

JURISDICTION AND THE INTERNET: RETURNING TO TRADITIONAL PRINCIPLES TO ANALYZE NETWORK-MEDIATED CONTACTS[†]

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Courts have been evaluating the issue of personal jurisdiction based on Internet or “network-mediated” contacts for some time. The U.S. Supreme Court has remained silent on this issue, permitting the federal appeals courts to develop standards for determining when personal jurisdiction based on network-mediated contacts is appropriate. Unfortunately, the circuit approaches—which emphasize a Web site’s “interactivity” and “target audience”—are flawed because they are premised on an outdated view of Internet activity as uncontrollably ubiquitous. This view has led courts to depart from traditional jurisdictional analysis and impose elevated and misguided jurisdictional standards. This article argues that courts should reinstitute traditional principles to analyze jurisdiction based on network-mediated contacts in light of current technology that enables Internet actors to restrict the geographical reach of their virtual conduct. Such a return will be fairer for plaintiffs while recognizing the legitimate due process rights of defendants.

I. INTRODUCTION

Imagine that you are surfing the Web in your home and you come across an article on the Web site of an out-of-state newspaper that makes numerous false statements about you, your views on race, and your work performance. You are outraged and file a complaint in federal court in your state alleging defamation by the newspaper for the libelous remarks published on its Web site. Your attorney has assured you that you can bring a suit against the newspaper in your state based on *Calder v. Jones*.¹

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1. 465 U.S. 783 (1984).

In that case, the U.S. Supreme Court upheld jurisdiction in California over out-of-state journalists based on a defamatory article they wrote about a California resident that was published in the *National Enquirer*.² Although the district court agrees with your attorney, the federal appeals court surprisingly decides that jurisdiction is not appropriate because the intended audience for the Web site was readers in the state where the newspaper is physically located, not people in your state.³

Welcome to the world of Internet-based jurisdiction, a realm in which courts have created new jurisdictional principles for analyzing contacts mediated through cyberspace⁴ that depart from the traditional jurisdictional principles articulated in cases involving contacts made in real space. In this world, new considerations such as a Web site's "interactivity" and "target audience" are the essential concepts courts use to determine whether to treat virtual contacts as minimum contacts. The courts believe that these new concepts, which seem to be more suited to the Internet, have supplanted traditional considerations. However, this article finds that courts have improperly altered traditional analysis in a way that results in an overly restrictive view of when virtual contacts may support jurisdiction.

The Supreme Court has consolidated concerns about fairness and the limits of state sovereignty into a law of personal jurisdiction that requires the defendant to have "minimum contacts" with the forum state.⁵ These dual concerns⁶ have led the Court to require actions by the defendant that purposefully affiliate the defendant with the forum before the Court has upheld assertions of jurisdiction over out-of-state defendants.⁷ This requirement of "purposeful availment" has satisfied both concerns about fairness and about adhering to limits on state sovereignty. It is fair to exercise jurisdiction over a defendant in a forum into which he purposefully directs his actions,⁸ and state sovereignty empowers a state to adjudicate matters arising from conduct directed into its territory⁹ or in-

2. *Id.* at 791.

3. See *Young v. New Haven Advocate*, 315 F.3d 256, 258–59 (4th Cir. 2002).

4. Cyberspace simply is "a metaphor for describing the non-physical terrain created by computer systems." Webopedia, *Cyberspace*, <http://www.webopedia.com/TERM/c/cyberspace.html> (last visited Sept. 10, 2005). In this article, cyberspace is used to refer to the nonphysical terrain created by online or networked computer systems. See MIKE GODWIN, *CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE* 5–6 (1998), for a good explanation of the series of "interconnected computer forums" that comprise cyberspace.

5. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980) ("The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.")

6. The Court has also identified a third concern, individual liberty. See *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest.")

7. See *World-Wide Volkswagen*, 444 U.S. at 297–98.

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

9. See *Calder v. Jones*, 465 U.S. 783, 789 (1984).

volving defendants substantially connected with,¹⁰ or present in,¹¹ that state.¹² Together with the requirement of purposeful availment, traditional specific personal jurisdiction analysis mandates that the cause of action arise out of the defendant's purposeful contacts¹³ and that an assertion of jurisdiction be constitutionally reasonable.¹⁴

The advent and extensive use of the Internet have presented new challenges for the law of personal jurisdiction. Many courts and scholars have grappled with how best to evaluate for constitutionality assertions of personal jurisdiction based on network-mediated contacts,¹⁵ reaching a wide range of conclusions about proper standards.¹⁶ The U.S. Supreme Court has thus far not entered this debate.¹⁷ Thus, appeals courts have

10. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (“Even when the cause of action does not arise out of or relate to the foreign corporation’s activities in the forum State, due process is not offended by a State’s subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.”); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952) (finding that Ohio was permitted to exercise general jurisdiction over a company on the basis of its having “continuous and systematic” contacts with the state).

11. *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (“The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of ‘traditional notions of fair play and substantial justice.’”); *id.* at 637 (Brennan, J., concurring) (“By visiting the forum State, a transient defendant actually ‘avail[s]’ himself of significant benefits provided by the State.” (alteration in original) (citation omitted)).

12. Jurisdiction based on purposeful contacts with a state has come to be known as “specific jurisdiction,” *Helicopteros*, 466 U.S. at 414 n.8, while jurisdiction based on state residency, presence, or a substantial and continuous connection with a state is referred to as “general jurisdiction.” *Id.* at 414 n.9 (citations omitted).

13. This arising-out-of requirement is sometimes referred to as the “relatedness” or “nexus” requirement.

14. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (permitting jurisdiction where purposeful availment, relatedness, and reasonableness are established).

