

COMMENTS

BULLSEYE!: WHY A “TARGETING” APPROACH TO PERSONAL JURISDICTION IN THE E-COMMERCE CONTEXT MAKES SENSE INTERNATIONALLY

“As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase.”¹

Chief Justice Earl Warren, *Hanson v. Denckla*, 1958.

INTRODUCTION

A. Untangling the Web—the Need for Predictability

The U.S. Supreme Court has long understood that technological progress drives jurisdictional change. It is hard to imagine, however, that the Court in all its sagacity envisioned the jurisdictional problems electronic commerce (“E-commerce”) now poses to U.S. and international courts. Perhaps the Court today would echo Judge Van Graafeiland of the U.S. Court of Appeals for the Second Circuit who stated that adjudicating over Internet-related matters is “somewhat like trying to board a moving bus.”²

Yet judges, both in the United States and abroad, must hop on the bus. Courts increasingly will be called on to decide cases arising in the E-commerce context. This increase stems from the Internet having become the global marketplace in the last decade. Because of the ubiquity of companies like eBay and Amazon and the steady growth of niche and specialty product sites, E-commerce sales are experiencing total growth at rates easily outpacing brick-and-mortar retail sales.³ The profundity of commercial offerings and

¹ *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958).

² *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997).

³ *See, e.g., Quarterly Retail E-Commerce Sales 3rd Quarter 2004*, U.S. DEP’T COM. NEWS, Nov. 19, 2004, at C.B.-04-199. The Department of Commerce estimates that retail E-commerce sales grew around

universality of the Internet make it increasingly attractive for commercial activity.⁴ Yet, it is this same universality that raises a host of new issues for businesses engaging in E-commerce. As jurisdictional law governing Internet transactions now stands, businesses often have to make educated and informed guesses—but guesses, nonetheless—about whether they will be subjected to lawsuits in other countries by offering their goods, services, or advertising online. For the sake of sustained growth, the jurisdictional “web” must be untangled.

The American Bar Association’s Cyberlaw Committee conducted a study in 2004 and found that businesses, particularly those located in North America, are beginning to take seriously the potentially devastating financial consequences that could (and probably would) flow from being hauled into foreign courts and suffering foreign court judgments resulting from their E-commerce activity.⁵ This concern over jurisdiction was not prompted in most cases by incidents within the organizations but rather by a heightened awareness of the shifting legal framework and associated developments worldwide.⁶ Businesses began to realize that in Internet-related cases, “nearly simultaneous decisions” with “seemingly indistinguishable facts” were reaching “opposite results.”⁷

This heightened concern among business leaders coincides with academic forecasting of the need for change in E-commerce jurisdictional law. Prophecies abound about the stagnating effects that inconsistent approaches to

twenty-one percent during the third quarter of 2004, while retail brick-and-mortar sales only grew six percent during the same period. *Id.*

⁴ While hard to imagine now, given the ubiquity of E-commerce, until 1991 the National Science Foundation forbade the use of the Internet for commerce. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 39 (1999). “The Internet was built for research, not commerce.” *Id.*

⁵ See INTERNET JURISDICTION SUBCOMM., AM. BAR. ASS’N BUS. LAW SECTION, *GLOBAL INTERNET JURISDICTION: THE ABA/ICC SURVEY* (Apr. 2004), available at <http://www.abanet.org/buslaw/newsletter/0023/materials/js.pdf> (indicating that by a ratio of six to one U.S. companies are more fearful of potential adverse litigation arising in remote parts of the world).

⁶ *Id.*; see also Terry Carter, *U.S. Firms Fear Internet Is Too Open: Jurisdiction Worries Have Many Working Around ‘High Risk’ Nations*, 3 No. 14 A.B.A. J. E-REPORT 4 (2004) (discussing the growing anxiety among American businesses concerning potential litigation in foreign states arising from E-commerce).

⁷ Robert W. Hamilton & Gregory A. Castanias, *Tangled Web: Personal Jurisdiction and the Internet*, LITIG., Winter 1998, at 27, 28. In fact, one scholar has noted that the question of jurisdiction in transnational litigation is increasingly important because “[m]any cases tend to settle after determination of jurisdiction on the basis of lawyers’ reasonable predictions of the likely outcome of the case in the court in which it will be tried.” Oren Bigos, *Jurisdiction Over Cross-Border Wrongs on the Internet*, 54 INT’L & COMP. L.Q. 585, 587 (2005).

Internet jurisdiction will have on E-commerce.⁸ Awareness of the interdependence of sovereign economies underlies this increased focus on jurisdictional uniformity.⁹ There has also been increased discussion about the potential for economic and cultural protectionism if jurisdictional questions are left to sovereign nations to decide without contemplation of the broader international impact.¹⁰

Many “traditionalists” believe that the emergence of a cohesive body of jurisdictional law for E-commerce will be the product of much contemplation of those cases, conventions, and statutes that preceded the Internet age but still substantially bear on the theories underlying contractual relationships and the exercise of jurisdiction.¹¹ For others, questions linger as to whether traditional jurisdictional “hooks” will suffice to treat the myriad scenarios that can arise through the consummation of Internet contracts.¹² This group of scholars

⁸ Warren B. Chik, *U.S. Jurisdictional Rules of Adjudication Over Business Conducted Via the Internet—Guidelines and a Checklist for the E-Commerce Merchant*, 10 TUL. J. INT’L & COMP. L. 243, 300 (2002) (“The Internet is constantly evolving, and an overly rigid judicial approach could create a stagnant body of case law incapable of adjusting to future developments, especially in this medium that has proven to be dynamic and to evolve at incredible speed.”).

⁹ Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 441–42 (2003). “National courts have applied the ‘law of nations’ for centuries. . . . But with the ‘globalization’ of any number of aspects of human endeavor—commerce, communications including the Internet, crime, human rights—the importance of transnational issues in national courts has grown.” *Id.*

¹⁰ While the kinds of cultural protectionism that may arise in the E-commerce context is beyond the scope of this Comment, one need only to consider the real differences between democratic and non-democratic countries concerning freedom of speech to envision clashes that would draw the attention of even the Titans. For discussion of the cultural issues raised by E-commerce, see Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261, 280 (2002) (“The implications for technological development are profound. No longer will technologists be able to ignore national policies in the architectural values of the Internet. The technical instrument of geographic determinacy will allow multiple policies and values to co-exist.”) and Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 389–91 (2002) (noting that nations have differing norms of appropriate speech and that any attempt to create international jurisdictional uniformity must account for these differences).

¹¹ Elizabeth Longworth, *The Possibilities for a Legal Framework of Cyberspace—Including a New Zealand Perspective*, in THE INTERNATIONAL DIMENSIONS OF CYBERSPACE LAW 56 (Terese Fuentes-Camacho ed., 2000) [hereinafter CYBERSPACE LAW] (arguing that the “substantive laws need to be reviewed” and adapted to the challenges of cyberspace). Private international law concerning offline contracts (both conflict-of-laws and personal jurisdiction law) usually looks to connecting factors such as domicile for individuals and place of incorporation or place of substantial business for corporations. Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM. BUS. L.J. 531, 536–44 (2002) (discussing the traditional nexuses for exercise of personal jurisdiction in foreign countries).

¹² Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 926 (1998) (pointing out that current law, even if flawed and anachronistic, is being applied by courts to resolve Internet jurisdictional disputes); see also Susan Nauss Exon, *A New Shoe is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1, 42 (2000) (concluding that “minimum contacts” is unworkable in the E-commerce context); Frederic Debussere,

believes that the Internet, as a radical new technology, requires equally radical approaches to regulation.¹³ In fact, the “Internet problem” has already spawned several new “theories” of cyber-jurisdiction.¹⁴

Fortunately, U.S. case law is beginning to pass from a period of “web entanglement” to embracing a workable jurisdictional framework for Internet cases. This framework emerged from case law that hashed out the “stream of commerce” discussion by the Supreme Court in *Asahi Metal Industry Co. v. Superior Court of California*.¹⁵ Ultimately, the “targeting” approach favored by Justice O’Connor and three other justices in *Asahi*,¹⁶ while not inspiring widespread adoption among U.S. courts in traditional contexts,¹⁷ is gaining traction in E-commerce cases in the United States. This Comment contends

International Jurisdiction over E-Consumer Contracts in the European Union: Quid Nove Sub Sole?, 10 INT’L J.L. & INFO. TECH. 344, 348–49 (2002) (discussing the changes made to the Brussels Convention by the Brussels Regulation in an effort to adopt a workable E-commerce framework). Professor Martinez of Stanford Law School further argues that:

[T]he Internet presents an even greater problem for transnational jurisdiction than antitrust and other business regulation cases because the very nature of the worldwide web makes it accessible everywhere. A website can have “effects” anywhere in the world. . . . The real problem in Internet cases then is not just the individual unfairness to the Yahoo!s of the world of being haled into court in France but the systemic problem that this creates.

Martinez, *supra* note 9, at 509.

¹³ See, e.g., Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 BERKELEY TECH. L.J. 759, 763 (1999) (“Smart governments will regulate, but not by directly regulating the behavior of people in cyberspace. Smart governments will instead regulate by regulating the code that regulates the behavior of people in cyberspace. Cyberspace’s code will become the target of regulation.”); see also Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1408 (1996) (“Regulation in cyberspace is, or can be, different. If the regulator wants to induce a certain behavior, she need not threaten, or cajole, to inspire the change. She need only change the code.”).

¹⁴ Some argue that courts or legislatures should not primarily implement E-commerce jurisdiction when highly regulated industries are capable of self-regulation. Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U. PA. J. INT’L ECON. L. 563, 574 (2000) (“[J]urisdictional uncertainties associated with transnational commerce on the Internet can be reduced when rules are made and enforced by private rather than public institutions.”); see also Henry Farrell, *Constructing the International Foundations of E-Commerce-The EU-US Safe Harbor Arrangement*, 57 INT’L ORG. 277, 277–79 (2003) (“Business actors claim that they are capable of regulating themselves, through voluntary codes of conduct.”). Other scholars view “Cyberspace” as a distinct territory or sovereignty subject to its own self-regulation and worthy of deference and respect from other sovereigns. David R. Johnson & David G. Post, *Law And Borders-The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1379 (1996) (“Treating Cyberspace as a separate ‘space’ to which distinct laws apply should come naturally.”).

¹⁵ 480 U.S. 102 (1987).

¹⁶ Chief Justice Rehnquist and Justices Powell and Scalia joined the part of Justice O’Connor’s opinion favoring a targeting approach. *Id.* at 105.

¹⁷ For post-*Asahi* cases declining to follow O’Connor’s targeting approach, see *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992) and *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir. 1989).

that “the concept of targeting is the best solution to the theoretical challenge presented by difficulties in localizing conduct in Internet markets.”¹⁸ In this regard, this Comment rejects treating Internet jurisdictional questions as *sui generis* and adopts the view that traditional concepts of jurisdiction can, with minor tweaking, prove up to the task in the Internet context.

First, this Comment discusses the unique jurisdictional problems inherent in the Internet as a commercial medium, with recent cases showing these problems to be more than hypothetical. Second, this Comment compares the emerging targeting approach with competing Internet-specific approaches in the United States. Here, the adoption of targeting notions by the Securities and Exchange Commission and targeting in cross-border disputes are considered. Third, this Comment discusses the Hague Convention on jurisdiction and the American Law Institute’s (ALI) proposed Recognition and Enforcement of Foreign Judgments federal statute as representative attempts to harmonize international jurisdictional law. In sum, this Comment demonstrates that targeting concepts are essential to a workable jurisdictional framework for E-commerce in the global marketplace.

B. Unique Problems Inherent in E-commerce Jurisdiction

1. The Internet Lacks Geographic Boundaries

It is easy to understand the unique problem that the Internet poses in jurisdictional matters. The very infrastructure of the Internet makes it difficult to determine some facts fundamental to the exercise of jurisdiction. This difficulty arises from the lack of geographic boundaries.¹⁹ Local sovereigns “may have a monopoly on the lawful use of physical force, but they cannot control online actions whose physical location is irrelevant or cannot even be established.”²⁰

¹⁸ Perritt, *supra* note 14, at 573.

¹⁹ Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J. L. & TECH. 3, 18 (1997) (“[G]eographic indeterminacy is simply part of the network’s normal operation.”); *see also* LESSIG *supra* note 4, at 14 (“For here’s the important point: given the architecture of the Internet (at least as it was), it doesn’t matter where in real space the server is set up. Access doesn’t depend on geography.”).

²⁰ David R. Johnson & David G. Post, *Cyberspace Law Inst., And How Shall the Net Be Governed? A Meditation on the Relative Virtues of Decentralized, Emergent Law* (Sept. 5, 1996), <http://www.cli.org/emdraft.html>; *see also* LESSIG, *supra* note 4, at 21 (“When you ‘go’ somewhere in real space, you leave; when you ‘go’ to cyberspace, you don’t leave anywhere. You are never just in cyberspace; you never just go there.”).

For traditional jurisdictional systems that are framed by geographic borders, the lack of geographic boundaries is especially threatening because exercising jurisdiction over E-commerce requires ad hoc rulemaking in a rapidly evolving area of law.²¹ The Internet is “not merely multi-jurisdictional, it is almost ‘a-jurisdictional.’”²² The hardware and software structure of the Internet is designed to ignore rather than acknowledge geographic location.²³ For purposes of jurisdiction, there is “simply no coherent homology between cyberspace and real space.”²⁴

A noteworthy Australian case precisely illustrates the problem of geographic indeterminacy. In *Dow Jones & Co. v. Gutnick*, the High Court of Australia held that the Dow Jones’ publication *Barrons* was subject to the jurisdiction of Australian courts because people in Australia can access the publication over the Internet.²⁵ The High Court found that Dow Jones was subject to suit in Victoria for publishing alleged defamatory material about an Australian resident that appeared in an online version of *Barrons*.²⁶ The Court also ruled that Victorian law would apply in the case.²⁷ Because some Australian consumers purchased subscriptions and viewed the website in Australia, the Court reasoned that Dow Jones could have reasonably foreseen litigation in Australia.²⁸ Critics of the decision predicted both that the decision

²¹ CYBERSPACE LAW, *supra* note 11, at 15. Additionally, one commentator has argued:

The problem, of course, is that local communities are now far more likely to be affected by activities and entities with no local presence. . . . Thus, although it is not surprising that local communities might feel the need to apply their norms to extraterritorial activities based simply on the local harms such activities cause, assertions of jurisdiction on this basis will almost inevitably tend toward a system of universal jurisdiction because so many activities will have effects far beyond their immediate geographical boundaries.

