 161 (D. Conn. 1996).

38. *See id.* at 162-63.

39. *See id.* at 163.

40. *See id.* at 165.

41. *See id.*

42. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125 (W.D. Pa. 1997).

43. *See id.* at 1126.

44. *See id.* at 1126-27.

have examined each on-line application and filtered out any subscribers who were Pennsylvania residents.

## V. UNIQUE NATURE OF DOT COM'S BUSINESS

Prior to analyzing the district court's rationale, it is necessary to understand the unique nature of Dot Com's business on the Internet. Zippo Dot Com provides a news service that can be accessed by anyone with a modem. Unlike a software company that advertises its products over the Internet, and then conducts a normal business in the physical world, Dot Com's business exists exclusively in cyberspace. Dot Com does not produce and mail publications to subscribers, or advertise its services on television or radio. It is a virtual business, and it relies on the cost-effectiveness and time-saving qualities of the World Wide Web to survive. Thus, it would be unfair to subject Dot Com to the same personal jurisdiction analysis as other traditional businesses.

In his article about jurisdiction, Dan Burk coins the phrase "geographic transparency" when discussing why disputes regarding the Internet transgress traditional jurisdiction law.<sup>45</sup> Internet addresses do not refer to a physical address, but a logical order on the network.<sup>46</sup> Also, in order to promote efficient access on the Web, servers will cache information from frequently accessed sites, and store copies of it.<sup>47</sup> When a user attempts to access the site, the information may come from the original server, or from a cache on a different server. The server from which the cache is retrieved could actually be located physically farther away from the original server, but logically closer.<sup>48</sup>

In addition to the indeterminacy of a resource's physical location, the location of a user can also elude geographical borders. For example, features that permit remote access and anonymous login remove a Web site's ability to screen users by geographic region.<sup>49</sup> Thus, any routine user of the Internet may easily disguise her geographical location in order to access a Web site that blocks access from her original physical location. This facet of the Internet renders useless the ability of a Web site owner to screen or block client requests according to geographic location. It would

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45. See Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA.J.L. & TECH. 3, ¶ 6 (1997) <<http://www.student.virginia.edu/~vjolt/vol1/BURK.html>>.

46. See David R. Johnson & David G. Post, *Law and Borders-The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1374 (1996).

47. Caching is a method by which a server downloads and temporarily stores a frequently accessed site from the network.

48. See Burk, *supra* note 45, ¶ 16.

49. See *id.* ¶ 18.

be unfair to expect a host to reasonably anticipate being hailed into court in a geographical location to which it was ignorant.

The *Zippo* court also suggests that Dot Com could decide with whom it chose to do business, but given the nature of the Internet, this statement is both unfair and untrue. The facts of *Zippo* reveal that each paying subscriber of the news service completed an on-line application, and was then assigned a password. However, a password only identified what level of news service the subscriber was permitted to access, not where the subscriber was located. When used as a protectionist measure against certain jurisdictions, passwords usually fail.<sup>50</sup> The *Zippo* court fails to mention whether geographical location was asked for on the questionnaire, but even if it was, any protectionist measure would require manual efforts, stripping the Internet of many of its automated time-saving advantages of information distribution.

The *Zippo* opinion demonstrates the difficulties associated with applying traditional personal jurisdiction analysis to the Internet. First, Dot Com should not have been expected to reasonably anticipate being summoned to court in Pennsylvania because Dot Com had no reasonable way of discerning the geographical location of its users. Second, the *Zippo* court's recommendation that Dot Com manually review each of its 140,000 subscribers would defeat some of the efficiencies gained by conducting a business over the Internet. Such a process could greatly hinder the success of a business that exists exclusively in cyberspace. Finally, unlike traditional jurisdiction cases, where the defendant reaches out into another state to solicit business, Internet cases work in reverse. The Web user accesses the site, and the host does not control who will constitute its user population. Thus, under a minimum contacts test, the purposeful availment requirement becomes more complicated.

