SCALING BACK *ZIPPO*: THE DOWNSIDE TO THE *ZIPPO* SLIDING SCALE AND PROPOSED ALTERNATIVES TO ITS USES

Emily Ekland[*]

[*] J.D. Candidate, Albany Law School 2012; B.A., Russell Sage College 2009. Special thanks to Professor Pamela Armstrong for her assistance.

INTRODUCTION

Establishing personal jurisdiction is a fundamental step of litigation in the adversarial system of the United States. The rules outlining personal jurisdiction are changing as technology and the requirements of the notice system evolve. The first real shift in personal jurisdiction analysis began mid-twentieth century as corporations started physically invading foreign territories through agents. The courts adjusted to this change by creating the minimum contacts test.[1] A minimum contacts analysis hinges on whether the defendant's entry into the court's jurisdiction was purposeful.[2] Due process prevents courts from pulling a foreign defendant into court for a mere fortuitous entry into the forum.[3]

The next shift is upon us with the development of the internet, which presents a special problem because there are no state boundaries in cyberspace. If there are no boundaries, how can someone using the internet know when they have "entered" a new forum? Even with this new issue, due process principles must remain paramount in establishing personal jurisdiction. In response to technological advances, the federal judiciary began comparing new internet contacts to previously settled physical contacts, such as sending an agent into a state, to determine if it would be fair to obligate a foreign defendant to the forum. Later, in an attempt to simplify the process, judges created a new test to articulate repetitive principles consistently used in internet jurisdiction fact patterns: the *Zippo* sliding scale.[4]

While the *Zippo* sliding scale may have created a definite rule regarding internet jurisdiction issues, it has spawned a number of inconsistencies, procedurally and substantively, among the courts. The development of the sliding scale has unintentionally created a problem: it destroys an effective notice system for internet users, which in and of itself violates due process. Without consistency in common law how can an internet user "structure [his or her] primary conduct with some minimum assurance as to where that conduct will and will not render [him

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

[2] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[3] *Id.*

[4] *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D.P.A. 1997).

or her] liable to a suit[?]"[5]

This note is a discussion of the *Zippo* sliding scale—its creation, varied interpretations, and solutions proposed to fix the discrepancies it causes. Part I summarizes personal jurisdiction concepts. Part II summarizes and explains early analyses regarding internet personal jurisdiction fact patterns, followed by Part III discussing the creation of the *Zippo* sliding scale. Part IV and V outline the federal circuits' current use of the *Zippo* rule, and Part VI outlines solutions used and proposed by internet users and legal scholars to combat personal jurisdiction issues facing internet use and the *Zippo* scale.

I. PERSONAL JURISDICTION 101

Personal jurisdiction is established if the defendant consents to being haled into the forum, or is a citizen of the chosen forum of litigation.[6] When a defendant is neither a forum citizen, consents, nor is present by person, or property, the court may still pull the defendant in through other means. These other means were explained in *International Shoe*. Under *International Shoe*, the Supreme Court outlined the due process requirement that if a person cannot be found within the boundaries of a state, he or she must have "minimum contacts" with the forum such that, "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[7] The substance of these contacts must be such that the defendant would be considered present in the forum.[8] The Court outlined two kinds of contacts that would hale a foreign defendant into a particular forum: contacts that are "so substantial and of such a nature as to justify a suit . . . [unrelated to] those activities" and contacts which bring about the cause of action.[9] Today, these contacts are called general jurisdiction or specific jurisdiction, respectively. Ultimately, the quality and nature of the contacts must not offend notions of fair play and substantial justice.[10]

Contacts with a forum cannot be prompted by mere chance. It

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[5] *World-Wide Volkswagen*, 444 U.S. at 297.

[6] *See* Pennoyer v. Neff, 95 U.S. 714, 737–38 (1877) (explaining the general principles of personal jurisdiction).

[7] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[8] *Id.* at 316–17.

[9] *Id.* at 318.

[10] *Id.* at 319.

would be unreasonable to hold a defendant to a forum unless he or she purposely availed himself or herself to the benefits and obligations of that jurisdiction.[11] Purposeful availment, a cornerstone to minimum contacts, grants potential defendants "clear notice" that intermingling with the forum may obligate them to defend a suit there.[12]

The less foreign the forum is to the defendant the more reasonable the obligation to defend in that forum.[13] Determining the reasonableness of holding a foreign defendant liable in a forum is a balancing test that considers: the burden on the defendant to litigate in the chosen forum, the state's interest in resolving the claim, the plaintiff's interest in convenient and effective relief, and surrounding states' interest in obtaining resolution of controversies and promoting substantive policies.[14]

The internet makes this analysis tricky because there are no boundaries in cyberspace. A person may make a website for his or her personal or business use, but that website may reach thousands of forums, and yet suggesting these realities are "clear notice" that one can be haled into any forum where the internet reaches defies logic. Thus, the rules for analyzing personal jurisdiction have evolved.

The need for legal evolution can create discrepancies, but even with inconsistent explanation of law between the circuits, the goal of each type of analysis has been the same: keep the government's reach limited so that it can only pull from outside its boundaries in narrow instances.[15] This approach has been difficult to continue because the ever-changing technological world has prompted multiple reevaluations of jurisdictional reach. The judiciary understood that the law needed to reflect the new reach available to individuals and corporations and, through time, has adjusted the personal jurisdiction analysis accordingly.

The present minimum contacts analysis is a result of the

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[11] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[12] *Id.*

[13] Burger King Co. v. Rudzewicz, 471 U.S. 462, 477 (1985).

