THE SHOE FITS AND THE LIGHTER IS OUT OF GAS: THE CONTINUING UTILITY OF *INTERNATIONAL SHOE* AND THE MISUSE AND INEFFECTIVENESS OF *ZIPPO*

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INTRODUCTION

You and a friend decide to start a new Internet company out of your home in Hawaii, selling little bean-bag bears. You gather inventory, set up a Web site where customers can purchase the bears online, and open for business. The orders start trickling in—mostly local, but a few from other states. You happily ship the bears off, never thinking that completing such sales might have unforeseen consequences. Nevertheless, a short time later you discover that Ty, Inc., the maker of the Beanie Baby, is suing for trademark infringement. Worse yet, you are being sued in Illinois, a state that you have never come within a thousand miles of, because you sold three bears to a customer there.

The United States District Court for the Northern District of Illinois recently decided a case that matches this scenario.[1] The Hawaiian company, Baby Me, claimed that its contacts in Illinois were so minimal that it could not reasonably have expected to be haled into court there, and that Illinois' exercise of jurisdiction would therefore violate its constitutional due process rights.[2] The court noted, however, that Baby Me's Web site offered its goods for sale anywhere in the United States, even

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1. Ty, Inc. v. Baby Me, Inc., No. 00 C 6016, 2001 U.S. Dist. LEXIS 5761 (N.D. Ill. Apr. 20, 2001).

2. *Id.* at *15–16, 18.

though Baby Me's contacts with Illinois were few. Furthermore, the contacts at issue involved the sale of the allegedly infringing goods, and thus were directly related to the suit.[3] Therefore, the court held that Baby Me was subject to jurisdiction in Illinois for this particular suit, and the seven-month-old, two-person company was forced to defend an expensive lawsuit thousands of miles from its home.[4]

The law of personal jurisdiction based on Internet activity is murky, and courts are wrestling with how to apply principles of personal jurisdiction to cases that deal with the highly impersonal universe of the World Wide Web.[5] Courts seem reluctant to apply the traditional standards of *International Shoe v. Washington*[6] and its progeny, simply because the types of contacts that a Web site generates seem so vastly different from what courts have previously encountered.[7] Thus, many jurisdictions, including the court in *Baby Me*, have adopted the sliding scale approach of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[8] This "test" places Web sites into three categories along the scale.[9] The first category, where exercise of jurisdiction is proper, includes Web sites that enter into contracts over the Internet.[10] The third category, where jurisdiction is not proper, includes Web sites that are passive, merely providing information.[11] In the middle are the interactive Web sites, where information is exchanged between the user and the host, although no commercial transaction occurs.[12] According to the *Zippo* court, "[i]n these [middle] 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."[13] Furthermore, the "likelihood that personal

3. *Id.* at *13–14.

4. *Id.* at *23.

5. *See, e.g.*, Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1332 (E.D. Mo. 1996) ("The internet . . . raises difficult questions regarding the scope of [a] court's personal jurisdiction in the context of due process jurisprudence.").

6. 326 U.S. 310 (1945).

7. *See* Dagesse v. Plant Hotel N.V., 113 F. Supp. 2d 211, 220–21 (D.N.H. 2000) (noting that many courts fail to apply traditional jurisdictional principles to Internet cases, and that the Internet challenges the concepts that courts traditionally rely on for jurisdictional analysis).

8. 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet."[14]

For a number of reasons, the *Zippo* test provides little useful guidance for courts wrestling with jurisdictional problems based on Internet activity. The sliding scale test is not truly a departure from traditional jurisdictional analysis and it only provides an "answer" for sites on the far ends of the spectrum, where a site is truly passive or highly commercial.[15] If a court were to apply traditional jurisdictional analysis to these cases, it could well reach the same jurisdictional result. For the interactive sites in the middle of the spectrum, *Zippo* provides no guidance as to when it is appropriate to assert jurisdiction. Thus, for these sites, courts are forced to conduct jurisdictional analysis similar to that of *International Shoe* and its progeny, although the terminology has changed.

What little guidance the *Zippo* test provides is as a conceptual aid to courts seeking to understand the Internet. In applying *Zippo*, however, courts often mistake a conceptual aid for a determinative test. These courts treat the *Zippo* categories as dispositive, with commercial sites automatically granting jurisdiction and passive sites never granting jurisdiction. Thus, these courts only examine the nature of the Web site, not the nature of the actual contacts made by that site. In essence, for many of the courts that have adopted it, the *Zippo* test has become an inappropriate proxy for traditional jurisdictional analysis.[16]

Rather than look for a new test to address personal jurisdiction based on Internet contacts, courts should instead look to pre-Internet case law. Many of these pre-Internet cases would provide useful analogies to the issues presented by the Internet. By using these analogies, courts could develop a body of Internet case law while remaining faithful to *International Shoe* and its progeny. Because, when considering personal jurisdiction based on Internet contacts, the jurisprudence of *International Shoe* and its progeny fits just fine.

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14. *Id.*

15. *See* Dagesse v. Plant Hotel N.V., 113 F. Supp. 2d 211, 222 (D.N.H. 2000) ("The *Zippo* [test] is most helpful when the web site at issue fits neatly into one of the extremes at either end of the spectrum.").

16. *See, e.g.*, Recent Case, GTE New Media Services Inc. v. BellSouth Corp., *199 F.3d 1343 (D.C. Cir. 2000)*, 113 HARV. L. REV. 2128 (2000).

Part I of this Comment provides an overview of the current law of personal jurisdiction from *International Shoe* to the present.[17] Part II presents a brief discussion of the Internet and the difficulties it poses for jurisdictional determinations. Part III discusses the current state of the law relating to personal jurisdiction based on Internet contacts, including an in-depth look at the *Zippo* case and test.[18] Part IV examines personal jurisdiction in the context of two types of non-Internet contacts—advertisements and products in the stream of commerce—and examines how analogies to these bodies of law can provide solutions for personal jurisdiction based on Internet contacts. Part V argues that the *Zippo* test should be discarded, and courts should look to existing non-Internet precedent when evaluating whether to exercise personal jurisdiction based on Internet contacts.

I. PERSONAL JURISDICTION FROM *INTERNATIONAL SHOE* TO THE PRESENT

In order for any court to render a decision on the merits of a case, it must have jurisdiction over the parties to the case.[19] Personal jurisdiction is defined as "the power of a court over the person of a defendant."[20] The determination of personal ju-

17. This comment only focuses on the constitutional aspects of personal jurisdiction, and does not address state long-arm statutes. This comment also does not consider personal jurisdiction based on the "effects" test. Under this test, if the defendant's tortious actions are intentionally aimed at a particular forum, jurisdiction in that forum may be appropriate, even though the defendant's contacts would not be sufficient without the tortious conduct. Calder v. Jones, 465 U.S. 783, 789–90 (1984). The effects test has also been used in the Internet context. *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321–22 (9th Cir. 1998). However, in applying this test, courts have not developed a new Internet version in place of the non-Internet test, as they have by applying *Zippo* in place of the minimum contacts test of *International Shoe* and its progeny.

18. Because the topic of personal jurisdiction is extremely broad (and getting broader with each passing day), this comment analyzes a more limited subsection of the topic. It does not address general jurisdiction based on Internet contacts, instead focusing only on specific jurisdiction. Furthermore, this comment focuses on strictly commercial uses of the Internet. Although non-commercial use of the Internet has increased at a dramatic rate, most cases to date have arisen in a commercial context.

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

20. BLACK'S LAW DICTIONARY 1144 (6th ed. 1990) ("Personal jurisdiction. The power of a court over the person of a defendant in contrast to the jurisdiction of a court over a defendant's property or his interest therein; *in personam* as opposed to *in rem* jurisdiction.").

risdiction is normally a two-part inquiry.[21] A court must look first to the state's long-arm statute to determine whether the assertion of jurisdiction is proper under state law before turning to the constitutional question of whether the exercise of jurisdiction by a court would violate the defendant's due process rights.[22] However, many long-arm statutes extend jurisdiction, either explicitly or implicitly, to the limits of constitutional due process. Thus, the following analysis only addresses the constitutional inquiry.

A. International Shoe *Creates a New Jurisdictional Framework*

Prior to 1945, personal jurisdiction over non-residents was based on the presence and consent theories of *Pennoyer v. Neff*.[23] As applied to non-resident corporations, courts determined whether the corporation was "doing business" within the state, thereby establishing presence in the state and consent to the state's jurisdiction.[24] Thus, a corporation wishing to shield itself from jurisdiction in a given state could do so rather easily, by not employing general agents in the state and refusing to enter into contracts within the state.[25] In a formal sense, the corporation transacted no business within the state, even if it shipped a number of goods to the state.[26]

Years after *Pennoyer*, the International Shoe Corporation, a Delaware corporation with its home office in Missouri, structured its operations in Washington in just such a manner.[27] Although sales agents of the corporation resided and worked in

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21. *See, e.g.*, GTE New Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343, 1347 (D.C. Cir. 2000).

22. *Id.*

23. 95 U.S. 714 (1877). *Pennoyer* held that a prior judgment was invalid because the party was not validly served and did not appear, thus the court never had jurisdiction to render the judgment. *Id.* at 733.

24. *See, e.g.*, Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 194 (1915) ("[I]t is indubitably established that the courts of one State may not without violating the due process clause of the Fourteenth Amendment, render a judgment against a corporation organized under the laws of another State where such corporation has not come into such State for the purpose of doing business therein . . . .").

25. *See* Christine M. Wiseman, *Reconstructing the Citadel: The Advent of Jurisdictional Privity*, 54 OHIO ST. L.J. 403, 417 (1993).