Berman, *supra*, note 10, at 319.

²² David G. Post, *Anarchy, State and the Internet: An Essay on Law-Making in Cyberspace*, 1995 J. ONLINE L., art. 3, para. 36; *see also* Perritt, *supra* note 14, at 570 (“The Internet makes it more difficult to localize legally relevant conduct than preceding commerce technologies. Where is a contract made when it is executed by the invisible interaction of server and client software on computers located in two different countries, neither of which may be the habitual residence of the buyer or seller?”).

²³ *Cyberspace Commc’ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 742–45 (E.D. Mich. 1999) (generally discussing the nature of the Internet as a medium that is not concerned with geographic limitations).

²⁴ Burk, *supra* note 19, at 17.

²⁵ *Dow Jones & Co., Inc. v. Gutnick*, No. BC200207411, 2002 AUST HIGHCT LEXIS 61, at *6 (Austl. Dec. 10, 2002).

²⁶ *Id.* at *2–3.

²⁷ *Id.* at *75–78.

²⁸ *Id.* at *74–75. The Australian High Court spent relatively little time trying to reconcile the problem of foreseeability with the near universality of the Internet. *See generally id.* Interestingly, a year earlier, the Australian High Court had reached a contradictory result in a similar online defamation case. *See* Macquarie

will produce ignoble offspring in other countries, and that it could, as noted above, encourage larger companies to restrict whole countries from accessing their websites to snuff out the possibility of litigation.²⁹

2. Consumers Can Easily Maintain Anonymity on the Internet

Consumers can also maintain nearly impenetrable anonymity throughout their “visit” to a website.³⁰ Names as well as geographic locations and virtually any other piece of information pertinent to the completion of a valid contract can be falsified.³¹ Given the countless ways in which contracting parties can hide or distort identifying personal or geographic information, it is no wonder that Internet anonymity poses especially difficult problems for determining the level of “contact” with the potential forum state under any contacts-based analysis. Also, it is no wonder that early decisions have ignored the actions of the consumer when they “lie” to get access to a website.

Consider *Twentieth Century Fox Film Corp. v. iCraveTV*,³² a U.S. district court decision that drives home this point emphatically. In *iCraveTV*, Twentieth Century Fox, other movie studios, and professional sports leagues brought suit against a Canadian company that broadcast both Canadian and U.S. television programming over its website.³³ The plaintiffs claimed the defendant’s programming infringed their trademarks and copyrights.³⁴ To gain access to the site, the user was required to enter his or her area code.³⁵ If the area code was not Canadian, then the user could not gain access to the online television programming. If the user succeeded in entering a Canadian area code, the user still had to acknowledge in another click-wrap agreement that he

Bank Ltd. v. Berg (1999) N.S.W.S. Ct. R. 526 (refusing to enjoin the publication of allegedly defamatory material on the Internet because to do so would impose the defamation laws of New South Wales on other countries).

²⁹ Felicity Barringer, *Internet Makes Dow Jones Open to Suit in Australia*, N.Y. TIMES, Dec. 11, 2002, at C6; see also Patrick Goodenough, *Court Ruling May Have Global Implications for Online Media*, CNSNEWS.COM, Dec. 10, 2002, <http://www.cnsnews.com/ViewForeignBureaus.asp?Page=/ForeignBureaus/archive/200212/FOR20021210b.html>.

³⁰ *Cyberspace Commc’ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 742–45 (E.D. Mich. 1999) (discussing the relative ease with which a user can avoid detection on the Internet through providing false information).

³¹ See generally Henry H. Perritt, Jr., *Jurisdiction in Cyberspace: The Role of Intermediaries*, in BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE 164 (Brian Kahin & Charles Nesson eds., 1997).

³² 53 U.S.P.Q.2d (BNA) 1831 (W.D. Pa. Feb. 8, 2000).

³³ *Id.* at 1833–34.

³⁴ *Id.*

³⁵ *Id.*

was in Canada.³⁶ After acknowledging he lived in Canada, the user would then continue to a third and final click-wrap agreement that contained the terms of service for use of the iCraveTV website.³⁷ Thus, for a user from the United States to access the television programming, he would have to make false statements in assenting to the click-wrap agreements.

Nevertheless, the federal district court exercised jurisdiction over the Canadian website, enjoining the company from broadcasting the programs so that American users could not access them.³⁸ The court found that the Pennsylvania long-arm statute provided for jurisdiction because Pennsylvania residents were able to access the infringing material from their homes in the state, despite the fact that they had to provide false information to do so.³⁹ This case also illustrates that business owners currently find it difficult to exclude whole geographic areas from their websites.⁴⁰

3. *E-commerce Is Dynamic*

E-commerce is also dynamic and interactive at its core. Interactive electronic documents operate on different assumptions than traditional paper-based contracts in that they lack the discrete qualities of time and space.⁴¹ With its focus on the present, E-commerce requires that the traditional notions of looking backwards to the intent of the contracting parties be reshaped to value process and dispute resolution for the sake of re-establishing relationships in the present.⁴² This feature of E-commerce should sensitize the international community to the need for jurisdictional standards that encourage the preservation of valuable relationships between businesses and consumers. Otherwise, forum disputes will pester the courts.

A French decision, *Association Union des Etudiants Juifs de France v. Yahoo! Inc.*, illustrates the potential for real clashes between the courts of

³⁶ *Id.*

³⁷ *Id.* “Further, Internet users from the United States and elsewhere easily may revisit the site because iCraveTV causes a small file, or cookie, to be deposited in a user’s computer during his or her initial visit so that the user can automatically bypass defendants’ screening process.” *Id.*

³⁸ *Id.* at 1838.

³⁹ *Id.* at 1836. “[B]ecause the defendants’ activities within this forum were integrally a part of the activities giving rise to the cause of action asserted, the Court also finds that specific personal jurisdiction exists over the non-resident defendants.” *Id.*

⁴⁰ Johnson & Post, *supra* note 14, at 1373–74.

⁴¹ See CYBERSPACE LAW, *supra* note 11, at 17.

⁴² See E.M. KATSH, LAW IN A DIGITAL WORLD 123 (1995).

different countries.⁴³ In November 2000, a French court found Yahoo! and Yahoo! France criminally liable for the sale of Nazi materials to French citizens through Yahoo!'s U.S. auction site.⁴⁴ The suit was brought by Holocaust survivors seeking nominal damages of one franc to have the sale of Nazi memorabilia banned from the auction site.⁴⁵ Despite the fact U.S. Yahoo! users offered inflammatory memorabilia through Yahoo!'s U.S. auction site and the site specified it was only for U.S. users, the French court found it had jurisdiction and reserved the right to fine the company \$12,000 per day for each day it refused to comply with the court's order.⁴⁶ Subsequently, a U.S. district court declared that the French judgment was unenforceable in the United States under the First Amendment.⁴⁷ Later, a panel of the Ninth Circuit vacated the district court's decision because it found that the district court did not have jurisdiction over the French parties.⁴⁸ On rehearing *en banc*, the Ninth Circuit determined that the district court did have jurisdiction but held that the case was not ripe for adjudication.⁴⁹ Jurisdictional conflict indeed.⁵⁰

While businesses in the twenty-first century are not likely to cut off domestic E-commerce efforts to avoid international liability, businesses already try to geographically limit access to their online commercial offerings

⁴³ Ass'n Union des Etudiants Juifs de France v. Yahoo!, Inc., T.G.I. Paris, Nov. 20, 2000, ord. ref., J.C.P. 2000, Actu., 2219, *available at* <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001). "Yahoo! has shown that the French order is valid under the laws of France, that it may be enforced with retroactive penalties, and that the ongoing possibility of its enforcement in the United States chills Yahoo!'s First Amendment rights." *Id.*

⁴⁸ Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 379 F.3d 1120, 1126–27 (9th Cir. 2004). "LICRA and UEJF took action to enforce their legal rights under French law. Yahoo! makes no allegation that could lead a court to conclude that there was anything wrongful in the organizations' conduct. As a result, the District Court did not properly exercise personal jurisdiction over LICRA and UEJF." *Id.*

⁴⁹ Yahoo! Inc. v. La Ligue Contre Le Racisme, No. 01-17424, 2006 U.S. App. LEXIS 668, at *36–37 (9th Cir. Jan. 12, 2006).

⁵⁰ Two other foreign decisions merit mention here as well. In 2000, the highest court in Italy, in an online defamation case, held that Italian courts can assert jurisdiction over foreign websites and shut them down if they contravene Italian law. Cass., 27 Dec. 2000, (translation on file with the Emory International Law Review). The Italian court ruled that it would exercise jurisdiction over foreign-based websites when the website activity has an effect felt in Italy. *Id.* Similarly, Germany's second-highest court held that an Australian website owner could be prosecuted in Germany for violating German speech laws for maintaining a website questioning the reality of the Holocaust, an activity legal in Australia but illegal in Germany. *See* People v. Somm, Case 8340 Ds 465 Js 173158/95 (Amtsgericht, Munich, Bavaria 1999), *translated at* <http://www.cyber-rights.org/isps/somm-dec.htm>.

through click-wrap agreements⁵¹ or software bars akin to the mechanisms used to prohibit underage consumers from visiting adult sites. Given how easily a user can falsify data and bypass such controls, however, such attempts have remained largely unsuccessful.⁵²

I. PERSONAL JURISDICTION IN THE UNITED STATES BEFORE ENTANGLEMENT IN THE WORLD WIDE WEB

The modern era of personal jurisdiction jurisprudence in the United States effectively began with the Supreme Court's decision in *International Shoe Co. v. Washington*.⁵³ It was in *International Shoe* that the Court moved away from its concern with a defendant's "presence" or "consent" to jurisdiction that had persisted since its decision in *Pennoyer v. Neff*.⁵⁴ In *International Shoe*, the Supreme Court adopted a new test that focuses on whether a defendant's activities constitute "minimum contacts"⁵⁵ with a forum state so that exercise of personal jurisdiction would be consistent with "traditional notions of fair play and substantial justice."⁵⁶ The Court shifted the focus to the activity of the defendant to determine whether it had availed itself of the benefits and protection of the law of the state.⁵⁷ While *International Shoe* involved a corporate defendant, later decisions made clear that the "minimum contacts" test applied to individual defendants as well.⁵⁸

Once a defendant's minimum contacts with a forum have been established, these contacts must be considered in light of other factors to determine if the

⁵¹ A "click-wrap" agreement is a legal agreement, such as a software license, contract to purchase goods, etc., to which one indicates acceptance by clicking on a button or hyperlink on a web page.

⁵² Burk, *supra* note 19, at 16. "[S]creening or blocking of Internet resources by country is nearly impossible. In theory, it might seem that the request-and-reply sequence of access to Internet resources could be used to screen requests, denying those requests originating in jurisdictions with which the host machine's operator did not wish to have contact. But in practice, such screening is eminently unworkable." *Id.*; see also Johnson & Post, *supra* note 14, at 1373-74 ("Faced with their inability to control the flow of electrons across physical borders, some authorities strive to inject their boundaries into the new electronic medium through filtering mechanisms and the establishment of electronic barriers. . . . But such protective schemes will likely fail.").

⁵³ 326 U.S. 310 (1945).

⁵⁴ 95 U.S. 714 (1878).

⁵⁵ *Int'l Shoe Co.*, 326 U.S. at 316.

⁵⁶ *Id.*

⁵⁷ *Id.* at 319.

⁵⁸ See *Kulko v. Super. Ct. of Cal.*, 436 U.S. 84, 92 (1978) (extending the *International Shoe* holding to cases involving individuals).

exercise of jurisdiction is fundamentally fair.⁵⁹ To make such a determination, courts may look to several factors, including the forum state's interest in adjudicating the dispute,⁶⁰ the plaintiff's interest in obtaining convenient and effective relief,⁶¹ the interstate judicial system's interest in efficient resolution of controversies,⁶² the general burden on the defendant,⁶³ and the availability of an alternative forum.⁶⁴ The presence of these factors makes the exercise of jurisdiction reasonable upon a showing of less minimum contacts than would otherwise be required.⁶⁵ Yet, due process considerations, while slightly relaxed in more recent Supreme Court decisions, still predominate, with the focus on individual liberty and adjudicatory equity.⁶⁶

In *Asahi*, the Supreme Court confronted lingering questions about "purposeful availment" and what it means for the proper exercise of jurisdiction in traditional settings.⁶⁷ The Court's split decision produced distinct approaches to what has come to be known as "stream of commerce" jurisdiction.⁶⁸

While a majority of the justices agreed that exercise of personal jurisdiction over the Japanese corporation was improper because the forum was unreasonable,⁶⁹ there was no majority as to the proper standard for determining sufficient contacts for reasonable exercise of jurisdiction. In a concurring opinion garnering four votes, Justice Brennan analyzed *Asahi's* activities and concluded that while the Japanese corporation had sufficient contacts for the exercise of jurisdiction, the unreasonableness of the forum outweighed this finding.⁷⁰ For Justice Brennan, the crucial question is whether the defendant is

⁵⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

⁶⁰ *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957).

⁶¹ *Kulko*, 436 U.S. at 92.

⁶² *Id.* at 93, 98.

⁶³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

⁶⁴ *Burger King Corp.*, 471 U.S. at 477.

⁶⁵ *Id.*

⁶⁶ *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 (1982). "The restriction on state sovereign power described in *World-Wide Volkswagen*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement." *Id.* at 703 n.10.

⁶⁷ *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987).

⁶⁸ *Id.* at 111

⁶⁹ *Id.* at 114.

⁷⁰ *Id.* at 117.

aware that his product is being marketed in a forum. If the defendant is aware and the forum is reasonable, then jurisdiction is proper.⁷¹

Yet, it is Justice O'Connor's plurality opinion, though criticized by Justice Stevens in a separate concurrence,⁷² which adopted a targeting approach to stream-of-commerce cases. This targeting approach holds the most promise for application to the Internet context. In her opinion, Justice O'Connor suggested that "something more" than awareness of a product or service being placed in the stream of commerce is needed for the exercise of jurisdiction under the Due Process Clause.⁷³ Believing that the "constitutional touchstone" for the proper exercise of jurisdiction is whether a defendant purposefully established "minimum contacts" with a forum,⁷⁴ Justice O'Connor stated that due process considerations require that there must be "an action of the defendant purposefully directed toward the forum State."⁷⁵

Under Justice O'Connor's view, targeting of the forum by the defendant is a necessary precondition for the exercise of jurisdiction by the forum state. Only three other justices supported this view.⁷⁶ Nevertheless, several courts after *Asahi* have adopted the targeting analysis suggested by Justice O'Connor as the most workable of the stream-of-commerce approaches.⁷⁷ This Comment

⁷¹ *Id.* "As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* For cases adopting Justice Brennan's approach, see *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir. 1989).