[14] *Id.*

[15] *Compare Int'l Shoe*, 326 U.S. at 320–21 (articulating a detailed rule about jurisdiction and giving an extensive review of the defendant's contacts), *with* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114–16 (1987) (refusing to obligate the defendant to the forum even though contacts were sufficient because the Court did not want the personal jurisdiction analysis to extend so far up the line of business production).

evolving American economic, political, and notice realities.[16] The mere establishment of the minimum contacts test signified the court's willingness to modify personal jurisdiction to the evolving character of interconnectedness in the United States. The minimum contacts test, when it was first articulated, was a radical approach, but it has been implemented slowly, creating a consistent spectrum of activity that could tie a defendant to a foreign jurisdiction. Today, people are more "connected" than they have ever been. Human interconnectedness has exploded over the internet; for example, online businesses are making billions of dollars in e-commerce.[17] Because of this, the personal jurisdiction analysis must further evolve or change altogether; courts now must adapt to the new cyber-defendant.

Courts have tried to do this by applying the *Zippo* scale.[18] This test looks at website interactivity.[19] Most circuits have applied this test, but some refuse and criticize its adoption into the modern personal jurisdiction evaluation. Courts that criticize *Zippo* indicate that the scale has altered the analysis too much, and there is some merit to those concerns.[20] Under *Zippo*, courts substitute a purposeful availment evaluation for assessing a website's interactivity. Interactivity has no bearing on an internet user's intent behind entering a forum via cyberspace. A website can be fully interactive without its creator having any intent for his or her website to be used outside a domicile; whereas a completely passive website, like an advertisement, may evidence intent to extend a relationship into a foreign forum. Instead, courts should look at the purpose of a website's interactions, and if the purpose is to induce a relationship between foreign parties, then the initial evaluation should be satisfied.

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[16] *See Int'l Shoe*, 326 U.S. at 316.

[17] *See* Stu Woo, *E-commerce Will Keep Rolling, Research Firm Says*, WALL ST. J. BLOGS (Feb. 27, 2011, 10:23 PM), http://blogs.wsj.com/digits/2011/02/27/e-commerce-will-keep-rolling-research-firm-says.

[18] *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D.P.A. 1997).

[19] *Id.*

[20] *See, e.g.*, Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154, 1159–60 (W.D. Wis. 2004).

II. A SIMPLISTIC APPROACH: EARLY INTERNET ANALYSES

The first federal courts to analyze internet contacts leaned in favor of a simple evaluation. Each court looked at the quality of the contacts in determining whether holding the defendant to the forum was constitutional.[21] They did not seem fazed that the totality of each defendant's contacts was internet based. To cope with this new technology, the courts looked at previous analyses and compared them to the internet contacts fact patterns at hand.[22]

In *Inset Systems, Inc. v. Instruction Set, Inc.*,[23] the district court obligated a Massachusetts defendant to its forum because his internet "contacts" were comparable to physical contacts such as soliciting patrons or sending catalogues into the state, either of which would satisfy due process principles in non-internet fact patterns.[24] The defendant in *Inset* created a website advertisement using a domain name already trademarked by another company.[25] He moved to dismiss for lack of personal jurisdiction because the only contact he had with the forum state was the web advertisement, which was visible to anyone using the internet.[26] The court noted the difficulty in satisfying due process because the internet could potentially open liability through contacts "at the stroke of a few keys of a computer."[27] That did not protect the defendant here because sending catalogues through the mail, or ordering products and soliciting customers in the forum indicate purposeful availment and would obligate a defendant to the forum.[28] The web advertisement at issue made all of these contacts through the internet.[29] Therefore, it followed that the foreign defendant should be held to the forum.

The Sixth Circuit followed the same approach. In *CompuServe, Inc. v. Patterson*,[30] the foreign defendant entered into a sales

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[21] *See supra* Part I.
[22] *Id.*
[23] 937 F. Supp. 161 (D. Conn. 1996).
[24] *Id.* at 164–65 (D. Conn. 1996) (quoting Whelen Eng'g Co. v. Tomar Elecs. Inc., 672 F. Supp. 659, 644 (D. Conn. 1987)).
[25] *Id.* at 163.
[26] *Id.* at 162, 164.
[27] *Id.* at 163.
[28] *Id.* at 165.
[29] *Id.*
[30] 89 F.3d 1257 (6th Cir. 1996).

contract over the web with an Ohio-based company and sent the company homemade computer programs through the internet.[31] The defendant continually sent the company software for a period of three years even though the company was not selling defendant's product well.[32] The court held that personal jurisdiction was constitutional because the contacts between the parties were comparable to long-distance phone calls and shipment of goods, which, like the contacts made by the defendant in *Inset*, indicate purposeful availment to the benefits of the forum state in non-internet circumstances and, thus, obligate the defendant to the forum.[33]

The court in *Maritz, Inc. v. CyberGold, Inc.*,[34] took the above analyses a step further and, in addition to comparing a defendant's internet contacts to established physical contacts that establish purposeful availment, the court looked at the purpose of the defendant's website itself.[35] Because the company's purpose in its web activity was to make personal contact with internet users, no matter the forum, and the company followed through with willing participants, this alone could have hailed the defendant into the forum.[36]

These three cases show that a new test was unnecessary. The constitutional standard was satisfied with current minimum contacts rules. Previously evaluated standards of physical contacts were easily comparable to contacts made using contemporary technology. This could have been the start of a new wave of evaluations tailored toward internet use and modern defendants, but courts following these cases did not pursue this change.

III. COMPLICATING THE PROCESS: *ZIPPO*'S CREATION

Shortly after early internet fact patterns were analyzed, a Pennsylvania district court ill-fatedly developed a new test to use in internet contacts personal jurisdiction analyses. In *Zippo*

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[31] *Id.* at 1260–61.

[32] *Id.* at 1261.

[33] *Id.* at 1265 (citing U.S. Sprint Commc'ns. Co. v. Mr. K's Foods, Inc., 624 N.E.2d 1048, 1052–54 (Ohio 1994)).

[34] 947 F. Supp. 1328 (E.D. Mo. 1996).

[35] *Id.* at 1332–33.