## VI. MISAPPLICATION OF THE SLIDING SCALE ANALYSIS IN *ZIPPO*

The *Zippo* court attempted to apply to Dot Com's situation the sliding scale analysis employed in other personal jurisdiction cases involving the Internet. The court reasoned that Dot Com's contacts with Pennsylvania amounted to the type of deliberate and repeated contacts that were found to subject the defendant to the court's jurisdiction in *Compuserve*. However, the *Compuserve* opinion is distinguishable because it was based on vastly different facts. In *Compuserve*, the defendant, Patterson, and

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50. See *id.* ¶ 45; see also Bradley A. Slutsky, *Jurisdiction Over Commerce on the Internet* (last modified June 6, 1997) <<http://www.kslaw.com/menu/jurisdic.html>>.

Compuserve entered into a distribution contract which put Patterson on notice that the agreement was governed by Ohio law.<sup>51</sup> Also, for a period of approximately three years, Patterson sent software via electronic links to the Compuserve system in Ohio, and he advertised and sold his product through that system.<sup>52</sup> Some of these product sales occurred in Ohio.<sup>53</sup> The *Compuserve* court assumed that standing alone, none of these three occurrences would establish minimum contacts. Instead, the court relied upon the fact that Patterson's contacts with Compuserve were deliberate and repeated.<sup>54</sup>

The *Zippo* court misinterpreted this standard which required that the defendant's contacts be "deliberate and repeated." Each of Patterson's contacts individually was insufficient, but in totality they provided evidence of directed activity towards Ohio. As Judge Stein explained in *Bensusan*, Patterson "specifically targeted Ohio."<sup>55</sup> Conversely, in *Zippo*, Dot Com did not specifically target Pennsylvania. Dot Com's Web site targeted a nationwide audience, with over 140,000 subscribers across the United States. Further, the contracts with Pennsylvania access providers were a necessary step that Dot Com would have taken in many states in order to facilitate its business on the Internet. Unlike Patterson, who chose to direct his business activities towards Ohio, Dot Com did not deliberately and repeatedly choose to deal with Pennsylvania.

If the *Zippo* court had accurately applied the *Compuserve* analysis, it would have closely examined all of Dot Com's business activities. Dot Com did not target Pennsylvania residents. Instead, Pennsylvania residents would find Dot Com's Web site on the Internet and subscribe to its news service, as did approximately 137,000 other nationwide subscribers. By allowing jurisdiction over Dot Com in Pennsylvania, the *Zippo* court is violating the principle set forth in *Asahi Metal Industry Co. v. Superior Court*,<sup>56</sup> that asserting jurisdiction over a defendant whose only contact with the forum state is the placement of a product (in this case a news service) into the stream of commerce, without more, violates principles of due process. The *Zippo* court justified its position by pointing to the access provider contracts, but Dot Com presumably entered into similar

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51. *See Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996).

52. *See id.* at 1264-65.

53. *See id.*

54. *See id.*

55. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

56. 480 U.S. 102 (1987) (plurality).



agreements across the nation. In effect, the *Zippo* rationale makes Dot Com vulnerable to nationwide jurisdiction.

Instead of finding that Dot Com engaged in deliberate and repeated contacts with Pennsylvania, the court should have closely analyzed the level of interactivity and the commercial nature of the exchange of information to determine whether the exercise of jurisdiction would be reasonable. Unfortunately, the cases decided to date have not been consistent in determining what level of activity is necessary to establish minimum contacts. In both *Inset* and *Maritz*, the courts asserted jurisdiction. However, subsequent cases have reasoned that the defendants' contacts in both cases were insufficient to establish personal jurisdiction under traditional notions of fair play and due process. In *Hearst Corp. v. Goldberger*,<sup>57</sup> the court declined to follow the *Inset* opinion because the defendant's only contacts with the forum state were a Web site and an 800 number.<sup>58</sup> The court also refused to follow the *Maritz* opinion because the defendant's only contact with the forum state consisted of a Web site that provided information about Cybergold's upcoming service.<sup>59</sup>

In both situations, the *Hearst* court reasoned that anyone with access (or a telephone in the case of *Inset*), including residents of the forum state, could have contacted the defendants' Web sites. The court acknowledged the rationale in both of these cases, that "through their web sites, defendants consciously decided to transmit advertising information to all users ... thereby (allegedly) ... purposefully availing themselves of the privilege of doing business with the forum state."<sup>60</sup> However, to allow such an assertion of jurisdiction in these cases would in effect create a national or even worldwide jurisdiction.<sup>61</sup> Thus, every plaintiff could sue in her home court every non-resident defendant who owned a Web site. Based upon the more well-reasoned analysis of *Hearst*, the *Zippo* court should not have included either the *Inset* or *Maritz* opinions in its own personal jurisdiction analysis.