⁷² *Asahi Metal Indus. Co.*, 480 U.S. at 121–22. In *Asahi*, Justice O'Connor wrote:

Whether or not [the defendant's] conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components. In most circumstances I would be inclined to conclude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute "purposeful availment" even though the item delivered to the forum State was a standard product marketed throughout the world.

Id. at 122.

⁷³ *Id.* at 111.

⁷⁴ *Id.* at 108–09.

⁷⁵ *Id.* at 112. As examples of such deliberate action, the Court suggested that the following would suffice: "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.*

⁷⁶ *Id.* at 103; see also Bruce N. Morton, *Contacts, Fairness, and State Interests: Personal Jurisdiction After Asahi Metal Industry Co. v. Superior Court of California*, 9 PACE L. REV. 451, 489 (1989) (arguing that the best explanation for the split decision in *Asahi* is the Court's concern about further offending an already leery international community).

⁷⁷ See *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 682–83 (1st Cir. 1992) (mere awareness that the product of a hot air gun manufacturer might end up in the forum state is insufficient for the exercise of

contains that a targeting framework modeled on *Asahi* is not only workable but also essential in the E-commerce context.

II. U.S. COURTS AND PERSONAL JURISDICTION IN THE INTERNET SETTING

A. *Early Attempts at Disentanglement*

Most U.S. courts that have addressed the question of jurisdiction in the Internet setting have not done so in an international context, but recent cases are reversing this trend. Whatever the disposition, national or international, the federal system in the United States suggests that the same principles underlying jurisdictional considerations within the States should apply equally to foreign countries as well.

Not surprisingly, U.S. courts, in the vein of the decisions leading from *International Shoe*, have tended to focus on the actions of the seller (or website owner) rather than the actions of the consumer in determining whether personal jurisdiction exists in the Internet context. However, although the courts may discern the broad outline of *International Shoe*, “predicting the outcome of the ‘minimum contacts’ test under a given set of transactions is something of a black art,”⁷⁸ and this is especially true of the early Internet cases. At the very least, U.S. courts have not taken a curmudgeonly, wooden view of the hard questions that the Internet presents, diving into the fray very early in the life of the problem.⁷⁹

There has been great divergence in the approaches courts have taken. Courts have generally employed two distinct tests in response to the Internet and the problem that its non-geographic nature presents to the exercise of jurisdiction. One line of cases has adopted a “sliding continuum” test, alternatively called the “Zippo” test.⁸⁰ A more recent line of cases has adopted an “effects”-based test that largely draws from the Supreme Court’s language in *Calder v. Jones*.⁸¹ Both are considered below, with the intent of showing

personal jurisdiction); *see also* *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375–76 (8th Cir. 1990) (finding the case “factually analogous” to *Asahi*, the court refused to exercise jurisdiction over defendant solely on the basis of selling parts into the stream of commerce).

⁷⁸ Burk, *supra* note 19, at 7.

⁷⁹ *See, e.g.*, *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996) (providing an overview of how the Internet works and then proceeding to discuss the jurisdictional questions).

⁸⁰ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

⁸¹ 465 U.S. 783 (1984).

why a third approach, a “targeting” approach, has emerged in recent Internet jurisdiction decisions to cure these tests’ shortcomings.

Prior to the emergence of the “Zippo” and “effects” tests, U.S. courts addressing the question of Internet jurisdiction concluded that the mere posting of a website was enough to confer jurisdiction over a defendant to any forum in which the defendant’s website could be accessed.⁸² In an early case, *Inset Systems, Inc. v. Instruction Set, Inc.*,⁸³ a Connecticut federal district court held that the defendant’s mere posting of a website by itself constituted “minimum contacts” for the proper exercise of jurisdiction by the Connecticut court.⁸⁴ The court reasoned that the website was a continuous form of advertising and that such advertising in traditional print ads was usually enough to confer jurisdiction.⁸⁵ Early on, other courts tended to find jurisdiction proper over an out-of-state defendant on nearly the same grounds.⁸⁶

These cases are easy to criticize on due process grounds. If posting a website alone is enough to subject a defendant to jurisdiction, then the notion of “purposeful availment” at the heart of Supreme Court jurisprudence apparently is meaningful only as a placeholder in the Internet context. Put simply, the courts in these cases conflated the public’s general accessibility to the Internet with “purposeful availment” in a way that Supreme Court decisions considering “purposeful availment” do not allow. Random or attenuated contacts do not confer jurisdiction to a forum.⁸⁷ In fact, in *World-Wide Volkswagen Corp. v. Woodson*, the Supreme Court stated that

⁸² *Inset*, 937 F. Supp. at 165.

⁸³ *Id.*

⁸⁴ *Id.* at 166.

⁸⁵ *Id.* at 165. “In the present case, [the defendant] has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states.” *Id.*

⁸⁶ *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996). The *Maritz* court stated:

Thus, while modern technology has made nationwide commercial transactions simpler and more feasible, even for small businesses, it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts. . . . Although CyberGold characterizes its activity as merely maintaining a ‘passive website,’ its intent is to reach all internet users, regardless of geographic location.

Id. at 1133–34; *see also* *Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715, 719 (Minn. Ct. App. 1997) (holding that the defendant’s posting of a website was the same as print advertising to suffice for personal jurisdiction). *But see* *Haelan Prods., Inc. v. Beso Biological Research, Inc.*, 43 U.S.P.Q.2d (BNA) 1672, 1675 (E.D. La. 1997) (holding that maintenance of website alone does not suffice for exercise of personal jurisdiction).

⁸⁷ *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). “[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Id.*

foreseeability alone “has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.”⁸⁸

Scholars have correctly characterized the analogizing of website posting to print advertising as “misguided” because, unlike print media advertisers who can target a geographic audience, “simply making a Web site available on the Internet does not without more direct it to any particular locale.”⁸⁹ Because these courts were skittish about evaluating the Internet without analogizing to traditional advertisement, they were shortsighted, not realizing that their decisions could have horrendous consequences for E-commerce growth.⁹⁰ Under this rubric, “every court, everywhere, could assert jurisdiction where a website was directed toward its forum.”⁹¹ This broad view of Internet jurisdiction would have chilled economic investment in E-commerce in both the United States and abroad if it had been extended. Fortunately, U.S. courts have almost universally rejected this view of Internet jurisdiction.⁹²

B. *The Zippo Sliding Scale*

In the wake of the criticism that followed the cases discussed above, the “sliding continuum” approach to Internet jurisdiction emerged—a test meant by its framers to be tailored to the singular needs of the Internet. The test was framed in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*⁹³ *Zippo* was a trademark infringement suit. The manufacturers of “Zippo” tobacco lighters, a Pennsylvania corporation, sued Zippo Dot Com, a California-based news service, for obtaining registrations for several domain names such as “zippo.com,” “zippo.net,” and “zipponews.com.”⁹⁴ The Pennsylvania court found jurisdiction proper even though the California resident did not have any

⁸⁸ World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980).

⁸⁹ Michael Traynor & Laura Pirri, *Personal Jurisdiction and the Internet: Emerging Trends and Future Directions*, 712 P.LI/PAT 93, 106 (2002).

⁹⁰ Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1362 (2001).

⁹¹ *Id.*

⁹² See, e.g., Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1297 (10th Cir. 1999) (declining to exercise jurisdiction over a merely passive website); Nutrition Physiology Corp. v. Enviro Ltd., 87 F. Supp. 2d 648, 654–55 (N.D. Tex. 2000) (same); Bedrejo v. Triple E Can, Ltd., 984 P.2d 739, 743 (Mont. 1999) (“The existence of a Web site, whether passive or interactive, does not rise to the requisite level of conduct. Publishing a Web site requires no ‘deliberate’ action within the forum state.”); Weber v. Jolly Hotels, 977 F. Supp. 327, 333 (D.N.J. 1997) (“Defendant placed information about its hotels on the Internet as an advertisement, not as a means of conducting business.”).

⁹³ 952 F. Supp. 1119 (W.D. Pa. 1997).

⁹⁴ *Id.* at 1121.

physical presence in the forum state.⁹⁵ The defendant company advertised its news service to the Internet public with the help of Internet service providers (“ISPs”) that had bases of operation in Pennsylvania.⁹⁶ The defendant actively sought out these Pennsylvania ISPs in its advertising efforts.⁹⁷

The Pennsylvania district court found the exercise of jurisdiction in Pennsylvania proper,⁹⁸ and, in doing so, distinguished between three broad categories of websites based on their interactive and commercial characteristics.⁹⁹ On one end of the scale are websites that conduct business over the Internet and actively target a forum state through advertising efforts and information collection.¹⁰⁰ Amazon.com is an example of such a website. At the other end of the spectrum are passive websites that “[do] little more than make information available to those who are interested, which [are] not grounds for the exercise of personal jurisdiction.”¹⁰¹ A used CD store owner who merely posts his inventory online and provides directions to his retail shop, with no ordering or online payment processing system, would be an example of such a passive website.

Many disputes will invariably fall in the middle of the sliding scale, where the defendant maintains an interactive website, freely exchanging information with the user regardless of the user’s forum state but also not reaching the user’s forum state through directed advertising or agreements with forum-specific ISPs or network servers.¹⁰² In these cases, the *Zippo* court encourages extensive fact-finding to assess the “level of interactivity and commercial nature of the exchange of information.”¹⁰³ Once such fact-finding is complete, a court is prepared to determine whether jurisdiction is proper.¹⁰⁴

⁹⁵ *Id.* at 1119–21.

⁹⁶ *Id.* at 1121.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1128.

⁹⁹ *Id.* at 1123–26.

¹⁰⁰ *Id.* at 1124.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1121–23.

¹⁰³ *Id.* at 1124.

¹⁰⁴ The *Zippo* court uses the *Maritz* decision, discussed *supra* at note 86, as an example of the middle of the sliding scale. See *Zippo Mfg. Co.*, 952 F. Supp. at 1125 (“This is not even an interactivity case in the line of *Maritz*.”). This is clearly a poor example of middle-scale interactivity. The *Maritz* court did not consider the interactivity of the website in reaching its decision but rather focused on the general accessibility of the website in the forum state. See *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996). So, the *Zippo* court’s attempt to use *Maritz* as paradigmatic of the middle of its test is plainly wrong.

At first glance, the attempt by the *Zippo* court to address the problem of E-commerce jurisdiction on its own terms, and without relying on analogy, seems informed and workable. Rather than looking to other contexts, the *Zippo* court almost exclusively resorted to the newly minted body of U.S. case law dealing with the Internet. Indeed, the *Zippo* test proves workable for cases that fall at either end of the spectrum. At one end of the spectrum are cases like *CompuServe, Inc. v. Patterson*,¹⁰⁵ a pre-*Zippo* decision, where the defendant's Internet activities are clearly aimed at a forum. The defendant, a Texas resident, transmitted software to CompuServe's Ohio system that could be downloaded for a fee, and he conducted all of his marketing through a CompuServe network system.¹⁰⁶ CompuServe sold software that the defendant felt infringed his copyright, and CompuServe preemptively brought an action for declaratory judgment. Reversing the Ohio district court's refusal to exercise jurisdiction over the defendant based on application of the state long-arm statute, the U.S. Court of Appeals for the Sixth Circuit found that the defendant's sending of software via the Internet to the plaintiff's servers, with the underlying commercial nature of the relationship between the parties, sufficed as "minimum contacts."¹⁰⁷

At the other end of the spectrum are cases like *Mink v. AAAA Development, L.L.C.*¹⁰⁸ In *Mink*, the U.S. Court of Appeals for the Fifth Circuit adopted the *Zippo* approach,¹⁰⁹ finding that the defendant's website, which contained information about both its products and services, was a passive website despite the fact that the site provided users with a printable mail-in order form, email addresses, and a toll-free number.¹¹⁰ The *Mink* court noted that the defendant's site was not interactive enough to support the exercise of jurisdiction because users could not make purchases through the site.¹¹¹ This case represents the "passive" end of the *Zippo* test, where it is rather easy *not* to find personal jurisdiction.

The middle of the *Zippo* scale is where the test ultimately fails. In the middle of the scale it becomes obvious that *Zippo* really adds nothing that traditional notions of jurisdiction cannot handle. Given that *Zippo* encourages

¹⁰⁵ 89 F.3d 1257 (6th Cir. 1996).

¹⁰⁶ *Id.* at 1260–61.

¹⁰⁷ *Id.* at 1265–66.

¹⁰⁸ 190 F.3d 333 (5th Cir. 1999).

¹⁰⁹ The *Mink* court summarized the *Zippo* test quite well. *See id.* at 336.

¹¹⁰ *Id.* at 337.

¹¹¹ *Id.*

inquiry into the level of interactivity of a website when it falls in the middle of the scale,¹¹² one would have expected the court to provide a rough definition of “interactivity.” It did not.¹¹³ Other commentators have noted this deficiency,¹¹⁴ and several district courts have aimed their criticism of *Zippo* at this definitional ambiguity.¹¹⁵ This is particularly problematic given that the test was adopted to *promote legal certainty* for E-commerce growth by restricting the exercise of jurisdiction in unreasonable circumstances.¹¹⁶

The middle of the *Zippo* scale is also where the discretionary aspects of U.S. jurisprudence, those aspects most at odds with European jurisdictional notions, are accentuated.¹¹⁷ Courts following *Zippo* have engaged in fact-specific inquiries to determine the interactivity and commercial nature of the website at issue.¹¹⁸ Yet, in parsing the facts, these courts have had to define the “interactivity” portion of the *Zippo* continuum to arrive at results that do not penalize businesses for wanting to exploit the potential of the Internet in their

¹¹² *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

¹¹³ See generally *Zippo Mfg. Co.*, 952 F. Supp. 1119.

¹¹⁴ Traynor & Pirri, *supra* note 89, at 114 (“The cases that *Zippo* cited to establish its sliding scale fail to make the rubric of interactivity any more intelligible because none of them relied on it in resolving personal jurisdiction.”).

