

## Minimum Contacts in Cyberspace: The Classic Jurisdiction Analysis in a New Setting

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### I. INTRODUCTION

Because no special law yet exists to address jurisdiction issues on the Internet, courts have been forced to apply traditional analyses of jurisdiction to cases in this new environment. Our traditional notions of jurisdiction have made a relatively smooth transition into cyberspace. Historically, jurisdictional requirements have centered on the locus and the activity of the parties as a means of determining which state's law to apply.<sup>1</sup> With the advent of the Internet and the new frontier of cyberspace, established ideas about where and how interactions take place must be re-considered in this unconventional, on-line environment. These sorts of issues affect a court's jurisdiction over parties interacting in cyberspace.

Surprisingly, our conventional notions of jurisdiction have adapted well to this new cyber-environment. This is illustrated by the report of the American Bar Association, which extends support to the minimum contacts analysis to determine jurisdiction over on-line parties.<sup>2</sup> Cyberspace has expanded the arena for interactions of all sorts,<sup>3</sup> and has provided another forum in which parties can reach out to each other from different locations, and possibly create the minimum contacts necessary for personal jurisdiction.<sup>4</sup> Traditional principles of jurisdiction are adaptable to cyberspace because they consider the

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1. See RICHARD D. FREER & WENDY COLLINS PERDUE, *CIVIL PROCEDURE, CASES, MATERIALS AND QUESTIONS* 70-71 (2d ed. 1997). The place of litigation is significant for several reasons. *Id.* at 70. First, parties want to avoid inconvenience. *Id.* A trial that occurs away from the resident state can bring up issues of out-of-state witnesses, documents, and attorneys. *Id.* Traveling to and maintaining a presence in a different state can be very costly and time-consuming. *Id.* at 71. Second, litigants might be concerned about the bias of a judge or jury to their own party. *Id.* Third, and most common, is the concern with which state's law applies to the suit. *Id.* The forum state decides which state's law will apply, and thus, the choice of forum becomes a very significant question. *Id.*

2. See AMERICAN BAR ASS'N, *ACHIEVING LEGAL AND BUSINESS ORDER IN CYBERSPACE* 29-30 (2000).

3. Donnie L. Kidd, Jr. & William H. Daughtrey, Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 RUTGERS COMPUTER & TECH L.J. 215 (2000). "The Internet provides four principal processes by which parties may enter an agreement: (1) e-mail; (2) listserv and chat services, (3) World Wide Web interfaces, and (4) electronic data interchange (EDI)." *Id.*

4. In *Int'l Shoe v. Washington*, 326 U.S. 310, 319-320 (1945), the Supreme Court held that a state may exercise personal jurisdiction over a defendant if he has sufficient minimum contacts with the state. The test is three-fold: (1) the defendant must have sufficient minimum contacts with the forum state; (2) the suit against the defendant must arise out of those contacts; and (3) the exercise of jurisdiction must be reasonable. *Id.* at 319-320. In cases involving corporate defendants, minimum contacts have been found in continuous but limited business relationships. In such a case, jurisdiction is proper only if the lawsuit arises out of the defendant's minimum contacts with the state.

physical location of the parties and the conduct they direct at the forum state.<sup>5</sup> These factors remain crucial to our current analysis of jurisdiction in cyberspace.<sup>6</sup>

Individuals and corporations continue to exist in real space, and continue to do business from one state, while targeting other states. We should continue to use the physical status of the parties as a starting point for jurisdictional analysis. This approach makes sense, because the application of the minimum contacts test to Internet jurisdiction simply extends the amenability to suit that already exists for parties. No new rules are necessary, because although the Internet is a new forum, parties, as always, exist in a physical space. The report of the American Bar Association and a review of current caselaw support this proposition.

## II. THE MODERN CHALLENGE: PERSONAL JURISDICTION AND THE INTERNET

### 1. *The Report of the American Bar Association*

An important, and largely on-target, reexamination of the issue of jurisdiction in cyberspace began with a report by the American Bar Association, published in July 2000.<sup>7</sup> The report, titled *ACHIEVING LEGAL AND BUSINESS ORDER IN CYBERSPACE: A REPORT ON GLOBAL JURISDICTION ISSUES CREATED BY THE INTERNET*, is the cumulative effort of multiple sections of the bar, working groups, and international commentators.<sup>8</sup> Cyberlaw jurisdiction is discussed in both global and domestic forums.<sup>9</sup> The report tends to be more successful when considering domestic jurisdiction problems.

The goal of the ABA's report is to promote a legal infrastructure that will provide guidance to the new area of cyberlaw and the jurisdiction of courts over Internet-related litigation.<sup>10</sup> Despite its global overtones, the report's analysis stays squarely in the American traditional context of jurisdiction, which is rooted firmly in physicality and minimum contacts.<sup>11</sup> The anatomy of American jurisdiction in the new Internet environment is preserved by the ABA's report.<sup>12</sup> A less conventional approach would seem too far a departure

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5. It is important to the jurisdictional analysis that the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

6. See AMERICAN BAR ASSOCIATION [hereinafter *ABA*], *ACHIEVING LEGAL AND BUSINESS ORDER IN CYBERSPACE* 9 (2000). "[W]hile technology changes how parties communicate, it does not and can not change the fact that parties themselves exist in physical space – the key to jurisdictional analysis. Cyberspace may be a 'place,' but it is inhabited bits and bytes, not by people. It may change how people understand their boundaries, and thus affect their state of mind, but in the end it is a means of communication." *Id.* at 9.