15. I use “network-mediated contacts” (and at times “virtual contacts”) in this article as a term to refer to activity of any kind transmitted via a computer network or the Internet. Such activity includes, for example, the posting of information to and publishing of Web sites, the use of e-mail or instant messaging, the use of chat rooms, newsgroups or other virtual forums, or the pushing or pulling of data onto or from computer networks or computers via such networks.

16. See, e.g., Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1380 (2001) (proposing a “targeting analysis” that would “seek to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction”); Andrea M. Matwyshyn, *Of Nodes and Power Laws: A Network Theory Approach to Internet Jurisdiction Through Data Privacy*, 98 NW. U. L. REV. 493, 498 (2004) (proposing a “Trusted Systems” approach that uses notions of social responsibility and consent to determine the propriety of exercises of jurisdiction over behavior transmitted through technologically mediated communications networks such as the Internet); Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575, 605 (1998) (recommending that the purposeful availment requirement be dispensed with in the Internet context); Carlos J. R. Salvado, *An Effective Personal Jurisdiction Doctrine For The Internet*, 12 U. BALT. INTELL. PROP. L.J. 75, 78–80 (2003) (arguing for application of a hybrid *Zipco* and *Calder* analysis that permits jurisdiction only where effects of Internet activity are deliberately intensified with respect to a particular state).

17. See *Gator.Com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1077 (9th Cir. 2003) (“No Supreme Court cases and only a handful of Ninth Circuit cases have addressed the issue of when and whether general jurisdiction may be asserted over a company that does business on the internet.”); *ALS Scan*

framed the standards for establishing personal jurisdiction on the basis of network-mediated contacts, with most developing or adopting a common approach. Most courts have employed some variation of the sliding-scale framework developed in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,¹⁸ and have incorporated a “targeting” or “express aiming” requirement seemingly inspired by the “effects” test the Supreme Court developed in *Calder v. Jones*.¹⁹

Unfortunately, the prevailing analysis embodied in contemporary *Zippo*-based approaches is fundamentally unsound. These approaches have increasingly led courts to resolve questions of jurisdiction in the Internet context in ways that diverge from the jurisdictional policy established by the Supreme Court in *International Shoe Co. v. Washington*²⁰ and its progeny.²¹ Thus, the modern standard permits the mere specter of an Internet connection to lead courts into erroneously forging new Internet-specific principles that unduly restrain legitimate exercises of jurisdiction.

The prevailing approaches to evaluating Internet-based assertions of personal jurisdiction go beyond protecting the core concerns that underlie the Supreme Court’s personal jurisdiction jurisprudence by rejecting jurisdiction when fairness to the defendant is not threatened and the limits of state sovereignty would not be breached.²² These approaches directly contravene jurisdictional precedent of the Supreme Court,²³ most notably *Calder v. Jones*,²⁴ which permits states to exercise jurisdiction when the defendants intentionally harm forum residents.²⁵ Courts’ common practice of rejecting jurisdiction in cases involving intentional harms directed at forum residents through the Internet, notwithstanding the availability of the offending Web sites within the forum,²⁶ violates *Calder*.

Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 713 (4th Cir. 2002) (noting that personal jurisdiction analysis has yet to be “reconceived and rearticulated by the Supreme Court”).

18. 952 F. Supp. 1119, 1123 (W.D. Pa. 1997); see, e.g., *ALS Scan*, 293 F.3d at 714 (indicating that the court was “adopting and adapting the *Zippo* model”).

19. 465 U.S. 783, 789–90 (1984) (citing *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 297–98 (1980)).

20. 326 U.S. 310, 316 (1945) (holding that if a defendant is not present within the forum state, jurisdiction may be exercised if the defendant has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” (citation omitted)).

21. E.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Calder*, 465 U.S. at 783; *World-Wide Volkswagen*, 444 U.S. at 286; *Kulko v. Super. Ct.*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957).

22. See, e.g., *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) (denying jurisdiction over nonresidents alleged to have intentionally defamed a forum resident).

23. E.g., *Burger King*, 471 U.S. at 472.

24. 465 U.S. 783 (1984).

25. See *id.* at 788–90. This standard has come to be referred to as the *Calder* “effects” test.

26. See, e.g., *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390 (4th Cir. 2003) (denying jurisdiction over nonresidents alleged to have violated the trademark of a forum resident); *Young*, 315 F.3d at 258–60, 264 (denying jurisdiction over nonresidents alleged to have defamed a forum resident).

This undue restriction of personal jurisdiction in the Internet context ultimately results from courts' decisions to discount the ubiquitous nature of Internet activity and their reluctance to embrace the consequences of the Internet's omnipresence under traditional standards of personal jurisdiction. Courts should return to an approach that honors traditional principles.

Part II of this article reviews how federal courts have applied or adapted the law of personal jurisdiction in the Internet context. It first focuses on the analysis developed by the Western District of Pennsylvania in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,²⁷ which has gained broad acceptance among the regional circuits. It then reviews how the appeals courts have evaluated personal jurisdiction based on network-mediated contacts, revealing a propensity to apply some form of the *Zippo* framework.

Part III analyzes this body of Internet-jurisdiction jurisprudence, identifying several shortcomings. First, the prevalent tests for evaluating jurisdiction based on network-mediated contacts wrongly presume that Internet activity is directed at no particular place simply because it is accessible globally. Thus, courts have required additional indicia of state-specific targeting before they permit a finding of purposeful availment. This stringent requirement is inappropriate given the ordinarily ubiquitous nature of Internet activity. Second, the prevalent approaches have overemphasized Web sites and their level of "interactivity." However, a Web site's interactivity minimally implicates whether a defendant's wrongful conduct is purposefully directed at a state in a manner that would support a finding of purposeful availment under traditional principles. More importantly, this irrelevant litmus test for Web sites has essentially disqualified all Web sites that are deemed "passive" from supporting personal jurisdiction, a result that is clearly extreme and inconsistent with what a traditional analysis would suggest. Third, and finally, the *Zippo*-based tests undermine the *Calder* "effects" test by supplanting it with a new standard. This new criterion replaces the critical factor in a *Calder* analysis—the target of wrongdoing—with a new factor: the overall target audience of Internet activity.