26. *See id.*

27. Int'l Shoe Co. v. Washington, 326 U.S. 310, 313–14 (1945).

Washington, they had limited authority.[28] The agents could not enter into contracts, and instead sent all orders to the home office, which had sole power to accept or reject the order. If the home office accepted the order, it then assumed responsibility for all invoicing, shipping, and collection.[29] The state of Washington claimed that International Shoe owed money to the state's unemployment compensation fund, and filed suit in state court to compel International Shoe to contribute.[30] International Shoe claimed that Washington's exercise of jurisdiction over it would be a denial of due process because its activities in Washington were not sufficient to establish its presence in the state.[31] The Supreme Court, in rejecting this assertion,[32] established a new jurisdictional framework that exists to this day.

The Court recognized that the concept of *in personam* jurisdiction is a legal fiction when dealing with a corporation, and that a corporation's presence in a state "can be manifested only by activities carried on in its behalf by those who are authorized to act for it."[33] In evaluating such activities, the Court stated that:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'[34]

The Court went on to describe a basic framework for the assertion of both general and specific jurisdiction.[35] General jurisdiction refers to situations in which a defendant's activities are substantial enough to render it amenable to suit on any claim, while specific jurisdiction refers to situations in which a

28. *Id.*
29. *Id.* at 314.
30. *Id.* at 311–12.
31. *Id.* at 315.
32. *Id.* at 320.
33. *See id.* at 316.
34. *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
35. *Id.* at 316–19.

defendant's activities only render it amenable to suits related to those activities.[36]

The Court recognized that assertion of general jurisdiction is appropriate where the defendant's activities are substantial and continuous, even if those activities are unrelated to the suit in question.[37] Assertion of jurisdiction may also be appropriate in situations where the defendant's activities do not render it amenable to suits arising from unrelated activities.[38] In such cases, the nature and quality of the acts may be sufficient to justify the assertion of specific jurisdiction if such acts are closely related to the suit.[39]

This jurisdictional framework was far from precise. Indeed, the Court recognized that it was not establishing a bright line rule:

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.[40]

This test, which can be described as one of reasonableness,[41] left lower courts and commentators with little guidance as to how many contacts would support a finding of jurisdiction.[42] It also brought new challenges. For one thing, courts had to determine whether *International Shoe* was going to be-

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36. *See, e.g.*, William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 614 (1993).

37. *Int'l Shoe*, 326 U.S. at 318.

38. *Id.*

39. *Id.*

40. *Id.* at 319.

41. *See, e.g.*, Note, *The Growth of the* International Shoe *Doctrine*, 16 U. CHI. L. REV. 523, 524 (1949) (describing it as "[t]his new test of reasonableness").

42. *See, e.g.*, Virginia B. Cowan, Note, *Recent Constitutional Developments on Personal Jurisdiction of Courts*, 4 VAND. L. REV. 661, 670–71 (1951) ("There have been a number of lower court cases since *International Shoe*, and the opinions reflect some uncertainty among the judiciary as to the effect of that holding."); Richard L. Walsh, Note, *"Doing Business" as a Basis for Jurisdiction in Personal Actions Against Nonresident Individuals*, 37 GEO. L.J. 596, 606 (1949) ("How much, or how little, will the courts consider as 'doing business'? Doubtless there is ground for the apprehension that the 'minimum' contacts might sometimes prove tenuous and remote.").

come the touchstone for personal jurisdiction.[43] Perhaps more importantly, as communications and transportation technology advanced in the years following World War II, courts had to adapt the jurisdictional concepts of *International Shoe* to new social, commercial, and technological realities.[44]

B. *Subsequent Explanation and Refinement of the* International Shoe *Doctrine for Specific Jurisdiction*

Although the Court in *International Shoe* clearly contemplated that "single or occasional acts . . . , because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit,"[45] it was far from clear what those acts would be.[46] Twelve years later, the Court provided some guidance in *McGee v. International Life Insurance Co.*[47] In *McGee*, Lowell Franklin, a California resident, purchased a life insurance policy from an Arizona insurer.[48] The insurer later transferred its obligations to the defendant, a corporation with its principal place of business in Texas.[49] The defendant then mailed a reinsurance certificate to Franklin in California, offering to continue to insure him under the same terms as his original policy.[50] Franklin accepted, and continued to pay premiums by mail until his death two years later.[51] The company refused to pay on the policy, and Franklin's mother, the beneficiary of the policy, brought suit in California.[52] When the plaintiff sought to have the judgment enforced in Texas, the Texas Court of Civil Appeals refused to do so, holding that California's assertion of jurisdiction was a violation of the defendant's right to due process.[53]

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43. Cowan, *supra* note 42, at 672 ("[The] decision has been interpreted in some cases as a redefinition of 'doing business,' rather than as the establishment of a new jurisdictional basis.").

44. See discussion in Section IIB, *infra*.

45. *Int'l Shoe*, 326 U.S. at 318 (citation omitted).

46. *See* Note, *supra* note 41 (discussing the possibility that jurisdiction based on isolated activity could be appropriate, but stating that it appears the Court has established a presumption against it).

47. 355 U.S. 220 (1957).

48. *Id.* at 221.

49. *Id.*

50. *Id.*

51. *Id.* at 221–22.

52. *Id.*

53. *Id.* at 221.

The defendant did not operate any offices in California, nor did it solicit or conduct any other business in California.[54] Nevertheless, the Supreme Court held that California's assertion of jurisdiction was appropriate, noting that California had "a manifest interest in providing effective means of redress for its residents."[55] The Court acknowledged that it had been following a trend towards the broadening of permissible assertions of jurisdiction.[56] It justified this trend by noting that the changing features of the modern world had led to a greater degree of interstate commerce, and that improvements in communication and transportation had made it far less burdensome for a party to defend itself in a forum in which it had engaged in economic activity.[57] In essence, the *McGee* Court clearly answered a question that lingered after *International Shoe*: one contact could be sufficient to support jurisdiction, if that contact had a substantial enough connection to the forum state.[58]

Lest the concept of personal jurisdiction become meaningless, the Court backpedaled from *McGee*'s broad holding a year later in *Hanson v. Denckla*.[59] The plaintiffs, children of a Florida decedent, brought suit in Florida against the executrix of the decedent's estate challenging gifts made from certain trusts.[60] The trust company, an indispensable party in the case, was a Delaware corporation that did not have any offices in Florida and did not conduct or solicit business there.[61] The trust itself was established when the decedent was a resident of Pennsylvania.[62] The only reason that the trust had any contact with Florida was because the decedent moved there years after she established the trust.[63] After that time, the decedent conducted "several bits of trust administration" from Florida and the trust company remitted trust income to the decedent in Florida.[64]

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54. *Id.* at 222.
55. *Id.* at 223.
56. *Id.* at 222.
57. *Id.* at 222–23.
58. *See, e.g.*, Richman, *supra* note 36, at 599.
59. 357 U.S. 235 (1958).
60. *Id.* at 240.
61. *Id.* at 241, 245, 251.
62. *Id.* at 238.
63. *Id.* at 252.
64. *Id.*

In *Hanson*, the Court stated that it would be a mistake to view *McGee* as "herald[ing] the eventual demise of all restrictions on the personal jurisdiction of state courts."[65] The trust company had virtually no contact with the state of Florida, and the agreement in question had no connection to the forum state.[66] Furthermore, the decedent's actions created the only connection the trust company had with Florida.[67] As in *McGee*, the Court recognized that technological advances and the resulting growth in interstate commerce had increased the need for states to exercise jurisdiction over nonresidents.[68] It further acknowledged that advances in communications and transportation had made defense of such suits far less onerous.[69] However, the Court stated that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."[70] The Court noted that the rule may vary according to the "quality and nature of the defendant's activity."[71] Nevertheless, the Court laid out a clear maxim of jurisdictional policy: "it 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."[72] Thus, the Court introduced new elements of voluntariness and forseeability into the determination of the overall fairness of the assertion of jurisdiction.[73]

Twenty years later, in *World-Wide Volkswagen Corp. v. Woodson*, the Supreme Court returned to the personal jurisdiction arena under vastly different circumstances.[74] In *World-Wide Volkswagen*, the plaintiffs, New York residents, had a car

65. *Id.* at 251 (citation omitted).
66. *Id.* at 252.
67. *Id.*
68. *Id.* at 250–51.
69. *Id.* at 251.
70. *Id.* at 253.
71. *Id.*
72. *Id.*
73. Wiseman, *supra* note 25, at 422 ("[I]t is essential that the connection to the state be the foreseeable result of the defendant's own conduct—not simply the unilateral activity of the plaintiff or some tangential third party. Thus, voluntariness and foreseeability, not physical impact, became the preeminent considerations for due process purposes.").
74. 444 U.S. 286 (1980).

accident in Oklahoma on their way to Arizona.[75] They brought suit in Oklahoma against the manufacturer of the automobile, the importer, the regional distributor, and the retail dealer.[76] The manufacturer and importer did not dispute jurisdiction, but the distributor and retail dealer, both New York corporations, objected to Oklahoma's exercise of jurisdiction over them.[77] The distributor did business in New York, New Jersey and Connecticut, while the retail dealership operated only in New York.[78]

The plaintiffs argued that the dealer and the distributor could have foreseen that the car would make its way to Oklahoma.[79] However, the Court rejected this notion of foreseeability as the touchstone for jurisdiction, declaring:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.[80]

The Court noted that jurisdiction would be appropriate if a sale were not an isolated occurrence, but rather the result, either directly or indirectly, of the defendants' efforts to serve that particular market.[81] If a defendant "delivers its products into the *stream of commerce* with the expectation that they will be purchased by consumers in the forum State," then exercise of jurisdiction over that defendant is not a violation of due process.[82] In this case, however, the dealer and distributor did business only in a small tri-state area.[83] Although it was foreseeable that the cars they sold or handled would be driven elsewhere, including Oklahoma, the Court cited *Hanson* for the proposition that such unilateral activity of car owners would not support a finding of jurisdiction.[84]

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75. *Id.* at 288.
76. *Id.*
77. *Id.* at 288 & n.3.
78. *Id.* at 289.
79. *Id.* at 295.
80. *Id.* at 297.
81. *Id.*
82. *Id.* at 298 (emphasis added).
83. *Id.* at 289.
84. *Id.* at 297–98.