7. See *ABA*, *supra* note 6, at 7.

8. See *ABA*, *supra* note 6, at i-iii.

9. See *ABA*, *supra* note 6, at 18-22 and 35-67.

10. See *ABA*, *supra* note 6, at 7. In 1998, the American Bar Association began a global study of the potential jurisdiction issues involved in cyberspace and their potential resolutions. *Id.* at 7. The project promotes a legal *infrastructure* that will allow electronic commerce to flourish, while promoting "elements of certainty and predictability" by suggesting up guidelines to be followed in an on-line environment. *Id.* at 7.

11. See *ABA*, *supra* note 6, at 35-67.

12. See *ABA*, *supra* note 6, at 35-67.

from the caselaw that has already developed, which is discussed below. The notion of “minimum contacts”, derived in 1945, has become and will likely remain the benchmark of jurisdiction in cyberlaw cases.<sup>13</sup>

The idea that the minimum contacts standard will continue to underwrite our jurisdictional analysis is reassuring for our domestic cases, but troubling for cases with international parties. The Constitution of the United States and its requirements of Due Process is unique, and is obviously not adopted in other countries. The *Int'l Shoe* standard of minimum contacts does not competently address concerns of jurisdiction over foreign defendants.<sup>14</sup> In a case with international parties, the physicality requirement of jurisdiction remains crucial. However, exercising jurisdiction over a foreign defendant is a complex matter, not simply solved by an exercise of jurisdiction based on purposeful availment. New international law must be developed to legislate the very complicated problem of global lawsuits arising from the Internet. At this point in time, the American minimum contacts analysis is inappropriate for jurisdiction in an international setting. Jurisdiction laws of other countries should be scrutinized, and an international committee should determine the best combination of methods to use for a jurisdictional analysis of online parties in an international setting.

The ABA report constructively comments on the state of the current American jurisdictional law, or the state of the law at the time the report was released (in July 2000).<sup>15</sup> It does offer some new insight into an appropriate approach to on-line jurisdictional analysis, while maintaining the integrity of American jurisdiction.<sup>16</sup> It is particularly helpful with specific admonitions to businesses, offering advice on how to help limit their liability to consumers.

#### *a. Federal Jurisdiction*

The global nature of the Internet is unsuitable for supervision of each state's courts. The Internet is the appropriate domain of federal regulation. The ABA report agrees with this proposition, stated in a federal district court opinion that suggests the Internet should be the province of federal jurisdiction and regulation, rather than the subject of each state's application of the law.<sup>17</sup> As the report is the product of an effort to regulate substantive law from the

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13. See *Int'l Shoe v. Washington*, 326 U.S. 310, 319 (1945).

14. See *id.*

15. See generally ABA, *supra* note 6.

16. On a side note, one interesting aspect of the ABA report is the repeated reliance of the drafters on the usefulness of Bots, i.e., programmed, intelligent agents to which specific criteria has been applied by a consumer or merchant. See ABA, *supra* note 6, at 84. For instance, in a discussion of the difficulties of international law, the drafters suggest that use of intelligent electronic agents to redress jurisdictional issues raised by the global span of the Internet. The Bots, it is suggested, “can be deployed by sellers and purchasers to evaluate the relative product, price and jurisdictional terms of the potential relationship, provide a basis for a global standard, as long as the underlying ‘code’ can be agreed upon.” See ABA, *supra* note 6, at 84. This level of sophistication of on-line transactions seems a long way off, but it will be interesting to note the development and deployment of Bots in the context of jurisdiction.

17. See ABA, *supra* note 6, at 5 n. 29 (citing *Am. Library Ass'n. v. Pataki*, 969 F. Supp. 160, 181-82 (S.D.N.Y. 1997)). A crucial element of predictability is the knowledge of website sponsors and consumers regarding what regulatory systems apply to the business that they transact over the Internet. See ABA, *supra* note 6, at 5.

perspective not only of the United States, but of certain European and Asian countries, this more generalized approach is clearly suitable.<sup>18</sup>

*b. Importance of Physical Location*

Where the parties exist in physical space continues to be a crucial component of jurisdictional analysis.<sup>19</sup> The new frontier of cyberspace has not changed the importance of location of the parties, but has expanded the geographic area throughout which these parties can readily interact. For instance, residents of Vermont can purchase inflatable alligators from Florida, and Florida residents can buy Vermont maple syrup on the Web. This creates a legal relationship between two residents of different jurisdictions.

The ABA report correctly maintains that the analysis for jurisdiction should begin at the conventional standpoint: where the parties exist in physical space.<sup>20</sup> As discussed below, most, if not all, American courts have applied this customary component to their analysis of jurisdiction in Internet cases.<sup>21</sup> Jurisdiction in Internet cases has largely followed precedent and traditional analysis.<sup>22</sup> This trend is a reliable way to frame guidelines for Internet jurisdiction; the analysis is familiar and readily applied by the courts. The ABA properly supports this inclination.

An overview of preliminary jurisdictional guidelines for the Internet is included in the report of the ABA.<sup>23</sup> These default rules are rooted in decisions of our recent case law and traditional ideas about jurisdiction. Both users and sellers are encouraged to identify the state in which they reside, so that the other party can be put on notice.<sup>24</sup> Although this rule makes sense from a legal perspective, it is hard to imagine that many consumers, and even many businesses, understand the rationale behind posting their home state. In this way, the report fails make a suggestion that has application to unsophisticated Web users. Even though many consumers include their home state information in forms that they fill out on the Web, most are unaware that their physical location affects their amenability to suit, or that such information is gathered

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18. See ABA, *supra* note 6, at 9.