[36] *Id.* at 1333. There was more than one internet contact with the forum, but the court stated that because each contact was purposeful even one would have been sufficient to satisfy due process. *Id.*

Manufacturing Co. v. Zippo Dot Com, the *Zippo* sliding scale was created to measure interactivity, which was originally equated with purposeful availment, when evaluating the constitutionality of haling a defendant to the forum.[37] This scale was intended to provide internet users notice for when they could be held to a foreign jurisdiction, but in actuality, it confused the judiciary into substituting purposeful availment concepts with an interactivity analysis. In short, the touchstone of the minimum contacts test, purposeful availment, was removed and replaced with interactivity.

In *Zippo*, the court looked at the precedent before it and articulated a relationship between a defendant's website's activity and the constitutionality of holding him to the forum.[38] If the court had stopped there it would not have strayed far from the traditional minimum contacts test. Instead, the court pushed on and created a sliding scale stating, "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."[39]

This rationale distinguished passive from interactive websites, and held that websites conducting business over the internet were interactive and, thus, more likely to be liable in foreign jurisdictions, while websites that simply posted information on the internet were passive in nature and could not, alone, subject the creator to a foreign jurisdiction.[40] In between those two labels is the middle ground where a "user can exchange information with the host computer," but there are not enough obvious indicators to deem the site interactive.[41] If an internet site falls into the middle ground, courts must examine "the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[42]

With the new rule in hand, the defendant was held to the forum.[43] The *Zippo* court found that by selling passwords to Pennsylvania subscribers through its website, the defendant had repeatedly chosen to contract a service to those users, and thus,

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[37] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D.P.A. 1997).
[38] *Id.* at 1124–25.
[39] *Id.* at 1124.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 1125–26.

transacted business in the commonwealth.[44] In addition to contracting a service, the defendant created the website with the intention of interacting with consumers for commercial gain.[45] The defendant argued that it did not purposely avail itself to the Pennsylvania forum because the website was not specifically tailored for the commonwealth, and it was merely "fortuitous" that Pennsylvania residents found the website and initiated contact.[46] The court disagreed and held that the contact would only be fortuitous if no Pennsylvania residents had ever heard of the defendant until someone from the defendant's domicile forwarded the website to a resident therein.[47]

IV. THE SPECTRUM OF *ZIPPO* USES

The *Zippo* sliding scale was created to help ease the personal jurisdiction analysis involving modern technology, but it actually complicates the process because it makes the judiciary use new labels such as "passive" or "interactive" to define each set of facts. Not only does this add an extra step in assessing purposeful availment, it leaves a lot of terms open to interpretation, leading to judicial discrepancies. Even today, internet contacts are not assessed under a uniform rule because not all circuits apply *Zippo*; those that do, do not employ it consistently.[48] This has harmed the notice system the minimum contacts test has created. This is an analysis of the circuits' use of *Zippo*, first, in substance, then procedurally.

A. Substance: How Zippo *is Implemented in the Circuits*

Zippo's initial use was straightforward and uncomplicated. The Ninth Circuit readily articulated the standard that passive websites could not hail their creators into the forum without something else connecting them to the court's jurisdiction. In *Cybersell Inc. v. Cybersell Inc.*,[49] no citizens of the forum state had entered into contracts with the defendant, nor did the defendant company have any other contacts with the forum such as sales or

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[44] *Id.* at 1126.
[45] *Id.* at 1125.
[46] *Id.* at 1126 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980)).
[47] *Id.* (applying *World-Wide Volkswagen*, 444 U.S. at 297).
[48] *See infra* Part IV.A.
[49] 130 F.3d 414 (9th Cir. 1997).

telephone calls.[50] The court stated, "Cybersell FL has done no act and has consummated no transaction, nor has it performed any act by which it purposefully availed itself of the privilege of conducting activities, in Arizona, thereby invoking the benefits and protections of Arizona law."[51]

Here, the Ninth Circuit set the stage for a smooth transition using the *Zippo* scale. It equated interactivity with purposeful availment because it saw that even though the internet could have been the channel of communication for transactions, it was not. The defendant was not present in the forum such that personal jurisdiction was proper because he had not crossed the threshold from making information available online to establishing a personal relationship with a citizen of the forum. Therefore, a defendant would be haled into court if the website connected the individuals through commercial activity or if there were any indications that the website was *purposely* aimed at the forum, such that presence is satisfied simply by placing the information on the internet.

The analyses after *Cybersell* became complicated. Courts began holding for defendants even though website interactivity exemplified purposeful availment. Eventually, courts separated interactivity and purposeful availment even though, initially, interactivity was indicative of purposeful availment, and replaced the purposeful availment requirement with a mandate for interactivity. The final blow to the *Zippo* analysis began when courts started using it in their general jurisdiction analysis; the *Zippo* scale was created in the specific jurisdiction context.

The complication began in the Fifth Circuit. After stating the rule for the *Zippo* sliding scale, the court in *Mink v. AAAA Dev. LLC*[52] did not hold the defendant to the forum because the website, which the plaintiff was using as a basis for personal jurisdiction, was passive in nature.[53] The website contained a toll-free number, a mail order form, and an email address, but it was not created to do business over the internet. Therefore, no internet transactions were present in the record.[54] This analysis is uncomfortable.

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[50] *Id.* at 419.

[51] *Id.* (distinguishing the parties in the opinion by abbreviating the state of incorporation following the company name).

[52] 190 F.3d 333 (5th Cir. 1999).

[53] *Id.* at 336–37.

[54] *Id.* at 337.

The court is correct that no business occurred over the internet, but the website is so customer-friendly it seems that the defendant won on a technicality. The email address allows the defendant company to establish contact with users who chose to initiate communication, like the defendant in *Zippo*. This is the type of activity that would push the website out of the "gray area" and into "interactive" on the sliding scale because the company would have made a conscious choice to create that connection to the forum. In this specific fact pattern, the plaintiff did not "connect" with the company over its website so that issue is unsolved.