The *World-Wide Volkswagen* decision is significant in a number of respects. For the first time, the Court separated the "minimum contacts" and "fair play and substantial justice" components of *International Shoe*, and established them as semi-independent elements of jurisdictional analysis.[85] The decision was also the first to discuss the "stream-of-commerce" theory of jurisdiction. Although the Court clearly required more than mere injection of a product into the stream of commerce, Justice Brennan's dissent notwithstanding,[86] it did recognize that the stream-of-commerce theory, based upon purposeful availment of the forum, could support the exercise of jurisdiction under certain circumstances.[87]

The Court later revisited the stream-of-commerce theory, with muddled results, in *Asahi Metal Industry Co. v. Superior Court of California*.[88] In *Asahi*, the Court reiterated the notion that mere awareness that a product may reach the forum state is not enough to support a finding of personal jurisdiction.[89] Rather, in order for jurisdiction to be appropriate under the stream-of-commerce theory, the defendant must intentionally direct its product to the forum state.[90] This portion of the *Asahi* opinion, however, is only a plurality, not a majority.[91] Thus, it remains unclear what the constitutional limits of the stream-of-commerce theory are, and when under this theory a defendant will be considered to have purposefully availed himself of the forum. Nevertheless, despite this uncertainty, mere awareness that the product might become available in a distant forum clearly does not suffice to support a finding of jurisdiction in that forum.[92] *Asahi* was decided over fifteen years ago, and since that time the Internet has transformed the world of information and commerce, posing new jurisdictional challenges that the Court has yet to address. The following section describes the Internet and its operation as a foundation for understanding these challenges.

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85. *See id.* at 291–92.

86. *See id.* at 306–307 (Brennan, J. dissenting) (Justice Brennan declared that the seller purposefully injected its goods into the stream of commerce with full knowledge that these goods would arrive in distant forums. As such, he believed that Oklahoma's assertion of jurisdiction was appropriate).

87. *Id.* at 297–98.

88. 480 U.S. 102 (1987).

89. *Id.* at 112–13.

90. *Id.*

91. *Id.* at 105.

92. *Id.* at 112.

II. STRUCTURE AND USE OF THE INTERNET

The Internet has been portrayed as a "network of networks,"[93] allowing a user on one network to share information with a user located thousands of miles away on a different network. In just a few short years, access points to the Internet have multiplied at a dramatic rate.[94] Users can find terminals in a myriad of locations, such as schools, offices, cafes, and public libraries.[95] Furthermore, the explosion of home computers with affordable access to the Internet has made such connections commonplace; a report by the United States Department of Commerce in February of 2002 indicated that over fifty percent of United States households now have Internet access.[96]

Once connected to the Internet, users generally participate in two primary activities: sending and receiving electronic mail ("email"), and "surfing" the World Wide Web.[97] Email has become an increasingly popular method of communication.[98] While similar to regular mail, email differs in some relevant respects. Because of its almost instantaneous nature, as well as its low cost (indeed, it is usually free to the user), email can be used quite differently from regular mail, and now often serves a similar function to telephone calls. Unlike regular mail, which involves significant action by the sender beyond writing the letter, email usually requires no further action than a single keystroke to send the letter. This ease of use and delivery has quickly made email a popular form of communication for both personal and business use.[99]

The World Wide Web, usually referred to as just the "Web," has rapidly become an integral part of our personal and commercial culture. A short survey of print or television adver-

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93. *See, e.g.*, ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996).

94. *See, e.g.*, U.S. Department of Commerce, National Telecommunications and Information Administration, *A Nation Online: How Americans Are Expanding Their Use of the Internet*, 35–38 (Feb. 2002) *available at* http://www.ntia.doc.gov/ntiahome/dn/ anationonline2.pdf.

95. *See, e.g.*, *id.* at 38–41.

96. *See, e.g.*, *id.* at 3.

97. There is an enormous array of possible ways to utilize the Internet, including file transfers, instant messaging, and newsgroups. However, an in-depth discussion of all possibilities is not warranted here.

98. *See, e.g.*, U.S. Department of Commerce, *supra* note 94, at 30.

99. *See, e.g.*, *id.* at 31 (noting that eighty-four percent of all Internet users utilize email).

tisements shows that a vast number now include a Web address, and business is conducted frequently over the Web.[100] Although there has been a recent slowdown in the growth of goods and services available over the Web, as sites offering such diverse items as pet food and toiletries have folded,[101] the Web as a commercial and informational source nevertheless continues to expand.[102]

The computers that create the networks known as the Web store a vast number of documents ("Web pages") that users may retrieve.[103] These Web pages provide a variety of content, including text, images, and sound.[104] They often contain "hyperlinks," which are sections of text or images that, when selected ("clicked"), automatically link the user to another page.[105] Thus, a company may have a Web site that includes a "home" page that in turn contains links to many sub-pages.[106] These pages may be stored on the computer of the "owner" of the page, but that is by no means a requirement.[107] They are often stored by a "host" network, which contracts with the owner to provide such storage.[108] Furthermore, because each page is technically independent, linked pages for one owner may be stored on different computers, perhaps even on different networks in entirely different physical locations.[109]

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100. *See, e.g., id.* at 30.

101. *See, e.g.*, Troy Wolverton, *Pets.com Latest High-Profile Dot-Com Disaster* (Nov. 7, 2000) *at* http://news.com.com/news/0-1007-200-3420731.html.

102. *See, e.g.*, Reuters, *Report: Half Billion People Have Home Net Access* (Mar. 7, 2002) *at* http://digitalmass.boston.com/new/2002/03/07/net_access.html (noting that home connections to the Internet in the United States were up 3.5 percent in the last quarter of 2001).

103. ACLU v. Reno, 929 F. Supp. 824, 836 (E.D. Pa. 1996).

104. *Id.*

105. *Id.*

106. *Id.* For example, a company that sells books and music may have a home page that contains the following: a link to a page that contains the music catalog, a link to a page that contains the book catalog, a link to a page that tells you more about the company (such as its location, its owner, and any current employment opportunities), and a link to a page that contains customer service information. Each of these pages may have additional links, thus creating something resembling a tree (although the "tree" is an imperfect analogy, as some of these links may return you to the home page, or to one of the other "branches").

107. *Id.* at 837.

108. *Id.*

109. *See id.* at 837–38. Where a particular page is stored should normally be irrelevant to the jurisdictional analysis, because the physical location of the host's storage is an arbitrary fact not controlled by the defendant, but some courts have mistakenly considered this location. *See, e.g.*, Bochan v. La Fontaine, 68 F. Supp. 2d 692, 699 (E.D. Va. 1999) (finding jurisdiction based on the defendants'

Each of these pages is located by an address similar to a postal address or phone number.[110] Thus, a user wishing to access the New York Times on the Web will type in www.nytimes.com[111] on his or her Web browser.[112] The computer translates this Web address into a numeric address,[113] and attempts to retrieve the appropriate page. It does this by transmitting a request through the Internet to the "home" computer of the page, which responds by transmitting the requested page back to the end user.[114] This is an important conceptual point to understand, and one that sometimes causes confusion among courts.[115] In one sense, the creator of a Web page has "broadcast" his or her information for all to see,[116] but in another sense, the information never gets broadcast to a particular user unless that particular user has first made a request for that information.[117] This difference can cause confusion because a court that conceptualizes the publisher of a Web site as broadcasting his site for everyone to see will be more likely to find that publisher subject to jurisdiction in a distant

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posting to a newsgroup through a Virginia service provider, even though the defendants did not use the provider to access the Internet, had almost no other contact with the forum, and the newsgroup had virtually no connection to any geographical area, but was temporarily stored in Virginia).

110. *ACLU*, 929 F. Supp. at 836.

111. This is formally known as a Uniform Resource Locator, or URL. It is commonly referred to as a Web address.

112. A Web browser is simply a program that is used to access and view Web sites, much like Microsoft Word or WordPerfect are programs used for word processing.

113. This address is known as an Internet Protocol, or IP, address. It is a series of numbers, quite similar to a phone number.

114. When the user clicks on a hyperlink, as opposed to typing in a Web address, the exact same process occurs.

115. *Compare* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (finding that defendant "purposefully availed itself of the privilege of doing business within [Connecticut]" merely by establishing a Web site that could be accessed by any of Connecticut's ten thousand Internet users at any time) *with* Millennium Enters., Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907, 922 (D. Or. 1999) ("[C]ontrary to the scenario described in *Inset*, information published on Web sites is not thrust upon users indiscriminately.").

116. *See e.g.*, *Inset*, 937 F. Supp. at 165 ("[O]nce posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user.").

117. *See, e.g.*, *Millennium*, 33 F. Supp. 2d at 922 ("[A] Web site is not automatically projected to a user's computer without invitation . . . . Rather, the user must take affirmative action to access [the] Web Site. The user must turn on a computer, access the Internet and the Web, and browse the Web for a particular site.").

forum.[118] Conversely, a court that conceptualizes the viewing of a published Web site as dependent on unilateral action by the end user will be less likely to exercise jurisdiction over the publisher.[119]

This vast, interconnected network of networks has provided courts with a number of jurisdictional challenges. Its rapid growth, and the ease with which a single person can publish a Web site that has nationwide impact, has lead to numerous situations where defendants find themselves objecting to jurisdiction in distant forums.[120] Thus, courts have been forced to assess jurisdictional issues related to the Internet even though they may be unfamiliar with the framework within which those issues arose.[121]

III. JURISDICTION BASED ON INTERNET CONTACTS: *ZIPPO*, THE SLIDING SCALE TEST OF WEB SITE INTERACTIVITY, AND SUBSEQUENT CASES

A survey of Internet case law reveals an explosion of Internet-related cases. In the period from 1990 through 1995, only eighteen cases on LEXIS contained at least three references to the word "Internet."[122] In the year 2001 alone, over five hundred cases made at least three references to the Internet. Similarly, the first Internet cases regarding personal jurisdiction surfaced in 1996, when fifteen cases on LEXIS contained the combination of "Internet" and "personal jurisdiction." In the year 2001, that figure had risen to one hundred and fifty-two.[123]

Not surprisingly, courts have struggled with this explosion of cases, and have searched for guidance in the evaluation of the jurisdictional problems raised by this new technology. The

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118. *See, e.g.*, *Inset*, 937 F. Supp. at 165 (finding jurisdiction).

