

A SURVEY OF PERSONAL JURISDICTION BASED ON INTERNET ACTIVITY: A RETURN TO TRADITION

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By its very nature, the Internet is without boundaries.¹ Any person connected to the Internet can access it and is limited in her activity only by the current state of technology. Additionally, the Internet rapidly changes to adapt to new technological innovations. In contrast, personal jurisdiction doctrine prevents courts from exercising their power beyond the geographical boundaries of their authority. This limitation derives from the interests in protecting defendants against undue litigation burdens and in preventing state courts from infringing upon the sovereignty of other states.²

The rise of litigation relating to Internet activity raises concerns about applying personal jurisdiction rules developed in geographical space to a means of exchanging information that has no boundaries. The first courts facing such litigation responded by applying existing personal jurisdiction rules. Later, some courts adapted the traditional personal jurisdiction rules to take into account the Internet's unique characteristics. Coming full circle, many courts have returned to applying the traditional personal jurisdiction rules to the Internet. This return to tradition has been subtle, as these courts assert that they are applying a test tailored to the Internet when in reality they are applying long-established tests.

This Note surveys the state of personal jurisdiction jurisprudence with respect to Internet-related activities. Part I traces the historical development of personal jurisdiction doctrine. Part II reviews how courts have applied personal jurisdiction rules to the Internet. Part III analyzes the appli-

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1. The Internet consists of individual computers networked to each other. Barry M. Leiner et al., *A Brief History of the Internet*, at <http://www.isoc.org/internet/history/brief.shtml> (last modified Dec. 10, 2003). The Internet allows many forms of communications such as electronic mail ("e-mail") and real-time communication ("chatting"). The most recognizable form of the Internet is the World Wide Web, which allows users to access websites through unique domain names and read the information contained there. *Id.* For a further description of the Internet and its functions, see *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 849-53 (1997); Andrew E. Costa, Comment, *Minimum Contacts in Cyberspace: A Taxonomy of the Case Law*, 35 HOUS. L. REV. 453, 463-65 (1998).

2. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Pennoyer v. Neff*, 95 U.S. 714, 722-23, 733 (1877).

cation of personal jurisdiction rules to the Internet and concludes that although there are advantages to the new personal jurisdictional tests that some courts have developed for these cases, the traditional personal jurisdiction tests remain the best approach, even when applied to the Internet. The traditional tests retain several advantages: one, the Internet is not so unique and different that it requires a tailored test; two, the traditional tests are well-developed and familiar to judges; three, the traditional tests are technology-neutral and can be applied even when the technology changes; and four, the traditional tests best preserve the underlying policy reasons for limiting courts in their exercise of personal jurisdiction.

I. TRADITIONAL PERSONAL JURISDICTION DOCTRINE

Parties to a lawsuit are not bound by a court's orders unless the court is able to exercise personal jurisdiction over the parties.³ Personal jurisdiction doctrine has evolved from simply requiring a defendant's actual physical presence in the forum at the time of service of process⁴ to a more nuanced determination of sufficient "minimum contacts" with the forum state when the defendant is not physically present in the state.⁵ The Internet challenges how far the definition of minimum contacts can be stretched to include various levels of Internet activity, since a defendant's actual physical presence may be far from the forum exercising jurisdiction.

A. Requiring Physical Presence versus "Minimum Contacts"

Personal jurisdiction doctrine has evolved from emphasizing physical presence to also allowing constructive presence. Consequently, the Court in *Pennoyer v. Neff* held that assertion of personal jurisdiction required the defendant's physical presence within the physical territory of the forum state.⁶ However, in *International Shoe Co. v. Washington*, the Supreme

3. See *Pennoyer*, 95 U.S. at 722 ("[T]he laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."); see also *Hanson v. Denckla*, 357 U.S. 235, 250 (1958) ("[A] State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction . . .").

4. See, e.g., *Pennoyer*, 95 U.S. at 734.

5. See, e.g., *World-Wide Volkswagen*, 444 U.S. at 292; *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

6. *Pennoyer*, 95 U.S. at 720; see Richard S. Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 341-42 (1996) ("Under conventional territorial laws, jurisdiction is

Court revised the personal jurisdiction requirements to include a “minimum contacts” alternative.⁷ The Court held that if a defendant was not physically present within a forum court’s jurisdiction, due process required only that the defendant “have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁸

Post-*International Shoe* cases have boiled down the “minimum contacts” sufficient to exercise specific personal jurisdiction to a three-element test.⁹ First, “there [must] be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the

predicated upon the physical and geographical location of both a particular court and the litigants before it.”).

Moreover, the state court could also exercise personal jurisdiction over the defendant’s property if it was located within the state. In such cases, the state could exercise personal jurisdiction only against the property the non-resident defendant owned in that state. See *Pennoyer*, 95 U.S. at 723. The Court stated that:

It is in virtue of the State’s jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident’s obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property.

Id.

7. 326 U.S. at 317. The amount of minimum contacts necessary to assert personal jurisdiction has been categorized into two types: general and specific. General jurisdiction is assertion of jurisdiction over a defendant when the defendant’s contacts are unrelated to the lawsuit or unrelated to the forum state. Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3, ¶ 27 (1997) [hereinafter Burk, *Jurisdiction*], at <http://www.student.virginia.edu/~vjolt/vol1/BURK.htm>. A court can assert general personal jurisdiction when a defendant’s contacts are so “continuous and systematic” that the defendant should expect to defend any type of claim in the forum. *Int’l Shoe*, 326 U.S. at 317; see Burk, *Jurisdiction*, *supra*, ¶ 27. Specific jurisdiction is assertion of jurisdiction over a defendant when the defendant’s contacts directly give rise to the suit. Burk, *Jurisdiction*, *supra*, ¶ 27. Under specific jurisdiction, it is not necessary for the defendant’s contacts to be continuous and systematic. Rather, the court must consider the quality and nature of the defendant’s contacts when determining if jurisdiction is proper. *Int’l Shoe*, 326 U.S. at 319; see Brian E. Draughdrill, *Poking Along in the Fast Lane on the Information Super Highway: Territorial-Based Jurisprudence in a Technological World*, 52 MERCER L. REV. 1217, 1222 (2001) (stating that specific jurisdiction is “claim specific”).

8. *Int’l Shoe*, 326 U.S. at 319 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

9. See *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997); *Compu-Serve, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996); *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 910 (D. Or. 1999); *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1122-23 (W.D. Pa. 1997); see also Zembeck, *supra* note 6, at 352-53 (summarizing the three-part test).

forum State”¹⁰ The Court has interpreted purposeful availment to include not only the defendant’s deliberate conduct but also the effects of the defendant’s conduct.¹¹ Thus, courts not only look to the defendant’s conduct but also the defendant’s intent to have some effect on the forum state as a result of her conduct.¹² Second, the claim must arise out of or result from forum-related activities.¹³ This requirement ensures that the suit is sufficiently related to the contacts between the defendant and the forum.¹⁴ Finally, the exercise of personal jurisdiction must be “reasonable” in consideration of a number of factors, including the burden on the defendant to litigate in the forum, the forum state’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.¹⁵

The Supreme Court has not defined the exact amount of minimum contacts necessary to satisfy the first prong of the test. Rather, it has stated that this determination “cannot simply be mechanical or quantitative” and depends on the “quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due

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

11. *Calder v. Jones*, 465 U.S. 783 (1984). This is also known as the “*Calder* effects test.”