Part IV proposes an alternative approach for evaluating jurisdiction based on network-mediated contacts in a manner that is more consistent with traditional personal jurisdiction analysis, arguing that application of traditional principles yields greater fairness to plaintiffs without sacrificing the legitimate due process concerns of defendants. Because it is now technologically possible to restrict the accessibility of Internet material to specific geographical areas, applying a traditional analysis to non-geographically restricted Internet activity yields a presumption that those Internet actors purposefully avail themselves of every jurisdiction they

27. 952 F. Supp. 1119 (W.D. Pa. 1997).

permit their virtual conduct to reach. However, the widespread fear shared by many courts and commentators that this application of unaltered traditional jurisdictional principles will result in universal jurisdiction over Internet actors is unfounded. Universal jurisdiction will hardly be the inevitable outcome of applying traditional principles, given the ability of defendants to avoid the presumption of purposeful availment by employing geographical restriction techniques and the role that the “arising-out-of” and “reasonableness” requirements of the analysis can play in limiting unwarranted assertions of jurisdiction.

II. CONTEMPORARY APPROACHES TO PERSONAL JURISDICTION AND THE INTERNET

Much has already been written about how the courts initially applied jurisdictional principles to the Internet.²⁸ However, a brief review of initial judicial treatment of this issue will contextualize the current approaches of the regional circuits.

A. *Inset Systems, Inc. v. Instruction Set, Inc.*

The path not taken, as it were, is represented by the “early” case of *Inset Systems, Inc. v. Instruction Set, Inc.*²⁹ *Inset* involved a trademark infringement claim brought in Connecticut by Inset Systems (Inset), a Connecticut corporation, against Instruction Set, Inc. (ISI), a Massachusetts corporation, arising out of ISI’s registration of “INSET.COM” as its Internet domain address.³⁰ Inset had previously registered “INSET” as a federal trademark and learned about ISI’s use of its trademark in its domain address when Inset itself sought to register for the “INSET.COM” domain address.³¹ ISI moved to dismiss the complaint for lack of personal jurisdiction, arguing that it did not conduct business in Connecticut on a regular basis.³² Inset responded that jurisdiction was appropriate because “the defendant has used the Internet, as well as its toll-free number to try to conduct business within the state of Connecticut.”³³

Analogizing ISI’s use of the Internet to the use of product catalogs to solicit orders from potential customers, the court in *Inset* found that ISI, by using the Internet and a toll-free telephone number, directed its

28. See, for example, Redish, *supra* note 16, for a discussion of the evolution of judicial approaches to this issue.

29. 937 F. Supp. 161 (D. Conn. 1996).

30. *Id.* at 162–63. Domain addresses are also referred to as “domain names.” A domain name is “any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.” 15 U.S.C. § 1127 (2000).

31. *Inset*, 937 F. Supp. at 162–63. ISI was also discovered to be “us[ing] the telephone number ‘1-800-US-INSET’ to . . . advertise its goods and services.” *Id.* at 163.

32. *Id.* at 164.

33. *Id.*

advertising activity toward Connecticut and all states.³⁴ The court reached this conclusion because “[t]he Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state.”³⁵ As a result, the court had no difficulty concluding, “ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut.”³⁶ The court also concluded that jurisdiction would be consistent with “fair play and substantial justice” because Connecticut had an interest in adjudicating the dispute and the minimal distance between Massachusetts and Connecticut would minimize any inconvenience to the defendant.³⁷

The *Inset* case received much criticism for its broad holding that publishing a Web site on the Internet would permit a finding of purposeful availment wherever the Web site was accessible.³⁸ Many critics argued that supporting such a conclusion would virtually eviscerate any limitations on state court jurisdiction, undermining the notion articulated in numerous Supreme Court cases that the Due Process Clause limits the territorial reach of states.³⁹ This view is a slight overreaction, because finding that purposeful availment exists wherever a Web site is made available is not necessarily finding that personal jurisdiction is proper; under traditional jurisdictional analysis, the court must still determine that the claim arises from the Web contact and that the assertion of jurisdiction is constitutionally reasonable. Other critics suggested that it was inappropriate to presume a global targeting of activity merely because the Internet was accessible globally; rather, courts should examine which geographical areas the defendant actually intended to target with its Internet activities.⁴⁰

34. *Id.* at 165.

35. *Id.*

36. *Id.*

37. *See id.*

38. *See, e.g.,* Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3, 53 (1997) (stating, in disapproving of *Inset*, “[A]s of this writing, there are estimated to be approximately half a million Web sites on the Internet; if one were to adopt the reasoning of the *Inset Systems* opinion, all half a million Web site operators have ‘purposefully availed’ themselves of the privilege of doing business in Connecticut—even if they have never heard of Connecticut.”); Geist, *supra* note 16, at 1362 (“The [*Inset*] court’s decision was problematic for several reasons.”); Redish, *supra* note 16, at 589 (indicating, in speaking about *Inset*’s approach, that “such a mode of analysis is seriously flawed”). *But see* Matwyshyn, *supra* note 16, at 507 (“Although the rationale proffered by the court in *Inset* was flawed in some respects, . . . summarily disregarding *Inset*’s analysis is unwarranted and, perhaps, inadequately contemplative of the types of harms that arise from contacts involving Web sites. The outcome in *Inset*, based on a different rationale grounded in a minimum contacts analysis, may have been appropriate.”).