Instead, a defendant should have more than a passive Web presence before a court can assert personal jurisdiction over the non-resident defendant. For example, in *EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd.*,<sup>62</sup> a defamation case, the defendant's contacts with the forum state were much greater than that of Dot Com. BASIS's contacts with Arizona included a

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57. No. 96 CIV. 3620 (PKL)(AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

58. *See id.* at \*20.

59. *See id.*

60. *Id.*

61. *See id.*

62. 947 F. Supp. 413 (D. Ariz. 1996).

contract with an Arizona company, phone, fax, and e-mail transactions, visits to Arizona, and sales to Arizona residents that totaled approximately \$50,000.<sup>63</sup>

Upon first glance, the fact pattern in *American Network, Inc. v. Access America/Connect Atlanta, Inc.*,<sup>64</sup> seems comparable to that of *Zippo*. In *American Network*, the plaintiff, a New York access provider, asserted claims of trademark infringement and unfair competition against the defendant, a Georgia corporation that provides similar services.<sup>65</sup> Access America claimed that out of its 7500 subscribers worldwide, only six (0.08%) were located in New York and they contributed only \$150 per month to its monthly revenue of \$195,000.<sup>66</sup> Dot Com was in a similar position, in that only 3000 of its 140,000 (2%) subscribers were in Pennsylvania. Clearly, Dot Com exceeds the percentage mark established by *American Network*. However, *Zippo* is still distinguishable because in *American Network*, the defendant mailed to each subscriber a software package and a written copy of the subscriber agreement. The activity of mailing software packages distinguishes Access America's transactions from that of Dot Com's, which occurred almost exclusively on the Internet. In its discussion of purposeful availment, the court in *American Network* pointed specifically to the mailings when concluding that the defendant purposefully directed its activity towards New York.<sup>67</sup> Access America's Web site was included in a minimum contacts analysis, but it was the physical mailing of products that was the lynch pin of the court's rationale in allowing jurisdiction.

Finally, in *Digital Equipment Corp., v. AltaVista Technology, Inc.*,<sup>68</sup> the court based its finding of jurisdiction on the totality of the defendant's contacts, which included "a contract with a Massachusetts corporation, reflecting an agreement to apply Massachusetts law, soliciting business through its Web site, including Massachusetts business, and three sales to Massachusetts residents."<sup>69</sup> However, the thrust of the court's argument focused on the defendant's blatant violation of a licensing agreement which prohibited AltaVista from selling goods or services on its Web site. This, combined with the fact that the defendant's Web site was virtually identical to the plaintiff's, increasing the threat of trademark infringement

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63. *See id.* at 415.

64. 975 F. Supp. 494 (S.D.N.Y. 1997).

65. *See id.* at 495-96.

66. *See id.*

67. *See id.* at 498-99.

68. 960 F. Supp. 456 (D. Mass. 1997).

69. *Id.* at 462.

and dilution, seemed to weigh heavily in the court's analysis. The forum court's interest in adjudicating this dispute was significant because Digital was one of the largest corporations in Massachusetts, and was in a position to suffer greatly from the alleged tort of trademark infringement.<sup>70</sup>

Thus, both the cases before and after *Zippo* fail to provide a coherent standard by which the *Zippo* case should have been decided. In all of the cases, the courts either used non-Internet activities as part of their minimum contacts analysis, or found jurisdiction based upon other grounds.