¹¹⁵ See *ESAB Group, Inc. v. Centricut, L.L.C.*, 34 F. Supp. 2d 323, 330 (D.S.C. 1999) (“[M]erely categorizing a web site as interactive or passive is not conclusive of the jurisdictional issue.”); *Coastal Video Commc’ns Corp. v. Staywell Corp.*, 59 F. Supp. 2d 562, 571 (E.D. Va. 1999) (“[I]t is not enough to find that an interactive website has the potential to reach a significant percentage of the forum state’s population. . . . Instead, for the contact to be continuous and systematic, there must be proof that the website is actually reaching a portion of the state’s population.”); *Winfield Collection Ltd. v. McCauley*, 105 F. Supp. 2d 746, 750 (2000) (“[T]he distinction drawn by the *Zippo* court between actively managed, telephone-like use of the Internet and less active but ‘interactive’ web sites is not entirely clear to this court. Further, the proper means to measure the site’s ‘level of interactivity’ as a guide to personal jurisdiction remains unexplained.”)

¹¹⁶ Traynor & Pirri, *supra* note 89, at 117–18. “The *Zippo* sliding scale is perhaps best understood as a court’s effort through dicta to constrain the breadth of the *Inset* analysis, which threatened to inundate courts with disputes arising from Internet use. However . . . [a]pplication of the *Zippo* test might lead . . . to jurisdiction in almost every case involving the Internet.” *Id.* at 118.

¹¹⁷ See Tapio Puurunen, *The Judicial Jurisdiction of States over International Business-To-Consumer Electronic Commerce from the Perspective of Legal Certainty*, 8 U.C. DAVIS J. INT’L L. & POL’Y 133, 245–50 (2002). One commentator has opined that:

The American approach’s generality is also visible in both prongs of the jurisdictional test. In evaluating the contacts between the defendant and the forum within the minimum contacts test, American courts are at greater liberty than their EU counterparts to determine whether the contacts in any given case are sufficient for requiring the defendant to defend action in the forum. From the EU perspective the American approach’s concept of “reasonableness” is also problematic because it is value-based and amorphous.

Id. at 246–47.

¹¹⁸ E.g., *Mink v. AAAA Dev., L.L.C.*, 190 F.3d 333, 337 (5th Cir. 1999) (discussing in detail the nature of the defendant’s website to determine personal jurisdiction).

respective state or region. A *Zippo* regime will chill efforts to explore the interactive possibilities of a website no matter what efforts judges make in dicta to avoid stifling E-commerce.

If the utility of the *Zippo* test lies in its ability to promote certainty in the marginal cases, then it is mostly a failure. When interactive sites are at issue, inconsistent results in similar factual circumstances are likely, with the amorphous definition of interactivity proving the foil.¹¹⁹ Some have even argued that *Zippo* discourages E-commerce innovation by “discouraging the adoption of interactive websites.”¹²⁰ Critics of *Zippo* also point out that as the Internet has expanded and flourished, the *Zippo* test, with its emphasis on the level of interactivity inherent in the website, has become less relevant given that almost all commercial sites now are “at least highly interactive, if not integral to the marketing of the website owners.”¹²¹

Given that traditional jurisdiction concepts can handle the ends of the *Zippo* spectrum, many are calling for an outright rejection of the *Zippo* test by U.S. courts.¹²² This is good advice, particularly in light of the greater facility of a targeting approach in E-commerce cases.

C. The “Effects” Test—A Precursor to the Targeting Approach

U.S. courts, in accord with jurisdictional developments abroad,¹²³ have developed an alternative approach to determining jurisdiction in E-commerce—an “effects” test—based on the Supreme Court’s decision in

¹¹⁹ Compare *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1329–30 (E.D. Mo. 1996) (although decided before *Zippo*, looking to the same facts that test would consider and finding jurisdiction proper when a defendant’s website invited visitors to join a mailing list), with *Scherr v. Abrahams*, No. 97-C-5453, 1998 U.S. Dist. LEXIS 8531, at *1 (N.D. Ill. May 29, 1998) (defendant’s website inviting users to join a mailing list is not sufficient to confer personal jurisdiction).

¹²⁰ Geist, *supra* note 90, at 1378.

¹²¹ Denis T. Rice, *Problems in Running a Global Internet Business: Complying with the Laws of Other Countries*, 797 PLI/PAT 11, 52 (2004); see also RICHARD FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE* 143 (3d ed. 2001) (suggesting that *Zippo* may be only marginally useful given the lack of physical boundaries on the Internet).

¹²² See Geist, *supra* note 90, at 1380; see also Traynor & Pirri, *supra* note 89, at 113 (“U.S. courts should support the emerging trend away from the *Zippo* sliding scale.”).

¹²³ The effects theory is utilized by a number of other countries to justify the extraterritorial exercise of jurisdiction. See, e.g., Harold Hongju Koh, *International Business Transactions in U.S. Courts*, 261 RECUEIL DES COURS 1, 59 (1996). “According to commentators, the effects doctrine is now considered a valid basis of jurisdiction in countries ranging from Argentina, China, Cuba, Denmark, France, Germany, Italy, Japan, Mexico, Sweden and Switzerland.” *Id.*

Calder v. Jones.¹²⁴ In *Calder*, a California resident brought suit in California Superior Court against Florida residents who allegedly wrote libelous matter about her in a prominent national publication.¹²⁵ In holding that jurisdiction was proper, the Court found “the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California.”¹²⁶ In the Court’s view, jurisdiction was proper because of the “effects” the defendants’ conduct in Florida had in California.¹²⁷ Part of the Court’s rationale centered on the fact that the defendants were not guilty of “mere untargeted negligence,” but of “intentional . . . actions . . . expressly aimed at California.”¹²⁸

The first courts applying the “effects” test to Internet jurisdiction did so around the same time that *Zippo* was decided. In *Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc.*,¹²⁹ an Illinois federal district court relied on *Calder* to assert jurisdiction over a defendant based on trademark infringement through a website posting.¹³⁰ The defendant did not sell any products or services directly in Illinois but maintained an informational website that used the allegedly infringing marks.¹³¹ Nevertheless, relying on an “effects” rationale, the court held jurisdiction in Illinois was proper, finding that the harm alleged occurred, if at all, in the plaintiff’s forum state of Illinois.¹³² Similarly, in *EDIAS Software International, L.L.C. v. Basis International Ltd.*,¹³³ an Arizona federal district court, citing *Calder*,¹³⁴ found jurisdiction proper over the defendant company because it had emailed alleged defamatory material about the plaintiff to Arizona, causing harm in Arizona.¹³⁵

In applying this “effects” test to Internet cases, U.S. courts focus on the actual effects the website has in the forum state rather than trying to examine the characteristics of the website or web presence to determine the level of contact the site has with the forum state. On this level, the “effects” test rejects the Internet-tailored approach of *Zippo* and achieves more consistency.

¹²⁴ 465 U.S. 783 (1984).

¹²⁵ *Id.* at 784–86.

¹²⁶ *Id.* at 789.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ 46 U.S.P.Q.2d (BNA) 1375 (C.D. Ill. 1998).

¹³⁰ *Id.* at 1378.

¹³¹ *Id.* at 1376.

¹³² *Id.* at 1378.

¹³³ 947 F. Supp. 413 (D. Ariz. 1996).

¹³⁴ *Id.* at 418.

¹³⁵ *Id.* at 422.

However, courts have not been completely satisfied with the “effects” test when applied to Internet cases for one simple reason: while such a test works particularly well in the context of tortious injuries to individuals,¹³⁶ where intent or foreseeability can be more easily inferred and injury is localized, the test falters in many E-commerce cases involving corporations. Because determining where a larger, multi-forum corporation is “harmed” is a difficult prospect and because it is easier for courts to repeat the mistake of *Inset* and see the website as “affecting” all places in which it can be accessed, the “effects” test is not universally useful.¹³⁷

The maintenance of a point-of-sale commercial website that offers goods or services to the entire Internet community would always satisfy the “effects” test if some targeting approach were not utilized. In fact, if the “effects” test had initially been closely tailored to the language of *Calder*, it would never have been divorced from notions of intentional or targeted actions, as has happened in several courts, and the chances for improper exercise of jurisdiction under an “effects” approach would have been greatly reduced. However, courts that divorce the “effects” test from a targeting element would likely reach the same questionable conclusions reached in *Gutnick*, *iCraveTV*, and *Yahoo!*. Clearly, something more is required than a soft “effects” approach. Due to courts’ divergent views about what the “effects” test requires for a finding of personal jurisdiction to be proper, the acceptance of a targeting approach by the courts would not merely represent a more faithful reading of the *Calder* opinion but would also represent so fundamental a shift away from a soft “effects” test as to justify the change in nomenclature. In sum, “[u]sing the effects test to analyze personal jurisdiction via Internet activities does not appear to solve the inconsistent and haphazard results of the Internet cases.”¹³⁸

¹³⁶ See, e.g., *Zumbro, Inc. v. Cal. Natural Prods.*, 861 F. Supp. 773, 782 (D. Minn. 1994) (noting that the effects test “generally has been limited to intentional torts”). But for tortious injuries to corporations, the test poses considerable problems. See, e.g., *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 420 (9th Cir. 1997).

¹³⁷ Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601, 629 (2003) (suggesting that the “effects” test is well suited for defamation, trademark, and copyright cases).

¹³⁸ Exon, *supra* note 12, at 42.

III. THE EMERGING TARGETING APPROACH

A. *Early Movements Away from Zippo and the “Effects” Test*

For the reasons stated above, some U.S. courts, through a targeting requirement, have refined the “effects” test’s emphasis on the defendant’s foreseeability of suit in the forum state.¹³⁹ This section discusses the current application of targeting analysis by U.S. courts in domestic cases. The next section shows its facility in dealing with international cases.

One of the most critical decisions in the development of a targeting approach is also the decision that initially most questioned the utility of the *Zippo* and “effects” tests. In *Cybersell, Inc. v. Cybersell, Inc.*,¹⁴⁰ an Arizona corporation sought to establish that a Florida corporation had sufficient contacts with Arizona for the exercise of personal jurisdiction. The Florida corporation posted a minimally interactive website that allegedly infringed the trademark of the plaintiff.¹⁴¹ The U.S. Court of Appeals for the Ninth Circuit found that the minimally interactive site, without any other contact, was insufficient to find jurisdiction over the Florida corporation.¹⁴²

Citing *Zippo*,¹⁴³ the court rejected the level of interactivity of the website as the test but rather focused on whether there was the “something more” needed for the exercise of jurisdiction. The Ninth Circuit concluded that “something more” in the Internet context is deliberate, intentional (albeit electronic) activity directed by the defendant corporation towards the forum state.¹⁴⁴ The court found that the Florida corporation “entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona. The only message it received over the Internet from Arizona was from Cybersell AZ.”¹⁴⁵ The court did not find the “something more” needed for the proper exercise of jurisdiction.

¹³⁹ In reality, an “effects” test that maintains a targeting approach is what the *Calder* court had in mind. See *Calder v. Jones*, 465 U.S. 783, 789 (1984). As noted above, however, the marked departure by courts from *Calder* justifies labeling a “targeting” test as something different than the “effects” test that has been routinely applied.

¹⁴⁰ 130 F.3d 414 (9th Cir. 1997).

¹⁴¹ *Id.* at 415.

¹⁴² *Id.* at 418–20.

¹⁴³ *Id.* at 418.

¹⁴⁴ *Id.* Interestingly, the court did not cite *Asahi* for the “something more” proposition. See *id.*

¹⁴⁵ *Id.* at 419.

Turning to the “effects” test, the Ninth Circuit pointed out the test’s limited applicability in commercial contexts. The court noted that the “effects” test does not “apply with the same force” to a corporation as it does to an individual because a corporation “does not suffer harm in a particular geographic location in the same sense that an individual does.”¹⁴⁶ For the court, deliberate action, rather than the more problematic notions of interactivity and “effects,” is key to E-commerce jurisdictional development. As one scholar has noted, the targeting or “deliberate action requirement” of *Cybersell* “should apply irrespective of whether the defendant’s website is passive or highly interactive.”¹⁴⁷

Since *Cybersell* was decided, several courts have adopted a targeting approach in the E-commerce context. In *Millennium Enterprises, Inc. v. Millennium Music, L.P.*,¹⁴⁸ an Oregon district court refused to exercise jurisdiction over a South Carolina record store in a trademark infringement action because the defendant’s website was not aimed at consumers in Oregon.¹⁴⁹ The court raised the standard for finding jurisdiction over a commercial website when it held that the middle ground of the *Zippo* scale, where fact-finding is necessary to determine the level of commercial interactivity, requires “deliberate action” aimed at the forum state consisting of “transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state.”¹⁵⁰ In doing so, the court effectively rejected the *Zippo* approach because *Zippo* does not require deliberate action for a finding of personal jurisdiction.¹⁵¹ Pointing to erratic decisions in the middle of the *Zippo* scale, the court described post-*Zippo* case law as “inconsistent, irrational, and irreconcilable.”¹⁵² The court stated that this “deliberate action” was the “something more” spoken of by Justice O’Connor in *Asahi*.¹⁵³

¹⁴⁶ *Id.* at 420 (quoting *Core-Vent Corp. v. Nobel Indus. A.B.*, 11 F.3d 1482, 1486 (9th Cir. 1993)).

¹⁴⁷ Traynor & Pirri, *supra* note 89, at 119.

¹⁴⁸ 33 F. Supp. 2d 907 (D. Or. 1999).

¹⁴⁹ *Id.* at 924.

¹⁵⁰ *Id.* at 921.

¹⁵¹ *Id.* “[T]he middle interactive category of Internet contacts as described in *Zippo* needs further refinement to include the fundamental requirement of personal jurisdiction: ‘deliberate action’ within the forum state.” *Id.*

¹⁵² *Id.* at 916 (quoting Stravitz, *supra* note 12, at 939).

¹⁵³ *Id.* at 915.