39. *See, e.g.,* *Hearst Corp. v. Goldberger*, No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097, at *16 (S.D.N.Y. Feb. 27, 1997) (“Because the Web enables easy world-wide access, allowing computer interaction via the Web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists . . .” (quoting *McDonough v. Fallon McElligot, Inc.*, No. 95-4037, 1996 WL 753991, at *3 (S.D. Cal. Aug. 6, 1996))); *see also* Geist, *supra* note 16, at 1362.

40. *See, e.g.,* Geist, *supra* note 16, at 1362.

Despite *Inset's* perceived shortcomings, it offered a certain simplicity and coherence as an alternative to the muddled confusion that had become personal jurisdiction law in the wake of *International Shoe* and its progeny.⁴¹ Rather than creating yet another “test,” the court reached the sound conclusion that Web-based advertising presumptively targeted all potential users of the Web in every state, and indeed across the globe. After all, the Web site in *Inset* was located on the “World Wide Web,” a moniker that expressly announces the medium’s global reach. The suggestion that one who places information on something called the World Wide Web can at least be presumed to intend that the information be accessible by everyone in the world with Internet access is rational. Certainly those commercial Internet actors who would welcome business from any state in the United States arising out of their Web presence could be said to be availing themselves of the national market.⁴² Thus, the *Inset* decision does not deserve all of the criticism that it has received.

B. Zippo Manufacturing Co. v. Zippo Dot Com, Inc.

Fortunately for *Inset's* detractors, a different federal district court soon articulated a competing approach for determining whether jurisdiction is appropriate based on an Internet presence. In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,⁴³ the court heard an Internet domain name dispute couched in terms of an action alleging trademark infringement,⁴⁴ as was the case in *Inset*. Zippo Manufacturing (Manufacturing) was a Pennsylvania corporation that brought suit in a federal district court in Pennsylvania against Zippo Dot Com (Dot Com), a California corporation.⁴⁵ Dot Com operated a Web site and Internet news service⁴⁶ and had secured the exclusive right to use the domain names “zippo.com,” “zippo.net,” and “zipponews.com” on the Internet.⁴⁷ Manufacturing, the owner of the “Zippo” trademark, based its claims of infringement on Dot Com’s use of the trademark in its domain names, in numerous locations on its Web site, and in the heading of newsgroup⁴⁸

41. See, e.g., Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward A Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998) (“Ambiguity and incoherence have plagued the minimum contacts test for the more than five decades during which it has served as a cornerstone of the Supreme Court’s personal jurisdiction doctrine.”).

42. As one court put it when referring to a business that posted advertising information on the Internet, if a forum resident had called the business in response to seeing the advertisement on the Web site, “Defendants would not have refused the call.” *TELCO Commc’ns v. An Apple A Day*, 977 F. Supp. 404, 406 (E.D. Va. 1997).

43. 952 F. Supp. 1119 (W.D. Pa. 1997).

44. *Id.* at 1120–21.

45. *Id.* at 1121.

46. Dot Com’s news service is a membership/subscriber service where subscribers can view or download newsgroup messages that are stored on Dot Com’s server in California. *Id.*

47. *Id.*

48. Newsgroups are on-line discussion groups or forums within USENET that contain discussions on specified topics; users post messages to a news server at which point other users can then read the postings. Sharpened.net, Newsgroup, <http://www.sharpened.net/glossary/definition.php?>

messages posted by subscribers to Dot Com's newsgroup.⁴⁹ Dot Com moved to dismiss the Pennsylvania action, arguing that its Web site, which was accessible to Pennsylvania residents via the Internet, was an insufficient basis for the assertion of personal jurisdiction.⁵⁰

Rather than take the approach of the *Inset* court that the Pennsylvania Web presence alone sufficed to create the requisite minimum contacts between Dot Com and Pennsylvania, and rather than applying purely traditional principles to the question, the *Zippo* court crafted a completely new approach. The heart of the *Zippo* court's approach is its "sliding scale," which provides that the constitutionality of an assertion of personal jurisdiction "is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."⁵¹ The court elaborated on its approach with the following (now famous) passage:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.⁵²

The categories of cases outlined in the above-quoted passage have come to be characterized as active (when the defendant clearly does business over the Internet), passive (the purely informational sites), and interactive (sites permitting the exchange of information).⁵³

newsgroup (last visited Sept. 19, 2005). To post to or read postings from a newsgroup, a user must subscribe to the group. *Id.* USENET is defined as "[a] worldwide bulletin board system that can be accessed through the Internet or through many online services." Webopedia, Usenet, <http://www.webopedia.com/TERM/U/Usenet.html> (last visited Sept. 17, 2005). USENET predates the Web but is now incorporated into it as one of the supported protocols. See Faqs.com, What is USENET? How is it different than "the Web"?, <http://www.faqs.org/faqs/judaism/FAQ/01-FAQ-intro/section-2.html> (last visited Sept. 19, 2005).

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

50. See *id.* at 1112-27.

51. *Id.* at 1124.

52. *Id.* (citations omitted).