Two years later, interactivity unfortunately evolved into its own constitutional principle, implemented by the Sixth Circuit. The court articulated a confusing *Zippo* standard in *Neogen Co. v. Neo Gen Screening, Inc.*[55] when it labeled a website passive after listing a number of interactive characteristics used on the website such as password selling, user registration, and contract formation.[56] These website characteristics are similar to the facts of the *Zippo* case, yet the Sixth Circuit was unwilling to hold the defendant to the forum on these facts alone. Instead, the court looked outside the website to physical contacts between the company and the forum state in haling the defendant into court.[57] The court was unwilling to use the website's interactivity to crack the bond connecting interactivity and purposeful availment. From this application on, the two principles are seen as distinct items and interactivity is given its own platform in the personal jurisdiction analysis. This was a mistake because the original intention was for interactivity to show purposeful availment.[58]

The Third Circuit followed this train of thought. Like the Sixth Circuit's holding in *Neogen*, the court was presented with a website that was interactive. Internet users could register an account with the defendant's website and place internet orders for products viewable in an online catalogue.[59] Once again, the court articulated a separate analysis for purposeful availment—

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[55] 282 F.3d 883 (6th Cir. 2002).

[56] *Id.* at 890–91.

[57] *Id.* at 891–93.

[58] *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D.P.A. 1997).

[59] Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 449–50 (3d Cir. 2003) (improperly applying *Zippo* instead of dismissing the case because it was not reasonable to hail the foreign company into the forum).

in addition to interactivity.[60] As a second court separated the two terms, it solidified the incorrect notion that interactivity was its own principle in an internet contact analysis for personal jurisdiction.

The Federal Circuit then followed the Third Circuit's poor example. In *Trintec Industries, Inc. v. Pedre Promotional Products Inc.*,[61] the court looked at the structure of the webpage and determined that, in addition to its passive nature of interactivity, the website had not purposefully availed itself to the forum because there was no indication on the webpage that the defendant company was targeting the forum specifically.[62] This is a great example of how far off track the *Zippo* scale managed to stray. Here, the court looked at purposeful availment through the website's structure as a distinct assessment from any features on the page that would depict interactivity.[63] This is not what the court in *Zippo* intended.

Misuse of the sliding scale continued into the Eighth and Tenth Circuits when the appellate courts applied the rule in a general jurisdiction analysis. Ironically, the Eighth Circuit explained its own misapplication of the *Zippo* scale when it stated that the scale was created for specific jurisdiction fact patterns.[64] Despite this, the court continued to analyze the website in the general jurisdiction context.[65] The court noted that the website was continually available online and contained interactive characteristics, such as an online application and communication opportunities between patrons and employees, but it felt uncomfortable with granting general jurisdiction over the defendants because it was unknown whether the website was used enough such that there was continuous and systematic contact with the forum.[66] In the end, the court did not give a

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[60] *Id.* at 454.

[61] 395 F.3d 1275 (Fed. Cir. 2005).

[62] *Id.* at 1281–83.

[63] *Id.* at 1281. *Trintec* also, contradictorily, makes an acute observation that websites can be completely passive in nature, yet possibly be specifically tailored towards a specific forum. *Id.* at 1281–82. The *Zippo* scale gives a defendant who structures a passive website immunity from being hailed into foreign courts even if such defendant's website was meant to spark contacts with that forum over the internet.

[64] Lakin v. Prudential Sec., Inc., 348 F.3d 704, 711 (8th Cir. 2003) (noting the split among the circuits).

[65] *Id.* at 711–14. On top of website interaction, the defendant had continuous ties to the forum through home-equity loans and lines of credit. *Id.* at 708.

[66] *Id.* at 712–14.

complete *Zippo* analysis, but did grant a motion to allow jurisdictional discovery.[67]

The Tenth Circuit also focused on the *Zippo* scale when assessing an offending website in a general jurisdiction context.[68] The website itself simply posted information in an attempt to solicit business, but no business was conducted over the internet.[69] Therefore, the court labeled the website passive and refused to hold the defendant under general jurisdiction.[70]

Both of these *Zippo* analyses were mistaken. While there may be room for courts to apply general jurisdiction evaluations to internet contact fact patterns, the *Zippo* scale is not the test to do that. The *Zippo* scale is tailored towards specific causes of action. It looks for a particular contact between the parties via the internet. By increasing the ground *Zippo* is intended to cover, the courts do a huge disservice to forum citizens. This harms the notice system because general jurisdiction focuses on continuous and systematic activity, while specific jurisdiction specifies that the contact in question must be *purposeful*. The *Zippo* scale was made to focus on that specific contact, not continuous and systematic activity.

Finally, the First and Seventh Circuits implemented a *Zippo* analysis without expressing the entire rule in *McBee v. Delica Co.*[71] and *Jennings v. AC Hydraulic A/S*,[72] respectively. The websites at issue in both cases were simple advertisements, not websites that allowed customers to initiate purchases.[73] In *McBee*, the First Circuit expressed an additional "something more" standard to apply when websites do nothing more than display company information.[74] This is dangerous because adding a new branch of analysis while the entire rule is applied inconsistently will only yield more discrepancies. The Seventh

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[67] *Id.* at 714.

[68] Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1297 (10th Cir. 1999).

[69] *Id.*

[70] *Id.*

[71] 417 F.3d 107 (1st Cir. 2005). "[T]he mere existence of a website that is visible in a forum and that gives information about a company and its products is not enough, by itself, to subject a defendant to personal jurisdiction in that forum." *Id.* at 124.

[72] 383 F.3d 546 (7th Cir. 2004). "We need not decide in this case what level of 'interactivity' is sufficient . . . . Rather, it is enough to say that this logic certainly does not extend to the operation of a 'passive' website . . . ." *Id.* at 549.

[73] *McBee*, 417 F.3d at 112–13; *Jennings*, 383 F.3d at 548.