## VII. PURPOSEFUL AVAILMENT IN ZIPPO

In the absence of a clear definition of what constitutes "sufficient contacts" on the Internet, we must still determine whether the court in *Zippo* should have exercised jurisdiction over Dot Com. The first question that should be answered is whether *Zippo* purposefully availed itself of the laws of Pennsylvania. Personal jurisdiction is not based upon random, fortuitous contacts, but instead upon deliberate, purposeful actions by the defendant.<sup>71</sup> Thus, any defendant who reaches outside of her state and intentionally creates ongoing relationships and obligations with citizens of another state should be subject to the laws of that state.<sup>72</sup> Under this standard, the *Zippo* court held that Dot Com purposefully availed itself of Pennsylvania law. However, Dot Com did not reach outside of California and intentionally create ongoing relationships with Pennsylvania residents. Neither did it target and direct its activity towards Pennsylvania. Instead, Dot Com simply posted a Web site, and interested users who found the site while Web browsing would intentionally contact and initiate a relationship with Dot Com.

Admittedly, Dot Com intentionally created "ongoing relationships" with Pennsylvania access providers. However, the court did not go into any detail about the character of these relationships. Did Dot Com employees engage in extensive negotiations and communications with the providers throughout the duration of the contract? Or was the relationship established through a simple, unilateral transaction on the Internet? Contracting with access providers may be a quick and effortless process, to the point that the Web site host may not even be put on notice that she has entered into a contract that is governed by a specific state's laws. In this situation, it would violate traditional notions of fair play and due process to subject Dot Com to jurisdiction in a foreign court.

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70. *See id.* at 471.

71. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

72. *See Travelers Health Ass'n. v. Virginia*, 339 U.S. 643, 647 (1950).

Although the *Zippo* court found that Dot Com could have reasonably anticipated being hailed into a foreign court, the nature of the Internet erodes the element of foreseeability. Due to remote access and anonymous logins, it is virtually impossible for a Web site host to police her borders for uninvited users. Dot Com placed its Web site into the electronic stream of commerce, but after that, it had little control over where its information would flow. The *Zippo* court dismissed Dot Com's claim that its contacts with Pennsylvania were random and fortuitous by analogizing the passage of information on the Internet to a driver driving a car through different states.<sup>73</sup> However, the two situations are not analogous. The Internet must be judged by a different standard than automobiles because by granting jurisdiction based upon such reasoning, the *Zippo* court subjected Dot Com to nationwide jurisdiction. A car is a physical entity that is completely within the control of the driver. Conversely, information on the Web is not tangible or even visible until downloaded onto a computer, and even then the user never knows exactly what server or access provider brought the information to her.

#### VIII. IS THE EXERCISE OF JURISDICTION REASONABLE?

In determining whether the exercise of jurisdiction is reasonable, a court must consider certain factors, including the burden on the defendant, the plaintiff's interest in obtaining convenient and effective relief, the forum state's interest in adjudicating the dispute, and the shared interest of the several states in promoting social policies.<sup>74</sup> In this case, a balance must be struck between the burden on Dot Com and Manufacturing's interest in obtaining convenient and effective relief. If jurisdiction was not granted in Pennsylvania, would a relatively large company like Manufacturing be unreasonably inconvenienced? Even worse, could the nature of transactions prevent Manufacturing from bringing a cause of action against the defendant in any convenient forum because certain minimum standards of contact are not established? On the other hand, would it be an undue burden to subject Dot Com to jurisdiction in every state in which it had both subscribers and access provider agreements?

Whereas the answers to these questions are more fact specific, the shared interests of the several states in promoting social policy elicits a unanimous answer: the exercise of jurisdiction should be such that future courts can apply a consistent personal jurisdiction standard to Internet

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73. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126 (W.D. Pa. 1997).

74. See *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

cases. The best way to promote social policy would be to create a uniform standard so that Web site owners will know how to shape their commercial transactions to avoid jurisdiction in foreign courts.

How should future courts balance a plaintiff's interest in obtaining convenient and effective relief, a defendant Web site owner's interest in avoiding the burden of jurisdiction in every state in which its Web site is accessed, and the states collective interest in creating a uniform standard of personal jurisdiction on the Internet? Existing case law regarding personal jurisdiction suggests that there is no easy answer to this question. However, because the majority of personal jurisdiction cases have been decided in favor of the plaintiff, our attention should be focused on how courts could prevent defendant Web site owners from being subjected to nationwide jurisdiction.