53. Heidle v. Prospect Resort, Ltd., 364 F. Supp. 2d 312, 318 (W.D.N.Y. 2005) (citing *Zippo*, 952 F. Supp. at 1119). As one commentator aptly noted, as more Web sites employ data collection technologies to collect information on visitors of those sites, "websites that a user perceives to be simply 'dead advertising' or content that is not collecting significant amounts of information and thus deemed to be relatively 'passive' under the sliding scale approach may, in fact, be still highly interactive in real

Applying this newly minted test, the court found Dot Com's site to be highly active.⁵⁴ Because the facts showed that Dot Com, through its Web site, had contracted with roughly 3000 individuals and seven Internet access providers in Pennsylvania, transactions that aimed to facilitate the downloading of material in Pennsylvania, the court concluded that Dot Com was purposefully availing itself of the privilege of doing business in Pennsylvania.⁵⁵ By "repeatedly and consciously cho[osing] to process Pennsylvania residents' applications and to assign them passwords," the court concluded that Dot Com freely chose to sell its services to Pennsylvania residents, "presumably in order to profit from those transactions."⁵⁶ After finding the assertion of jurisdiction over Dot Com to be reasonable,⁵⁷ the court denied Dot Com's motion to dismiss.⁵⁸

C. Circuits Applying a Zippo-Based Test

Courts immediately exalted the *Zippo* case to the status of an instant classic.⁵⁹ Seemingly relieved that a court had offered an apparently sensible and workable approach for tackling jurisdictional questions in the new medium of the Internet that did not simply abdicate all jurisdictional analysis as the *Inset* court was seen to have done, courts rushed to adopt and apply the *Zippo* framework as the standard for determining personal jurisdiction in cyberspace.⁶⁰ Many federal appeals courts have embraced the *Zippo* test. The Ninth Circuit was one of the first circuit courts to address the issue of personal jurisdiction based on network-mediated contacts in *Cybersell, Inc. v. Cybersell, Inc.*⁶¹ In *Cybersell*, the Ninth Circuit indicated that Web sites that simply advertise or solicit sales could not support an assertion of personal jurisdiction without "something more" to indicate that the defendant purposefully (albeit

terms because of the extent of data collection being conducted in relation to the user." Matwyshyn, *supra* note 16, at 513 (citation omitted).

54. *Zippo*, 952 F. Supp. at 1125 ("This is a 'doing business over the Internet' case. . .").

55. *Id.* at 1121-26.

56. *Id.* at 1126.

57. *Id.* at 1127.

58. *Id.* at 1128.

59. *See, e.g.*, Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003) ("The opinion in *Zippo* . . . has become a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site."); Shamsuddin v. Vitamin Research Prods., 346 F. Supp. 2d 804, 809 (D. Md. 2004) ("*Zippo* has proved to be a watershed case. . .").

60. *See, e.g.*, Patriot Sys., Inc. v. C-Cubed Corp., 21 F. Supp. 2d 1318, 1324 (D. Utah 1998) ("The court finds [*Zippo*'s] analysis helpful in this relatively new and changing area of law. . ."); Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738, 742 (W.D. Tex. 1998) ("[*Zippo*'s] sliding scale is consistent with well developed personal jurisdiction principles."); Mieczkowski v. Masco Corp., 997 F. Supp. 782, 786-87 (E.D. Tex. 1998) ("After reviewing the cases relating to this issue, the Court agrees with the proposition that 'the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet.'" (quoting *Zippo*, 952 F. Supp. at 1124)); SF Hotel Co., L.P. v. Energy Invs., Inc., 985 F. Supp. 1032, 1034-35 (D. Kan. 1997) (applying the *Zippo* standard); Weber v. Jolly Hotels, 977 F. Supp. 327, 333 (D.N.J. 1997) (applying the tripartite *Zippo* framework).

61. 130 F.3d 414 (9th Cir. 1997).

electronically) directed his activity in a substantial way to the forum state.”⁶² Because the defendant’s Web site in *Cybersell* was “an essentially passive home page,” the court concluded, “[W]e cannot see how from that fact alone it can be inferred that [the defendant] deliberately directed its merchandising efforts toward [forum] residents.”⁶³ Thus, the Ninth Circuit indicated that for a Web site to serve as the basis for personal jurisdiction, it would have to be specifically targeted at the forum state.⁶⁴ The rationale for such a limitation was made clear: if a passive Web site that contained infringing material could, without more, satisfy the purposeful availment requirement of the specific jurisdiction test, “every complaint arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction wherever the plaintiff’s principal place of business is located.”⁶⁵

Today, most circuits have adapted the *Zippo* test by infusing it with some requirement of intentional and forum-specific “targeting” or “express aiming” as the “something more” demanded by the *Cybersell* court. The Fourth Circuit adopted such an approach in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*,⁶⁶ requiring that a Web site be directed at the forum and also mandating a specific intent to engage in business or other interactions within the forum state.⁶⁷ Based on its commitment to maintain limits on the reach of state jurisdiction in the face of social and technological change,⁶⁸ the court in *ALS Scan* indicated that it was compelled to adapt traditional jurisdictional principles for the purposes of analyzing Internet-based contacts “because the Internet is omnipresent.”⁶⁹ Such an adaptation was necessary, the court suggested, because otherwise, under traditional principles, “[t]he person placing information on the Internet would be subject to personal jurisdiction in every State.”⁷⁰ This outcome was unacceptable to the court because “then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist.”⁷¹

Because it was unwilling to accept what it perceived would be the outcome of applying traditional principles to network-mediated contacts—universal jurisdiction—the *ALS Scan* court determined that it had to develop “the more limited circumstances when it can be deemed that

62. *Id.* at 418.

63. *Id.* at 419.

64. *Id.* at 419–20.

65. *Id.* at 420.

66. 293 F.3d 707 (4th Cir. 2002).

67. *Id.* at 714.

68. *Id.* at 711. The court took this charge from *Hanson v. Denckla*, 357 U.S. 235 (1958), where the Supreme Court stated that the “technological progress” that had “increased the flow of commerce between States” should not be viewed as a trend that “heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.” *Id.* at 250–51.

69. *ALS Scan*, 293 F.3d at 712.