Language similar to that in *Millennium Enterprises* can be found in *American Information Corp. v. American Infometrics, Inc.*,¹⁵⁴ with the *American Information* court ratcheting up the “targeting” language. There, the Maryland federal district court refused to exercise jurisdiction over a California ISP based on the ISP’s posting of a website that allegedly infringed the plaintiff’s trademarks.¹⁵⁵ The court was pointed in its assertion that the Due Process Clause in the Internet context requires targeting of the forum by the defendant: “A company’s sales activities focusing generally on customers located throughout the United States and Canada without focusing on and targeting the forum state do not yield personal jurisdiction.”¹⁵⁶ The court added that “a Web presence that permits no more than basic inquiries from [a state’s] customers, that has never yielded an actual inquiry from a [state’s] customer, and that does not target [a state] in any way” should not subject a defendant to personal jurisdiction in that state.¹⁵⁷

While most of the decisions embracing a targeting approach after *Cybersell* have emerged from district courts, the U.S. Court of Appeals for the Ninth Circuit has also indicated that it will continue to use a targeting approach in Internet jurisdiction cases.¹⁵⁸ In *Bancroft & Masters v. Augusta National, Inc.*, a California plaintiff appealed the decision of the district court to dismiss its declaratory judgment action due to lack of personal jurisdiction.¹⁵⁹ The district court dismissed the action, a dispute over the domain name “masters.com,” holding that the defendant did not have the systematic and continuous contacts with California to exercise jurisdiction.¹⁶⁰

The Ninth Circuit reversed the district court and, in the process, affirmed its adoption of a targeting approach for Internet jurisdictional disputes. Noting

¹⁵⁴ 139 F. Supp. 2d 696 (D. Md. 2001).

¹⁵⁵ *Id.* at 702.

¹⁵⁶ *Id.* at 700.

¹⁵⁷ *Id.*; see also *Impact Prods., Inc. v. Impact Prods., L.L.C.*, 341 F. Supp. 2d 1186, 1190 (D. Co. 2004) (declining to exercise jurisdiction when defendant had not expressly aimed any activities at the forum state).

¹⁵⁸ *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (refusing to exercise jurisdiction over defendant-owner of “Masters” trademark because no targeting of the plaintiff’s forum was found). “We now conclude that ‘something more’ is what the Supreme Court described as ‘express aiming’ at the forum state.” *Id.* Much of the groundwork for the *Bancroft* decision was laid in another Ninth Circuit decision, *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998). In *Panavision*, the Ninth Circuit had no trouble finding personal jurisdiction over the defendant when the defendant had purposefully registered the plaintiff’s trademarks in an effort to extort money from the California-based plaintiff. *Id.* at 1321–22.

¹⁵⁹ 223 F.3d at 1085.

¹⁶⁰ *Id.*

that the Supreme Court's decision in *Calder* greatly muddied the waters as to what "purposeful availment" means,¹⁶¹ the court concluded that the "something more" spoken of by Justice O'Connor in *Asahi* requires "express aiming at the forum state."¹⁶² Nominally relying on the *Calder* "effects" test, the court found that the defendant had targeted California by sending a letter to the plaintiff's business in California demanding that the plaintiff cease from using the "masters.com" website.¹⁶³ Interestingly, the *Bancroft* court's proper reliance on *Calder* proves that the "effects" test separated from a targeting element was not endorsed by *Calder*. The *Bancroft* decision proves this point by focusing on the language of the *Calder* decision, which stated that one element of a finding of purposeful availment requires "express aiming" at the forum state.¹⁶⁴ Courts in the Ninth Circuit have subsequently adopted the *Cybersell/Bancroft* approach.¹⁶⁵

At this point it is helpful to highlight the main differences between the targeting approach and the *Zippo* and soft "effects" approaches. Whereas courts have expressed concern over the applicability of an Internet-focused test like *Zippo* that largely ascends above a more general consideration of the sufficiency of the defendant's "minimum contacts" with the forum state,¹⁶⁶ a targeting approach, with its focus on whether a defendant *purposely availed* himself of a forum, is intrinsically traditional. Unlike the *Zippo* approach, "a targeting analysis [seeks] to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction."¹⁶⁷

The primary difference between a targeting-based approach and an "effects"-based approach lies in the intention of the defendant. Whereas an "effects" framework focuses on whether the defendant could have foreseen its

¹⁶¹ *Id.* at 1087.

¹⁶² *Id.*

¹⁶³ *Id.* at 1088.

¹⁶⁴ *Calder v. Jones*, 465 U.S. 783, 789 (1984). "[T]heir intentional, and allegedly tortious, actions were expressly aimed at California." *Id.*

¹⁶⁵ *Medinah Mining, Inc. v. Amunategui*, 237 F. Supp. 2d 1132, 1137 (D. Nev. 2002) (adopting a targeting element under the Ninth Circuit's "effects" test).

¹⁶⁶ *See Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 750 (E.D. Mich. 2000).

[T]his court observes that the need for a special Internet-focused test for "minimum contacts" has yet to be established. It seems to this court that the ultimate question can still as readily be answered by determining whether the defendant did, or did not, have sufficient "minimum contacts" in the forum state. The manner of establishing or maintaining those contacts, and the technological mechanisms used in so doing, are mere accessories to the central inquiry.

Id.

¹⁶⁷ Berman, *supra* note 10, at 418.

activities impacting a forum state, a targeting analysis requires that a defendant specifically aim its online activities at a forum to come under the jurisdiction of that state.¹⁶⁸ A targeting approach removes much of the uncertainty that accompanies the usually-applied soft “effects” approach. Thus, the emergence of a targeting emphasis in the E-commerce context represents a circling back to Justice O’Connor’s plurality opinion in *Asahi*. Concepts like “purposeful availment” and “stream of commerce” are refined in an Internet targeting analysis, not redefined.

Part of the facility of the targeting approach is the familiarity of U.S. judges with traditional concepts of jurisdiction. One would expect that the judiciary would prefer to begin with the “stuff” they know and then apply their powers of interpretation to forge a continuous path through a technologically challenging area. In fact, the U.S. Court of Appeals for the D.C. Circuit expressly said as much when it stated that it did not believe “that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction.”¹⁶⁹ Indeed, the initial attempt by the *Zippo* court to craft an Internet-specific test moved the courts off their innately organic and efficient process of jurisprudential development.¹⁷⁰ Given that the Supreme Court acknowledged many years ago in *Hanson* that it understood, at least partially, the implications that technological advancement has on jurisdiction,¹⁷¹ *Zippo* seems to lack faith in the ability of the Supreme Court and federal circuit courts to adapt pre-Internet principles to the Internet world. A targeting approach places the courts squarely back in the line leading from *Asahi*. This commitment to traditional jurisdictional principles proves most useful in the harder cases because it gives courts a solid conceptual basis—deliberate or intended action—from which to tackle sophisticated cases and produce consistent results.

¹⁶⁸ See Carole Aciman & Diane Vo-Verde, *Refining the Zippo Test: New Trends on Personal Jurisdiction for Internet Activities*, COMPUTER & INTERNET LAW., Jan. 2002, at 16, 19. One court has defined the differences between a targeting and “effects” based approach by delineating what the “effects” test typically lacks and needs to incorporate: (1) the defendant must direct electronic activity into the forum state; (2) intend to engage in business or other interactions in the forum state; and (3) engage in activity that created under the forum state’s law a potential cause of action with regard to a person in the forum state. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

¹⁶⁹ *GTE New Media Serv. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000).

¹⁷⁰ See generally TiTi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKELEY TECH. L.J. 519 (2004).

¹⁷¹ *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958).

One might question why a “narrower” view of stream-of-commerce theory like targeting is necessary for E-commerce given that the Supreme Court stated in *Burger King* that “purposeful availment” inherently means that defendants will not be haled into a forum solely as a result of “‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.”¹⁷² Others have raised this question.¹⁷³ Yet this is a particularly optimistic view given that, *in fact*, several courts have exercised jurisdiction in the Internet context over defendants based solely on attenuated and random contacts. *Inset’s* rationale, discussed above, is a glaring example.¹⁷⁴ A targeting approach is needed precisely because courts are unable to resist the urge to exercise jurisdiction in the Internet context simply because “the Internet is everywhere.”

A targeting framework also avoids many of the problems faced by competing tests in cross-border cases by retaining the guiding principles ingrained in American personal jurisdiction jurisprudence. The next section will discuss the successes of the targeting test in this context. If targeting has proven more consistent in the national context, it has proven doubly so in “international” cases in U.S. courts. This suggests that international adoption of a targeting approach modeled on *Asahi* might not only prove valuable but inevitable.

B. Targeting in the Cross-Border Context

For purposes of demonstrating the relative efficiency, consistency, and predictability of a targeting approach to Internet jurisdiction, those decisions by U.S. courts in cross-border contexts need to be considered. This section will look at those cases first. This section will also briefly consider what result

¹⁷² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 299 (1980)).

¹⁷³ See Christopher M. Porterfield, *Which Stream to Follow: Why the Eleventh Circuit Should Adopt a Broader Stream of Commerce Theory in Light of Growing E-Commerce Markets*, 20 GA. ST. U. L. REV. 539, 563 (2003).

Advocates of a more narrow stream of commerce theory, like the “additional conduct” theory, would argue that requiring a more direct connection between a defendant and the forum state “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” However, prior Supreme Court decisions already “ensure[] that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.”

Id. (quoting *Burger King*, 471 U.S. at 475).

¹⁷⁴ See *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 162 (1996).

a targeting approach would have dictated in the *Gutnick*, *iCraveTV*, and *Yahoo!* decisions discussed above.

In *Rio Properties, Inc. v. Rio International Interlink*,¹⁷⁵ the Ninth Circuit considered whether the “something more” required by *Asahi* was present in a trademark infringement case involving a defendant from Costa Rica. A Las Vegas casino brought the trademark infringement action in Nevada claiming that the Costa Rican gambling operator had violated its trademark rights by posting a passive website using the marks that could be accessed by Nevada residents.¹⁷⁶ The court found jurisdiction proper, but refused to do so solely on the existence of the passive website. Instead, the court found personal jurisdiction because the defendant had targeted Nevada by running radio and print ads in the Las Vegas area.¹⁷⁷ The court stated that “operating a passive website in conjunction with ‘something more’” suffices for the exercise of personal jurisdiction over a foreign defendant.¹⁷⁸

While *Rio Properties* is an easy case for finding the “something more” in the E-commerce context, the targeting framework is equally facile with less obvious decisions. In *America Online, Inc. v. Huang*,¹⁷⁹ a Virginia federal district court rejected personal jurisdiction over a foreign-based corporation because there was no evidence that the corporation had targeted Virginia. The plaintiff, America Online (“AOL”), brought suit against eAsia, Inc., alleging that the Asian company was violating its rights in the “ICQ” mark by using the mark on its websites. EAsia, a California corporation based out of Taiwan, registered the allegedly infringing domain names with NSI, a Virginia-based domain registration company.¹⁸⁰ EAsia provided Internet service primarily to Chinese-speaking Asians through web pages written exclusively in Chinese.¹⁸¹ AOL contended that the defendant’s registration of infringing domain names through servers and systems present in Virginia subjected the company to Virginia’s jurisdiction.¹⁸²

The district court rejected AOL’s contention that the defendant had purposefully directed its activities towards Virginia by registering the

¹⁷⁵ 284 F.3d 1007 (9th Cir. 2002).

¹⁷⁶ *Id.* at 1012–13.

¹⁷⁷ *Id.* at 1020.

¹⁷⁸ *Id.*

¹⁷⁹ 106 F. Supp. 2d 848 (E.D. Va. 2000).

¹⁸⁰ *Id.* at 852.

¹⁸¹ *Id.* at 850.

¹⁸² *Id.* at 850–51.

infringing domain names in Virginia.¹⁸³ The court found that the defendant's activities were "aimed primarily, if not exclusively, at Taiwan and other parts of Asia" and that there was "no evidence that eAsia purposefully directed its activities towards Virginia by offering the allegedly infringing domain names for sale to plaintiffs or anyone else."¹⁸⁴ A court employing either the *Zippo* or "effects" approaches here likely would have been led astray by the attenuated contact of domain registration by the defendant. The *America Online* court achieved the correct result because it focused on the intent of the defendant as expressed in its activities outside of the one "fortuitous" event connecting the defendant to the plaintiff's forum.

Under a targeting approach, the decisions in *iCraveTV* and *Yahoo!* would almost certainly have been different. In both cases, the defendant website owner had taken precautions to exclude users from outside the defendant's forum state. The French court in *Yahoo!*, applying a targeting analysis, would not have exercised jurisdiction over the American-based company for this reason. Looking to evidence of targeting or de-targeting, the website had a "terms of use" agreement specifically stating that the site was governed by U.S. law and that the site was intended for U.S. users governed by that law.¹⁸⁵ Also, the website only accepted U.S. currency and contained content written only in English.¹⁸⁶ Given these facts, it would have been impossible for the French court to have found that *Yahoo!* "aimed" its U.S. site at France. The result in *iCraveTV* would also have been different under a targeting approach. The several click-wrap agreements in place on the Canadian website, agreements specifically intended to exclude non-Canadian residents from the site,¹⁸⁷ would have precluded a finding by the U.S. district court that the defendant company purposefully directed its site at U.S. users.

Predicting the outcome of the *Gutnick* decision under a targeting approach is more challenging without knowing more about the "targeting" elements of

¹⁸³ *Id.* at 859.

¹⁸⁴ *Id.*; see also *Ty Inc. v. Clark*, No. 99-5532, 2000 U.S. Dist. LEXIS 383, at *2 (N.D. Ill. Jan. 14, 2000) (holding that defendant's interactive website is not sufficient for jurisdiction because the defendant specifically disallowed orders to be placed online); *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1298 (10th Cir. 1999) (holding that a bank's passive, informational website was not sufficient for the exercise of personal jurisdiction even when the bank also sent, faxes, mailings, and wire transfers to the forum state).

¹⁸⁵ *Ass'n Union des Etudiants Juifs de France v. Yahoo!, Inc.*, T.G.I. Paris, Nov. 20, 2000, ord. ref., J.C.P. 2000, Actu., 2219, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf>.

¹⁸⁶ *Id.*

¹⁸⁷ *Twentieth Century Fox Film Corp. v. iCraveTV*, 53 U.S.P.Q.2d (BNA) 1831, 1833-34 (W.D. Pa. 2000).

the Barron's website. Ultimately, if the Australian court applied a targeting approach, focusing on Dow Jones' deliberate activities toward Australia, the decision would turn on questions of fact about the advertising activities of Dow Jones, the subscription numbers for Australian users, and whether the website was tailored in any way through software to use in Australia.¹⁸⁸ Given that the Australian High Court, relying on a soft "effects" test, glossed over the actions of Dow Jones that perhaps suggested deliberate targeting of Australian consumers,¹⁸⁹ a remand for fact-finding would be necessary for proper application of a targeting approach. In an analogous case not involving a cross-border dispute, the U.S. Court of Appeals for the Fourth Circuit found the exercise of jurisdiction in Virginia over two Connecticut newspapers improper based on their publication of alleged defamatory material about a Virginia prison warden on their respective websites.¹⁹⁰ The court found dispositive the fact that the newspapers had targeted Connecticut users, not Virginia users.¹⁹¹

Hypothetical application of a targeting analysis to *Gutnick* reveals one deficiency in the targeting framework at this stage in its development: a relative dearth of factors for courts to look to in determining whether a defendant has targeted a forum. Development of such criteria will be necessary if the U.S. targeting framework is to be a guide to the international community.¹⁹²

¹⁸⁸ An example of such tailoring is a drop-down menu allowing for the user to select Australia as the user's location.