19. See *id.* at 27.

20. See *id.* at 9, 27.

21. The ABA report notes some confusion among lower court decisions regarding jurisdiction over Internet defendants. The report criticizes the decision of *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996), characterizing the decision as "wrong." ABA, *supra* note 6, at 54. In *Inset*, the court found jurisdiction over the defendant based on its web site and the fact that it also offered a toll-free number "designed to communicate with people and their businesses in every state." *Inset Sys.*, 937 F. Supp. at 164. The report's contention with this analysis is its oversimplification – adoption of such an analysis would subject all companies who maintained web sites to jurisdiction everywhere. ABA, *supra* note 6 at 54-56. *But see* *Tech Heads, Inc. v. Desktop Service Center, Inc.*, 105 F. Supp. 2d 1142 (D. Or. 2000) (holding that the operation of a web site, in conjunction with a toll-free number, and national newspaper advertisements, constituted the defendant's purposeful availment of the forum state).

22. See, e.g., *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996); *Zippo Manufacturing v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997); *Panavision Intern., L.P. v. Toepfen*, 141 F.3d 1316 (9th Cir. 1998).

23. See ABA, *supra* note 6, at 19-87. The report first states some default rules, then discusses choice of law and forum provisions in contract, and then discusses hybrid alternatives.

24. See *id.* at 20.

for legal purposes. (The suggestion that businesses also post their home state information is discussed below.)

The default rules also suggest that more than one nation-state may be able to assert personal and prescriptive jurisdiction over Internet transactions, just as they have over physical transactions. However, every party on the Internet should be subject to both personal and prescriptive jurisdiction in at least one state.<sup>25</sup> Parties should be amenable to suit in at least one state. These suggestions follow traditional notions of jurisdiction, and are sensible.

### *c. Targeting of a Forum State*

The ABA report reflects the current caselaw in its recommendation that passive web sites, i.e., web sites that do not seek out traffic and merely offer information, should not be subject to jurisdiction solely on the basis that they were accessible in the forum state.<sup>26</sup> This assertion follows the common logic, and is very reasonable. If the web site does not target the forum state, and the claim is based solely on accessibility, an exercise of jurisdiction is not proper. Recent American caselaw supports this contention, as discussed below.<sup>27</sup>

One reason for this reluctance to subject passive websites to suit is to encourage individuals to share information in the forum of cyberspace, without fear of litigation in a foreign environment.<sup>28</sup> In fact, the report goes so far as to say that absent an interactive site which accepts offers from buyers, the seller should not be subject to jurisdiction in the buyer's home state based on one sale.<sup>29</sup> It is then proposed that the buyer could be described as having "targeted" the seller, and should be amenable to suit in the seller's home state.<sup>30</sup> This would be a departure from traditional jurisdictional principles. Presently, it does not seem like a feasible alternative, as sellers are still generally thought of as having more bargaining power.<sup>31</sup>

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25. *See id.* at 19.

26. *See id.* at 93.

27. *See, e.g.,* Citigroup, Inc. v. City Holding Co., 97 F. Supp. 2d 549 (S.D.N.Y. 2000) (discussing traditional notions of jurisdiction, and allowing specific personal jurisdiction based on the nature and quality of the activity over the Internet); *see also* Mink v. AAAA Dev. LLC, 190 F.3d 333 (5th Cir. 1999) (holding that "passive" web sites should not be subjected to jurisdiction based solely on their site).

28. In rare cases, passive web sites have been found to have the "minimum contacts" necessary to establish jurisdiction. *See* Tech Heads, Inc. v. Desktop Serv. Ctr., Inc., 105 F. Supp. 2d 1142 (D. Or. 2000) (holding that a largely passive web site subjected the defendant to personal jurisdiction in the forum state).

29. *See* ABA, *supra* note 6, at 32.

30. *See id.*

31. The ABA suggests that the notion of superior seller bargaining power might be outdated. ABA, *supra* note 6, at 32. Its drafters state that the Internet "not only empowers consumers; it also may reduce a seller's power to define its market . . . Now, the buyer is as likely to search out a relatively passive seller, as is an active seller to search out a passive customer." ABA, *supra* note 6, at 32. Although this is true – Internet consumers can seek out passive Internet sellers – this does not change the conventional idea that sellers generally inhabit the more powerful position in the seller-buyer relationship. Sellers can limit their liability on the Web. *See infra* § d, at 15).

*d. Liability of Web Site Sponsors*

The ABA guidelines also suggest situations in which sponsors of web sites should be amenable to litigation in a forum state.<sup>32</sup> Again, these guidelines are safely within our courts' current approach to personal jurisdiction, which conforms to established approaches to jurisdiction. The report proposes that both personal and prescriptive jurisdiction may be asserted over a website sponsor in a state, provided there is no enforceable contractual choice of law and forum.<sup>33</sup>

The ABA's suggested requirements to meet jurisdiction are: (1) the sponsor is a resident of the forum state, or has a principal place of business in that state; (2) the sponsor targets the forum state and the claim arises from the content of the website, and (3) the claim arises from a transaction on the website that may not target the forum state specifically, but is interactive.<sup>34</sup> This approach is agreeable because it is firmly rooted in our personal jurisdiction jurisprudence, but is updated enough for its new cyberspace environment.

The report also suggests that businesses engaged in commerce in cyberspace should make good faith efforts to indicate the state in which they reside, as well as the physical targets of their web site.<sup>35</sup> This section of the report is particularly helpful to businesses that operate web sites, and the advice that the report gives is consistent with current approaches to limiting liability. The report recommends a clear description of the web site's origin and its target audience.<sup>36</sup> This protects both the sponsor and the consumer. Good faith efforts of businesses to notify consumers of their origin include the use of disclosures, disclaimers, technological blocking or screening mechanisms.<sup>37</sup> Such precautions should protect the web sponsor from being subject to personal jurisdiction in a foreign state, unless they have targeted that state.<sup>38</sup>

The ABA report correctly maintains that such steps will help to avoid consumer confusion and possible jurisdiction disputes. However, some of the ABA's suggested precautions might overestimate the sophistication of the average Internet consumer. When faced with this problem, the report again relies on the feasibility of Bots to navigate through the issues of jurisdiction.<sup>39</sup> This is not a satisfying alternative at the present time; most consumers do not yet shop on the Internet via Bot. Traditional jurisdictional guidelines need to be maintained to protect consumers in the realm of cyberspace.