70. *Id.*

71. *Id.*

an out-of-state citizen, through electronic contacts, has conceptually ‘entered’ the State via the Internet for jurisdictional purposes.”⁷² Standing on the core requirement of specific jurisdiction that there must be purposeful conduct of the defendant directed at a state that gives rise to the plaintiff’s claims, the court decided to “adopt[] and adapt[] the *Zippo* model”⁷³ and created the following standard:

[A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State’s courts.⁷⁴

In elaborating on this standard, the court indicated that “passive” Internet activity would not subject the actor to jurisdiction in each State where the electronic signal is transmitted and received.⁷⁵ Rather, the court explained, “specific jurisdiction in the Internet context may be based only on an out-of-state person’s Internet activity directed at [a state] and causing injury that gives rise to a potential claim cognizable in [that state].”⁷⁶

The Third Circuit—out of which the district court opinion in *Zippo* originates—announced a similar approach to evaluating jurisdiction based on network-mediated contacts in *Toys “R” Us, Inc. v. Step Two, S.A.*,⁷⁷ concluding that a commercial Web site must target the forum state or knowingly interact with forum residents to support personal jurisdiction.⁷⁸ The case involved a trademark, unfair competition, and cybersquatting⁷⁹ dispute between Toys “R” Us, Inc., a Delaware corporation based in New Jersey, and Step Two, S.A., a Spanish corporation, over Step Two’s use of the mark “Imaginarium” in two of its Web sites.⁸⁰ These Web sites were commercial in nature in that they advertised products (educational toys) and allowed consumers to purchase the products through the Web site.⁸¹ However, the Web sites were entirely in Spanish, prices were listed exclusively in pesetas and Euros, and goods ordered from the site could only be shipped within Spain, with U.S. addresses not

72. *Id.* at 713.

73. *Id.* at 713–14.

74. *Id.* at 714.

75. *See id.*

76. *Id.* at 714.

77. 318 F.3d 446 (3d Cir. 2003).

78. *Id.* at 454.

79. “Cybersquatting means registering, selling or using a domain name with the intent of profiting from the goodwill of someone else’s trademark. It generally refers to the practice of buying up domain names that use the names of existing businesses with the intent to sell the names for a profit to those businesses.” Nolo.com, *Cybersquatting: What It Is and What Can Be Done About It*, <http://www.nolo.com/article.cfm/objectID/60EC3491-B4B5-4A98-BB6E6632A2FA0CB2/111/228/195/ART> (last visited Jan. 21, 2005).

80. *Toys “R” Us*, 318 F.3d at 448.

81. *Id.* at 450.

being accommodated in the online form.⁸² Toys “R” Us brought suit in New Jersey federal court and Step Two challenged personal jurisdiction.

On appeal from a judgment denying personal jurisdiction over Step Two, the Third Circuit first discussed *Zippo* and indicated that courts within the Third Circuit had since “made explicit the requirement that the defendant intentionally interact with the forum state via the web site in order to show purposeful availment”⁸³ and “have repeatedly recognized that there must be ‘something more’ . . . to demonstrate that the defendant directed its activity towards the forum state.”⁸⁴ After reviewing these lower court decisions and consulting the opinions of other circuits,⁸⁵ the Third Circuit concluded,

[T]he mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world. Rather, there must be evidence that the defendant “purposefully availed” itself of conducting activity in the forum state, by directly *targeting* its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts.⁸⁶

This approach is similar to the Fourth Circuit’s test in its references to targeting the forum and interaction with state residents. However, the standard is easier to satisfy than the Fourth Circuit test because the Third Circuit posits its factors as alternative rather than cumulative requirements; that is, purposeful availment may be found *either* where the Web site targets the forum *or* if the defendant knowingly interacts with residents of the forum state. The Fourth Circuit requires both the targeting of the Web site at the forum and at least a specific intent to interact with forum residents.⁸⁷ Having articulated its approach, the Third Circuit easily concluded that the facts before it could not support a finding of personal jurisdiction over Step Two.⁸⁸ Courts in the Fifth,⁸⁹ Sixth,⁹⁰ and Sev-

82. *Id.* Visitors to the site could also become a member of “Club Imaginarium” upon providing an email address. Club Imaginarium was “a promotional club with games and information for children.” *Id.*

83. *Id.* at 452 (citing *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 540 (E.D. Pa. 1999)).

84. *Id.* (quoting *Desktop Techs., Inc. v. Colorworks Reprod. & Design*, No. CIV. A. 98-5029, 1999 WL 98572, at *5 (E.D. Pa. Feb. 25, 1999)) (emphasis omitted).

85. The court considered the standards articulated in *ALS Scan v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002), and *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997).

86. *Toys “R” Us*, 318 F.3d at 454 (emphasis added).

87. *ALS Scan*, 293 F.3d at 714.

88. *Toys “R” US*, 318 F.3d at 454. The critical factors supporting the court’s decision that Step Two had not targeted New Jersey were the fact that Step Two’s web sites were entirely in Spanish, the prices for its merchandise were listed in pesetas or Euros, and the fact that merchandise could be shipped only to addresses within Spain, with none of the portions of Step Two’s web sites being capable of accommodating addresses within the United States. *Id.* The court also found no evidence of knowing interaction with forum residents or any other related contacts. *Id.*

89. The Fifth Circuit requires express aiming of Internet activity at the forum state in particular before such activity can support personal jurisdiction. In *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002), the Fifth Circuit determined that an allegedly defamatory post to an Internet bulletin board had to be

enth⁹¹ Circuits have adopted approaches similar to those of the Third and Fourth Circuits.