119. *See, e.g.*, GTE New Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343, 1349–50 (D.C. Cir. 2000) (finding no jurisdiction).

120. *See, e.g.*, Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123 (W.D. Pa. 1997).

121. *See, e.g.*, ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996) (noting that "the Internet . . . presents unique issues relating to the application of First Amendment jurisprudence and due process requirements to this new and evolving method of communication.").

122. Presumably, a case that makes more than one or two references to the Internet is in some sense "Internet-related."

123. Of course, the mere fact that a case contains both terms does not mean that the case addresses jurisdiction based upon Internet contacts.

court in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[124] provided just such a touchstone. The following subsections examine, in turn, the *Zippo* decision itself, subsequent cases that have turned the *Zippo* analysis into a test that serves as a proxy for traditional jurisdictional analysis, and subsequent cases that reject the *Zippo* test. These latter cases correctly consider the specific circumstances of the case and the nature of the contacts, without the use of an analytical proxy, to determine whether the assertion of jurisdiction would comport with constitutional due process requirements.

A. Zippo *and the Sliding Scale Test*

Zippo Dot Com ("Dot Com"), a California corporation, operated a Web site and Internet news service and laid claim to the domain names "zippo.com," "zippo.net," and "zipponews.com."[125] Zippo Manufacturing, a Pennsylvania company that manufactures the well-known Zippo brand of lighters, sued Dot Com in the United States District Court for the District of Western Pennsylvania, alleging trademark infringement.[126] Dot Com moved to dismiss for lack of personal jurisdiction, and the *Zippo* court denied this motion.[127]

Dot Com's Web site allowed users to subscribe to its news service by completing an application that included such information as the user's name and address.[128] Customers could pay for this service "over the Internet or by telephone."[129] Dot Com had no offices, employees, or agents in Pennsylvania, but did have approximately 3,000 subscribers[130] located in the state.[131] Dot Com also contracted with seven Internet service providers in Pennsylvania, allowing their customers to access Dot Com's news services.[132]

The *Zippo* court began its jurisdictional analysis by discussing the traditional framework of *International Shoe*, noting

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124. 952 F. Supp. 1119 (W.D. Pa. 1997).
125. *Id.* at 1121.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* This figure represented about two percent of Dot Com's overall subscriber base.
131. *Id.*
132. *Id.*

that "[d]efendants who . . . create continuing relationships and obligations with the citizens of another state are subject to regulation and sanctions in the other State for consequences of their actions."[133] The court then turned to the Internet and jurisdiction. It began by noting that, as stated in *Hanson*, the need for the expansion of jurisdiction has increased as technology has expanded the range of commercial activities.[134] It also noted the Supreme Court's pronouncement that "[j]urisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State."[135]

In a survey of the scant body of Internet case law existing at that time, the *Zippo* court found that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."[136] With its analysis, the *Zippo* court did not intend to preempt the traditional framework, stating that "[t]his sliding scale is consistent with well developed personal jurisdiction principles."[137] The court went on to discuss the nature of different Web sites, noting that some sites are used to conduct business and enter into contracts.[138] The court concluded that for these sites, if the defendant enters into contracts and knowingly and repeatedly transmits information to residents of another state, assertion of jurisdiction by that state is proper because the defendant has purposefully availed itself of the privilege of conducting business in that state.[139] Such sites are commonly referred to as "active" Web sites, although the Zippo court never used this terminology.[140]

At the other end of the spectrum are sites that simply post information on the Web that is accessible in another state.[141] The court recognized that the mere availability of these "passive" sites in a foreign state will not support a finding of juris-

133. *Id.* at 1123 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985)).

134. *Id.*

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

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

137. *Id.*

138. *Id.* at 1124.

139. *Id.* at 1124–1126.

140. *See, e.g.*, Sch. Stuff, Inc. v. Sch. Stuff, Inc., No. 00 C 5593, 2001 U.S. Dist. LEXIS 23382 at **7–8 (N.D. Ill. May 17, 2001).

141. *Id.*

diction.[142] In the middle ground, the court found what it called "interactive Web sites."[143] Such sites do not allow users to actually conduct business, but do support the exchange of information.[144] For these sites, the court reasoned, "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."[145]

The court again referred to the traditional framework of jurisdictional analysis, observing that "[t]raditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper. Different results should not be reached simply because business is conducted over the Internet."[146] Citing *McGee* and *International Shoe*, the court noted that even one contact may be enough to create a substantial connection to the forum state, and the jurisdictional test requires that courts focus on the nature and quality of the contacts, not just their quantity.[147]

In examining the facts of its case, the *Zippo* court found that Dot Com's Web site was an active site, and that the defendant had engaged in repeated commercial transactions with Pennsylvania residents via its Web site.[148] Thus, Dot Com's contacts with Pennsylvania were not "fortuitous" within the meaning of *World-Wide Volkswagen* because it knowingly engaged in business with Pennsylvania residents.[149] Furthermore, the court found that these intentional contacts with Pennsylvania were numerous enough to support an assertion of jurisdiction.[150]

The court rejected the defendant's contention that exercising jurisdiction would be unreasonable.[151] Although the court recognized that defending a suit in Pennsylvania would impose a burden on the defendant, the concerns of the forum state and

142. *Id.* at *8.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* (internal citation omitted).
147. Zippo Manufacturing Co. v. Zippo Dot Com, Inc, 952 F. Supp. 1119, 1127 (W.D. Pa. 1997).
148. *Id.* at 1125–26. The court, however, never used the term "active."
149. *Id.* at 1126.
150. *Id.* at 1127.
151. *Id.*

the plaintiff's choice of forum outweighed this burden.[152] Noting that the defendant chose to do business in Pennsylvania, the court observed that "[t]he Due Process Clause is not a 'territorial shield to interstate obligations that have been voluntarily assumed.'"[153]

The *Zippo* court produced a thoughtful opinion that was careful to remain true to established principles of personal jurisdiction as explained by the Supreme Court. Furthermore, the court did not actually create a new test for personal jurisdiction based on Internet contacts. Indeed, a sliding scale to assess the contacts of a defendant had been used in similar pre-Internet jurisdictional analyses.[154] Nevertheless, as more courts began to grapple with this new arena of jurisdictional questions, the *Zippo* decision became a touchstone for courts seeking to understand the Internet. What was an insightful opinion applying traditional principles of personal jurisdiction has now developed into a test that is used as an inappropriate proxy for those principles.

B. *Cases Subsequent to* Zippo*: Moving Away from* International Shoe

The *Zippo* case has been cited positively in courts of every federal circuit except the First Circuit.[155] In just a few short

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152. *Id.*

153. *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)).

154. *See, e.g.*, Michele N. Breen, Comment, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace into* International Shoe, 8 SETON HALL CONST. L.J. 763, 781 (1998) ("[T]he notion of a 'sliding scale' or '*Shoe* spectrum' developed to demonstrate how a forum's power over a defendant will change as the contacts increase.").

155. *See, e.g.*, Mink v. AAAA Dev. L.L.C., 190 F.3d 333, 336 (5th Cir. 1999); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1296 (10th Cir. 1999); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997); Ty, Inc. v. Baby Me, Inc., No. 00 C 6016, 2001 U.S. Dist. LEXIS 5761, *9–*10 (N.D. Ill. Apr. 20, 2001); Cuccioli v. Jekyll & Hyde Neue Metropol Bremen Theater Produktion Gmbh & Co., 150 F. Supp. 2d 566, 576 (S.D.N.Y. 2001); Jeffers v. Wal-Mart Stores, Inc., 152 F. Supp. 2d 913, 922–23 (S.D. W. Va. 2001); Neogen Corp. v. Neo Gen Screening, Inc., 109 F. Supp. 2d 724, 728 (W.D. Mich. 2000); Uncle Sam's Safari Outfitters, Inc. v. Uncle Sam's Army Navy Outfitters-Manhattan, Inc., 96 F. Supp. 2d 919, 922–23 (E.D. Mo. 2000); Butler v. Beer Across Am., 83 F. Supp. 2d 1261, 1268 (N.D. Ala. 2000); Decker v. Circus Circus Hotel, 49 F. Supp. 2d 743, 748 (D.N.J. 1999); GTE New Media Servs., Inc. v. Ameritech Corp., 21 F. Supp. 2d 27, 38 (D.D.C. 1998) (the adoption of *Zippo* in this case was implicitly overturned by *GTE New Media Servs., Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000)).

years, it has become the preeminent case relating to personal jurisdiction based on Internet contacts.[156] In and of itself, this is not a problem. However, many courts that cite *Zippo* fail to even acknowledge a significant body of Supreme Court precedent concerning personal jurisdiction.[157] These courts rely on *Zippo* as the touchstone of personal jurisdiction analysis in the Internet realm. For example, the Fifth Circuit in *Mink v. AAAA Development* stated that "[c]ourts addressing the issue of whether personal jurisdiction can be constitutionally exercised over a defendant look to the 'nature and quality of commercial activity that an entity conducts over the Internet,'" [158] in essence declaring *Zippo* as the source of Internet jurisdiction jurisprudence. The *Mink* court made only an initial brief mention of traditional personal jurisdiction principles before adopting *Zippo* as its analytical model.[159] Many other courts have followed a similar path in addressing the problem of jurisdiction based on Internet contacts, applying *Zippo* with little or no mention of traditional personal jurisdiction principles.[160]

Furthermore, many courts fail to recognize that *Zippo* merely described a spectrum of possible Web sites. They use *Zippo*'s descriptions as neat categorical boxes, thereby making the analysis easier but less accurate. This analysis ignores the fact that the critical inquiry is the nature of the contacts a defendant has with the forum state. These courts deliberate over which category a particular Web site belongs to, and then treat the categorization as dispositive, thus avoiding the more difficult fact-specific inquiry into the defendant's contacts. Thus, courts using this approach seem inclined to find that "mildly"

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156. *See, e.g.*, Richard E. Kaye, Annotation, *Internet Web Site Activities of Nonresident Person or Corporation as Conferring Personal Jurisdiction Under Long-Arm Statutes and Due Process Clause*, 81 A.L.R. 5th 41, 89 (2000) ("The *Zippo* case is notable and has been much quoted by other courts as elucidating the 'sliding scale' test for jurisdiction.").