12. *See id.* at 789. Furthermore, foreseeability that the defendant’s acts would cause injury in the forum state is insufficient to demonstrate that the defendant purposefully availed itself of the privilege of conducting activities within the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). “Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” *Id.* at 297. The Supreme Court has divided on the issue of foreseeability. In *Asahi Metal Industry Co. v. Superior Court*, Justice O’Connor’s plurality opinion stated that “mere awareness” by the defendant that its product would reach the forum state in the stream of commerce was insufficient to demonstrate purposeful availment. 480 U.S. 102, 111, 112 (1987) (O’Connor, J., plurality). Thus, purposeful availment could be proved by demonstrating that the defendant intended to serve the market in the forum State, such as advertising in the forum state or designing the product for the market in the forum state. *Id.* In contrast, Justice Brennan’s plurality opinion in *Asahi* held that a defendant purposefully availed itself of the forum if the defendant was aware that its product entered the forum state and the defendant benefited economically from the sale of that product in the forum state. *Id.* at 117 (Brennan, J., plurality).

13. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

14. *See Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (emphasizing the relationship among the defendant, the forum, and the litigation). Because the Supreme Court has not addressed the arising-out-of issue in-depth, some lower courts apply a but-for test to determine relatedness while other courts apply a proximate cause approach. Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1838-1841 (2003).

15. *See Burger King*, 471 U.S. at 477; *World-Wide Volkswagen*, 444 U.S. at 292.

process clause to insure.”¹⁶ But the Court has clearly stated that there is a minimum threshold that must be met before a court can obtain personal jurisdiction. If this threshold is not met, jurisdiction cannot be obtained even if the third-prong’s requirement of reasonableness weighed in favor of asserting personal jurisdiction.¹⁷

Applying the three-element minimum contacts test to a defendant’s Internet activities poses special problems. Courts must determine what Internet activities, such as posting information or advertisements on a website or conducting commercial transactions, qualify as minimum contacts. Courts must also decide the level of Internet activity that meets the minimum threshold.

B. Long-Arm Statutes

To assert personal jurisdiction, a court must not only conform to Constitutional Due Process requirements but also, as a preliminary matter, to the long-arm statute of the state in which the court sits.¹⁸ The Due Process requirement is a constitutional boundary placed on the court’s ability to assert personal jurisdiction, but legislatures are not required to empower courts with the ability to exercise all the jurisdictional power contemplated by the Constitution.¹⁹ As a result, a court may exercise jurisdiction over a defendant only when a state or federal statute authorizes it to do so.²⁰

C. Rationale for Personal Jurisdiction Doctrine

The Supreme Court has two reasons for requiring physical presence or minimum contacts in order to exercise personal jurisdiction. First, the limitation protects defendants’ due process rights under the Fourteenth Amendment of the U.S. Constitution.²¹ This due process protection arises

16. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

17. *Hanson v. Denckla*, 357 U.S. 235, 252 (1958). Factors that would weigh in favor of the reasonableness of asserting personal jurisdiction include the defendant’s burden of defending in the foreign forum being minimal while the state’s interest in litigating the case being strong.

18. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 191 (5th ed. 2000).

19. *Id.* California, for example, grants its courts the full scope of personal jurisdiction permissible by the U.S. Constitution. CAL. CIV. PROC. CODE § 410.10 (West 1973). Some states have long-arm statutes limiting personal jurisdiction to specified occurrences. *See, e.g.*, N.Y. C.P.L.R. 302 (McKinney 1990) (permitting personal jurisdiction over defendants who, inter alia, transacts any business within the state; commits a tortious act within the state; commits a tortious act outside the state that causes injury to person or property within the state; or owns, uses or possesses any real property situated within the state); *see* YEAZELL, *supra* note 18, at 192.

20. YEAZELL, *supra* note 18, at 191.

21. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

out of the idea that it is unfair to require defendants to defend themselves in remote jurisdictions.²² Second, the limitation prevents a state from encroaching upon the sovereignty of other states.²³ A state has the power to control persons and property within its territory, as well as persons who have established minimum contacts with the state, but the Court has affirmed that “[t]he several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others.”²⁴ Thus, the state’s physical boundary demarcates where the state does and does not have the power to exercise control over defendants.²⁵

These two justifications have important implications for asserting personal jurisdiction based on Internet activities. First, the Internet is an efficient and rapid means of communication, and coupled with similar progress in transportation, defending a suit in a remote jurisdiction may be less of a burden today than in the past.²⁶ For example, some courts allow parties to electronically file their pleadings via the Internet, rather than filing in person at the courthouse.²⁷ Some courts also allow litigants to participate via the telephone. Litigants can also maintain contact with each other and the court via e-mail. However, the Supreme Court has also warned that technological progress does not and will not “herald[] the eventual demise of all restrictions on the personal jurisdiction of state courts.”²⁸ Instead, it has declared that “[h]owever minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power over him.”²⁹ Second, because the Internet

22. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Pennoyer*, 95 U.S. at 733; see *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985); *Shaffer v. Heitner*, 433 U.S. 186, 204 & n.20 (1977) (“[T]he relationship among the defendant, the forum, and the litigation . . . [has become] the central concern of the inquiry into personal jurisdiction.”); *Hanson*, 357 U.S. at 251 (“However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power over him.”).

23. *Pennoyer*, 95 U.S. at 723.

24. *Id.* at 722.

25. *Hanson*, 357 U.S. at 250-51; *Pennoyer*, 95 U.S. at 722.

26. See *Hanson*, 357 U.S. at 250-51.

27. For a good explanation of electronic filing (“e-filing”) and a list of courts that allow e-filing, see SearchLaw Legal Search Engine, at <http://www.seachlaw.com/efiling.htm> (last visited Feb. 4, 2004).

28. *Hanson*, 357 U.S. at 250-51. Part of the reason why there would be no such demise is because the restrictions on personal jurisdiction also serve as “territorial limitations on the power of the respective States.” *Id.*

29. *Id.* at 251.

is borderless, it reaches across all state and national boundaries. A result is that many laws, some of them in conflict with one another, may apply to a defendant's Internet activities.³⁰ Therefore, courts must carefully balance a state's desire to see its laws and policies enforced and the undue interference such an application would have on another state's or country's laws and policies.