*e. Contractual Choice of Law and Contractual Choice of Forum*

Contractual choice of law and forum provisions are an effective way for businesses to limit their ability to be sued in foreign states. Because of this,

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32. See ABA, *supra* note 6, at 19-20.

33. See ABA, *supra* note 6, at 19-20.

34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.*

38. See ABA, *supra* note 6, at 20.

39. See *supra* note 16.

they should be enforced, especially in a business to business setting. When exercising jurisdiction over an entity, the ABA suggests that courts consider the good faith efforts made by the business to limit its amenability to suit as well as other factors.<sup>40</sup> Absent fraud, courts should uphold contractual choice of law and forum agreements.<sup>41</sup> The ABA suggests several situations in which enforcement of contractual choice of law and forum decisions are appropriate. Rules 1.2-1.2.5 include scenarios in which: (1) the consumer demonstrably bargained with the seller; (2) the consumer entered into the contract based on the use of a “fiduciary” Bot, i.e., a programmed, intelligent agent to which no criteria has been applied save for those specified by the consumer, and the Bot included programming that allowed for such terms as the nature of the protections sought to the extent that such protections are enforceable; and (3) the Internet sponsor is subject to tax assistance in a particular state and should have the ability to contract with other Internet or financial providers in order to reallocate the burden of required tax assistance.<sup>42</sup>

In consumer transactions, such a unilaterally drafted provision is considered a contract of adhesion, and is enforceable only in the absence of unfairness or unconscionability to the buyer.<sup>43</sup> In consumer transactions involving choice of law and forum provisions, protecting consumers is of the utmost importance. The average consumer does not have the same legal or economic resources as the average company. Thus, the report correctly upholds this traditional standard.

#### *f. Hybrid Alternatives*

The report also offers a hybrid alternative for jurisdiction disputes in the form of safe harbor agreements.<sup>44</sup> Such agreements are cited as good models for Cyberspace dispute resolution, because they include public law minimum standards, government enforcement, and the opportunity for multiple entities to establish their own guidelines for dispute resolution and enforcement.<sup>45</sup> These qualities are attractive, as a possible alternative to court resolution, should the Internet continue to grow in such a way that some self-governance is appropriate. Also, the report proposes that new forms of dispute resolution may be necessary in the realm of cyberspace.<sup>46</sup> This section of the ABA report is very interesting and helpful, because it begins to envision new alternatives for Internet dispute resolution in an international setting.<sup>47</sup> The current example of ICANN dispute resolution rules involved in domain names is cited as a helpful model.<sup>48</sup> Such dispute resolutions may reduce transaction costs and

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40. See ABA, *supra* note 6, at 67-69.

41. Choice of forum provisions are generally enforced in business to business contracts. Because of inequity of bargaining power, they become problematic in the setting of business to consumer contracts. See *id.*

42. See *id.* at 21-22.

43. See *id.* at 67.

44. See *id.* at 22.

45. See ABA, *supra* note 6, at 22.

46. See *id.* at 24.

47. See *id.*

48. See *id.*

formulate a new framework that could work well in a global setting.<sup>49</sup> The flexibility of this approach is in concert with the developing nature of the Internet, and the desire for its continued growth.

The ABA report suggests that highly regulated industries, such as securities, should reach a uniform agreement regarding the application of laws and regulations in a global environment.<sup>50</sup> Such rules should be developed so that parties are informed as to whose laws are applied in an electronic environment. This approach is rational for an industry that depends upon the global marketplace, as uniformity of laws in this area would enable business transactions to run smoothly, and would eliminate the question of which country's standards apply.

## 2. *The Concept of Minimum Contacts in Recent, Internet-Related Caselaw*

The Internet, which was created in 1969 as a network of four computers at the University of California, is a worldwide group of connected networks that allows public access to information and services.<sup>51</sup> In the 1990's, use of the Internet became common in our society. Since that time, companies have developed online, shopping on the Internet has become commonplace, and people have begun interacting with each other from remote locations – sometimes locations unknown to the other party.

In such an environment, courts have been forced to apply the traditional framework of minimum contacts to a jurisdictional analysis of parties interacting in cyberspace.<sup>52</sup> This standard has adapted exceedingly well to its new environment. A tour through recent caselaw will be beneficial in illustrating new tests that have evolved, and how the conventional standards are still applied.

### *a. Interactivity of the Web Site*

In an influential 1997 case, the federal court for the Western District of Pennsylvania found jurisdiction over the defendant, based on its purposeful availment of the forum state.<sup>53</sup> Zippo Dot Com was a California corporation that operated a web site containing information about the company, advertisements, and an application for an Internet news service.<sup>54</sup> Zippo Dot Com contracted with seven Internet access providers and 3000 residents of Pennsylvania, and allowed them to download electronic messages.<sup>55</sup> Some of the messages contained explicit sexually oriented material, and these messages were the basis of the lawsuit.<sup>56</sup> Zippo Manufacturing, a Pennsylvania

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49. *See id.*

50. *See ABA, supra* note 6, at 24.