[74] *McBee*, 417 F.3d at 123–24.

Circuit in *Jennings* did not complete a *Zippo* analysis; rather, it held that the defendant's website simply could not pass as anything but passive.[75] In other words, the Seventh Circuit cut the analysis short and inadvertently created a minimum threshold of interactivity that a website must meet before the scale is even implemented. This is also an unfortunate interpretation of *Zippo* because it now starts the scale at the *Zippo* gray area when the passive end of the scale is necessary to the integrity of the test.

B. Procedure: Circuits that Refuse or Have Yet to Apply Zippo

The second type of inconsistency promulgated by the *Zippo* decision is procedural. The scale is actually implemented just as randomly as it is used substantively. The circuit courts are split evenly regarding whether they use *Zippo* solely, partially, or not at all when assessing internet contacts. A few circuits have not even had the opportunity to decide. This is another reason why *Zippo* should not be a part of the modern era personal jurisdiction analysis.

The Eleventh Circuit has not expressed an opinion on *Zippo*, mostly because it has not yet had a *Zippo*-like fact pattern. In its most recent federal circuit fact pattern involving internet contacts, the appellate court did not apply a *Zippo* analysis. In fact, it did not cite *Zippo* once.[76] The court applied what is known as the *Calder* effects test to the fact pattern and found that the defendant had created a website and intentionally put the infringing material on the website to attract clients from the forum state.[77] Deliberateness and intentionality were the only factors that mattered. The court held "where the internet is used as a vehicle for the deliberate, intentional misappropriation . . . ," the actor can be held to the forum.[78] It is unclear what would happen if this circuit were approached with a *Zippo* situation.

Similarly, the Fourth Circuit has yet to see a pure *Zippo* fact pattern. Its recent decision required a hybrid *Zippo*-*Calder*

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[75] *Jennings*, 383 F.3d at 550–51.

[76] *See* Licciardello v. Lovelady, 544 F.3d 1280 (11th Cir. 2008).

[77] *Id.* at 1287–88. The *Calder* effects test looks at the intent behind the offending action, not the intent to invade the forum when obligating the defendant to a foreign jurisdiction. Calder v. Jones, 465 U.S. 783, 789–90 (1984). If the act was intentional and the harm was felt in the forum state it would not be unreasonable to compel someone to defend a suit there. *Id.*

[78] *See Licciardello*, 544 F.3d at 1288 n.8.

analysis, in which the court stated it would only hold a defendant to the forum through internet contacts if a website was directed at the forum and the purpose for directing the website to the forum was to spawn further interactions, business or casual, with residents of the forum state, and that activity gave rise to the claim.[79] The court did express that *Zippo* would not hold a defendant under general jurisdiction,[80] but the court's rule application leaves internet users unsure of how their internet contacts would be assessed in the forum.

The Second Circuit most likely would not use the sliding scale when assessing internet contacts. In a recent decision, the Second Circuit noted the *Zippo* sliding scale in its personal jurisdiction inquiry, but held that its only place in a personal jurisdiction analysis was in determining whether the individual maintaining the website was transacting business in the forum.[81] The court explained that while other courts used *Zippo* to determine the constitutionality of holding the defendant to the forum, it refused to do so because it preferred the traditional approach.[82]

The District of Columbia Circuit outright refuses to apply *Zippo* in internet contact analyses. This circuit stated that, "[j]ust as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet."[83] Even though the court had yet to be presented with a specific jurisdiction internet claim, it was adamant that new tests were inappropriate for a constitutional analysis.[84]

V. A SUMMARY OF THE SUBSTANTIVE AND PROCEDURAL ISSUES

One of the major criticisms of the sliding scale is its

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[79] ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 715 (4th Cir. 2002); s*ee also* A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 81 (2006).

[80] Spencer, *supra* note 79, at 81.

[81] Best Van Lines, Inc. v. Walker, 490 F.3d 239, 252 (2d Cir. 2007).

[82] *Id.* "[T]raditional statutory and constitutional principles remain the touchstone of the inquiry." *Id.* (quoting Best Van Lines, Inc. v. Walker, 2004 U.S. Dist. LEXIS 7830, at *9 (S.D.N.Y. May 4, 2004)).

[83] Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 510–11 (D.C. Cir. 2002).

[84] *Id.* at 510–12.

ineffectiveness. It can hold some internet users to a forum while completely excluding others who may have purposely availed themselves to the court's jurisdiction under traditional notions of fair play and substantial justice. For example, under *Zippo*, a completely passive website will never hold its creator to a forum, even if that person targeted a forum specifically in his or her website creation—this does not follow the principles of fair play and substantial justice.[85] The "something more" test was the initial solution to this problem. Under "something more," a passive website can be held to a forum as long as that website sparked further contacts between the website company and the forum.[86] So if a company posts a web advertisement that entices a consumer into doing business with the company or other companies the website promotes, the internet contact will be included in a personal jurisdiction analysis.[87] The problem with this is that it obligates the courts to further analyze fact patterns using the *Zippo* interactivity scale and the traditional minimum contacts test when it is more efficient and less confusing to just stick with a minimum contacts analysis because it yields applications that conform to the constitutional standard without creating new law.

A serious problem with the *Zippo* scale is that it does not give internet users notice as to when their websites will hold them to the forum or which forums will apply the test. The reason for this is because courts have extended *Zippo*'s gray area by refusing to find that websites with multiple interactive features are in the interactive end of the scale thereby enlarging its middle ground.[88] Because the gray area is so large, courts make a longer fact examination, which generates inconsistent opinions.[89] These inconsistent opinions destroy any effective notice system that prior personal jurisdiction analyses gave that can extend to internet contacts.

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[85] *See* Susan Nauss Exon, *A New Shoe is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1, 12–16 (2000).

[86] *Id.* at 15, 18.

[87] *See id.* at 15–18.