157. *See* Dagesse v. Plant Hotel N.V., 113 F. Supp. 2d 211, 220 (D.N.H. 2000) ("The usefulness of the existing case law is . . . limited by the reluctance of some courts to apply traditional due process principles to a defendant's internet activity.").

158. *Mink*, 190 F.3d at 336 (quoting Zippo Mfg. Co. v. Zippo Dot Com, Inc, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

159. *Id.*

160. *See, e.g.*, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); On-Line Techs. v. Perkin Elmer Corp., 141 F. Supp. 2d 246 (D. Conn. 2001); Am. Info. Corp. v. Am. Infometrics, Inc., 139 F. Supp. 2d 696 (D. Md. 2001); People Solutions, Inc. v. People Solutions, Inc., No. 3:99-CV-2339-L, 2000 U.S. Dist. LEXIS 10444 (N.D. Tex. July 25, 2000).

interactive web sites are passive, presumably because such a finding obviates the need for further analysis into the nature of the contacts or interactivity.[161] For example, the *Mink* court found that the defendant's Web site was passive even though technically it was interactive.[162]

Courts may be choosing to expand the passive category because the *Zippo* test provides little guidance for the analysis of interactive Web sites—sites that fall in the middle of the spectrum.[163] The *Zippo* court merely stated that for an interactive site "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."[164] Because the defendant in *Zippo* had an active Web site, and entered into numerous contracts with residents of the forum state, no further analysis of interactivity was required.[165] Thus, for a court facing the question of personal jurisdiction based on an interactive

161. *See* Eugene R. Quinn, Jr., *The Evolution of Internet Jurisdiction: What a Long Strange Trip It Has Been*, 2000 SYRACUSE L. & TECH. J. 1, 24–28 (2000). *See also Cybersell*, 130 F.3d 414, 420 (describing a site that was technically interactive as "essentially passive"); Brown v. Geha-Werke GmbH, 69 F. Supp. 2d 770, 777 (D.S.C. 1999) (finding a site passive even though it technically was interactive). In the opposite situation, some courts have found sites that are actually capable of on-line sales to be "interactive" instead of "active" because these courts believe that active sites automatically confer jurisdiction. *See, e.g.*, Brown v. AST Sports Science, Inc., 2002 U.S. Dist. LEXIS 12294, at **16–18 (E.D. Pa. June 28, 2002) (finding that defendant's site was in the middle category even though defendant actually sold products to Pennsylvania through its site); D.J.'s Rock Creek Marina, Inc. v. Imperial Foam & Insulation Mfg. Co., 2002 U.S. Dist. LEXIS 13470, at *10 (D. Kan. June 10, 2002) (noting that the site "allows customers to order online" but declared that the defendant's site was interactive); Millennium Enters., Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907, 920 (D. Or. 1999) (finding a site interactive instead of active because the court believes that an active site will "confer personal jurisdiction almost as a matter of course"). *See also* Rainy Day Books, Inc. v. Rainy Day Books & Café, L.L.C., 186 F. Supp. 2d 1158, 1164–65 (D. Kan. 2002) (finding assertion of jurisdiction appropriate because "Defendant's website is a commercial website accessible by Kansas residents" even though there was some question as to whether the plaintiff had "manufactured" jurisdiction by purchasing products from the defendant).

162. *Mink*, 190 F.3d at 336–37 (defendant's Web site was passive even though it contained an email link and a printable order form).

163. *See, e.g.*, Dagesse v. Plant Hotel N.V., 113 F. Supp. 2d 211, 222 (D.N.H. 2000). The *Dagesse* court stated that the *Zippo* test was most useful at either end of the spectrum, and that application of the *Zippo* test provided little guidance for an interactive Web site.

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

165. *Id.* at 1125–26.

Web site, rather than a passive or active site, *Zippo* provides no tools to aid in the analysis.

Furthermore, many courts misapprehend *Zippo*'s holding.[166] In defining a site as active, the court in *Zippo* was not referring merely to the site's *capability* to enter into contracts, but rather to the fact that the defendant *actually* entered into such contracts.[167] Additionally, the *Zippo* court indicated that an examination of an interactive Web site must look at the exchange of information that occurs on the site, not merely at the capability of the site to exchange information.[168] Indeed, such a holding harkens back to an annotation first published in 1956: "No generally applicable standards can be ascertained from [*International Shoe*] as to the circumstances under which a foreign corporation will be deemed to have sufficient contacts with the forum . . . . The material factor is *the quality and the nature of the corporate activity*."[169] Thus, *Zippo* did not contemplate an abandonment of the "minimum contacts" required by *International Shoe*.[170] Instead, the court merely provided a conceptual framework in which to analyze the contacts of the Web site.

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166. *See, e.g.*, Millennium Enters., Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907, 921 (D. Or. 1999) (The *Millennium* court believed that *Zippo* called for a determination of jurisdiction based *solely* upon the capabilities of the site, rather than the activity that actually occurred on the site. Thus, the court held that the *Zippo* categories needed "further refinement," determining that some additional form of "deliberate action" within the state by the defendant was necessary to support a finding of jurisdiction). *See also* ESAB Group, Inc. v. Centricut, LLC, 34 F. Supp. 2d 323, 330 (D.S.C. 1999) (the court apparently believed that following *Zippo* meant placing sites into categories that were dispositive on the question of personal jurisdiction).

167. *Zippo*, 952 F. Supp. at 1125–26 ("We are not being asked to determine whether Dot Com's Web site alone constitutes the purposeful availment of doing business in Pennsylvania . . . . We are being asked to determine whether Dot Com's conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania.").

168. *Id.* at 1124 ("[T]he 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").

169. C. T. Dreschler, Annotation, *Validity, Construction, and Application of Statute Making a Foreign Corporation Subject to Action Arising Out of Contract Made Within the State Although Such Corporation Was Not Doing Business Therein*, 49 A.L.R. 2d 668, 669 (1956) (emphasis added).

170. *Zippo*, 952 F. Supp. at 1122–23 (discussing minimum contacts).

C. *Cases Subsequent to* Zippo*: Continuing with Traditional Jurisdictional Analysis*

Not all courts have adopted the *Zippo* test as *the* source of Internet jurisdiction jurisprudence, and a few have actually rejected it. For example, in *Dagesse v. Plant Hotel N.V.*,[171] the court examined the question of personal jurisdiction based on Internet contacts as one of first impression.[172] The court acknowledged the limited utility of existing case law, recognizing that "traditional constitutional requirements of foreseeability, minimum contacts, purposeful availment, and fundamental fairness must continue to be satisfied before any activity—including internet activity—can support an exercise of personal jurisdiction."[173] While the court did not openly reject *Zippo*, it noted that *Zippo* "is most helpful when the web site at issue fits neatly into one of the extremes at either end of the spectrum."[174] The court chose instead to "look beyond the degree of interactivity provided by the web site and instead emphasize the degree to which the defendant actually used its web site to conduct commercial or other activity with forum residents."[175]

In another case where personal jurisdiction was challenged, *GTE New Media Services Inc. v. Ameritech Corp.* ("*Ameritech*"),[176] the plaintiff alleged that the defendants had engaged in a conspiracy to dominate the Internet directory market.[177] The district court adopted the *Zippo* approach and found that the assertion of jurisdiction was appropriate.[178] On an interlocutory appeal, in *GTE New Media Services Inc. v. BellSouth Corp.* ("*BellSouth*"),[179] the District of Columbia Circuit never cited to *Zippo*, and the only mention of interactivity occurred in its discussion of the decisions of other courts. The *BellSouth* court reversed the *Ameritech* ruling, noting that personal jurisdiction cannot be based solely on the existence of the

171. 113 F. Supp. 2d 211 (D.N.H. 2000).
172. *Id.* at 220.
173. *Id.* at 221.
174. *Id.* at 222.
175. *Id.*
176. 21 F. Supp. 2d 27 (D.D.C. 1998).
177. *Id.* at 32. Internet directories are, essentially, on-line yellow pages.
178. *Id.* at 38.
179. 199 F.3d 1343 (D.C. Cir. 2000) (BellSouth, one of the defendants of the original case, filed an interlocutory appeal of the trial court's finding of jurisdiction, and hence is listed as the party defendant on appeal).

Web site and the ability of forum residents to access it.[180] It further rejected the notion that accessing the Web site, with nothing more, would support a finding of personal jurisdiction, because such access is akin to a forum resident merely placing a telephone call to the defendant's servers located outside of the forum.[181] Rather than conceptualizing the publication of a Web site as broadcasting it for all to see, the *BellSouth* court recognized that access to the Web site by an individual still requires some form of unilateral action by that individual.