51. *See* GEORGE S. MACHOVEC, TELECOMMUNICATIONS, NETWORKING AND INTERNET GLOSSARY 56 (1993); *see also* MARK A. LEMLEY ET AL., SOFTWARE AND INTERNET LAW 3-16 (2000).

52. *See infra* n. 27.

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

54. *Zippo*, 952 F. Supp. at 1121.

55. *Id.* at 1121-22.

56. *Id.* at 1122.



corporation that manufactures lighters, brought suit against Zippo Dot Com in the district court of Pennsylvania, alleging trademark infringement, dilution, and false designation of origin.<sup>57</sup>

The *Zippo* court examined the traditional requirements for the exercise of specific personal jurisdiction.<sup>58</sup> The court considered the minimum contacts test, and discussed the foreseeability and reasonableness aspects of the test.<sup>59</sup> The court noted that caselaw on the issue of jurisdiction was scarce, but based on a review of available cases, the “likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”<sup>60</sup>

In determining whether jurisdiction could be properly exercised over the defendant, the court examined the “level of interactivity and commercial nature of the exchange of information that occurs on the [w]eb site.”<sup>61</sup> Thus, the court introduced the “sliding scale” test, declaring it “consistent with well developed personal jurisdiction principles.”<sup>62</sup> The logic of the interactivity test is apparent. It is an extension of the traditional minimum contacts analysis. The more the defendant directs its attention to the forum state, the more minimum contacts established. By having an interactive web site available to residents of the forum state, the defendant is reaching out to the forum state, inviting an interaction with residents.

The court found that the defendant, by having an application on their web site, and by repeatedly and consciously processing Pennsylvania resident’s applications and assigning them passwords, created “an interactive Web site through which it exchange[d] information with Pennsylvania residents in hopes of using that information later.”<sup>63</sup> The defendant argued that its contacts with

57. *Id.* at 1121.

58. There are two types of jurisdiction. General jurisdiction is permitted over an out-of-state “defendant for non-forum related activities when the defendant has engaged in ‘systemic and continuous’ activities in the forum state.” *Id.* at 1122, (quoting *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984)). If no general jurisdiction is found, specific jurisdiction may be permissible under the test of *Int’l Shoe* (stating that specific jurisdiction may be established if a defendant has such minimum contacts with the state that it would comply with due process rights to require the defendant to defend a lawsuit in the forum state). *Zippo*, 952 F. Supp. at 1122.

59. *Zippo*, 952 F. Supp. at 1123.

60. *Id.* at 1124.

61. *Id.* (emphasis added).

62. *Id.* at 1124. The sliding scale was articulated further:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g. *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). At the opposite end are situations where a defendant has simply posted information on an Internet [w]eb site which is accessible to users in foreign jurisdictions. A passive [w]eb site that does little more than make information available to those who are interested is not grounds for the exercise of personal jurisdiction. E.g. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996). The middle ground is occupied by interactive [w]eb sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. E.g. *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 96 (E.D. Mo. 1996).

*Id.*

63. *Zippo*, 952 F. Supp. at 1125.

Pennsylvania were not actively sought after.<sup>64</sup> The court rejected this position, and found that it was the corporation chose to subject itself to suit in Pennsylvania by the processing of the Pennsylvania residents' applications.<sup>65</sup> This analysis has helped form the basis of jurisdiction analysis for Internet parties. As an extension of the minimum contacts test, it fairly considers the efforts of the defendant to target residents of the forum state.<sup>66</sup> "When a defendant makes a conscious choice to conduct business with the residents of a forum state, 'it has clear notice that it is subject to suit there . . . .'"<sup>67</sup>

#### *b. Interactivity Test Applied*

In another influential case from 1997, an Arizona corporation brought suit against a Florida corporation of the same name, alleging service mark infringement.<sup>68</sup> The plaintiff, Cybersell AZ, was an Arizona corporation that provided Internet advertising and marketing services.<sup>69</sup> The defendant, Cybersell FL, was a corporation run from Florida by a father and son team that offered web marketing and advertising consulting services.<sup>70</sup> Cybersell FL did no advertising in Arizona, and had no offices, employees, or clients in the state.<sup>71</sup> Cybersell AZ discovered the existence of the Cybersell FL, and informed them of the existence of their registered service mark.<sup>72</sup>

Cybersell AZ initially filed suit in the District Court of Arizona.<sup>73</sup> Cybersell FL moved to dismiss for lack of personal jurisdiction, and the district court granted their motion.<sup>74</sup> The Court of Appeals affirmed the decision of the district court.<sup>75</sup> The court applied traditional jurisdiction principles to determine the fairness of the exercise of jurisdiction.<sup>76</sup> They used the three part test minimum contacts test first enumerated in *Int'l Shoe v. Washington*.<sup>77</sup>

The court found that the first prong of this test was not satisfied, as the defendant had not purposefully availed itself of the privilege of conducting business in the forum state, and therefore did not invoke its benefits or protections.<sup>78</sup> The court noted that no Arizonan except for the plaintiff

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

68. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997).

69. *Cybersell*, 130 F.3d at 415.

70. *Id.*

71. *Id.* at 419.

72. *Id.* at 416.

73. *Id.*

74. *Cybersell*, 130 F.3d at 416.

75. *Id.* at 420.

76. *Id.* at 416-20.

77. *Id.* at 416. The Court of Appeals for the Ninth Circuit's test was articulated as follows: (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections[;] (2) [t]he claim must be one which arises out of or results from the defendant's forum-related activities[; and] (3) [e]xercise of jurisdiction must be reasonable. *Id.* at 416 (quoting *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995)).