The Eighth, Tenth, D.C., and Federal Circuits have all addressed the issue in some way, but less fully. The Eighth Circuit has yet to analyze an assertion of specific jurisdiction based on a Web site. However, in *Lakin v. Prudential Securities, Inc.*,⁹² a general jurisdiction case, the court remarked, “We agree with our sister circuits that the *Zippo* model is an appropriate approach in cases of specific jurisdiction.”⁹³ Because the Eighth Circuit has not provided any further interpretation of *Zippo*, lower courts within the Eighth Circuit have had to apply their own view of the *Zippo* test.⁹⁴ A similar situation obtains in the Tenth Circuit, which has minimally addressed this issue. Although it clearly stated in an early case that, based on the *Zippo* framework, a “passive” informational Web site could not constitute purposeful availment such that would support an assertion of personal jurisdiction,⁹⁵ lower courts in the Tenth Circuit have had to fill in the gaps, with one district court reaching the same conclusion that other circuits have reached: “Courts require something more that indicates the defendant purposefully directed its activities in a substantial way toward the forum state to find personal jurisdiction.”⁹⁶

specifically targeted at the forum, the state of Texas. *Id.* at 475 (“[A]pplication of *Calder* in the Internet context requires proof that the out-of-state defendant’s Internet activity is expressly directed at or directed to the forum state.” (quoting *Young v. New Haven Advocate*, 315 F.3d 256, 262 (4th Cir. 2002))).

90. When evaluating assertions of jurisdiction based on network-mediated contacts, the Sixth Circuit evaluates the degree of interactivity of a Web site and whether it “reveals specifically intended interaction with residents of the state.” *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002) (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)). Thus, without a sufficient level of “specifically intended” interactivity with forum residents, the Sixth Circuit views a Web site alone as merely an “attenuated” contact that falls short of purposeful availment.” *Id.*

91. In *Jennings v. AC Hydraulic A/S*, 383 F.3d 546 (7th Cir. 2004), the Seventh Circuit wrote, “The exercise of personal jurisdiction based on the maintenance of a passive website is impermissible because the defendant is not directing its business activities toward consumers in the forum state *in particular.*” *Id.* at 549–50 (emphasis added).

92. 348 F.3d 704 (8th Cir. 2003).

93. *Id.* at 711.

94. One court that faced this issue recently used the *Zippo* test only to conclude that the Web site at issue was interactive, but then referred to the *Calder* “effects test” to determine whether jurisdiction was appropriate. *See Zidon v. Pickrell*, 344 F. Supp. 2d 624, 630–31 (D.N.D. 2004). In doing so, the *Zidon* court required the same deliberate and specific targeting of the Web site at the forum in the name of *Calder* that other courts have come to require without expressly invoking that case. *See id.* at 631 (“The record reveals that Pickrell deliberately and knowingly directed the Web site, e-mail, and Internet comments at the State of North Dakota because North Dakota is Zidon’s residence.”).

95. *Soma Med. Int’l v. Standard Chartered Bank*, 196 F.3d 1292, 1299 (10th Cir. 1999).

96. *Payless Shoesource, Inc. v. Genfoot Inc.*, No. 02-4160-JAR, 2004 WL 2182184, at *3 (D. Kan. Sept. 21, 2004). As a different district court within the Tenth Circuit stated it, slightly more strongly, “a proper analysis of the jurisdictional effects of an internet web site must look beyond the degree of interactivity provided by the web site and instead focus on whether the defendant has actually and deliberately used its web site to conduct commercial transactions or other activities with residents of the forum.” *Fairbrother v. Am. Monument Found., LLC*, 340 F. Supp. 2d 1147, 1156 (D. Colo. 2004) (internal quotation marks omitted).

The D.C. Circuit has addressed the issue on two occasions but has not expounded in great detail its approach to analyzing jurisdiction in the Internet context. Although initially cautioning against permitting Web sites to establish minimum contacts within the forum for fear of promoting universal jurisdiction,⁹⁷ the D.C. Circuit more recently stated that where a defendant's Web site is highly interactive, enabling "District residents [to] use its website to engage in electronic transactions with the firm . . . 24 hours a day,"⁹⁸ such contacts could be considered "continuous and systematic" to such a degree that the defendant could be considered "doing business" in the forum.⁹⁹

Finally, the Federal Circuit in *Maynard v. Philadelphia Cervical Collar Co.*¹⁰⁰ held, "A passive website is insufficient to establish purposeful availment for the purpose of due process."¹⁰¹ The Federal Circuit suggested that beyond the maintenance of a Web site, defendants must have "performed additional acts to purposefully avail themselves of the forum state" to establish jurisdiction.¹⁰²

D. Circuits Yet to Adopt an Approach

The First Circuit has yet to address the issue of personal jurisdiction based solely on network-mediated contacts and has had no occasion to cite to the *Zippo* case.¹⁰³ District courts within the First Circuit, however, have addressed the issue, adopting the *Zippo* sliding-scale framework.¹⁰⁴ A recent opinion of a magistrate judge in the U.S. District Court for the District of Maine combined the use of the sliding-scale framework with the "target audience" reasoning used by most circuits to deny jurisdiction in Maine based on a Web site viewable in Maine that allegedly defamed Maine residents.¹⁰⁵ Jurisdiction was denied because the Web site itself

97. *GTE New Media Servs., Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) ("This theory simply cannot hold water. Indeed, under this view, personal jurisdiction in Internet-related cases would almost always be found in any forum in the country. 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.").

98. *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 512 (D.C. Cir. 2002).

99. *Id.* at 513.

100. 18 F. App'x 814 (Fed. Cir. 2001).

101. *Id.* at 816.

102. *Id.*

103. *See Venture Tape Corp. v. McGills Glass Warehouse*, 292 F. Supp. 2d 230, 232 (D. Mass. 2003) ("The First Circuit has not addressed the question whether an interactive website, located outside Massachusetts and directed at Massachusetts residents only in the sense that it is directed at residents of every state, may on its own fulfill the requirement of purposeful availment."); *Swarovski Optik N.A. Ltd. v. Euro Optics, Inc.*, C.A. No. 03-090ML, 2003 WL 22014581, at *4 (D.R.I. Aug. 25, 2003) ("[N]either the First Circuit nor this District Court have examined the exact contours of personal jurisdiction based upon the existence of a web site, particularly when the defendant has no other contacts with the forum state.").