¹⁸⁹ The High Court seems to have assumed that failure to attempt geographic isolation equals targeting. *See generally* Dow Jones & Co., Inc. v. Gutnick No. BC200207411, 2002 AUST HIGHCT LEXIS 61 (Austl. Dec. 10, 2002).

¹⁹⁰ Young v. New Haven Advocate, 315 F.3d 256, 264 (4th Cir. 2002).

¹⁹¹ *Id.* at 263–64.

The articles reported on and encouraged a public debate in Connecticut about whether the transfer policy was sound or practical for that state and its citizens. Connecticut, not Virginia, was the focal point of the articles. . . . The facts in this case establish that the newspapers' websites, as well as the articles in question, were aimed at a Connecticut audience. The newspapers did not post materials on the Internet with the manifest intent of targeting Virginia readers.

Id.; *see also* Griffis v. Luban, 646 N.W.2d 527, 536 (Minn. 2002). "The mere fact that [the defendant, who posted allegedly defamatory statements about the plaintiff on the Internet] knew that [the plaintiff] resided and worked in Alabama is not sufficient to extend personal jurisdiction over [the defendant] in Alabama, because that knowledge does not demonstrate targeting of Alabama as the focal point of the . . . statements." *Id.*

¹⁹² Indeed, some scholars have pointed to other potential problems with a targeting framework that relate to the potential for economic and cultural isolationism, problems mentioned at the beginning of this Comment with regard to the current "checkerboard" jurisdictional landscape. *See* Geist, *supra* note 90, at 1405. Geist further states:

According to Michael Geist, a Canadian professor who has written extensively about E-commerce jurisdiction, the challenge is two-fold: the criteria “must be technology neutral so that the test remains relevant as technology develops” and the criteria “must be content neutral so that there is no apparent bias” in favor of any single group (such as sellers or consumers).¹⁹³ In response to this challenge, Geist suggests three criteria for courts to consider in determining the foreseeability of a defendant being haled into court based on his activities. The first criterion focuses on whether there is any click-wrap agreement or contract put in place by the defendant specifying which law should govern and which forum is favored for litigation.¹⁹⁴ The second criterion focuses on the Internet technologies utilized to either target or avoid a certain forum.¹⁹⁵ The third criterion focuses on the knowledge the defendant had or should have had about the geographic location of the online activity.¹⁹⁶

These criteria provide courts with general starting points for inquiry. One would expect that courts utilizing these criteria will at once expand them and refine them. Certainly thought should be given to more specific levels of inquiry, but the broader criteria seem to encompass those conceptual points that generally arise in E-commerce jurisdiction cases. Courts should dispose of *Zippo* and the softer “effects” tests and begin the process of developing these targeting criteria more fully, for the sake of giving American jurisprudence persuasive strength on the global scene. However, these courts should thoroughly develop the criteria to be applied under a targeting approach, for, as one commentator has noted, “without universally applicable standards for assessment of targeting in the online environment, a targeting test is likely to leave further uncertainty in its wake.”¹⁹⁷

Although a bordered Internet carries certain advantages, it is also subject to abuse because countries can use bordering technologies to keep foreign influences out and suppress free speech locally. Second, the targeting test might also result in less consumer choice since many sellers may stop selling to consumers in certain jurisdictions where risk analysis suggests that the benefits are not worth the potential legal risks.

Id. However, it is this author’s belief that a fleshed-out targeting approach will largely avoid the “consumer choice” problem and will not work harm to free speech given that this Comment calls for its adoption as an international standard, not just for the United States.

¹⁹³ Geist, *supra* note 90, at 1384–85.

¹⁹⁴ *Id.* at 1386.

¹⁹⁵ *Id.* at 1393.

¹⁹⁶ *Id.* at 1402.

¹⁹⁷ *Id.* at 1384.

C. *The Securities and Exchange Commission as an Early Adopter of Targeting Principles*

Perhaps U.S. judges should take a page from the U.S. Securities and Exchange Commission's (SEC) book. More than most U.S. regulatory bodies, the SEC has been confronted with the economic disjointedness and retreat from investment that accompanies widely divergent trading practices in different countries when those countries' markets begin to overlap.¹⁹⁸

The remarkable growth in U.S. investment in foreign securities has prompted the SEC to relax the application of the Securities and Exchange Acts' requirements to foreign issuers.¹⁹⁹ Pertinent to this Comment's discussion, the SEC, as part of its efforts to remove unnecessary barriers to domestic issuances by foreign companies, has promulgated a release stating the Commission's opinion as to when the use of the Internet by a foreign issuer will trigger SEC jurisdiction.²⁰⁰ The Commission generally adopted a targeting paradigm to determine when an offshore issue comes under the regulation of the Securities and Exchange Acts.²⁰¹ The SEC's approach to offshore offers and solicitations on the Internet is that "investor protection concerns are best addressed through the implementation by issuers and financial service providers of precautionary measures that are reasonably designed to ensure that offshore Internet offers *are not targeted* to persons in the United States or to U.S. persons."²⁰² The Commission stated in the release that it would consider the following factors in determining whether the United States and U.S. persons were de-targeted on the Internet: (1) whether the website includes a prominent disclaimer making it clear that the offer is directed only to countries other than the United States; (2) whether the website offeror implements procedures that are reasonably designed to guard against sales to U.S. persons in the offshore offering; and (3) whether, despite these de-targeting mechanisms, the website bears any indicia of being targeted at

¹⁹⁸ JAMES D. COX, ROBERT W. HILLMAN & DONALD C. LANGEVOORT, *SECURITIES REGULATION* 98 (4th ed. 2005). "In view of Section 5's overbreadth and the increasing importance of international securities offerings, the [SEC] has taken a series of interpretative and regulatory steps to lighten seriously the concerns over Section 5's application." *Id.*

¹⁹⁹ Purchases and sales by U.S. investors of foreign debt and equity securities totaled \$53.1 billion in 1980; by 2001, total investment in foreign debt and equity had increased to over \$5,000 billion. *Id.* at 96.

²⁰⁰ Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities Offshore, Securities Act Release No. 7516 (Mar. 23, 1998).

²⁰¹ *Id.*

²⁰² *Id.* (emphasis added).

U.S. persons.²⁰³ In the Commission's view, "if a U.S. person purchases securities . . . notwithstanding adequate procedures reasonably designed to prevent the purchase, we would not view the Internet offer after the fact as having been targeted at the United States."²⁰⁴

Clearly, the SEC's approach approximates the kind of targeting framework needed in Internet jurisdiction cases. The Commission's position on Internet offers by foreign issuers evidences sensitivity to the financial needs of the emerging global economy and a deeper understanding of the exigencies of the Internet context. The Commission also squarely situated itself in the line leading from *Asahi* by relying on targeting norms.

There are international hurdles to overcome for a targeting framework to enjoy wider success, however. In the next section, this Comment will discuss the tensions between American and European views of jurisdiction. The European Union's recent efforts in the area of E-commerce jurisdiction will briefly be considered to highlight the general differences from American jurisdictional ideas.

IV. EUROPEAN ATTEMPTS AT AN E-COMMERCE JURISDICTIONAL FRAMEWORK

A. *General Differences Between American and European Views of Jurisdiction*

A unified jurisdictional framework underpinned by a targeting approach will have to address and ameliorate the philosophical tensions that exist between American and European views of jurisdiction. The United States and Europe have fundamentally different philosophical approaches to jurisdiction. Whereas the American legal system embraces discretionary jurisprudence, European countries, and particularly civil law regimes, have always preferred more formal rules. U.S. jurisdictional tests like "minimum contacts" are eschewed in the broader European legal community as bowing to the good or bad feelings of the individual judges that decide such cases.²⁰⁵ If the European

²⁰³ *Id.*

²⁰⁴ *Id.* Additionally, the release suggests that an issuer would be put on notice that a purchaser was a U.S. person when the purchaser's payment was drawn on a U.S. bank or the purchaser provided a U.S. tax I.D. or social security card. *Id.*

²⁰⁵ Puurunen, *supra* note 117, at 245. Puurunen also notes:

The crucial difference between the Brussels Convention/EC Regulation, on the one hand, and the U.S. approach on the other hand, lies in the level of generality of the norms and in the way they

affinity for bright-line rules is born out of a desire for legal certainty and consistency, then a targeting approach seems to accommodate this desire without totally foreclosing the American propensity toward individualized justice. Such a “synthetic” approach to Internet jurisdiction, borrowing some of the European affinity for bright-line codification and U.S. affinity for discretionary allowances, is already being implemented in jurisdictional systems in Asian countries.²⁰⁶

U.S. and European courts also disagree about the expansion of general jurisdiction over corporate defendants to forums where the defendant has systematically or continuously done business. The European conventions concerning jurisdiction do not “recognize such theories as reasonableness, purposeful availment, stream of commerce, or doing business as a general connecting factor determining jurisdiction.”²⁰⁷ Instead, they “aspire to a framework that discourages opportunities for forum shopping at the transnational level.”²⁰⁸

The United States embraces many of the standards relating to “doing business” jurisdiction eschewed by European models. In fact, a defendant would be subject to general jurisdiction “in any place [in the United States] where it had extensive activities (‘doing business’ jurisdiction) and not just its place of incorporation/principal place of business” and would be amenable to “specific jurisdiction . . . where the contract negotiations occurred, where the

function. As a general matter, the former employs more specific, rigid, bright-line black-letter norms. It appears to be seeking to achieve what in the general jurisprudence of rules have been termed as the two great social virtues of formally reliable rules: the restraint of official arbitrariness and certainty. The latter has largely shifted to approaches and multifactor analyses that are more general in application—an approach which may not necessarily promote the two great virtues to the same extent as the former.

Id.

²⁰⁶ Akihiro Hironaka, *Jurisdictional Theory “Made in Japan”: Convergence of U.S. and Continental European Approaches*, 37 VAND. J. TRANSNAT’L L. 1317, 1349 (2004).

[T]he Japanese framework for deciding international jurisdiction combines the Continental European rule-based approach and the U.S. standard-based approach. The Japanese approach is similar to the Continental European approach in that courts are supposed to apply rules codified in a statute when determining jurisdictional issues. It is also similar to the U.S. approach in that courts may exercise discretion in evaluating relevant factors in the determination of “exceptional circumstances.”

Id.

²⁰⁷ Puurunen, *supra* note 117, at 247.

²⁰⁸ Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 328 (2002).

contract was performed, and perhaps even where the contract was entered into.”²⁰⁹ At odds here is the European preference for legal certainty and the American desire for fairness in litigation.²¹⁰ Perhaps there is no greater illustration of this difference than in the U.S. commitment to the doctrine of *forum non conveniens* and the European aversion to the doctrine.²¹¹

B. *The European Union and E-Commerce Jurisdiction*

While the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (“Brussels Convention”) dealt with issues of jurisdiction in the commercial context,²¹² it was apparent upon the arrival of E-commerce to Europe that the Brussels Convention was not suited to deal with the new questions that electronic transactions raised.²¹³ The problem of E-commerce was not as quickly felt in Europe, however, because E-commerce growth clearly lagged behind E-commerce growth in the United States due to doubts about the security of Internet transactions.²¹⁴ When the rushing tides of Internet business began to pound against the Brussels Convention, its deficiencies were quickly realized.²¹⁵

²⁰⁹ *Id.*

²¹⁰ Arthur T. von Mehren, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems*, 295 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 68 (2003) (discussing “ease of administration and predictability” and “litigational fairness” as two sets of basic jurisdictional policies).

²¹¹ Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT’L L.J. 467, 468 (2002) (pointing out that common law systems like the United States have traditionally embraced the doctrine of *forum non conveniens* while European civil law systems traditionally have not).

²¹² Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, *reprinted in* 8 I.L.M. 229 [hereinafter Brussels Convention].

²¹³ Michael Cordera, Note and Comment, *E-Consumer Protection: A Comparative Analysis of E.U. and U.S. Consumer Protection and the Internet*, 27 RUTGERS COMPUTER & TECH. L.J. 231, 241 (2001).

²¹⁴ See Victorya Hong, *‘Brussels I’ Angers EC Businesses*, INDUS. STANDARD, Dec. 1, 2000 (quoting Leonello Gabrici, a Commission spokesman, stating that a “lack of consumer confidence is the main thing holding up the development of e-commerce.”).

²¹⁵ Under the Brussels Convention, the plaintiff in a typical business-to-business dispute would sue in the “place of performance of the obligation in question” or where the transaction should have been completed, in the case of material or preemptive breach. The Brussels Convention treated business-to-consumer transactions in a much different way, however. Article 13 of the Brussels Convention governed E-commerce contracts until the Brussels Regulation was enacted. Article 13 provided that before the conclusion of the contract, the other party must have addressed a specific invitation to the consumer or advertised in the state in which the consumer is domiciled. Second, the consumer must have taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled. Article 14 gave the consumer a choice of jurisdictions within which to bring legal suits, allowing for suit in either the consumer’s forum state or in the defendant-business’s locale. These provisions, coupled with other provisions granting the consumer great discretion in

In 2000, the Council of the European Union issued a new regulation (“Brussels Regulation”)²¹⁶ aimed at unifying the law among E.U. countries concerning jurisdiction in civil and commercial matters. The European Union also intended, through the Brussels Regulation, to clear perceived obstacles to E-commerce growth under the Brussels Convention.²¹⁷ The Brussels Regulation is binding on all E.U. member states and took effect, with its amendments to the Brussels Convention, on March 1, 2002.²¹⁸

The Brussels Regulation did not attempt a complete overhaul of the Brussels Convention but rather introduced new rules concerning jurisdiction, some of which were certainly informed by E-commerce concerns.²¹⁹ While the Brussels Regulation does not explicitly state how it is to be applied in the E-commerce context, part of the impetus for initiating the work on the regulation was the need for a more coherent application to Internet consumption.²²⁰ Drafters considered the applicability of the Regulation to E-commerce closely throughout the drafting period.²²¹ The preference for legal certainty, logical consistency, and predictability of results that marked the older Brussels Convention continues to mark the Brussels Regulation.