78. *Id.* at 419-20.

accessed the defendant's web site.<sup>79</sup> In finding that Arizona had no personal jurisdiction over the defendant, the court characterized the web site in the language of the *Zippo* sliding scale, holding that the defendant's web site was "essentially passive" and that it did not "deliberately" direct its efforts towards Arizona residents.<sup>80</sup> The court explained that to find jurisdiction over the defendant, "something more" than its passive web site must exist to demonstrate that Cybersell FL directed its activities at Arizona.<sup>81</sup> Again, this trend of the courts to maintain the integrity of the minimum contacts test in cyberspace is a fair and reasonable way to resolve jurisdiction issues. The fact that parties are conducting business over the Internet does not necessarily dictate a departure from traditional, well-established law.

In a case distinguishing itself from this decision, jurisdiction was found over an company doing business on the Internet because of that certain "something more" than a passive web site.<sup>82</sup> The plaintiff, Tech Heads, was an Oregon-based company in the business of providing computer-related services, including installation and maintenance of computer hardware, consulting and training.<sup>83</sup> Tech Heads sued the out-of-state defendant, Desktop, in Oregon district court under the Lanham Act for trademark infringement, and under state law for service mark infringement and dilution claims.<sup>84</sup> Tech Heads held a registered service mark in the name "Tech Heads" from the corporations division of the State of Oregon.<sup>85</sup>

Desktop was a Virginia-based Internet company that offered computer-related services, and recruited and trained individuals with computer-related skills.<sup>86</sup> Over 95% of the Desktop's business was conducted in Virginia.<sup>87</sup> It had no physical presence in Oregon, was not registered to conduct business there, and had no registered agents, employees, or sales representatives in Oregon.<sup>88</sup> Desktop used the term "TECHHEAD" as a service mark in connection with its services, which are similar to Tech Head's services.<sup>89</sup>

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79. *Cybersell*, 130 F.3d at 419.

80. *Id.*

81. *Id.*

82. See *Tech Heads*, 105 F. Supp. 2d at 1148. The District court of Oregon noted that, at the time of the *Tech Heads* decision of July 11, 2000, many district courts, but few circuit courts, had addressed whether personal jurisdiction can be properly exercised when the defendant's web site on the Internet is the sole contact with the resident forum. *Id.* at 1148. For district courts addressing such a question include see *Cybersell*, 130 F.3d 414; see also *Millennium Enter., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907 (D. Or. 1999) (suggesting that the "middle zone" of the sliding scale introduced in *Zippo* needs further refinement to define the "something more" discussed by the court in *Cybersell*; further suggesting the requirement of "deliberate action" within the forum state, in the form of transactions with residents of the forum state or conduct of the defendant purposefully directed at the forum state); see also *Neogen Corp. v. Neo Gen Screening, Inc.*, 109 F. Supp. 2d 724, 729 (W.D. Mich. 2000) (suggesting that something more than a passive availment of opportunities in the forum state could be "something akin to a deliberate undertaking to do or cause an act to be done in [the state] or conduct which can be properly regarded as a prime generating cause of the effects resulting in [the forum state] . . ." (quoting *Jeffrey v. Rapid Am. Corp.*, 448 Mich. 178, 188 (1995))).

83. See generally *Tech Heads*, 100 F. Supp. 2d. 1144.

84. *Id.* at 1143.

85. *Id.* at 1144.

86. *Id.*

87. *Id.* at 1149.

88. *Tech Heads*, 105 F. Supp. at 1144.

89. *Id.* at 1145.

Desktop registered the service mark "TECHHEAD" with the United States Patent and Service Mark Office in 1999.<sup>90</sup>

In spite of finding that Desktop did not intentionally direct its activities at the forum state, the Oregon court denied Desktop's motion to dismiss for lack of personal jurisdiction.<sup>91</sup> The court cited several facts in support of their decision.<sup>92</sup> At least one Oregon resident "reached out" to the Desktop web site and submitted a resume to them while residing in the forum state.<sup>93</sup> The court found that Desktop "actively encourage[d] and receive[d] resumes from job-seekers" through a "highly commercial, highly interactive Web site."<sup>94</sup>

The *Tech Heads* case seems like an extremely broad exercise of specific personal jurisdiction – it almost seems like an exercise of general jurisdiction.<sup>95</sup> The Oregon court proposed that traditional notions of jurisdiction must maintain flexibility in a society transformed by technological innovation.<sup>96</sup> The court then offers advice to Internet companies seeking to protect themselves from the exercise of personal jurisdiction in a forum state.<sup>97</sup> Such companies are advised to implement: "(1) a disclaimer that they will not sell products or provide services. . . outside a certain geographic area; and (2) an interactive agreement that includes a choice of venue clause to which a consumer or client must agree before purchasing any products or receiving any services."<sup>98</sup> Such

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90. *Id.* at 1143-44.

91. *Id.* at 1152.

92. *Id.* at 1150-51. The court found that Desktop purposefully reached out across the United States, including Oregon and around the world, not only through its Web site, but also through national advertising and a toll-free telephone number. Desktop's advertisements with the Tech Heads marks appear in a nationally circulated newspaper, The Washington Post, and reach Oregon and other states . . . . Desktop does not confine its activities to the local area. Instead, it accepts resumes on a global basis. For those anywhere in the world with access to the Internet, the Washington Post, or the telephone, who wish to relocate to the Virginia area, Desktop acts as a placement agency . . . . This is a commercial activity involving individuals from across the United States and in foreign countries from which Desktop presumably receives income. Desktop should therefore reasonably expect its actions to subject it to jurisdiction in states where its actions cause harm.

*Id.*

93. *Tech Heads*, 105 F. Supp. at 1149-50.