II. TRENDS IN THE APPLICATION OF PERSONAL JURISDICTION DOCTRINE TO THE INTERNET

Lawsuits involving Internet activities have become more common with increased Internet usage.³¹ When defendants invoked a personal jurisdiction defense against lawsuits based on their Internet activities, courts initially applied traditional personal jurisdiction tests. The results of this application varied. Then, some courts attempted to tailor a personal jurisdiction test to fit the Internet. This Internet-tailored test created a proportional relationship between the propriety of asserting personal jurisdiction and the level and character of the Internet activity. Finally, some courts further developed the Internet-tailored personal jurisdiction test by including more elements from the traditional test. While these courts acted as though they were applying an Internet-tailored test, in reality they had, perhaps unwittingly, resuscitated the traditional personal jurisdiction test.

A. Early Cases: Applying Traditional Personal Jurisdiction Tests

Initially, courts applied traditional personal jurisdiction tests to the then-novel cases involving Internet activities.³² Although courts applied the same tests, they differed on how to characterize "contacts" with the forum state with respect to the Internet activity in question. Consequently, some courts exercised personal jurisdiction because the defendant maintained a website that was accessible by everyone connected to the Internet,

30. See, e.g., *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). In that case, Yahoo!, a company incorporated in Delaware and headquartered in California, was sued in France because French users were able to access Yahoo!'s website, which contained information banned in France. The French plaintiffs unsuccessfully attempted to enforce the French court's order in a United States court. The case is currently on appeal before the United States Court of Appeal for the Ninth Circuit.

31. Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1095 (1996).

32. See, e.g., *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997) [hereinafter *Bensusan II*] (holding that "well-established doctrines of personal jurisdiction support the result reached by the district court," which could not assert personal jurisdiction over the defendant based on his website activity).

including people in the forum state,³³ while other courts held that maintenance of a website was not purposeful availment sufficient to assert personal jurisdiction in the forum state.³⁴

The courts that exercised personal jurisdiction under this broad definition utilized deductive reasoning to define a defendant's website alone as a contact with the forum state. The courts found that the Internet is used to conduct wide-spread communication with everyone connected to the Internet.³⁵ They then concluded that the defendant purposefully directed her activities toward the forum state because she knew her website would reach everyone connected to the Internet, including residents in the forum state.³⁶ Consequently, the defendant's "contacts," via her website, were "of such a quality and nature, albeit a very new quality and nature for per-

33. *See, e.g.,* *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1330 (E.D. Mo. 1996) (asserting personal jurisdiction over a California defendant based on the defendant's website, which provided information about its new upcoming service that maintained a mailing list in order to provide Internet users with advertisements targeted towards their selected interests); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 162 (D. Conn. 1996) (asserting personal jurisdiction over a Massachusetts-based defendant in a website domain name dispute).

34. *See, e.g.,* *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (asserting personal jurisdiction over the defendant because he electronically transmitted his product to the forum state and entered into a contract that had a connection with the forum state); *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996) [hereinafter *Bensusan I*] (rejecting plaintiff's argument that personal jurisdiction was proper because the defendant's website was accessible in the forum state and holding that asserting personal jurisdiction over the defendant would violate New York's long-arm statute and the Due Process Clause of the U.S. Constitution), *aff'd* 126 F.3d 25 (2d Cir. 1997) (upholding the district court's ruling based on New York's long-arm statute rather than an analysis of the due process issue).

35. *See Maritz*, 947 F. Supp. at 1330 (agreeing with plaintiff's argument that the defendant's website was a "state-wide" advertisement that invited and solicited business from residents in the forum state); *Inset*, 937 F. Supp. at 165 (stating that "the Internet . . . [is] designed to communicate with people and their businesses in every state"). Moreover, one court analogized websites to television and radio advertising and found that the purposeful availment via an Internet webpage was more persistent because "once posted on the Internet . . . the advertisement is available continuously to any Internet user." *Inset*, 937 F. Supp. at 165.

36. *See Maritz*, 947 F. Supp. at 1333 (finding that the defendant "consciously decided to transmit advertising information to all [I]nternet users, knowing that such information will be transmitted globally [through the defendant's website]"); *Inset*, 937 F. Supp. at 165 (finding that since the defendant's website could be reached by Internet users within the forum state, the defendant had purposefully directed its activities toward the forum state and thus was subject to personal jurisdiction there).

sonal jurisdiction, that they favor[ed] the exercise of personal jurisdiction over defendant.”³⁷

Other, more circumspect courts rejected the argument that a website, by itself, was a sufficient minimum contact. The courts found that the defendants simply created a website and allowed others on the Internet to access it.³⁸ The courts found that the defendants did not actively encourage residents in the forum state to access the defendants’ website,³⁹ did not continuously or systematically conduct business in the forum state,⁴⁰ and did not create or maintain the website in the forum state.⁴¹ As a result, one court concluded that “[c]reating a site, like placing a product into the stream of commerce, may be felt nationwide—or even world-wide—but, without more, it is not an act purposefully directed toward the forum state.”⁴²

B. The Sliding Scale: Tailoring the Personal Jurisdiction Test to the Internet

The court in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* enunciated the first personal jurisdiction test tailored to the Internet.⁴³ In the most often-cited passage, the *Zippo* court stated that “the likelihood that personal jurisdiction can be constitutionally exercised is *directly proportionate* to the nature and quality of commercial activity that an entity conducts

37. *Maritz*, 947 F. Supp. at 1333. Accordingly, the courts rejected the defendants’ arguments that they did not have sufficient minimum contacts with the forum state because their office and principal place of business were not in the forum state and because they did not conduct business in the forum state on a regular basis. See *Maritz*, 947 F. Supp. at 1334; *Inset*, 937 F. Supp. at 164.

38. *Bensusan I*, 937 F. Supp. at 301.

39. *Id.*

40. *Id.*

41. *Bensusan II*, 126 F.3d 25, 29 (2d Cir. 1997).

42. *Id.*; see also *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) (rejecting plaintiff’s argument that “mere accessibility of the defendants’ websites in the [forum] establishes the necessary ‘minimum contacts’ with [the forum]”); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264-65 (6th Cir. 1996) (asserting personal jurisdiction over the defendant because the defendant 1) entered into a contract that involved the forum state; 2) injected his product, via electronic transmission, in the forum state’s stream of commerce; and 3) advertised and sold his product in the forum state).

43. 952 F. Supp. 1119 (W.D. Pa. 1997). *Zippo Manufacturing* (“*Manufacturing*”) is a Pennsylvania corporation which makes, among other things, “*Zippo*” tobacco lighters. *Id.* at 1121. *Zippo Dot Com* (“*Dot Com*”), a California corporation, operated an Internet website and news service using the domain names “*zippo.com*,” “*zippo.net*,” and “*zipponews.com*.” *Id.* *Manufacturing* filed suit in Pennsylvania alleging various federal and state trademark infringement claims. *Id.*

over the Internet. This sliding scale is consistent with well-developed personal jurisdiction principles."⁴⁴ As a result, this Internet-tailored personal jurisdiction test is known as the "*Zippo* sliding scale" and consists of three divisions.