The *BellSouth* court refused to find jurisdiction based solely on the defendant's actions to maximize its Web site's usage in the forum and the accessibility of the site in that forum. The court stated that a finding of jurisdiction under these circumstances would not comport with traditional principles of personal jurisdiction because "this does not by itself show any persistent course of conduct by the defendants in the District."[182] In the court's eyes, advanced technology must still hew to such principles, and allowing an assertion of jurisdiction based upon the mere accessibility of the Web site "would shred these constitutional assurances out of practical existence."[183] The court strongly rejected the application of any new jurisdictional model: "We do not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction."[184]

BellSouth and *Dagesse* represent thoughtful approaches to the problems that personal jurisdiction based on Web site contacts pose. Both decisions considered the existing Internet case law, yet refused to apply such case law where it was in apparent conflict with traditional jurisdictional principles. Instead, in contrast to the growing body of case law, they considered the specific circumstances of the case and the nature of the contacts, without the use of an analytical proxy, to determine whether the assertion of jurisdiction would comport with constitutional due process requirements. While no court considering personal jurisdiction based upon Web site contacts intentionally ignores such constitutional doctrines, many courts follow an analytical path that may lead to a violation of a de-

180. *Id.* at 1350.
181. *Id.* at 1349–50.
182. *Id.* at 1349.
183. *Id.* at 1350.
184. *Id.*

fendant's due process rights. By applying the *Zippo* test, and treating the sliding-scale categories as dispositive, these courts often do not engage in an in-depth analysis of the nature of the contacts that do or do not support jurisdiction. Closer consideration of these contacts and their significance in light of existing case law, as was done in *Dagesse* and *BellSouth*, would hold true to *International Shoe* and its progeny. The next section examines this existing case law and its applicability to personal jurisdiction based on Internet contacts.

IV. "TRADITIONAL" ADVERTISEMENTS, THE STREAM OF COMMERCE, AND THE CONTINUING APPLICABILITY OF TRADITIONAL ANALYSIS TO INTERNET CONTACTS

The subject matter offered on the Web is remarkably diverse, as is the level of sophistication. Indeed, even the essential functions of sites vary greatly. For example, there are sites that advertise a product or company,[185] provide news,[186] deliver email services,[187] offer advice,[188] or sell merchandise.[189] This is by no means an exclusive list, and many sites present some combination of functions,[190] while other sites simply defy description.[191] Such variety poses challenges for anyone trying to discern a "unified field theory"[192] for the Internet. However, in the context of commercial Web sites, existing non-Internet case law can provide guideposts to assist courts in navigating the realm of personal jurisdiction based on Internet contacts. Some sites are analogous to advertisements in "traditional" media, while others are more similar to products placed in the stream of commerce. The following sections consider the appli-

185. *E.g.*, Chicago Cutlery, *at* http://www.chicagocutlery.com/chicago/ (last visited Oct. 27, 2002).

186. *E.g.*, CNN.com, *at* http://www.cnn.com (last visited Oct. 27, 2002).

187. *E.g.*, msn Hotmail, *at* http://www.hotmail.com (last visited Oct. 27, 2002).

188. *E.g.*, WebMD, *at* http://www.webmd.com (last visited Oct. 27, 2002).

189. *E.g.*, Amazon.com, *at* http://www.amazon.com (last visited Oct. 27, 2002).

190. *E.g.*, Yahoo!, *at* http://www.yahoo.com (last visited Oct. 27, 2002).

191. *See, e.g.*, http://www.fsinet.or.jp/~sokaisha/rabbit/rabbit.htm (last visited Oct. 27, 2002).

192. "Unified field theory" is a phrase most often used in science. As a generic term, it refers to a single theory that explains all phenomena. *See, e.g.*, http://whatis.techtarget.com/definition/0,,sid9_gci554508,00.html (last visited Oct. 27, 2002).

cability of case law from each of these areas to questions of personal jurisdiction based on Internet contacts. Using analogies from these cases can illuminate the murky jurisprudence of personal jurisdiction based on Internet contacts.

A. Advertisements in "Traditional" Media

The act of creating a commercial Web site and placing it on the Internet has many parallels to advertising in more "traditional" media. By publishing a Web site, the owner has placed his information or message in a place where any Internet user can access it. Likewise, an advertisement placed in a magazine or on television is available to any reader or viewer who subscribes to that particular form of media. The owner of a Web site may target certain geographic or demographic segments of the Internet through marketing or partnerships with other organizations.[193] Advertisers in traditional media may take similar actions.[194] Furthermore, the essential function of some Web sites is to advertise and sell products.[195] Thus, an examination of how courts approach traditional advertisements in determining questions of personal jurisdiction may illuminate the appropriate analysis for these Web sites. The case law shows that traditional advertising alone, without something more to indicate purposeful availment, will not support a finding of jurisdiction. The same should hold true for the publisher of a Web site.

It is well settled that placing an advertisement in a national publication does not by itself constitute the "purposeful availment" necessary to justify the assertion of personal jurisdiction over a nonresident defendant.[196] This proposition may derive from the long-standing rule that "mere solicitation" does

193. For example, the owner of a car dealership in Denver may advertise his Web site only on other sites specific to Denver, or through partnerships with nationwide automobile Web sites.

194. The same car dealership might advertise in local newspapers or television stations, and may choose to advertise on specific television programs based upon viewer demographics.

195. There are a myriad of Web sites that fit this description. For example, www.amazon.com sells books, music, and a variety of other goods, www.sierratradingpost.com sells outdoor equipment, and www.chicagocutlery.com advertises a line of kitchen knives.

196. Andrew J. Zbaracki, Comment, *Advertising Amenability: Can Advertising Create Amenability?*, 78 MARQ. L. REV. 212, 234 (1994).

not constitute doing business within a state.[197] However, advertising combined with additional contacts may support jurisdiction.[198] The number of contacts that are required depends in part on the claim asserted as well as the details of the additional contacts.[199] This is by necessity a fact-specific inquiry. Nevertheless, personal jurisdiction requires some contact in addition to a mere advertisement.

For example, in *Growden v. Bowlin & Associates, Inc.*,[200] the defendant, a used airplane dealer located in Georgia, advertised in two national publications.[201] The plaintiff's decedent (Growden), a resident of Louisiana, saw the advertisement and telephoned the defendant in Georgia to inquire about an airplane.[202] The two then met in Alabama to inspect the plane, and later signed a purchase agreement in Georgia.[203] Growden took delivery of the plane in Georgia and flew it back to Louisiana.[204] On the very next flight, the plane crashed, killing Growden.[205] The plaintiff filed suit in Louisiana for wrongful death, and the defendant objected to Louisiana's assertion of personal jurisdiction.[206]

After reviewing constitutional due process requirements, the court analyzed the defendant's contacts with Louisiana.[207] It noted that the defendant had no place of business or agent in Louisiana, nor was there any evidence that it had ever made any sales to Louisiana residents prior to the sale in question.[208] The court found that the only significant contact with Louisiana was the defendant's advertisements in two national publications.[209] Although the court recognized that *World-Wide Volkswagen* had indicated that advertising designed to reach

197. *See, e.g.*, J. Baranello & Sons v. Hausmann Indus., Inc., 86 F.R.D. 151, 155–56 (E.D.N.Y. 1980). *See also*, CASAD & RICHMAN, *supra* note 24, at § 3-2[2][b][ii]-[iii]. This rule existed prior to *International Shoe*, when "doing business" was part of the jurisdictional test, and still survives in some form. *Id.* at § 3-2[2][b][ii].

198. Zbaracki, *supra* note 97, at 234–35.

199. *Id.* at 235.

200. 733 F.2d 1149 (5th Cir. 1984).

201. *Id.* at 1150.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 1150-51.

208. *Id.* at 1151.

209. *Id.*

the forum state could be a factor in the jurisdictional analysis, the *Growden* court noted that the Supreme Court did not hold that such an advertisement, without additional contacts, would be *sufficient* to support a finding of jurisdiction.[210] Therefore, the *Growden* court held that the mere advertisement in two national publications, along with few additional contacts, was insufficient to subject the defendant to Louisiana's jurisdiction.[211] Other courts have followed similar reasoning.[212]

Courts have treated advertising over broadcast media similarly. In *WSAZ, Inc. v. Lyons*,[213] the defendant operated a television station in West Virginia, across the Ohio River from Kentucky.[214] Although it had no office or agents in Kentucky, the defendant solicited various merchants in Kentucky for advertising on its telecasts, its broadcast range included Kentucky, and it occasionally gathered information in Kentucky for its news broadcasts.[215] However, less than four percent of the defendant's total advertising sales were made to Kentucky residents.[216] The plaintiff sued in Kentucky, alleging that the defendant had committed libel during one of its newscasts. The defendant objected to jurisdiction in Kentucky, claiming that such a finding would subject it to jurisdiction "in any state of the union to which the television waves coming from its West Virginia facilities are transmitted."[217]

The *WSAZ* court considered the systematic nature of the defendant's contacts with Kentucky. It rejected the notion that telecasts received in a particular forum would, as a matter of course, subject the broadcaster of the telecasts to jurisdiction in that forum.[218] The court noted, however, that the facts of the

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210. *Id.*

211. *Id.* at 1152.

212. *See, e.g.*, Williams v. Bowman Livestock Equip. Co., 927 F.2d 1128, 1131 (10th Cir. 1991) (national advertising, by itself with no further evidence, was insufficient to support jurisdiction); Pizarro v. Hoteles Concorde Internationale C.A., 907 F.2d 1256, 1260 (1st Cir. 1990) (placement of nine advertisements in a Puerto Rico newspaper was not sufficient for the court to assert jurisdiction over the defendant); Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40, 43 (8th Cir. 1988) (sole contact between defendants and the forum was an advertisement in a national publication; this "advertising did not represent a purposeful availment of the benefits and protections" of the forum's laws).

213. 254 F.2d 242 (6th Cir. 1958).

214. *Id.* at 244.

215. *Id.* at 244–46.

216. *Id.* at 244.