94. *See id.* at 1150-51. The court found that, in addition to the minimum contacts requirement, Desktop's activities satisfied the other two prongs of jurisdiction as well. *Id.* at 1151-1152. First, the claim arose out of the defendant's forum-related activities because of their use of Tech Head's marks on Desktop's web site, in their toll-free number, and in their nation-wide newspaper advertising. *Id.* at 1151. Second, the exercise of jurisdiction was reasonable, as the court ruled that Tech Heads had established that Desktop had purposefully availed itself of jurisdiction in Oregon. *Id.* at 1152.

95. The *Tech Heads* court, comparing itself to the *Stomp v. NeatO, LLC*, 61 F. Supp. 2d 1074 (D. Cal. 1999) court, stated that finding jurisdiction over the defendant in this case did not strictly comply with "traditional" notions of jurisdiction. *Tech Heads*, 105 F. Supp. at 1152. "But when a merchant seeks the benefit of engaging in unlimited commerce over the Internet, it runs the risk of being subject to the process of the courts of those states." *Id.* (quoting *Stomp*, 61 F. Supp. 2d at 1081).

96. *Id.* at 1152. *But see* Neogen Corp. v. Neo Gen Screening, Inc., 109 F. Supp. 2d at 728-29 (explaining that district courts have not exercised jurisdiction over defendants with passive web sites because of the risk of national, and perhaps global, "jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law . . ." (quoting *Weber v. Jolly Hotels*, 977 F. Supp. 327, 333 (D.N.J. 1997) and cases cited therein)).

97. *Tech Heads*, 105 F. Supp. at 1152.

98. *Id.* at 1152 (citing *Stomp v. NeatO, LLC*, 61 F. Supp. 2d at 1080-81).

disclaimers are indeed a good idea, but the exercise of jurisdiction in this case seems too far-reaching.

*c. Targeting the Forum State and the “Effects” Test*

Other recent cases, where jurisdiction has been found over Internet defendants, examine whether the defendant has “targeted” the forum state with its business. In 2000, the district court for the Eastern District of Michigan found jurisdiction over a defendant, based on sales of its products to Michigan residents.<sup>99</sup> The court held that the defendant solicited, and perhaps targeted, its goods on its web site to appeal directly to the citizens of Michigan.<sup>100</sup> The items for sale were sports memorabilia with the logos of Michigan athletic teams.<sup>101</sup> The court suggested that “the traditional [jurisdictional] framework most analogous” to operating a web site is placing a product into the “stream of commerce.”<sup>102</sup> The court found that the defendant did more than place its product into the stream of commerce by targeting its activities to the residents of Michigan, and by allowing residents to contract on its web site.<sup>103</sup>

Another test that is utilized in the area of cyberspace jurisdiction is the “effects” test described in a 1984 Supreme Court case,<sup>104</sup> and subsequent cases.<sup>105</sup> In *Calder v. Jones*, the Supreme Court held that the purposeful availment prong of the minimum contacts test is satisfied if a defendant aims a foreign act at the forum state, and the act has effect there.<sup>106</sup> “To meet the effects test, the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which was suffered and which the defendant *knows* is likely to be suffered in the forum state.”<sup>107</sup>

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99. *The Sports Auth. Michigan, Inc. v. Justballs, Inc.*, 97 F. Supp. 2d 806 (E.D. Mich. 2000).

100. *The Sports Auth.*, 97 F. Supp. 2d at 814.

101. Justball’s web site was also found to be interactive, which contributed to the court’s decision to exercise jurisdiction over it. *Id.* at 814-15. Justballs’s web site allowed users to view a comprehensive product list, a pricing guide, and allowed Internet users to buy its products exclusively over the Internet, and contact the company via e-mail. *Id.* at 814. The court also held that the “[a]bility to download, transmit or exchange information with a defendant via the computer and the presence of on-line contracts between a defendant and a plaintiff are sufficient for a court to exercise personal jurisdiction over a defendant.” *Id.* at 813 (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996)).

102. *The Sports Auth.*, 97 F. Supp. 2d at 813 (citing *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102 (1987)). In *Asahi*, the Supreme Court held that the placement of “a product into the stream of commerce, without more,” does not satisfy the purposeful availment requirement of the minimum contacts standard. *Asahi*, 480 U.S. at 112. *But see* ABA, *supra* note 6, at 43 (stating that the stream of commerce theory is not an appropriate analysis for jurisdiction in Internet commerce cases).

103. *The Sports Auth.*, 97 F. Supp. 2d at 814-15.

104. *Calder v. Jones*, 465 U.S. 783 (1984). This test was later utilized in *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998).

105. *See Neogen Corp.*, 109 F. Supp. 2d 724; *see also* *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082 (9th Cir. 2000).

106. *Calder*, 465 U.S. at 785.

107. *Bancroft & Masters*, 223 F.3d at 1087, (citing *Panavision*, 141 F.3d at 1321 (emphasis added)). *See also* *Intercon, Inc. v. Bell Atl. Internet Solutions, Inc.*, 205 F.3d 1244 (10th Cir. 2000) (holding that defendant’s knowledge of e-mail routed through Oklahoma put the defendant on notice that he could be haled into court there); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (holding that defendant’s review of applications from the forum state, on which the state was noted, put the defendant on notice that he could be subject to suit in the forum state).