At one end of the *Zippo* sliding scale, the defendant "clearly does business over the Internet."⁴⁵ The *Zippo* court cited activities such as entering into contracts with a resident of the forum state and repeatedly transmitting files over the Internet to the forum state.⁴⁶ One reason that assertion of personal jurisdiction is proper is because the defendant has made a "conscious choice to conduct business with the residents of a forum state."⁴⁷ Thus, a high level of commercial activity correlates to a high likelihood that the court in the forum state can properly exercise personal jurisdiction.

At the other end of the scale, the defendant simply posts information on a website.⁴⁸ Although the website may be accessible to Internet users in the forum state, "a passive [website] that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction."⁴⁹ According to the *Zippo* sliding scale, if a passive website has little commercial activity, there is a low or no likelihood that a court will assert personal jurisdiction.

Between the two ends of the sliding scale are "interactive" websites that allow users to exchange information with the website.⁵⁰ The assertion of jurisdiction over interactive websites is "determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the [website]."⁵¹ However, the *Zippo* court did not provide further guidance for conducting this examination on interactive websites, such as how much interactivity or commercialism would suffice to

44. *Id.* at 1124 (emphasis added).

45. *Id.*

46. *See id.* (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), as an example).

47. *Id.* at 1126. Applying the sliding scale to the facts before it, the *Zippo* court asserted personal jurisdiction over Dot Com because Dot Com had sold passwords to its service to subscribers in Pennsylvania, had transmitted electronic messages to Pennsylvania, and had entered into several contracts with Internet access providers to furnish its services to customers in Pennsylvania. *Id.* Consequently, Dot Com's level of commercial Internet activity was sufficient to meet the minimum contacts criteria.

48. *Id.* at 1124.

49. *Id.* (citing *Bensusan I*, 937 F. Supp. 295 (S.D.N.Y. 1996)).

50. *Id.*

51. *Id.* (citing *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996)).

assert personal jurisdiction or how interactivity and commercialism should relate to each other.⁵²

Most courts facing the issue of exercising personal jurisdiction based on the defendant's Internet activities have heartily embraced the *Zippo* sliding scale.⁵³

C. "Something More": Returning to the Traditional Personal Jurisdiction Tests

While simultaneously embracing the *Zippo* sliding scale, some courts have also modified it by requiring that plaintiffs demonstrate "'something more' to indicate that the defendant purposefully targeted (albeit electronically) directed his activity in a substantial way to the forum state."⁵⁴ This "something more" includes actions, either electronic or physical, that indicate the defendant purposefully availed herself of the forum state be-

52. Note, *supra* note 14, at 1834 ("As formulated and developed, *Zippo* provides little guidance for determining how to deal with [interactive] sites."). As a result, some courts found that the existence of an interactive website sufficient to establish minimum contacts while other courts found minimum contacts through additional contacts by the defendant, either related or non-related to the plaintiff's underlying claim. *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 916-17 (D. Or. 1999).

53. See, e.g., *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 713, 714 (4th Cir. 2002) (announcing "[w]e adopt today the model developed in [*Zippo*]" and finding defendant's website to be "at most, passive"); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999) ("We find that the reasoning of *Zippo* is persuasive and adopt it in this Circuit."); *Rainy Day Books, Inc. v. Rainy Day Books & Café, L.L.C.*, 186 F. Supp. 2d 1158, 1164-65 (D. Kan. 2002). The district court in *Rainy Day Books* stated,

Defendant's website falls within the sliding scale category of websites that allows a defendant to "do business" and "enter into contracts with residents of foreign jurisdiction over the Internet." As Plaintiff has established that Defendant's website constitutes a commercial website, Plaintiff has demonstrated that it purposefully availed itself of the privilege of doing business in this jurisdiction.

186 F. Supp. 2d at 1164-65; see also *Toys 'R' Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003) ("The opinion in [*Zippo*] has become a seminal authority regarding personal jurisdiction based upon the operation of an Internet [website]."); *Draughdrill*, *supra* note 7, at 1222-23 ("Adopted to some extent by virtually every court that has addressed the assertion of personal jurisdiction via Internet contacts, the sliding scale test is the foundation of nearly every Internet jurisdictional analysis.").

54. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997); see also *Toys 'R' Us*, 318 F.3d at 454 (stating that "there must be evidence that the defendant 'purposefully availed' itself of conducting activity in the forum state"); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (requiring "'something more' to demonstrate that the defendant directed his activity toward the forum state"); *Millennium Enters.*, 33 F. Supp. 2d at 921.

yond posting a website. Other courts have simply applied the *Calder* effects test to the defendant's Internet activities.⁵⁵ Either by modifying the *Zippo* sliding scale or utilizing the *Calder* effects test, these courts have unwittingly returned to the traditional personal jurisdiction test.

1. *Modifying the Zippo Sliding Scale*

The *Zippo* sliding scale allowed the assertion of personal jurisdiction based on the direct proportionality of a website's interactivity.⁵⁶ These courts believed that it was not enough for the plaintiff to show that the defendant operated an accessible and/or interactive website; rather, the sliding scale required that plaintiff's demonstrate "something more" to indicate the defendant's purposeful availment of the benefits of the forum state.⁵⁷

For these courts, "something more" can include both Internet and non-Internet activities. Internet activities which demonstrate purposeful availment include "directly targeting [one's website] to the [forum] state" or "knowingly interacting with residents of the forum state via [one's website]."⁵⁸ Non-Internet activities which demonstrate purposeful availment include entering into contracts in the forum state, making sales in the forum state, or receiving telephone calls or sending messages over the Internet to the forum state.⁵⁹

Consequently, by looking for "something more," these courts focus on the substance of the defendant's Internet activity rather than the existence

55. See *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2001) (involving an article, posted on a website accessible to members of the public over the Internet, that allegedly defamed plaintiff); *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082 (9th Cir. 2000) (involving a trademark dispute over a website domain name); *Pavlovich v. Superior Court*, 29 Cal. 4th 262 (2002) (involving the posting of DeCSS, the decryption algorithm to the Content Scrambling System ("CSS"), a system used to encrypt and protect copyrighted motion pictures on digital versatile discs (DVDs), on an Internet website).

56. See *Zippo*, 952 F. Supp. at 1124 ("[T]he 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.").

57. See *supra* note 54.

58. *Toys 'R' Us*, 318 F.3d at 454.