[88] *See, e.g.*, Neogen Co. v. Neo Gen Screening*, Inc.*, 282 F.3d 883 (6th Cir. 2002).

[89] Exon, *supra* note 85, at 15–19. *See also* Catherine Ross Dunham, *Zipping the Wrong Way: How the Internet has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis*, 43 U.S.F. L. REV. 559, 573 (2009); Anne Sikes Hornsby, *Internet Transactions and Communications: Expanding or Contracting Traditional Notions of Personal Jurisdiction*, 70 ALA. LAW. 378, 382 (2009).

When looking at the defendant's contacts with the forum, courts feel most comfortable labeling a website interactive if it promotes commercial activity and the cause of action rises out of those contacts.[90] Courts are, also, more likely to hold a defendant to the forum by way of an interactive website if the plaintiff presents a combination of internet and non-internet contacts carried out by the defendant, initiated by the website.[91] These holdings, however, are not uniform throughout the circuits; some middle-ground websites exhibiting similar fact patterns are labeled interactive while others are not depending on the circuit.[92] Courts even disagree when deciding whether the *Zippo* scale can confer general jurisdiction on a defendant.[93] Constitutional principles fall on the concept of notice. If courts cannot agree, there is no notice.

The main problem with the *Zippo* scale is that it has separated the initial partnership between interactivity and purposeful availment. Those items are now two distinct things that cannot be comingled. This was foreseeable because the root of the sliding scale "was predicated on the concept of non-contact rather than on the longstanding concepts of minimum contacts and purposeful availment."[94] Courts should refocus on traditional principles and forget interactivity. Concepts like interactivity may have a place in determining purposeful availment, but they should not overwhelm the personal jurisdiction analysis because traditional concepts are adaptable to evolving technology.

VI. PROPOSED ALTERNATIVES TO *ZIPPO*

The *Zippo* scale issue has been sitting in jurisprudence for over a decade. As the internet has evolved, internet users are becoming savvier at avoiding foreign jurisdiction problems, but issues still exist within the courts. In response to these issues, both businesses and scholars have proposed various solutions.

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[90] *See* Exon, *supra* note 85, at 18.

[91] *See id.* at 19–20.

[92] *Compare Neogen Co.*, 282 F.3d at 890–91 (finding that requiring a password for users to access information on a website supported a finding of purposeful availment), *with* Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (finding that maintaining a website that was merely available to anyone did not constitute purposeful availment, but was similar to placing a product into the stream of commerce).

[93] Hornsby, *supra* note 89, at 382.

[94] Dunham, *supra* note 89, at 578.

A. Forum Selection Clauses

Companies that use the internet to transact business in different states have started protecting themselves by attaching forum selection clauses to online transactions.[95] The federal circuits have held that forum selection clauses must be freely negotiated and reasonable in order to satisfy due process, but some have upheld forum selection clauses that were not necessarily freely negotiated.[96]

Such clauses in internet transactions are usually called "click-wrap" or "browse-wrap" agreements.[97] A click-wrap agreement is exactly what it sounds like; in order to enter into a contract with an internet provider, the accepting party must make an affirmative gesture over the internet, usually by clicking an "I agree" or "yes" button, after an opportunity to read a company's terms of use.[98] By "clicking" an affirmative answer, the accepting party has assented to all the terms of use created by the offering party, which usually include a forum selection clause.[99] It is settled in law that this is a legitimate assent and will be enforced by the courts.[100]

A browse-wrap agreement is a more recent development, but applies the same concept click-wrap agreements promote. In this type of contract, a person agrees to the terms of internet companies by simply transacting business with them.[101] This is controversial because users can consent to an agreement without knowing when or to what they have consented. What makes this contract constitutional depends on whether the internet user had actual or constructive knowledge of the fact that they had agreed to a company's terms of use, and whether such terms are

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95 *See, e.g.*, *Terms of Use: Disputes*, AMAZON WEB SERVICES, http://aws.amazon.com/terms (last visited Aug. 29, 2011) (limiting any dispute arising out of Amazon services to be brought to King County, Washington). *See also Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/terms.php (last visited Aug. 29, 2011) (requiring Santa Clara County, California, to be the forum in litigation).

96 KENT D. STUCKEY, INTERNET AND ONLINE LAW §1.02(4) (Rel. 26 2009) (wrap agreements are not negotiated, but are consistently upheld).

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

conscionable.[102] Courts usually allow this type of agreement too, as long as the website points out to the user that he or she will be bound by the agreement.[103] Websites cannot simply post an "inconspicuous link to a page stating 'Entering this Site will constitute your acceptance of these Terms and Conditions,'" but not refer to the terms of the agreement at the time of purchase.[104]

The bottom line of both agreements is that the offeree must have some sort of knowledge that he or she is assenting to a contract with a forum limiting term. As long as this condition is met, most courts have no problem affirming forum selection clauses. This is not a bad solution; it is probably the most commercially kind way to avoid internet contact analyses confusion. One problem, however, is that it cannot cover the majority of internet contact causes of action because, naturally, it only controls claims involving business transactions.

B. Internet Registration Procedures

Another proposed method to fix the current personal jurisdiction problem, adds to forum selection clauses by submitting forum-limiting information into an online database so as to put all internet users on notice in a simple and efficient manner.[105] Once a business or individual registers with the central bureau, they have effectively added a forum selection clause to their website. It is a simple process, comparable to domain name registrations.[106] The central bureau would incorporate this information into the website and could possibly even attach the forum selection clause to email correspondence between the website and website users.[107]

This solution has one huge benefit: it simplifies personal jurisdiction issues. Internet users would know about a forum selection clause almost immediately, giving them the option to continue using the website or seeking out the same services from a less restricting business. Many courts already uphold forum selection clauses, and this would strengthen that precedent,

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102 *Id.*

103 *Id.*

104 *Id.* (citing Hines v. Overstock.com, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009)).