The first step that a court should take regarding a personal jurisdiction case on the Internet is to closely examine all of the business activities of the defendant. A court must analyze the nature of the defendant's business contacts to determine what would constitute purposeful availment for that specific business. For instance, if a defendant's contacts with the forum state exist almost exclusively over the Internet, a court should not find jurisdiction over the defendant. In *Zippo*, the court based its jurisdiction on Dot Com's Internet related contacts with Pennsylvania, running the risk of subjecting Dot Com to a nationwide jurisdiction.

If, however, the defendant's contacts involve other types of non-Internet activities, such as contractual agreements, phone and mail solicitation, or product disbursement through the postal system, a court may fairly exercise jurisdiction over the defendant, depending upon the level of interaction with the forum state. In *American Network*, the defendant mailed to each subscriber a software package and a written copy of the subscriber agreement. These contacts exceeded the realm of an Internet based business, and the court was justified in exercising jurisdiction over the defendant. However, in examining the type of non-Internet activities engaged in by a defendant, a court should determine whether these activities were intrinsic to the unique nature of a business that exists primarily on the Internet, or unrelated to the additional contacts the defendant had with the forum state. For example, in *Zippo*, Dot Com entered into agreements with access providers in Pennsylvania, but these contacts were necessary so that Dot Com's Web page could be accessed by Pennsylvania residents.

A court should next determine whether the defendant Web site owner purposefully directed its activities toward the forum state. Although some Web site owners place advertisements about their Web pages on the Inter-

net, other Web site owners are passive in that they do not solicit browsers. Instead, a Web browser may have accessed the Web page on her own initiative, using a search engine or hyperlink from a different Web page to find it. A court should not subject an Internet business to jurisdiction in the forum state if the defendant simply posted a Web site, and a browser accessed the Web page on her own initiative, because a Web site owner should not be liable for contacts that were not under its control. Some Web sites ask for personal information from browsers who access its sites, but a court must look at what was asked. If geographical information was included, a court should determine whether the Web site owner had the ability to exclude browsers based upon their location, without unreasonably burdening its business. If so, then the defendant Web site owner had some amount of control over who it conducted business with over the Internet, and a court could weigh this factor in favor of exercising jurisdiction.

Upon concluding this fact-intensive analysis, a court should ask whether the defendant Web site owner could have reasonably avoided contact with the forum state without injuring the advantages of its business. It would be unfair to subject a business like Zippo Dot Com, which existed solely on the Internet, to the same standards as a franchise corporation like McDonald's, whose Web page is insignificant in comparison to all of its other commercial activities. McDonald's does not rely on its Web page as its sole form of promotion and advertisement; television and radio commercials, free merchandise, and promotional activities are only a few of the numerous ways that McDonald's sells its burgers. On the other hand, Zippo Dot Com relies on its Web page as its primary source of advertisement and business contact. The advantage of an Internet business is that it can reach a wide audience with little cost or time investment. A court should not impose standards that will destroy this facet of the Internet, because it will destroy the business itself and discourage future entrepreneurs from utilizing the Internet.

Finally, a court should ask whether subjecting a defendant Web site owner to the forum state's jurisdiction will subject the defendant to nationwide jurisdiction. If Zippo Dot Com can be haled into a Pennsylvania court for its contacts with the forum state, what will prevent it from being pulled into any state with which it has similar contacts? A court must find something more purposeful in a defendant's contacts with the forum state than a Web page and other minor contacts that are indispensable to a business that exists primarily on the Internet.

## IX. CONCLUSION

Given the chaotic status of the case law that currently exists, it is understandable why the court's opinion in *Zippo* breeds only more confusion. The problem is not only with how the court applies the traditional analysis of personal jurisdiction to the Internet, but also with how the court ignores the fact that Dot Com is a unique type of business that exists almost exclusively in cyberspace. Before any consistent body of law can be developed to address jurisdictional disputes, courts must begin to understand how the Internet works. Moreover, courts must recast personal jurisdiction analysis to encompass the unique characteristics of the Internet that allow it to transcend traditional geographical borders.