59. *Cybersell*, 130 F.3d at 420; see also *Toys 'R' Us*, 318 F.3d at 453 (finding that "something more" included evidence that "defendant intentionally and knowingly conducted business with residents of the forum state, and [that the defendant] had significant other contacts with the forum besides those generated by its [website]"); *Panavision*, 141 F.3d at 1322 (finding that the "something more" included evidence that the defendant's actions were for the purpose of extorting money from the plaintiff); *Millennium Enters.*, 33 F. Supp. 2d at 921 (finding "deliberate action" within the forum state to be transactions between the defendant and residents of the forum state or conduct by the defendant purposefully directed at residents of the forum state).

or level of activity of a website. Thus, the interactivity of the defendant's website is merely an indicator of the defendant's purposeful availment of the forum's benefits, as opposed to the bare reason for asserting personal jurisdiction. This focus on the substance of the activity, whether Internet or non-Internet, rather than the means through which the activity is conducted, indicates a shift from a technology-specific test—such as the *Zippo* sliding scale—to a technology-neutral one. Ironically, this technology-neutral test is essentially the traditional personal jurisdiction test. As a result, after enunciating new principles to be applied to the Internet, many courts have returned to the traditional legal principles of personal jurisdiction.⁶⁰

2. *Applying the Calder Effects Test*

In *Calder v. Jones*, the Supreme Court held that purposeful availment by the defendant includes not only deliberate actions the defendant takes to avail herself of the benefits of the forum state but also deliberate effects arising from the defendant's conduct.⁶¹ Thus, personal jurisdiction is proper under the *Calder* effects test when the defendant's actions are expressly aimed at, and the brunt of the injury is felt in, the forum state.⁶²

Some courts that applied the *Calder* effects test to Internet activities followed a two-step procedure.⁶³ First, the courts used the *Zippo* sliding

60. The switch back to the existing personal jurisdiction tests has been subtle because courts hold that they have adopted the *Zippo* sliding scale, but substitute or append the "something more" element to the proportional element. *See, e.g., Cybersell*, 130 F.3d at 418 (citing, with approval, *Zippo's* use of "interactive" and "passive" websites yet looking at defendant's non-Internet related activities to determine that the court could not exercise personal jurisdiction).

61. 465 U.S. 783, 789 (1984). In *Calder*, the plaintiff brought suit in a California court alleging that an article written and edited by the defendants in Florida had libeled her. *Id.* at 784. Although the article was published in a national magazine with a large circulation in California, almost all of the defendants' activities occurred in Florida. *Id.* at 784-86. However, the Court allowed the California court to assert personal jurisdiction over the defendants because "their intentional, and allegedly tortious, actions were expressly aimed at California" and the defendants "knew that the brunt of the injury would be felt by [the plaintiff in California]." *Id.* at 789-90; *see also id.* at 788-89 (detailing how defendants' acts were aimed at California and concluding that "[i]n sum, California is the focal point both of the story and of the harm suffered"). It found jurisdiction was proper based on the "effects" of the defendants' conduct. *Id.* at 789.

62. *Id.*

63. *See* Richard A. Bales & Suzanne Van Wert, *Internet Web Site Jurisdiction*, 20 J. MARSHALL J. COMPUTER & INFO. L. 21, 38 (2001) ("The trend in the courts has been to add an analysis based upon the effects test after considering the interactivity of the defendant's Web site [sic] based on the *Zippo* sliding scale.").

scale to determine the level of interactivity of the defendant's website.⁶⁴ Next, the courts applied the *Calder* effects test to the defendant's activity once the court determined that the defendant's website was interactive.⁶⁵ In contrast, another court applied both the *Zippo* sliding scale and the *Calder* effects test to the defendant's website, and found that the assertion of personal jurisdiction was improper under both tests.⁶⁶

Thus, while courts used the *Zippo* sliding scale, they also simultaneously returned to tradition by using the *Calder* effects test. In the case of the first court, the additional requirement that the *Calder* effects test be used to determine the propriety of asserting personal jurisdiction is analogous to the "something more" requirement.⁶⁷ Consequently, the court looked to more than the interactivity of the defendant's website by also examining the defendant's purposeful avilment of the forum state via the effects of her conduct. In the case of the second court, the court used the *Zippo* sliding scale, yet also returned to the traditional tests.⁶⁸

Although *Calder* was a libel case, its effects test has been applied to the intentional and business torts that occur both in the physical world and over the Internet.⁶⁹ In applying the *Calder* effects test to the defendant's Internet activities, courts have looked at the intended effect of the defendant's actions rather than the defendant's usage of the Internet⁷⁰ or the

64. See, e.g., *Revell v. Lidov*, 317 F.3d 467, 472 (5th Cir. 2001) (utilizing the *Zippo* sliding scale to determine the interactivity of the bulletin board section of the defendant's website).

65. See, e.g., *id.* ("[The defendant's website] bulletin board is thus interactive, and we must evaluate the extent of this interactivity as well as [the plaintiff's] argument with respect to *Calder*.").

66. See *Pavlovich v. Superior Court*, 29 Cal. 4th 262, 274-76 (2002).

67. See *Revell*, 317 F.3d at 472.

68. Indeed, the bulk of the *Pavlovich* decision is devoted to whether the defendant had the knowledge required to establish his intentional targeting of the forum state. See *id.* at 275-79; see also *id.* at 286-98 (Baxter, J., dissenting).

69. For examples of the application of the effects test in non-libel cases, see *supra* note 55.

70. See, e.g., *Revell*, 317 F.3d at 473, 475 (holding that the defendant's conduct was not directed at the forum because the website article contained no references to the forum state, the forum state was not the focal point of the article or the harm suffered, and the defendant did not even know that the plaintiff was a resident of the forum state); *Pavlovich*, 29 Cal. 4th at 273 (finding that the record did not show that the defendant expressly aimed his alleged tortious conduct at or intentionally targeted the forum state). But see *Pavlovich*, 29 Cal. 4th at 288 (Baxter, J., dissenting) (arguing that personal jurisdiction was proper because "the intended injurious effects of posting DeCSS were aimed directly at [the forum state]").

specific characteristics of the defendant's website.⁷¹ Because the *Calder* effects test focuses on the defendant's intended effect rather than the means used to convey the effect, the *Calder* effects test is a technology-neutral test. Thus, courts applying the *Zippo* sliding scale and the *Calder* effects test also progressed from using a technology-specific test to a technology-neutral one.

III. ANALYSIS OF ASSERTING PERSONAL JURISDICTION BASED ON INTERNET ACTIVITIES

Courts have traveled in a full circle in deciding which personal jurisdiction test to apply to Internet activities. First, courts applied traditional personal jurisdiction tests.⁷² Next, courts adopted the *Zippo* sliding scale, a personal jurisdiction test tailored to the Internet.⁷³ Finally, courts modified the *Zippo* sliding scale to include an element of "something more."⁷⁴ The "something more" requirement, whether determined via other forum-related contacts or effects of the defendant's conduct, focused on the substance of the defendant's activity rather than the means through which the activity is conducted.⁷⁵ Although courts behaved as though they were applying an Internet-tailored test, they had in fact gone back to using the traditional personal jurisdiction test.

The courts' return to the traditional personal jurisdiction tests presents a puzzle. On the one hand, the Internet-tailored test was crafted because of the perceived inadequacies of the traditional test when applied to this new technology. Courts immediately adopted the *Zippo* sliding scale,⁷⁶ and it has served as a basis for almost every personal jurisdiction case involving

71. See Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1371-72 (2001) ("[R]ather than examining the specific characteristics of a website and its potential impact, courts focused their analysis on the actual effects that the website had in the jurisdiction.").