105 Exon, *supra* note 85, at 49–50.

106 *Id.*

107 *Id.* at 50.

because it is improbable that someone is ignorant to the forum selection clause when it is readily available in a central database and, possibly, business correspondence.

A downside to this solution is that it severely limits the notion that a harmed individual should be able to seek redress conveniently. It allows the defendant to choose the forum instead of the injured party, which gives potential defendants less of an incentive to prevent injurious acts because litigation for them would be easy. Forum selection clauses can reach a point of overbreadth, but courts have yet to hold these articles invalid and probably will not.

C. A New, Separate Cybercourt

Another proposed solution to eliminate internet contacts confusion is to create a new court system for issues arising out of the internet.[108] While this is a more radical approach to solving internet contacts discrepancies, it does eliminate the concern that forum selection registration caters to defendants. Under this proposal, websites could register with a cybercourt, which would act like a forum selection registration, but it would only bind claims arising out of a registered website's activity to be litigated in a completely neutral forum.[109] Registration would be voluntary, but websites who do not register would be subject to the current jurisdictional analysis.[110]

Cybercourt itself would have two branches: a dispute resolution center or a traditional litigation forum.[111] Both parties would have the right to either option, but if litigation was the only possible solution, pre-trial matters like pleading and discovery could be done through electronic filing.[112] The actual trial would be performed through electronic means as well.[113]

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[108] *Id.* at 51.

[109] *See id.*

[110] *Id.* at 51–52.

[111] *Id.* at 52.

[112] *Id.*

[113] *Id.* at 53. This author suggests using holography at trial. *Id.* Holography is a scientific process that emits three-dimensional characters from one location to another, like a live projection, giving the impression of a real trial while parties remain in their home states. *Id.*

D. Re-emphasizing the State's Interest in Litigation

One scholar urges courts to place less of an emphasis on contacts and more of an emphasis on the state's interest in a personal jurisdiction analysis.[114] This approach follows Justice Brennan's plea in *World-Wide Volkswagen* that requiring a defendant to travel in order to defend a suit does not violate the Due Process Clause.[115] Placing a strong emphasis on the state's desire to resolve a particular issue in its forum would accommodate technological developments; but this conflicts with the priorities articulated in *Burger King*, that a defendant is severely disadvantaged in a particularly inconvenient forum, compared to the plaintiff, and thus it is unconstitutional.[116]

The problem with this solution is the state's interest does not come into a personal jurisdiction analysis until the reasonableness assessment. After minimum contacts have been established and deemed sufficient to hold the defendant to the forum. To focus on the state's interest would be to change the overall evaluation, which completely distorts traditional concepts of personal jurisdiction, especially specific jurisdiction. While the state's interest is important, in litigation it should not be more important than the parties' interest. If it would be extremely inconvenient for the defendant to litigate in the forum, then that should outweigh a less important state interest.

E. Mapping Technology that Limits Specific Jurisdiction

Most critics of the *Zippo* scale complain that it does not conform to traditional notions of purposeful availment. Despite the courts' fears that applying a traditional personal jurisdiction test to internet contacts will subject all internet users to foreign jurisdictions, the traditional principles are proper and should continue being applied to internet contacts. Universal jurisdiction is unlikely to happen if courts apply a traditional contacts analysis because there are protections for foreign

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114 Hornsby, *supra* note 89, at 386.

115 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 308–11 (1980) (Brennan, J., dissenting).

116 Hornsby, *supra* note 89, at 386 (citing Burger King Co. v. Rudzewicz, 471 U.S. 462, 476–78 (1985)).

defendants' at all three steps of the analysis.[117] In order to find specific jurisdiction a defendant must purposely avail himself or herself to the forum, the claim must arise from the defendant's contacts, and holding the defendant to the forum must be reasonable.[118]

The existence of mapping technology limits the argument that traditional analyses would invoke universal jurisdiction under the first prong of this test.[119] Mapping technology allows internet users to limit where their websites can be viewed.[120] Further, technology has been developed that allows websites to identify the forums in which they are transacting business.[121] If a website is using these programs and still chooses to contact the forum, then they have purposely availed themselves to the benefits of the court's jurisdiction. If the website is using the program and is not contacting the forum then it has not availed itself. Websites that do not use the mapping or identification technologies would be viewed as purposely availing themselves to all forums.[122] This would encourage internet users to use this mapping technology, and would lessen the fear that purposeful availment would become universal.

For those websites who do not use mapping or identification technologies, the second prong of the specific jurisdiction analysis prevents universal jurisdiction because jurisdiction is not automatically found once purposeful availment is established.[123] Even if a website purposely availed itself to a forum, it could not be liable there unless its internet contact gave rise to the claim. Therefore, holding foreign defendants to the forum is further limited by the kind of contact made.

Lastly, the reasonableness of holding a defendant to a foreign jurisdiction will provide additional limits to universal jurisdiction fears. If holding the defendant to a forum would be extremely

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117 *See* Spencer, *supra* note 79, at 104 (citing ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 715 (4th Cir. 2002)).

118 *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 292–297.

119 Spencer, *supra* note 79, at 105.

120 *Id.*

121 *Id.*

122 *Id.* "Because such technology exists, those publishing on the Web who do not employ any of these methods persist in willful blindness to the location of those who visit and use their Web site. This chosen ignorance can no longer serve as a shield . . . ." *Id.*

123 *Id.* at 105–06.

difficult, it is a compelling reason to hold personal jurisdiction improper.[124] If the forum state has no interest in litigation, that would be another reason to free the defendant from forum obligations. Whatever the constitutional reason, this final step protects foreign defendants.[125]

F. Return to Traditional Principles

Returning to traditional principles would benefit the judiciary because the test would not have to change. It is adaptable to internet contacts just like it was adaptable to different technology before the internet. Further, courts should return to a more traditional approach because neither Congress, nor the Supreme Court has changed personal jurisdiction concepts.[126] If reform is needed, then one of those two powers should act.