*d. Zippo and Cybersell Become Pillars of Internet Jurisdiction Cases*

Since 1997, when the influential decisions of *Zippo* and *Cybersell* were issued, four short years have passed. The litigation of Internet jurisdiction cases has increased tremendously. In a survey of the most recent cases, there was a notable reliance and adherence to the standards set forth in *Zippo* and *Cybersell*.<sup>108</sup>

In a 2001 case, jurisdiction was found over a Dominican Republic entity which allegedly irreparably harmed the plaintiff's mark.<sup>109</sup> The court denied the plaintiff's motion for summary judgment based on in rem jurisdiction over the subject matter, but granted personal jurisdiction based on the entity's intentional activities and personal availment of the forum state.<sup>110</sup> Citing no case law on the subject matter in the fourth circuit, the court applied the *Zippo* sliding scale of interactivity, and found that due process requirements were satisfied to exercise jurisdiction over the defendant based upon sufficient minimum contacts and purposeful availment.<sup>111</sup>

Jurisdiction was denied in a 2000 case, based on a similar analysis, because of the finding that the defendant did not have an interactive web site.<sup>112</sup> In this case, the court noted that the interactive portion of the web site was still under construction, and that no electronic transactions were occurring at the time of the litigation.<sup>113</sup> This is a striking example of how fact-specific the jurisdiction analysis has become in this area, and how closely the *Zippo* test is followed.

Another recent, interesting case found no jurisdiction over a website dispute, even though the defendant maintained an office in the forum state.<sup>114</sup> The court found that in spite of the fact that the defendant maintained office space in Florida, its web sites were clearly directed at 17 other states in which it was registered to do business, and not directed at Florida itself.<sup>115</sup> This is a *very* strict adherence to the facts of the case and to the new jurisdiction tests that have sprung from the minimum contacts analysis.

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108. See, e.g., *Alitalia-Linee Aeree Italiane v. Casinotalia.com and Technologia JPR, Inc.*, 2001 U.S. Dist. LEXIS 534 (E.D. Va. 2001); *Uncle Sam's Safari Outfitters, Inc. v. Uncle Sam's Army Navy Outfitters-Manhattant, Inc.*, 96 F. Supp. 2d 919 (E.D. Mo. 2000); *JB Oxford Holdings, Inc. v. Net Trade, Inc.*, 76 F. Supp. 2d 1363 (S.D. Fl. 1999).

109. *Alitalia-Linee*, 2001 U.S. Dist. LEXIS 534. The plaintiff was an Italian airline company with a registered United States trademark in their company name. *Id.* at 2. The defendant was a Dominican Republic entity with no offices or employees existing within the United States. *Id.* at 3. The defendant had registered a domain name with Network Solutions, Inc. (NSI), and this domain name was the subject of the litigation. *Id.* See also *America Online, Inc.*, 106 F. Supp. 2d 848, which involved a trademark dispute. This case held that a California defendant was not subject to personal jurisdiction solely on the basis of registering an allegedly infringing domain name with NSI. *Id.* at 857-58. The court noted that the contract with NSI alone was not a sufficient basis for minimum contacts. *Id.*

110. *Alitalia-Linee*, 2001 U.S. Dist. LEXIS at 28.

111. *Id.* at 27. "Simply put, as the level of interactivity of the website and the commercial nature of the exchange of information increase, the more reasonable it is to conclude that a defendant directed its activities purposefully at the forum state and should reasonably have foreseen being haled into court in the forum jurisdiction." *Id.*

112. *Uncle Sam's, Inc.*, 96 F. Supp. 2d 919 (E.D. Mo. 2000).

113. *Uncle Sam's* at 922-23.

114. *JB Oxford*, 76 F. Supp. 2d 1363.

115. *Id.* at 1367.

*e. Traditional Standards Still Apply*

From this survey of the current caselaw, it appears that the courts are choosing to maintain traditional standards of jurisdiction in cases involving Internet disputes.<sup>116</sup> Jurisdictional analysis appears to depend on the facts of each specific case. For now, while the Internet continues to develop, these traditional approaches are still appropriate. Businesses and consumers alike may be certain that the rules of jurisdiction remain consistent, and what precautions they need to take to protect themselves – because these rules are similarly applied in other contexts. Hopefully, over time, a body of law will emerge from our technological adolescence that is perfectly tailored to our issues of jurisdiction in the newly emerging global setting. In the interim, our traditional notions of jurisprudence serve us well.

## III. CONCLUSION

As demonstrated by the review of the current caselaw, and the report of the American Bar Association, traditional methods of analyzing jurisdiction are currently working in the context of cyberspace. The jurisdictional analysis of each case seems to be very fact-driven, and each matter appears to be settled on a case-by-case basis.

Historically, jurisdictional requirements in American courts have centered on the physicality of the parties as a means of determining which state's law to apply. Now that parties are interacting in the new sphere of cyberspace, the law that has evolved in physical space is adapting to new types of transactions. As our society becomes more sophisticated and reaches out to a global marketplace, and as people from all over the country reach out to the Internet, the laws of jurisdiction will further evolve. The standard of minimum contacts is an appropriate starting point for jurisdictional analysis of online parties, and continues to adapt to the new field of cyberspace.

It will be interesting to see what survives as analysis for jurisdiction, and what tests (if any) will become applicable to the international arena. It will also be interesting to see if the *Zippo* and *Cybersell* cases, which were the frontiersmen of Internet jurisdiction cases at the time of their release, will continue to heavily influence American courts in this area. We are at the beginning of a very long line of cases, and it will be exciting to note which case becomes the *International Shoe* of cyberspace. Or if it will remain *International Shoe* itself. And then, one might think, what if the *Shoe* does not fit? There is some danger in resting on our legal laurels. What if there were a better analysis waiting to be developed – but, in a manner similar to our “QWERTY” system of typing and our mass societal reliance on the Microsoft Word® operating platform – we simply refused to discover it, because we were already using something that worked, for the most part. As we advance past our technological adolescence, it will be very interesting to see if we change our ways.

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116. For an argument against the traditional application of jurisdictional analysis to cyberspace, see David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

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