72. For cases where the court held that the existence of an Internet website signaled the defendant's intent to reach all Internet users and thus evidenced the defendant's purposeful availment of the benefits of the forum state, see *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996), and *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996). However, the court in *Bensusan I*, 937 F. Supp. 295 (S.D.N.Y. 1996), held the opposite.

73. See *supra* note 53 and accompanying text.

74. See *supra* Part II.C.

75. See *id.*

76. See *supra* note 53 and accompanying text.

Internet activity.⁷⁷ Yet, courts have modified the Internet-tailored test in such a way that it is in essence the traditional test, effectively returning to tradition despite the efforts made to craft a technology-specific test.

This Part argues that courts are correct to return to the traditional personal jurisdiction tests for Internet-related suits. While the Internet, in its infancy, may have appeared to present novel jurisdictional problems irresolvable through existing methods, in fact the Internet is not so unique and different that it requires a tailored test. Moreover, the traditional tests are technology-neutral, can be applied even when the technology evolves, and best preserve the underlying reasons for limiting courts in their exercise of personal jurisdiction. Finally, even if a new test equally addressed these concerns, the traditional tests benefit from their ubiquity; courts understand them and their application, and they trust their results.

A. The Traditional Tests are Well-Developed and Familiar to Courts

The very prevalence of the traditional tests favors their application to the Internet. Courts are familiar with the traditional tests because they have been using the tests for many years.⁷⁸ In addition, most courts have encapsulated the “minimum contacts” test into a three-element test which requires purposeful availment, relatedness, and reasonableness.⁷⁹ As a result, the jurisprudence regarding the traditional tests is also well-developed. The familiarity and comfort the courts have with using the traditional personal jurisdiction tests means that courts are more efficient and predictable in their application of the test. Moreover, the parties to the suit are also familiar with the traditional tests, and thus know what and how the test will be applied. The result is the minimization of transactional costs and confusion associated with litigating a new test or re-forming an old test.⁸⁰

77. Draughdrill, *supra* note 7, at 1222-23 (“Adopted to some extent by virtually every court that has addressed the assertion of personal jurisdiction via Internet contacts, the sliding scale test is the foundation of nearly every Internet jurisdictional analysis.”).

78. The minimum contacts test, which is the basis for modern personal jurisdiction, was first enunciated in 1945. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1935). One of the last Supreme Court cases that dealt with personal jurisdiction was in 1987. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

79. *See Zembeck*, *supra* note 6, at 352-53 (summarizing the three-element test for asserting personal jurisdiction based on minimum contacts).

80. *Id.* at 367. A sterling example of the problems courts can have in applying a new test is the adoption of the *Zippo* sliding scale. “As formulated and developed, *Zippo* provides little guidance for determining how to deal with [interactive] sites. . . . It does not specify how much interactivity or commercialism suffices, nor even how those two char-

One could argue, however, that the traditional tests are not familiar and well-developed enough to warrant their application to the Internet.⁸¹ A prime example is the conflicting results in early cases involving Internet activity. Some courts broadly asserted personal jurisdiction whenever and wherever the defendant's Internet contacts reached, whether commercial or by posting a website,⁸² while other courts refused to exercise personal jurisdiction based on similar facts.⁸³

But the differing results in early Internet cases did not occur because of a misunderstanding or misapplication of the traditional tests. Rather, the results arose from a mischaracterization of the Internet. Courts analogized the Internet to other forms of communication, such as radio and television, and found that the purposeful availment via an Internet webpage was more persistent because "once posted on the Internet . . . the advertisement is available continuously to any Internet user."⁸⁴ Courts did not take into account the fact that Internet users had to actively seek the websites and thus the defendant did not always direct his website towards the forum state. Once courts better understood the characteristics and the capabilities of the Internet,⁸⁵ they had little trouble applying the tests.

acteristics ought to interact." Note, *supra* note 14, at 1834 (footnotes omitted). As a result, courts have reached different conclusions when applying the *Zippo* sliding scale to interactive websites. The court in *Millennium Enterprises, Inc. v. Millennium Music, LP*, detailed that:

[S]ome courts find that an interactive [website] alone is sufficient to establish minimum contacts. Others find minimum contacts through additional non-Internet activity in the forum, regardless of whether the activity is related to the underlying claim. Finally, some courts require additional conduct in the forum that is related to the plaintiff's cause of action.

33 F. Supp. 2d 907, 916-17 (D. Or. 1999). Thus, the test is not predictable and courts are unfamiliar with its application.

81. Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 393 (1998) ("Unfortunately, the [Supreme Court Justices'] utter lack of agreement about . . . the reasons why any particular exercise of jurisdiction is or is not permitted, makes the doctrine exceedingly difficult to apply to new and unforeseen situations, such as transactions occurring in whole or in part in cyberspace."); *id.* at 385-86 ("[Personal jurisdiction doctrine] is inconsistent in that various formulae and factors prescribed to determine jurisdiction do not serve the doctrine's articulated purposes.").

82. *See* *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).

83. *See* *Bensusan I*, 937 F. Supp. 295 (S.D.N.Y. 1996).

84. *Inset*, 937 F. Supp. at 165.

85. For example, compare *Millennium*, 33 F. Supp. 2d at 914 ("Unlike newspaper, mailing, radio, television and other media containing advertisements and solicitations,

Moreover, even after courts enunciated and adopted an Internet-tailored personal jurisdiction test, courts gravitated back to the traditional test. The *Zippo* sliding scale based the assertion of personal jurisdiction on the direct proportionality of a website's interactivity.⁸⁶ However, the addition of the "something more" requirements minimizes the importance of the website's interactivity and emphasizes the importance of purposeful availment.⁸⁷ These "new" additions to *Zippo* should look familiar; they are characteristics of the traditional test. Thus, even after creating and adopting a new, Internet-specific personal jurisdiction test, courts, either unwittingly or purposefully, returned to what is familiar and well-developed: the traditional personal jurisdiction test.

B. The Traditional Tests are Technology-Neutral and Can be Applied Even When Technology Changes

An advantage of a technology-specific test is that it is crafted to fit the technology in question. As a result, courts do not have to struggle to twist the characterization of the technology, or create ill-fitting analogies, in order to apply the traditional tests.⁸⁸ However, the disadvantages of a technology-specific test, especially when crafted to the ever changing Internet, outweigh its advantages. Because the traditional tests are technology-

most Internet advertisements and solicitations are not directed at a [sic] specific geographic areas or markets; to the contrary, advertising on the Internet targets no one in particular and everyone in particular in any given geographic location."), which was decided in 1999, with *Maritz*, 947 F. Supp. at 1333 ("Clearly, [the defendant] has obtained the website for the purpose of, and in anticipation that, internet users, searching the internet for websites, will access [its] website [The defendant's] intend is to reach all internet users, regardless of geographic location."), which was decided in 1996.

86. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

87. See *Toys 'R' Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998) (requiring "something more" to demonstrate that the defendant directed his activity toward the forum state"); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (invoking the "passive" and "interactive" website language of the sliding scale but looking for "something more"); *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 921 (D. Or. 1999).

88. See Kendrick D. Nguyen, Note, *Redefining the Threshold for Personal Jurisdiction: Contact and the Presumption of Fairness*, 83 B.U. L. REV. 253, 272 (2003) ("Rather than vainly forcing the *International Shoe* approach to cope with new issues caused by social and technological advancement, or hopelessly mending society to conform to the outdated rule, we need a new method of jurisdictional analysis to address modern issues.").

neutral, they can be applied to new changes in technology.⁸⁹ Consequently, courts and parties are able to rely on familiar and well-developed tests when encountering new situations.

Technology-specific tests risk becoming outdated when the technology changes.⁹⁰ The *Zippo* sliding scale is a prime example of the advantages of a technology-neutral test, such as the traditional personal jurisdiction tests, and the disadvantages of a technology-specific test. At the time the sliding scale was created, most websites could be classified either as passive or commercial. However, the majority of websites today fall within the “interactive” part of the scale.⁹¹ One example is the use of pop-up ads on passive websites that only make information available. Another example is the use of cookies to facilitate the user’s transaction, whether reading the information on the website or conducting business with the website.⁹² Because the “interactive” part of the test gives little guidance, courts and litigants still have little certainty about what Internet activities qualify as minimum contacts;⁹³ this defeats the purpose of having a technology-specific test such as the sliding scale. Moreover, the sliding scale does not work in all instances. Under the sliding scale, courts are inclined to dismiss for lack of personal jurisdiction if a defendant’s website does “little

89. See *id.* at 1359; Zembeck, *supra* note 6, at 342 (“Existing jurisdictional jurisprudence, however, contains conceptually similar paradigms that should properly apply when novel jurisdictional scenarios arise from a non-resident defendant’s isolated electronic contacts with a particular forum.”).

90. See Geist, *supra* note 71, at 1359. Geist observes that:

Since technological change is constant, standards created with specific technologies in mind are likely to become outdated as the technology changes. In the context of Internet jurisdiction, using indicia that reflect the current state of the Internet and Internet technologies is a risky proposition since those indicia risk irrelevancy when the technology changes.

Id.

91. See *id.* at 1379.

92. See, e.g., *id.* (“[S]ites that feature content best characterized as passive, may actually be using cookies or other data collection technologies behind the scenes unbeknownst to the individual user. Given the value of personal data, its collection is properly characterized as active, regardless of whether it occurs transparently or surreptitiously.”).

93. See *id.* (“With many sites falling into this middle one, their legal advisors are frequently unable to provide a firm opinion on how any given court might judge the interactivity of the website.”); Bales & Van Wert, *supra* note 63, at 32 (“The sliding scale of *Zippo*, although widely used, still falls short of supplying the courts with a means of assessing the true nature of Web site [sic] activity.”); Note, *supra* note 14, at 1834 (“As formulated and developed, *Zippo* provides little guidance for determining how to deal with [interactive] sites.”).

more than make information available.”⁹⁴ This may be the case even if the defendant posted the information with the knowledge and the purpose to harm the plaintiff in the forum state, such as in defamation cases.

In addition, every time the technology-centric test had to be “updated” to reflect technological change, litigants and courts would again be uncertain as to when personal jurisdiction may apply.⁹⁵ The problem would be compounded especially since most of today’s technology changes rapidly.⁹⁶ Moreover, the problem of determining when to update the test is the exact problem faced by courts and parties with regard to updating personal jurisdiction tests to fit the Internet: determining whether courts are utilizing the traditional tests, the *Zippo* sliding scale, or the *Zippo* sliding scale with the “something more” requirements.

C. The Traditional Tests Best Preserve the Interests Behind Limiting the Exercise of Personal Jurisdiction

The Supreme Court has stated that if a certain minimum threshold of contact is not met, a court cannot obtain personal jurisdiction even though the defendant’s burden of defending in the foreign forum is minimal.⁹⁷ The traditional personal jurisdiction tests have been crafted to protect the defendant against the burden of defending a suit in a foreign jurisdiction and to prevent states from encroaching upon other states’ sovereignty.⁹⁸

94. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

95. Geist writes,

[I]t is important to note that the standards for what constitutes an active or passive website are constantly shifting. When the [*Zippo*] test was developed in 1997, an active website might have featured little more than an email link and some basic correspondence functionality. Today, sites with that level of interactivity would be viewed as passive In fact, it can be credibly argued that owners of websites must constantly re-evaluate their position on the passive versus active spectrum as web technology changes.

Geist, *supra* note 71, at 1379-80.

96. *Id.* at 1380. Geist notes,

In light of the ever-changing technological environment . . . , the effectiveness of the *Zippo* doctrine is severely undermined no matter how it develops. If the test evolves with the changing technological environment, it fails to provide much needed legal certainty. On the other hand, if the test remains static to provided increased legal certainty, it risks becoming irrelevant

Id.

97. *Hanson v. Denckla*, 357 U.S. 235, 252 (1958).

98. See the discussion in Part I.C *supra*.

These important values should not be dismissed simply because the defendant chooses to use the Internet as his means of communication.

Finding personal jurisdiction wherever the defendant's Internet contacts reach, whether the contact is commercial or simply the posting of a website, endangers these interests in two ways. First, it is not always true that someone who posts a website intends to communicate to all users in all jurisdictions.⁹⁹ Second, this approach reaches dangerously towards the foreseeability approach the Supreme Court has rejected.¹⁰⁰ The automobile, for instance, is designed with the intent to take driver anywhere and everywhere the automobile can be driven, and thus the producer could "foresee" its products reaching any forum. Yet, the Supreme Court expressly rejected the idea that the sale of an automobile signaled the seller's intent to establish contacts with any jurisdiction.¹⁰¹ Similarly, the ubiquity of the Internet should not render the website owner subject to suit in every jurisdiction the website reaches.

There is also an argument that being subject to suit in every jurisdiction the Internet reaches should be a cost of conducting Internet activities. However, asserting personal jurisdiction on that broad basis guts the purposes of personal jurisdiction—protecting defendant's individual rights and preventing states from overextending their boundaries—because every jurisdiction is reachable via the Internet.¹⁰²

D. The Internet Does Not Require a Tailored Test

Finally, for the purposes of determining minimum contacts, activities conducted via the Internet are no different than activities conducted in real space.¹⁰³ That is, Internet activities "involve real people in one territorial jurisdiction either (i) transacting with real people in other territorial jurisdictions or (ii) engaging in activity in one jurisdiction that causes real-

99. See *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 914 (D. Or. 1999) (stating that Internet advertising and soliciting is not necessarily directed at a specific geographic area).

100. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (O'Connor, J., plurality); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). *But see Asahi*, 480 U.S. at 117 (Brennan, J., plurality).