217. *Id.*

218. *Id.* at 245.

case "consist not only of certain general conditions and situations with reference to telecasting."[219] Instead, the defendant had expressly contracted to deliver advertising to Kentucky, and had in fact transmitted and delivered such advertising.[220] The court found that the "defendant carried on a regular and continuous course of business activity in Kentucky, for its usual broadcast, started by defendant in West Virginia, was regularly carried over into Kentucky by defendant as expressly contracted."[221] Consequently, the court held that the "[d]efendant through its telecasting had substantial ties, contracts and relations with . . . Kentucky and its activities within that state created obligations therein. It follows that within the doctrine of [*International Shoe*], . . . defendant is doing business within . . . Kentucky."[222]

Given the jurisdictional requirement that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State,"[223] it is not surprising that the more targeted the advertising, the more likely an assertion of jurisdiction will comport with due process. Thus, parties engaged in more localized advertising, as in *WSAZ*, are more likely to be subject to jurisdiction in the states that their advertisements target.[224]

Like traditional advertisements, a Web page is viewable by anyone who chooses to access it, yet without something more, it is not directed at any particular forum.[225] Both traditional media and Web pages can be more focused, and target certain sectors of the market or certain locations. Thus, the conduct of the defendant in either situation must play a role in the analysis. If the creator of a Web site targets a particular forum, then that effort should count in the jurisdictional analysis, because it might constitute purposeful availment of the privileges and

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219. *Id.*
220. *Id.* at 247.
221. *Id.*
222. *Id.*
223. Hanson v. Denckla, 357 U.S. 235, 253 (1958).
224. Zbaracki, *supra* note 197, at 242–43.
225. *E.g.*, Hearst Corp. v. Goldberger, 96 Civ. 3620, 1997 U.S. Dist. LEXIS 2065, at *31 (S.D.N.Y. Feb. 26, 1997) (analogizing a Web site to an advertisement in a national magazine) ("[The defendant's] Internet web site thus is most analogous to an advertisement in a national magazine. Like such an ad, [the defendant's] Internet web site may be viewed by people in all fifty states (and all over the world too for that matter), but it is not targeted at the residents of New York or any other particular state.").

benefits of doing business in that forum. Without such targeting, however, the Web site, even if it is "active," is nothing more than an advertisement in a national publication, viewable by one who knows where to look for it or stumbles across it, but not directed at any particular forum.

Some courts have recognized and applied this analogy. For example, in *Hearst Corp. v. Goldberger*, decided approximately six weeks after *Zippo*, the plaintiff alleged that the defendant's Web site infringed on its trademark.[226] The United States District Court for the Southern District of New York refused to exercise jurisdiction over the defendant, a New Jersey resident.[227] Although New York residents had accessed the defendant's Web site, the site merely contained a description of services that the defendant intended to provide as well as a few hyperlinks to other Web pages. The site was, "at most, an announcement of the future availability of [the defendant's] services."[228] The court determined that:

> [the defendant's] Internet web site thus is most analogous to an advertisement in a national magazine. Like such an ad, [the defendant's] Internet web site may be viewed by people in all fifty states (and all over the world too for that matter), but it is not targeted at the residents of New York or any other particular state.[229]

The court noted that "New York law is clear, however, that advertisements in national publications are not sufficient to provide personal jurisdiction."[230]

Of course, a Web site may be more than an advertisement in a national publication because it has the capability to do much more than a traditional advertisement, both in the quantity and quality of the information it can convey.[231] As explained in Section III, however, potentiality and actuality must not be confused. The mere fact that a Web site is *capable* of doing more than a national advertisement should not grant jurisdiction wherever that site is viewed. Many of the courts that

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226. *Id.* at *1.
227. *Id.*
228. *Id.* at *31.
229. *Id.*
230. *Id.* at *32.
231. For example, while a classified advertisement can do little more than provide a few lines of text, a Web site can provide virtually unlimited quantities of information, as well as tailor such information to the needs of the particular user.

have applied the *Zippo* test have failed to make more than a cursory examination of the *actual* activity and contacts of a particular defendant's Web site. These courts have merely examined the *potential* level of interactivity of the site to determine that the exercise of jurisdiction is appropriate.[232] Such an examination fails to acknowledge the actual wording of *Zippo*, which required not just an assessment of the interactivity of the site in a vacuum, but also an assessment of the "exchange of information that occurs on the Web site."[233] Furthermore, this examination ignores the significant body of jurisdictional precedent regarding pre-Internet advertisements—precedent that can and should be applied to these cases.[234] Nevertheless, the advertising analogy only addresses Web sites that act as mere advertisements. Many Web sites can and do serve very different functions. The following section addresses some of those Web sites.

B. Products and the Stream of Commerce

Some Web sites, while having qualities that are analogous to an advertisement, more closely resemble a product. Selling or advertising goods is not the essential function of these sites. Instead, the site itself is the product, and the owner of the site may sell advertisements or establish partnerships with other Web sites in order to make money. For sites such as these, application of the stream-of-commerce theory of personal jurisdiction would provide a useful analogy for appropriate jurisdictional analysis.

For example, Salon.com ("Salon") touts itself as an "Internet media company"[235] and is often referred to as an online

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232. *See, e.g.*, Amberson Holdings, LLC v. Westside Story Newspaper, 110 F. Supp. 2d 332, 336 (D.N.J. 2000) (noting that "for [active] sites, an exercise of personal jurisdiction is always appropriate") (the *Amberson* court incorrectly used the term "interactive" to describe commercial sites, and called interactive sites "semi-interactive"); Stomp, Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074, 1078 (C.D. Calif. 1999) (finding that exercise of jurisdiction "is appropriate when an entity is conducting business over the Internet" even though the only sales made to the forum were initiated by the plaintiff).

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

234. *See, e.g.*, *Hearst*, 1997 U.S. Dist. LEXIS 2065, at *31.

235. Salon.com, *at* http://www.salon.com/press/fact/ (last visited Oct. 27, 2002).

magazine.[236] Indeed, Salon provides content similar to many print magazines, including information and articles on a variety of topics, such as news, politics, and books. Salon is a free site, although it provides additional content to subscribers willing to pay for "Salon Premium."[237] Just like a print magazine, Salon generates income not only from these subscribers, but also from the numerous advertisements that adorn virtually every page of the site. Given the similarities between Salon and print magazines,[238] an examination of how courts address jurisdiction over foreign publishers of "traditional" print media provides a useful analogy for Internet magazines and other similar sites.

In *Keeton v. Hustler Magazine, Inc.*, the Supreme Court considered whether New Hampshire could exercise jurisdiction over the defendant, an out-of-state corporation, based on allegedly libelous material printed in its magazine.[239] The Court noted that circulation within the state consisted of more than 10,000 copies every month.[240] As such, the Court determined that "regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous."[241] These sales were more than sufficient to satisfy the minimum contacts requirement of the Due Process Clause.[242] Although the *Keeton* Court considered additional factors weighing against the assertion of jurisdiction, it decided that they did not "merit a different result."[243]

In *Gray v. St. Martin's Press, Inc.*, the United States District Court for the District of New Hampshire considered whether, in a suit for defamation, it could assert jurisdiction over Susan Trento, the author of a book, based upon the sale of

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236. *Id.*; Salon.com, *at* http://www.salon.com/press/quotes/index.html (last visited Oct. 27, 2002).

237. Salon.com *at* http://www.salon.com/premium/intro/index.html (last visited Oct. 27, 2002).

238. Admittedly, the analogy between an online magazine and a print magazine is particularly strong, while it would be more difficult to, find a close non-Internet analogy for sites that provide services unique to the Web. Nevertheless, the larger analogy, that some Web sites are basically products, still holds, and an enormous amount of case law dealing with personal jurisdiction based upon the stream of commerce exists for a wide variety of products.

239. 465 U.S. 770, 772 (1984).

240. *Id.*

241. *Id.* at 774.

242. *Id.*

243. *Id.* at 775.

sixty-one copies of that book in New Hampshire.[244] Trento argued that the stream-of-commerce theory supported dismissal of the suit.[245] She claimed that she merely placed the book into the stream of commerce when she gave St. Martin's the right to publish it, and that she had done nothing further to indicate purposeful availment.[246] The court rejected this argument, noting that she retained the copyright when she signed a contract with a national publisher, and that "[n]ational distribution [of the book], including distribution within the State of New Hampshire, was the *raison d'etre* of the Contract."[247] This was not, the court stated, "a simple stream of commerce scenario."[248] Instead, Trento had engaged in sufficient "additional conduct" to indicate purposeful availment.[249]

To return to the Salon.com example, by placing its site on the Web, Salon has inserted its product—the online magazine—into the stream of commerce. Using this conceptualization makes the opinions in *World-Wide Volkswagen* and *Asahi* particularly enlightening.[250] Both decisions recognized, albeit with just a plurality in *Asahi*, that merely placing a product into the stream of commerce, without more, does not give rise to personal jurisdiction in *every* forum where that product happens to arrive.[251] Thus, if a plaintiff wished to sue the publisher of a print magazine in a particular forum, the court of that forum would presumably conduct an inquiry into the nature of the publisher's contacts with the forum. The mere fact that one copy of the magazine was physically found in the forum would not be sufficient for the exercise of jurisdiction. If the plaintiff could show, however, that the defendant had sold numerous subscriptions to residents of the forum, as in *Keeton*, or had engaged in other activity designed to target that forum, as in *St. Martin's Press*, assertion of jurisdiction might be appropriate. Similarly, the mere publication of a Web site, even

244. 929 F. Supp. 40, 43 (D.N.H. 1996). Although both the publisher and the author were defendants, only Trento objected to New Hampshire's exercise of jurisdiction. *Id.*

245. *Id.* at 47.

246. *Id.*

247. *Id.* at 48.

248. *Id.*

249. *Id.*

250. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Asahi Metal Indus. Co. v. Super. Ct. of California, 480 U.S. 102 (1987). See discussion in Section IIB, *supra*.

251. *World-Wide Volkswagen*, 444 U.S. at 297; *Asahi*, 480 U.S. at 112–13.

an active one under the *Zippo* test, should not subject the owner to jurisdiction in distant forums solely because the site may be viewed there. Additional conduct sufficient to indicate purposeful availment, such as subscription sales or targeted marketing, must be shown.