Before its adoption, there was speculation as to whether the Brussels Regulation would employ a country-of-origin approach or a country-of-destination approach for consumer transactions. In an effort to bolster consumer confidence in E-commerce, the European Union adopted a country-of-destination approach concerning personal jurisdiction in the Brussels Regulation.²²² Arguably the most important change from the older Convention is the expansion of the nature and scope of the type of activity that can serve as

contracting in or out of jurisdiction-centered clauses, show the consumer-friendly nature of the Brussels Convention.

²¹⁶ Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels Regulation].

²¹⁷ Puurunen, *supra* note 117, at 169.

²¹⁸ Brussels Regulation, *supra* note 216, art. 1.

²¹⁹ Joakim S.T. Oren, *International Jurisdiction over Consumer Contracts in E-Europe*, 52 INT’L & COMP. L.Q. 665, 667 (2003) (noting that under the Brussels Regulation, “the existing provisions of the Brussels Convention have been maintained to a large degree”).

²²⁰ *Id.* at 670–72 (noting the intense discussions between businesses and consumer organizations about the application of the Brussels Regulation to E-commerce).

²²¹ *E.g.*, *Commission Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, § 6, COM (1999) 348 Final (July 14, 1999). As originally proposed, the Regulation stated that it applied specifically to “consumer contracts concluded via an interactive website accessible in the State of the consumer’s domicile.” *Id.* The language of the Regulation as adopted does not mention interactive websites, but the words “any means” certainly cover them.

²²² Brussels Regulation, *supra* note 216, art. 15, § 1(c).

a basis for personal jurisdiction over defendants in actions brought by consumers.²²³ This can be seen in the replacement of Articles 13 through 15 of the Brussels Convention with Articles 15 through 17 in the Regulation that confer jurisdiction in a greater number of circumstances.²²⁴

The added consumer provisions in the Brussels Regulation were designed to protect the presumed weaker party to the contract, the consumer, by strengthening the plaintiff's position in a lawsuit.²²⁵ Certainly, on their face this is true of the new provisions. The new general rule is that a consumer who is domiciled in an E.U. member state and who uses, anywhere in the world, an interactive website which is also accessible in the member state in which he is domiciled, can bring suit against the defendant website-owner in the consumer's state of domicile.²²⁶ As adopted, the Brussels Regulation essentially means that "enterprises that are domiciled in a EU Member State can be sued in any EU Member State where their website is accessible, irrespective of whether or not they 'focused' their online business on that Member State."²²⁷ This reflects the E.U. Council's belief that "if the website has an interactive nature, its mere accessibility in the EU Member State in which the consumer is domiciled is sufficient for asserting jurisdiction over the E-Contract."²²⁸ This view obviously comports with the *Zippo* test in U.S. jurisprudence.

The language of Article 15 leaves open the possibility that a targeting framework could be utilized under the Brussels Regulation without substantive change to the language of the Regulation itself. Article 15 provides that jurisdiction will be proper if

the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, *directs such activities* to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.²²⁹

²²³ Cordera, *supra* note 213, at 243.

²²⁴ Compare Brussels Convention, *supra* note 212, arts. 13-15, with Brussels Regulation, *supra* note 216, arts. 15-17.

²²⁵ Oren, *supra* note 219, at 670-71.

²²⁶ Debussere, *supra* note 12, at 361.

²²⁷ *Id.* at 361-62.

²²⁸ *Id.* at 365.

²²⁹ See Brussels Regulation, *supra* note 216, art. 15(1)(c) (emphasis added).

An example here is helpful to illustrate the Regulation's effect on E-commerce.²³⁰ Assume that a Belgian consumer accesses a Swedish seller's interactive website while staying in a hotel room in Paris and views the seller's French language offer. The offer is directed at the francophone market in the European Community. The consumer places an order while in Paris, but the item is received when the consumer is back home in Belgium. Article 15 of the Regulation applies here, and Article 16 provides for jurisdiction at the consumer's domicile when the seller "by any means directs such activities to that state" or to several states, among which is the state of the consumer's domicile. Here, the Swedish seller directed his activities to the francophone community, evidenced by the French language advertisement. Gone is the Brussels Convention's requirement from Article 13 that the seller have directed his activities to the specific consumer and that the consumer acted in his home state to conclude the contract. In this situation, the Belgian consumer may sue in Belgium under the Regulation, whereas the Convention would not have permitted suit in Belgium.

The European Parliament considered the import of the new consumer contract provisions excessive and proposed that the Regulation be amended to include more explicit targeting language. Of particular note is the European Parliament's recommended amendment to Article 15 of the Regulation, which would have added the following paragraph:

The expression "directing such activities" shall be taken to mean that the trader must have purposefully directed his activity in a substantial way to that other Member State or to several countries including that Member State. In determining whether a trader has directed his activities in such a way, the courts shall have regard to all circumstances of the case, including any attempts by the trader to ring-fence his trading operation against transactions with consumers domiciled in particular Member States.²³¹

This proposed amendment would have brought the Brussels Regulation very close to the "purposeful availment" standard of U.S. personal jurisdiction jurisprudence. Indeed, in rejecting the proposed amendment, the European Commission, supported by the E.U. Council, affirmed the general European disdain for American "general business" jurisdiction:

²³⁰ The example used is taken from PETER HAY, RUSSELL J. WENTRAUB & PATRICK J. BORCHERS, *CONFLICT OF LAWS: CASES AND MATERIALS* 1083 (12th ed. 2004).

²³¹ Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (C 146) 98.

Parliament proposes a new paragraph to define the concept of activities directed towards one or more Member States, and takes as one of its assessment criteria for the existence of such an activity any attempt by an operator to confine its business to transactions with consumers domiciled in certain Member States.

The Commission cannot accept this amendment, which runs counter to the philosophy of the provision. The definition is based on the essentially American concept of business activity as a general connecting factor determining jurisdiction, whereas that concept is quite foreign to the approach taken by the Regulation. Moreover the existence of a consumer dispute requiring court action presupposes a consumer contract. Yet the very existence of such a contract would seem to be a clear indication that the supplier of the goods or services has directed his activities towards the state where the consumer is domiciled. Lastly, this definition is not desirable as it would generate fresh fragmentation of the market within the European Community.²³²

There are those who question whether the Brussels Regulation is not already bound to bring greater E-commerce market segmentation in the European Union because of uncertainty arising from the mixed signals that Article 15 and its “directed” language sends.²³³ Many have criticized the new Brussels Regulation because Article 15 is indefinite. Coupled with other ambiguous terms in the Regulation, the article leaves open the possibility that a court could find “personal jurisdiction over defendants in consumer transactions that are not concluded via the Internet but that nevertheless are related to and fall within the scope of the foreign defendant’s website.”²³⁴ Ultimately, rather than increasing certainty and predictability in the area of E-commerce, the Brussels Regulation likely will lead to the European Court of

²³² Amended Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM(2000)689 final at 5–6; *see also* Letter from European Council General Secretariat to Coreper, European Council, Subject: Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I) (Dec. 14, 2000).

In this context, the Council and the Commission stress that the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.

Letter from European Council General Secretariat, *supra*.

²³³ Debussere, *supra* note 12, at 360; *see also* Cordera, *supra* note 213, at 246–51.

²³⁴ Rice, *supra* note 121, at 34.

Justice having to engage in the kind of standard-based analysis Europeans have tried to avoid.²³⁵

The reasoning of the European Commission in the above-quoted response to the European Parliament's proposed amendment to Article 15 is logically flawed. The Commission contends that the very existence of a contract is a "clear indication that the supplier of the goods or services has directed his activities towards the state."²³⁶ If "directing to" is necessary for the existence of a consumer contract under Article 15, then the existence of a consumer contract cannot be proof that the "directing to" condition is met. Scholars critical of the Commission's position have pointed out the circularity of the Commission's reasoning.²³⁷ This harkens back to the flawed rationale of early U.S. cases, where jurisdiction was found just because a defendant's website could be accessed in a forum state. The tautological problems with drawing the inference that the defendant directed his or her activity to any place his website can be accessed are self-evident. This problem could be remedied, however, simply by confining the definition of "directed" activity in Article 15 to activity that evidences deliberate action on the part of the defendant toward a forum.

With strong criticism of the Brussels Regulation by E.U. business organizations starting even before it was enacted,²³⁸ the European Parliament's proposal to add specific targeting language to the Brussels Regulation may take on greater significance as the E.U. business community continues its criticism of the Regulation. Regardless of the current reluctance of the Council to accept an "American" concept of personal jurisdiction, the Parliament's recommendation is proof that the European community, though starting later than the United States in addressing E-commerce in the jurisdictional context, is far enough along in its consideration of the problem to recognize and discuss the utility of a targeting framework.

²³⁵ See Debussere, *supra* note 12, at 360.

²³⁶ Ammended Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, *supra* note 232, at E/243.

²³⁷ See Debussere, *supra* note 12, at 360.

²³⁸ See, e.g., Position Paper, Federation of European Direct Marketing, Applicable Law and Jurisdiction in Electronic Commerce (Nov. 3, 1999), www.fedma.org/img/db/Position_paper_Brussels_convention.pdf (stating in commentary predating the Brussels Regulation: "FEDMA therefore believes that the criteria imposed by both the Brussels Convention and the Draft Regulation constitute an obstacle to the free movement of services which is not proportionate to the objectives to be achieved.").

Preemptive criticism of the Brussels Regulation informed what eventually became the E.U. E-Commerce Directive.²³⁹ The E-Commerce Directive, complementing the Brussels Regulation, advocates a “country-of-origin” rule for determining which country’s law to apply in litigation. Under the E-Commerce Directive, companies located within any of the E.U. member states are subject to the law of the member state in which they are established for all cases concerning E-commerce or other commercial Internet activity.²⁴⁰ Yet, the problem still remains that E.U. businesses will not be able to afford to litigate whirlwind disputes in various member states of the Union, *even if they are given the “benefit” of having their forum state’s law applied*. The E-Commerce Directive results in granting only those companies that can afford to defend suits in foreign courts the benefit of forum law. The point is this: favorable choice-of-law provisions cannot make up for jurisdictional law deficiencies, especially when a major jurisdictional concern is the financial inability of young E-commerce businesses to defend suits in foreign courts.

The Hague Convention, mentioned above, represents an attempt to address these jurisdictional problems in the international community. While the Convention looks as if it may never be enacted given the strong disagreements between the United States and European countries over its structure, it at least provides some theoretical guidance as to how an international jurisdictional convention could effectively incorporate targeting concepts.

C. The Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

The work of the Hague Conference represents a recent—but almost certainly failed—attempt to unify international jurisdictional law.²⁴¹ The Hague Conference has produced several Hague Conventions—multilateral treaties that address numerous areas of substantive and procedural law in an explicit attempt to produce uniform application of the law among the signatory

²³⁹ Council Directive 2000/31, Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 [hereinafter E-Commerce Directive].

²⁴⁰ *Id.* at 2–9.

²⁴¹ See Hague Conference Special Commission, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Aug. 11, 2000), <http://www.hcch.net/upload/wop/jdgmpl1.pdf> [hereinafter Hague Convention]; see also Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 110–11 (1999) (proposing that the draft Hague Convention could work efficiently on a global scale in the near future).

countries.²⁴² Several of the Conventions are not yet complete. The Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (“Hague Convention”) is one such convention still undergoing revision and discussion.²⁴³ One of the purposes of the Hague Convention is to provide for the recognition of judgments delivered in one signatory country by the courts of another signatory country.²⁴⁴ As a preliminary draft, the Convention has been constantly revised and discussed.²⁴⁵ Those working on the Convention agree that it should be informed by E-commerce concerns as fully as possible.²⁴⁶

However, at this point there is much opposition to the Hague Convention, particularly from E.U. countries, and this opposition will not subside without significant changes to certain provisions in the Convention.²⁴⁷ E.U. countries have argued strongly for changes to Article 37 of the Hague Convention, the article dealing with the interrelationship of the Draft Convention with other conventions already in force.²⁴⁸ Article 37 states that the Convention prevails

²⁴² See Hague Conference, Vision, Mission, Strengths, & Values, http://hcch.e-vision.nl/index_en.php?act=text.display&tid=27 (last visited Feb. 16, 2006). For a list of signatories to the different Hague Conventions, see Hague Conference, Member States, http://hcch.e-vision.nl/index_en.php?act=states.listing (last visited Feb. 22, 2005).

²⁴³ For the status of all Hague Conventions, see Hague Conference, Overall Chart of Signatures and Ratifications of the Hague Conventions, http://hcch.e-vision.nl/upload/statmtrx_e.pdf (last visited Feb. 27, 2005).

²⁴⁴ Hague Convention, *supra* note 241, art. 2.

²⁴⁵ For the most recent official “working text,” see Hague Conference, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, Interim Text, http://www.cptech.org/ecom/jurisdiction/Interim_text.rtf (last visited Feb. 27, 2005) [hereinafter Interim Text].

²⁴⁶ See, e.g., CATHERINE KESSEDIAN, ELECTRONIC COMMERCE AND INTERNATIONAL JURISDICTION: SUMMARY OF DISCUSSIONS 11 (2000), available at <http://www.cptech.org/ecom/hague/ottawa2000sum.pdf> (“[I]t is important to note that at no time was it suggested, during the discussions in the Ottawa working group, that electronic commerce should be excluded from the Hague Convention on jurisdiction and foreign judgments. On the contrary, many experts said everything possible should be done to adapt the Convention to the needs of electronic commerce. In this respect, the point was made, as it has been in all the meetings in which we have been able to participate since then, that what electronic commerce needs is certainty and predictability.”)

²⁴⁷ Berman, *supra* note 10, at 395.

The Hague Convention has been beset by similar difficulties. The treaty got its start in 1992, when the United States approached the other countries that belong to the Hague Conference on Private International Law and suggested that the conference attempt to harmonize international rules for enforcement of judgments across borders. Almost ten years later, that goal continues to elude convention delegates, largely because of a lack of consensus about adjudicatory jurisdiction generally, and about jurisdiction over online commercial transactions in particular.

Id.