Another advantage to returning to traditional principles is courts would no longer treat internet contacts as distinct from traditional contacts.[127] Treating internet contacts differently from contacts previously seen in case law created confusion amongst the courts. This was not necessary because a contact is a contact as long as it is purposeful. One downside to this approach is further inconsistency among courts occurring if the analysis hinges on reasonableness factors and the courts feel uncomfortable holding the defendant to the forum due to the subjective nature of the balancing test.

G. Burden Shifting

In a traditional specific jurisdiction analysis the burden falls on the plaintiff to show the defendant had sufficient minimum contacts to tie him or her to the forum.[128] The internet has complicated this procedure because the internet is boundary-less. It can be difficult for a plaintiff to show purposeful availment when website makers have no control over where their website

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[124] *Id.* at 106–07.

[125] *Id.* "[T]he reasonableness prong of the personal jurisdiction test, or the availability of venue transfers and *forum non conveniens* dismissals, should enable courts to protect defendants against having to litigate in [an] inappropriate forum[ ]." *Id.* at 107.

[126] *Id.* at 114.

[127] *Id.* at 111–13.

[128] *Id.* at 109.

could be seen. Mapping and identification programs make this issue obsolete. Combining traditional approaches with modern technology, all a plaintiff would have to do to show sufficient internet contacts is show that the defendant did not use forum-limiting programs because by not using one, the defendant is willfully subjecting his website to all jurisdictions and possibly benefitting in all of them. This could be dangerous because not every website necessarily needs these programs especially if they are obviously directed towards a particular forum and have no intention of contracting business in other forums. In these circumstances a burden-shifting approach would be appropriate.

Under the burden-shifting proposal, the relevant inquiry at a personal jurisdiction hearing is whether mapping or identification programs were used by the defendant in maintaining his website.[129] Once the initial question is answered, the burden would shift to the defendant to show that despite forgoing forum-limiting technology he did not purposely avail himself to the relevant forum.[130] If the defendant succeeded then the burden would return to the plaintiff to establish other evidence that the defendant purposely availed himself to the forum.[131] If there is enough evidence to support a finding that internet contacts were sufficient then the court follows through with the reasonable analysis to make sure constitutional principles are not mistreated.

Burden shifting is not new to U.S. courts. The Supreme Court has shifted burdens in discrimination claims and encouraged this approach in motions for summary judgment.[132] This proposal would simply expand the circumstances of its application.

This proposal benefits the personal jurisdiction analysis because it does not try to contort the traditional notions of fair play and substantial justice that are integral to due process. This proposal is "rooted in traditional jurisdictional [analyses] rather than an adaptation of the problematic *Zippo* standard."[133] This proposal also has the flexibility *Zippo* and its brethren lack.[134] Technology will hardly remain stagnant, so, the judiciary needs a test that can adapt to new creations that pose threats to

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129 *Id.*

130 *Id.*

131 *Id.* at 110.

132 *Id.*

133 *Id.* at 111.

134 *Id.* at 112.

consistency under the *Zippo* standard. Burden shifting also takes away the blanket protection websites are given by holding their creators accountable to the forums they touch because programs exist that can limit the website's reach.[135]

The downside to this proposal is it expands liability to internet users, which may affect internet commerce. Internet users who do not incorporate mapping or identification technology into their internet use could be haled into many different forums, subjecting them to multiple state legal obligations, which can, in some instances, conflict with one another. So effectively, expanding liability could create more confusion and ultimately deter the internet business.

CONCLUSION

The internet's lack of boundaries has created a dilemma in personal jurisdiction; the *Zippo* test, however, is not the solution to this issue. For one, it changes the core requirement of the personal jurisdiction analysis—purposeful availment. Second, many internet users today are individuals using websites to transact business in a forum. They are not businesses using the internet to seek mass profit-making capability—like the original defendant sparking the *Zippo* scale. Third, the test does not create a clear rule that puts ordinary citizen defendants on notice that they may have to defend in the far away forum. Would it be appropriate to apply these tests to individuals who may only have one or two contacts with the forum through their internet actions? Or is the opposite true, should we hold them because their websites though not interactive are purposely tailored toward the forum?

Companies who conduct business over the internet are making a fortune.[136] Deep pockets are a dangerous thing to have if facing

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135 *Id.*

136 For example, Amazon.com reported an estimated operating income between $360 million and $560 million on sales of about $13 billion in 2010. Joseph Galante, *Amazon.com's Profit Forecast Falls Short of Estimates*, BLOOMBERG BUSINESSWEEK (Oct. 21, 2010, 6:51 PM), http://www.businessweek.com/news/2010-10-21/amazon-com-s-profit-forecast-falls-short-of-estimates.html. Expedia, the online travel site, likewise reported more than $170 million in profits on sales of nearly $7 billion in their third quarter. *Expedia Profits Beat Forecasts as Bookings Increase*, REUTERS NEWS (Oct. 28, 2010, 4:36 PM), http://www.reuters.com/article/2010/10/28/us-expedia-idUSTRE69R56X20101028.

a lawsuit. They can subject a business to expensive damages, or large litigation bills or both. In order to avoid costly litigation all over the country, internet-based industries are taking matters into their own hands and devising ways to avoid being pulled into a foreign jurisdiction. Likewise, legal scholars have proposed alternatives to the *Zippo* test. Ultimately, something needs to change.

The notice system currently in place under the *Zippo* scale is inadequate. This is a problem because the cornerstone of each claim is personal jurisdiction. Therefore, we must fix notice issues involving personal jurisdiction because obscurity violates due process. The solution must be carefully drawn out. It should not be so regulated as to obligate every cyber-defendant to a foreign jurisdiction because that would hamper internet commerce. But the solution should not be too forgiving as to immunize websites with a clear intent to enter other forums. There must be a balance, and that balance must fit into the judicial scheme already set up before the courts so it can subsist amidst new questions that come up as the internet and other technologies evolve.