Some courts have recognized the applicability of the stream-of-commerce analogy to the Internet context.[252] However, even these courts have failed to recognize that the usefulness of the analogy depends on the nature of the Web site. For example, in *Bensusan Restaurant Corp. v. King* (a pre-*Zippo* case), the defendant, the owner of a small music club in Missouri, operated a Web site that allegedly infringed on the plaintiff's trademark.[253] The defendant's Web site contained a calendar of upcoming shows as well as ticketing information.[254] It was an entirely passive site,[255] serving essentially as nothing more than an advertisement for the defendant's business. The court viewed the site, as well as Web sites in general, as products placed in the stream of commerce, but stated that the defendant had done nothing further to "purposefully direct[]" his site toward New York, and thus the New York court did not have jurisdiction over him.[256] It would have been more accurate, however, to note that the defendant's site was actually a national advertisement, and such an advertisement does not by itself justify the assertion of personal jurisdiction over a nonresident defendant.[257]

Although focusing on the essential function of the site as an advertisement, rather than the nature of Web sites in general, would have yielded the same result in *Bensusan*, the analysis would have been more accurate. Similarly, the *Zippo*

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252. *See, e.g.*, Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34, 42 (D. Mass. 1997) ("Perhaps the traditional framework most analogous to posting information on the World Wide Web is placing a product into the 'stream of commerce.'"); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) ("Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state.").

253. *Bensusan*, 937 F. Supp. at 297. The defendant operated a club called "The Blue Note" which is also the name of a well-known New York club.

254. *Id.*

255. *Bensusan* was cited in *Zippo* as an example of a passive site. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). The *Bensusan* decision did not use the term passive.

256. *Bensusan*, 937 F. Supp. at 301. Thus, the court found that it did not have jurisdiction over the defendant.

257. Zbaracki, *supra* note 197, at 234.

test, by focusing entirely on interactivity, does not recognize that different sites might serve different functions. In most cases, this failure will not result in an incorrect assertion of jurisdiction. The jurisprudence for advertisements and products in the stream of commerce both require some additional conduct by the defendant, and the owner of an interactive Web site will likely engage in that additional conduct merely by interacting with residents of the forum state. Nevertheless, in some circumstances, focusing on interactivity or choosing the incorrect analogy might lead to an incorrect outcome.

Returning to the example of Salon, suppose the site did not offer any subscriptions and instead derived all of its income from advertisements. As such, it would belong to the "interactive" category under *Zippo* but would probably not be considered highly interactive because it would contain little more than email addresses and banner advertisements. Thus, if Salon were sued in a particular forum, a court applying *Zippo* might decline to exercise jurisdiction over Salon by deciding that the site was essentially passive. However, if the court looked to *Keeton* or *St. Martin's Press* as the source of its jurisprudence, it would look beyond the interactivity of the site and consider the defendant's conduct. For example, perhaps Salon used its banner advertisements to target certain users or geographical areas. In this examination, the court might find that Salon had engaged in sufficient "additional conduct" to indicate purposeful availment, thus justifying the forum state's assertion of jurisdiction.[258]

V. KEEP THE SHOE, DROP THE LIGHTER

The *Zippo* decision offers an accurate and thorough analysis of the facts of that particular case, and indeed even provides an accurate *assessment* of Internet Web sites in general. Unfortunately, *Zippo* fails as a test because it leads courts to ignore a basic tenet of personal jurisdiction analysis: that the defendant take some affirmative action to purposefully avail himself of the forum state. The *Zippo* test leads courts to worry more about categorizing a site than assessing the activities of the defendant:

258. *Id.*

> [M]erely categorizing a web site as interactive or passive is not conclusive of the jurisdictional issue. . . . [J]urisdiction must be based on more than a defendant's mere presence on the Internet even if it is an "Interactive" presence. . . . Rather, the critical issue for the court to analyze is the nature and quality of commercial activity *actually conducted* by an entity over the Internet in the forum state.[259]

Although only a handful of cases applying *Zippo* have perhaps been decided incorrectly,[260] we ought to acknowledge that jurisdiction based on Internet contacts still must be governed by "traditional" jurisdictional analysis.

There is nothing problematic about continuing to use the traditional analysis to determine jurisdiction based on Internet contacts. The framework of *International Shoe*, as modified by subsequent cases, still provides a workable structure for determining when jurisdiction is appropriate. Although commentators and courts often claim that *International Shoe* is ill-equipped to handle our technologically advanced world,[261] such an analysis fails to recognize the evolution of jurisdictional doctrine from 1945, when *International Shoe* was decided, to the present. When the Supreme Court introduced its jurisdictional model of minimum contacts,[262] it obviously could not place ap-

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259. ESAB Group, Inc. v. Centricut, LLC, 34 F. Supp. 2d 323, 330–31 (D.S.C. 1999) (emphasis added) (internal citations omitted).

260. *See, e.g.*, Rainy Day Books, Inc. v. Rainy Day Books & Café, L.L.C., 186 F. Supp. 2d 1158, 1163–65 (D. Kan. 2002); Carrot Bunch Co. v. Computer Friends, Inc., 2002 U.S. Dist. LEXIS 15085 (N.D. Tex. Aug. 14, 2002). In *Rainy Day*, the court appeared to confuse the effects test with the *Zippo* test. It determined that the defendant's active web site conferred jurisdiction as a matter of course. *Rainy Day Books*, 186 F. Supp. 2d at 1165. The court stated that the "individual book orders placed by Kansas residents . . . are not determinative" even though it appears that those sales may have been manufactured by the plaintiff. *Id.* Its reasoning for disregarding such "manufactured" contacts appears to closely reflect the effects test. *See id.* In *Carrot Bunch*, the court held that the defendant was subject to its jurisdiction because it had made sales to Texas residents, yet the court never stated how many sales were actually made; perhaps the court felt that such an inquiry was unnecessary, or perhaps it just neglected to state the number in its decision. *See Carrot Bunch*, 2002 U.S. Dist. LEXIS 15085, at **11–13.

261. *See, e.g.*, Susan Nauss Exon, *A New Shoe Is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1, 3 (2000); Richard Philip Rollo, Case Note, *The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 FLA. L. REV. 667, 693–694 (1999); Todd D. Leitstein, Comment, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565, 566–67 (1999).

262. Int'l. Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

propriate values[263] on the contacts that were to occur in future cases, nor could it foresee the types of contacts that would exist in the future. Thus, in the years after *International Shoe*, courts made jurisdictional determinations without the guidance of the Supreme Court, unless the case at hand had significant similarities to *International Shoe*.[264] In making these independent determinations, courts slowly established a body of jurisdictional precedent. In time, conflicting precedents, or new jurisdictional problems, would make their way to the Supreme Court, which then provided further guidance and refinement.[265]

This process of judicial evolution would work equally well for determining the limits of personal jurisdiction based on Internet contacts. Courts simply need to figure out how to evaluate such contacts and what values to place on them, thereby establishing a body of Internet precedent.[266] That is no different, however, from what courts have always done, placing different values on things such as telephone calls and advertisements on radio, television, and in print media.[267] Although initial decisions will surely be inconsistent, such is the nature of any "new" body of law. In developing this Internet common law, courts should look for analogies to pre-Internet case law to guide their jurisdictional determinations. Courts will find that much of the law concerning advertisements in print and television is equally applicable to the Internet. Furthermore, the stream-of-commerce theory may be illustrative in situations

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263. The term "values" is used to indicate that not all contacts possess the same weight when considering questions of personal jurisdiction. For example, the signing of a contract *in the forum state* surely carries more weight than receiving a phone call *from the forum state*. Thus, courts place different values on different types of contacts.

264. C. T. Dreschler, Annotation, *Validity, Construction, and Application of Statute Making a Foreign Corporation Subject to Action Arising Out of Contract Made Within the State Although Such Corporation Was Not Doing Business Therein*, 49 A.L.R. 2d 668, 669 (1956) (noting that "[n]o generally applicable standards can be ascertained from [*International Shoe*] as to the circumstances under which a foreign corporation will be deemed to have sufficient contacts with the forum").

265. See discussion in Section I.B., *supra*.

266. One might argue that modern courts are already making such evaluations and thus establishing a body of jurisdictional precedent for the Internet. However, in doing so they are giving little deference to, or even acknowledgment of, existing non-Internet case law.

267. *See, e.g.*, Growden v. Bowlin & Associates, Inc., 733 F.2d 1149 (5th Cir. 1984) (considering print advertisements and telephone calls); WSAZ, Inc. v. Lyons, 254 F.2d 242 (6th Cir. 1958) (considering television advertising).

where the Web site is more analogous to a product than to an advertisement. Applying the principles gleaned from these cases will lead to more consistent results and will remain true to existing precedent. In time, with the development of a body of case law and with Supreme Court guidance, the phrase "*International Shoe* and its progeny" will comfortably encompass jurisdiction based on Internet contacts.

CONCLUSION

Commerce and communication have advanced dramatically in the years since *International Shoe* was decided, and the Court has responded by adapting personal jurisdiction jurisprudence to address some of the difficulties posed by these advances. Although there is something vaguely unsettling about the assertion of jurisdiction over a defendant who has never "entered" a forum state, the Court has stated "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted."[268] Thus, the Court has considered the notion that while technology might challenge existing principles of personal jurisdiction, such challenges do not demand that existing principles be discarded.[269] Although the Internet surely presents a new set of challenges, no new test is needed to overcome these hurdles. Thus, the *Zippo* test should be discarded as a mere bump on the information superhighway as courts struggle to develop a new body of Internet common law. In developing this Internet common law, courts should remain true to *International Shoe* and its progeny, because the shoe fits just fine.

268. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). Of course, "territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there," but such presence is not required to support an assertion of jurisdiction. *Id.*

269. *See id.*