²⁴⁸ See Hague Convention, *supra* note 241, art. 37.

over other instruments.²⁴⁹ E.U. member states argue that the Brussels and Lugano Conventions should take precedence over the Hague Convention in all E.U. states.²⁵⁰ The disagreements are now so “entrenched”²⁵¹ that the primary agreements reached up till now are in jeopardy as informal working committees are currently attempting to revise the draft convention. These committees have spawned several conferences specifically dedicated to discussing E-commerce jurisdiction problems.²⁵²

The United States particularly will be disappointed if the Hague Convention is forever stalled. The United States has a heightened interest in negotiating a worldwide convention and jurisdictional framework for E-commerce. The United States is not a party to any bilateral judgments conventions. As a result, there is some reluctance to enforcing U.S. judgments abroad,²⁵³ whereas the United States is generally liberal in enforcing foreign judgments.²⁵⁴ Thus, one of the motivating factors for the European Union and other European countries to enter into a jurisdictional convention with the United States would be to obtain from the United States, in return for enforcement of U.S. judgments, some restraint by U.S. courts from so liberally enforcing the judgments of other countries.²⁵⁵

²⁴⁹ *Id.*

²⁵⁰ Bruno Zeller, *The Development of Uniform Laws—A Historical Perspective*, 14 PACE INT’L L. REV. 163, 171–72 (2002).

²⁵¹ Berman, *supra* note 10, at 395.

²⁵² For a sampling of the conferences recently held, see Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=progress.listing&cat=9 (last visited Oct. 23, 2005).

²⁵³ This is the general perception, though it is slightly exaggerated. Recent International Agreement, *Hague Conference Approves Uniform Rules of Enforcement for International Forum Selection Clauses—Convention on Choice of Court Agreements*, 119 HARV. L. REV. 931, 938 n.9 (2005); see also Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT’L L. 111, 114 (1998) (“There may be some American judgment creditors with horror stories to tell about their inability to collect abroad on a domestic judgment; but there does not seem to be an army of them clamoring for greater comity.”). But see Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away To Get It?*, 26 BROOK. J. INT’L L. 167, 170–71 (1998) (describing the need for empirical research to determine how frequently foreign courts enforce U.S. judgments).

²⁵⁴ See Association of the Bar of the City of New York, Committee on Foreign and Comparative Law, Survey on Foreign Recognition of U.S. Money Judgments (July 31, 2001), http://www.brownwelsh.com/Archive/ABCNY_Study_Enforcing_Judgments.pdf.

²⁵⁵ Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 635–638 (2000). The U.S. eagerness to put the Hague Convention into effect should not be read to mean that the Convention perfectly reflects existing American jurisdictional principles. In fact, the Hague Convention would greatly curtail the American doctrine of *forum non conveniens* and would almost completely prohibit “general doing business” jurisdiction. In this regard, the proposed Convention clearly adopts the European preference for predictability of venue and assumes that forum-selection clauses and arbitration clauses do not attain the level of certainty needed to anchor E-commerce activity. However, the “leaner” *forum non conveniens* language is

The most recent version of the Hague Convention largely tracks the language of the Brussels Regulation, making it fair to characterize the Convention as taking a country-of-destination approach to jurisdiction.²⁵⁶ Article 7 of the Hague Convention provides the following:

1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if

a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and

b) the consumer has taken the steps necessary for the conclusion of the contract in that State.²⁵⁷

Clearly, this provision, like the analogous provision in the Brussels Regulation, leaves ample room for the adoption of a targeting framework in the context of consumer contracts.²⁵⁸ The Hague Conference has thus become a battleground for American and European jurisdictional ideas.²⁵⁹ What makes the Hague Convention different from the Brussels Regulations is the generally favorable disposition of the drafters and negotiators to a targeting approach.²⁶⁰ One provision added to an interim Convention text illustrates this openness: “[A]ctivity by the business shall not be regarded as being directed to a State if the business demonstrates that it took reasonable steps to avoid concluding

still in the proposed Convention, which suggests that the drafters are sensitive to American ideas of jurisdictional reasonableness.

²⁵⁶ Michael Traynor, *An Introductory Framework for Analyzing the Proposed Hague Convention on Jurisdiction and Foreign Judgment in Civil and Commercial Matters: U.S. and European Perspectives*, 6 ANN. SURV. INT’L & COMP. L. 1, 6–7 (2000).

²⁵⁷ Hague Convention, *supra* note 241, art. 7.

²⁵⁸ Compare Brussels Regulation, *supra* note 216, art. 15, with Hague Convention, *supra* note 241, art. 7.

²⁵⁹ See Jean Eaglesham & Patti Waldmeir, *Laws Unto Themselves*, FIN. TIMES (London), July 9, 2001, at 22 (reporting that the June 2001 Hague meetings resulted in little accord because of “a fundamental difference of approach between the US and the EU”); see also Anandashankar Mazumdar, *New Hague Draft Reflects Influence of Electronic Commerce Interests on Process*, 6 Elec. Commerce & L. Rep. (BNA) 830 (2001).

²⁶⁰ See KESSEDIAN, *supra* note 246, at 7.

Another idea has also been put forward: to include in the rule of conflicts of jurisdiction the concept of a “target”. If the enterprise has specifically targeted consumers in a particular country, it would be consistent to decide that the courts of that country have jurisdiction for consumers residing on its territory. . . . [T]his [test] is not unanimously endorsed as yet.

Id.

contracts with consumers habitually resident in that State.”²⁶¹ This provision, if adopted, would embrace the kinds of precautions iCraveTV took in order to exclude U.S. users from its website.²⁶² Drafters at the Hague Conference meetings, though admitting that a targeting approach “is not without its problems,”²⁶³ acknowledge that a targeting approach may best inform the needs of E-commerce.

The Hague Convention may never enter into effect. Nevertheless, the Convention proves the point that targeting analysis has made its way from *Asahi* to the world stage. The discussions surrounding the Convention should prove useful to the formulation of any future international jurisdictional convention. Later efforts to enact an international jurisdictional regime will almost certainly contemplate the targeting concepts considered by the Hague Conference.

The next section will briefly discuss the ALI’s proposed Recognition and Enforcement of Foreign Judgments federal statute, an effort to unify U.S. judicial recognition and enforcement of foreign judgments. The proposed statute is an attempt to remedy one of the core “defects” of the Hague Convention in the European community’s mind.

V. CLEARING A PATH FOR INTERNATIONAL MODELING OF *ASAHI*: THE AMERICAN LAW INSTITUTE’S PROPOSED RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS STATUTE

As noted above, hope is waning that the Hague Convention will ever be enacted. Much of the American-European conflict over enactment of the Draft Convention springs from the European agitation at U.S. courts’ liberality in enforcing foreign judgments. This liberality seems to be at least partly driven by lack of statutory guidance on the issue of recognition and enforcement of foreign judgments.

²⁶¹ Hague Conference Permanent Bureau, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, Interim Text 7, http://www.cptech.org/ecom/jurisdiction/Interim_text.rtf (last visited Feb. 27, 2005).

²⁶² *Twentieth Century Fox Film Corp. v. iCraveTV*, 53 U.S.P.Q.2d (BNA) 1831, 1833–34 (W.D. Pa. 2000).

²⁶³ Avril D. Haines, Hague Conference, *The Impact of the Internet on the Judgments Project: Thoughts for the Future*, Apr. 2002, <http://www.cptech.org/ecom/hague/hague17feb2002-ah-internet.rtf>.

Recognizing that “it is unlikely that the delegates to the Hague Conference would reach agreement on a comprehensive Convention,”²⁶⁴ the ALI has continued from the point at which the Hague Conference stalled, and this effort has culminated in a proposed federal statute on the Recognition and Enforcement of Foreign Judgments (“Recognition Statute”). The ALI’s more specific goal in proposing the Recognition Statute is to make recognition and enforcement of foreign judgments uniform throughout the United States.²⁶⁵ Such a statute would clear some of the hurdles to achieving a global jurisdictional convention by alleviating much European concern with the manner in which U.S. courts have handled foreign judgments up to now.

While much time could be spent parsing the numerous provisions of the Recognition Statute, this article will briefly focus on the Recognition Statute’s handling of the kind of conflicts evidenced in the French and American *Yahoo!* decisions discussed above—public policy conflicts.

The ALI notes that “[t]he appropriate scope for the public-policy exception has given rise to sharp debate,”²⁶⁶ particularly in light of recent U.S. court decisions.²⁶⁷ Currently, U.S. recognition and enforcement of judgments is left to the states in which the actions are brought. As a result, many of the public policy concerns that stalled the Hague Convention “are those implicating the U.S.—either as the forum where the judgment was initially handed down or as the forum in which a plaintiff seeks recognition.”²⁶⁸ This is troublesome for many European countries because U.S. courts unilaterally enforce many foreign judgments.

The ALI seeks to assuage this tension by making a foreign judgment “uniformly unenforceable or nonenforceable in every state of the Union.”²⁶⁹ Thus, the proposed statute would avoid the outcome in *Jaffe v. Snow*, in which a Florida court denied enforcement to an Ontario judgment despite repeated

²⁶⁴ AMERICAN LAW INSTITUTE, INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT xi (2d tentative draft, Apr. 13, 2004) (subsequently titled AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (proposed final draft, Apr. 11, 2005)).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 67.

²⁶⁷ *See, e.g.*, *Telnikoff v. Matusевич*, 702 A.2d 230 (Md. 1997), *aff’d*, No. 95-7138, 1998 U.S. App. LEXIS 10628, at *2 (D.C. Cir. May 5, 1998) (refusing to enforce British libel judgment on the grounds that enforcement would violate the First and Fourteenth Amendments and would be repugnant to Maryland public policy).

²⁶⁸ Lindsay Loudon Vest, Comment, *Cross-Border Judgments and the Public Policy Exception: Solving the Foreign Judgment Quandary by Way of Tribal Courts*, 153 U. PA. L. REV. 797, 800 (2005).

²⁶⁹ *Id.* at 62.

attempts by the U.S. Secretary of State to convince the Florida court to recognize the judgment.²⁷⁰

Actualized uniformity in recognition and enforcement of foreign judgments in the United States would conceivably lessen the European apprehension to negotiating the more germane question to this Comment—what approach to adopt internationally with regard to personal jurisdiction. With a unifying statute in place, no longer would European countries be able to balk at negotiations on the basis of the U.S.'s Wild West-like liberality in enforcement of foreign judgments.²⁷¹

The ALI's approach, as embodied in the proposed statute, hopes to slowly but surely relieve the tensions between Europe and the United States and foster globalization of commerce, which would of necessity require the reconsideration of a Hague-type approach to personal jurisdiction. In this sense, one can view the ALI's proposal as attempting to ameliorate a problem that pestered the Hague Conference from its earliest days—disdain for supposed American judicial arrogance in the realm of recognition and enforcement of judgments.

CONCLUSION

Few would question the need for global minimum standards for the exercise of jurisdiction in the E-commerce context. Given the push by large, tightly regulated industries for freedom to self-govern in Internet matters and the often antagonistic jurisdictional positions taken by the United States and Europe, there is pressing concern in the global market that the flow of goods among countries through electronic channels could slow because of the legitimate fears of litigation-averse companies.

²⁷⁰ *Jaffe v. Snow*, 610 So. 2d 482 (Fla. Dist. Ct. App. 1992), *review denied*, 621 So. 2d 432 (Fla. 1993), *cert. denied*, 512 U.S. 1227 (1994).

²⁷¹ For a good discussion of the merits of a unifying statute in this area, see Susan L. Stevens, Note, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 28 HASTINGS INT'L & COMP. L. REV. 115, 115 (2002).

While the United States has been generous in its recognition and enforcement of foreign judgments, many foreign countries have been unwilling to honor U.S. judgments. Such disparity is due in part to the opaque nature of the United States' foreign judgment recognition and enforcement system and in part to the tendency of U.S. courts to unilaterally recognize and enforce foreign judgments.

Id.

The targeting approach currently evolving in U.S. courts could alleviate much of this concern. In *Asahi*, Justice O'Connor expressed her concerns about the due process implications of adopting a broad stream-of-commerce approach that did not require "something more than that the defendant was aware of its product's entry into the forum State through the stream of commerce."²⁷² It is for this reason that the other approaches to Internet jurisdiction explored by U.S. courts are deficient. Without a targeting element, these tests hold up foreseeability as the dispositive factor in determining whether a defendant can be haled into a forum without violating the Constitution. The trouble is that foreseeability is an easy thing to find when the nature of the Internet makes it virtually impossible to control the flow of information to any and every forum on the planet. Foreseeability without the "something more" of targeting strikes a blow at the innovative hand of business because it forces companies doing business on the Internet into a defensive posture. Instead of strategizing about improving their E-commerce offerings, businesses are forced to defend in potentially crippling litigation around the world.

For businesses engaged in E-commerce, widespread adoption of a targeting approach would alleviate much of the opportunity for unreasonable litigation because business owners could limit the geographic areas they target for business, regardless of whether they are technically "successful" at keeping users from certain locales off their site. For the typical Internet plaintiff, such a targeting requirement would spell the end of lawsuits in the plaintiff's forum state when all that was accessed in the state was a website not *intending* to do business in that state. Such a result would be encouraging to E-commerce innovation and expansion.

Given the criticisms leveled against the E.U.'s expansive country-of-destination approach under the Brussels Regulation (particularly that such an approach discourages E-commerce innovation and exploitation), the European Union may be open to "outside" suggestions concerning the future of E-commerce regulation. While the European Commission's rejection of the European Parliament's proposed amendments to the Brussels Regulation suggests a certain jurisdictional rigidity remains, one can see that the European Union understands the need for a more robust jurisdictional framework by its attempt to ameliorate some of the problems inherent in its bright-line, country-of-destination approach through the E-Commerce Directive.

²⁷² *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 111 (1987).

The adoption by the European Union of an *Asahi*-like targeting approach could prove to bridge the gap between the European and American views of jurisdiction—at least in the E-commerce context—and could provide a framework which could facilitate American and E.U. participation in a unified international jurisdictional system. If a targeting approach is crafted with enough specificity, then it may bear enough resemblance to a bright-line standard so as to assuage European concern with a sleight of hand. As for the United States, international adoption of a jurisdictional standard largely modeled on the touchstone of its domestic law would encourage U.S. courts to widen their field of vision and think of the international economic community when crafting decisions.

Perhaps, with some revision, a convention similar to the Hague Convention can serve this function. European countries, although reticent to sign the Hague Convention, may enter another convention if the United States enacts a foreign recognition and enforcement statute similar to the one proposed by the ALI. Mounting proof of the effectiveness of the targeting approach in the United States may prove key, and for this reason courts should be quick to abandon both *Zippo* and the soft “effects” test and focus their efforts on sharpening the targeting approach.

In sum, it may take considerable negotiation and compromise between the United States and Europe, but ultimately the international adoption of a targeting framework would prove most effective in the E-commerce context, not only for its economic appeal, but also for its ability to ameliorate high-level tensions between American and European views of jurisdiction.

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