101. See *World-Wide Volkswagen*, 444 U.S. at 295.

102. See *Hanson*, 357 U.S. at 250-51 (warning that technological progress did not and would not "herald[] the eventual demise of all restrictions on the personal jurisdiction of state courts" because the restrictions not only relieved a defendant's burden from litigating in a foreign forum but they also posed "territorial limitations on the power of the respective States").

103. Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1239 (1998).

world effects in another territorial jurisdiction.”¹⁰⁴ Since cyberspace does not exist separate and apart from the physical world,¹⁰⁵ traditional personal jurisdiction tests are not so outmoded that they cannot be applied to the Internet.

The traditional personal jurisdiction tests have been criticized for being inadequate because the existing rules rely on physical territorial borders, whereas the Internet has no boundaries,¹⁰⁶ and because the existing rules do not change quickly, whereas the Internet changes rapidly.¹⁰⁷ This inadequacy is evidenced by the creation of a technology-specific test in response to the dissatisfying results obtained in applications of the existing tests to early Internet cases.¹⁰⁸ Thus, because existing personal jurisdiction tests do not understand the Internet and cannot keep up with it, the Internet “needs and can create its own law and legal institutions” separate from laws and legal institutions of laws based on geographic boundaries.¹⁰⁹

104. *Id.* at 1239-40.

105. Zembek, *supra* note 6, at 367. For an argument to the contrary, see David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1378 (1996). Johnson and Post argue that

[t]he law has in essence presumed that the activities conducted by these regulated persons cannot be performed without being tied to a physical body or building subject to regulation by the territorial sovereign authority, and that the effects of those activities are most distinctly felt in geographically circumscribed areas. These distinctly local regulations cannot be preserved once these activities are conducted by globally dispersed parties through the Net.

Id. at 1378. *But see* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 210 (1996) (“Most behavior in cyberspace is easy to classify under current property principles.”).

106. *See, e.g.*, Johnson & Post, *supra* note 105, at 1367 (“Global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility—and legitimacy—of laws based on geographic boundaries. . . . [A] new boundary defines a distinct Cyberspace that needs and can create its own law and institutions.”).

107. *See, e.g.*, Nguyen, *supra* note 88, at 274 (“As modern technological advancement opens up a new world of interaction, it also opens up a new level of jurisdictional complication unfathomed by the *International Shoe* court.”).

108. *Compare* *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (asserting personal jurisdiction because defendant’s website could be accessed in the forum state), *with* *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (stating that a defendant’s passive website is not sufficient a contact to assert personal jurisdiction over the defendant).

109. *See* Johnson & Post, *supra* note 105, at 1367. Some scholars argue that only minor changes in personal jurisdiction doctrine are necessary in order for the tests to be adequately applied to the Internet. *See* Burk, *Jurisdiction*, *supra* note 7; Geist, *supra* note 71; Note, *supra* note 14. Another scholar goes even further by advocating that the entire

However, even though the traditional tests were crafted with geographical boundaries in mind, they nonetheless can be applied to Internet activity because the tests focus not only on physical boundaries but also on physical *actions*. Under the traditional analysis, a defendant must act in some way to purposefully avail herself of the benefits of the forum state. Thus, the test emphasizes the result of the defendant's action, rather than the means the defendant used to conduct her activity. Because a defendant's Internet activity can only occur through her actions in the physical world,¹¹⁰ the traditional analysis can be used because it emphasizes the result of the defendant's Internet usage, rather than the defendant's use of the Internet.

In contrast, a technology-specific test tends to ignore the underlying *actions*. Internet interactivity is a characteristic of the website itself and not necessarily evidence of conduct directed at any particular forum.¹¹¹ As a result, a person purposefully avails herself of the forum state not through the medium she used, Internet or otherwise, but through her transaction or intended effect in the forum.¹¹²

Furthermore, since the traditional tests focus on the defendant's physical acts rather than the method used to carry out these acts, the tests need not change rapidly to keep up with technology. In contrast, a test crafted specifically for the Internet is prone to the second criticism, which argued that traditional tests cannot adapt quickly to match rapidly changing technology. A test crafted to today's Internet may not be adaptable to tomorrow's Internet. The *Zippo* sliding scale was created when many sites were clearly either passive or commercial. Today, many websites are a mix between passive, interactive, and commercial. Thus, the test collapses into an inquiry about the level of interactivity of the website, an inquiry that the *Zippo* sliding scale does not fully explain.¹¹³

Since a defendant's Internet activity is no different from activity in real space, the Internet is not so different that it requires the application of new or technology-specific rules. Thus, courts and litigators need not regard the Internet as an alien "place" that requires different rules. More-

modern personal jurisdiction doctrine be changed. See Nguyen, *supra* note 88 (arguing that a completely new method to analyze modern issues of specific personal jurisdiction is necessary).

110. See Goldsmith, *supra* note 103, at 1239.

111. Jason Green, Comment, *Is Zippo's Sliding Scale a Slippery Slope of Uncertainty? A Case for Abolishing Web Site Interactivity as a Conclusive Fact in Assessing Minimum Contacts in Cyberspace*, 34 J. MARSHALL L. REV. 1051, 1076 (2001).

112. *Id.*

113. See *supra* note 52 and accompanying text.

over, because the traditional tests focus on defendant's physical acts rather than the defendant's Internet usage, it does not matter that the tests were crafted for geographical boundaries or that the tests cannot evolve as rapidly as the Internet.

IV. CONCLUSION

The Internet has significantly enhanced our ability to communicate—we can easily post information that can be accessed instantaneously by people worldwide. While this ability can be used for good purposes, unfortunately, it can also be used for bad purposes. Thus, a key legal issue currently facing courts is determining the courts' ability to exercise personal jurisdiction over a defendant based on the defendant's Internet activity.

Personal jurisdiction is a fairly well-settled doctrine: a court may exercise personal jurisdiction when the defendant is physically present within its territory or when the defendant has sufficient minimum contacts with the forum court such that the exercise of personal jurisdiction is reasonable. What is not well-settled is the application of personal jurisdiction doctrine to activities conducted via the Internet. Given the reach a person has through the Internet, whether by posting a website or conducting electronic commerce, a defendant could potentially be haled into court anywhere in the world based on the website's accessibility.¹¹⁴

Although it is tempting to think that a new and different technology such as the Internet might require a new and different personal jurisdiction test, the trend in the case law has shown otherwise. Courts initially crafted a new test specifically for the Internet, yet have now fallen back to using the existing personal jurisdiction test. This shift back to tradition has been subtle, since courts still act as if they are using a technology-specific test.

However, the traditional tests still retain several advantages when applied to Internet activities, such as being well-developed and familiar to judges, being technology-neutral and applicable even when technology changes, and best preserving the underlying policy reasons for limiting courts in their exercise of personal jurisdiction. Moreover the Internet is not so unique and different that it requires a tailored test. Thus, the courts' shift back to tradition is good because the traditional tests are still the best way for courts to determine when to assert personal jurisdiction based on Internet activity.

114. For an example, see *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).