104. *See, e.g., Comer v. Comer*, 295 F. Supp. 2d 201, 209–10 (D. Mass. 2003) (declining to exercise jurisdiction on the basis of a "passive" Web site).

105. *Gentle Wind Project v. Garvey*, No. 04-103-P-C, 2005 WL 40064, at *6–9 (D. Me. Jan. 10, 2005).

did not target Maine specifically: “Nothing offered by the plaintiffs in this case allows the drawing of a reasonable inference that Ross designed the web site at issue ‘to attract or serve a [Maine] audience.’”¹⁰⁶

The Second Circuit addressed the issue in *Bensusan Restaurant Corp. v. King*¹⁰⁷—a pre-*Zippo* case—but declined to exercise jurisdiction based on the defendant’s Web site solely because that connection failed to satisfy New York’s long-arm statute.¹⁰⁸ However, in so doing, the Second Circuit did conclude that the Missouri defendant’s passive informational Web site could not support a finding that the defendant had committed a tortious act in the forum, New York.¹⁰⁹

Finally, although the Eleventh Circuit appears not to have addressed this issue, courts within the Eleventh Circuit are relying upon the *Zippo* approach to evaluate assertions of personal jurisdiction based on network-mediated contacts. For example, in *Barton Southern Company, Inc. v. Manhole Barrier Systems, Inc.*,¹¹⁰ the court used the *Zippo* sliding scale to determine that the Web site at issue was interactive and proceeded to evaluate “the level of interactivity and commercial nature of the exchange of information” per *Zippo*.¹¹¹ In conducting that analysis, the court concluded that the Web site was insufficiently interactive because “it does not allow customers to make payments or complete orders.”¹¹² The court further found that “[t]here is nothing on the website showing an intent to reach out to persons living in Georgia, and there is no evidence that any Georgia residents have done business with MBS, either through the Internet or otherwise.”¹¹³ These comments suggest an affinity for the position espoused by those circuits requiring intended, specific, and actual interaction with forum residents; however, the Eleventh Circuit itself has yet to specify what standards should apply.

III. A CRITIQUE OF CONTEMPORARY ANALYSES

Having surveyed the relevant circuit court opinions, a consensus emerges: for a Web site to support the claim, courts require it to be (1) interactive and (2) intentionally and specifically targeted at an audience within the forum. Some courts additionally or alternatively require the Web site to (3) have a history of actual interaction with forum residents to support a finding of purposeful availment. Three preliminary observa-

106. *Id.* at *8.

107. 126 F.3d 25, 27–29 (2d Cir. 1997).

108. *See id.* at 29. The Second Circuit recently faced the question of whether jurisdiction could be based on the presence of a Web site, but again decided the case on the basis of the failure to satisfy the terms of New York’s long-arm statute. *See Girl Scouts of the United States of America v. Michael Steir*, 102 F. App’x 217, 219–21 (2d Cir. 2004).

109. *See Bensusan*, 126 F.3d at 29.

110. 318 F. Supp. 2d 1174 (N.D. Ga. 2004).

111. *Id.* at 1177.

112. *Id.*

113. *Id.*

tions are warranted here. First, the circuits have developed this approach to jurisdiction based on network-mediated contacts mainly in the context of considering commercial Web sites, but have generalized its application to Web sites of any kind. Second, the consensus approach largely discounts passive Web sites as insufficient for jurisdictional purposes—a position in keeping with the original vision of *Zippo*.¹¹⁴ Third, courts are requiring state-specific targeting in light of the fact that Internet activity ordinarily (but not always or inevitably) results in a ubiquity that defies geographical boundaries; that is, because Internet activity goes everywhere, the courts have created a presumption that the activity is targeted nowhere, a presumption I will refer to as the presumption of aimlessness.

These observations reveal three principal difficulties with the prevailing *Zippo*-inspired approaches to analyzing Internet contacts. First, the presumption that Internet activity targets no particular place because it is broadcast everywhere indiscriminately is little more than a convenient fiction that has enabled courts to negate the very ubiquity that defines the Internet and leads businesses and individuals to avail themselves of the medium. However, that fiction is inconsistent with the reality of Internet activity: absent the employment of restrictive measures that can limit the accessibility of Web sites to certain geographical areas or users,¹¹⁵ those who post information on the Internet—by placing material on a globally accessible medium—arguably direct that material at all potential users of the Internet, wherever they may be found.

Second, it is unclear what relevance the degree of interactivity (or lack thereof) of a Web site has to traditional personal jurisdiction analysis. This is particularly true, given that such a consideration bears no necessary relation to whether the conduct at issue—which could consist of commercial activity, defamatory statements, or the misuse of intellectual property—constitutes purposeful availment. Thus, refusing to permit so-called passive Web sites to support jurisdiction unduly limits the jurisdictional reach of states regardless of whether the site would satisfy the Supreme Court's established jurisdictional standards.

Third, and finally, in the intentional tort context—which principally includes defamation but can also include tort-like intellectual property claims¹¹⁶—the focus of the prevailing *Zippo*-based approaches on the forum targeting of Web sites, rather than on the targeting of the tortious conduct manifested within the Web sites, distracts courts from a proper application of the *Calder* “effects” test in the Internet context. As a result, courts senselessly concern themselves, for example, with whether

114. The Tenth and Fourth Circuits appear to place more weight on specific-forum targeting than the passive-versus-interactive profile of the Web site.

115. See *infra* text accompanying notes 136–46.

116. See, e.g., *Panavision Int'l, L.P. v. Toepfen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (indicating that trademark infringement is “akin to a tort case” and thus warrants application of the *Calder* “effects” test).

Web-based activity “target[s] Marylanders”¹¹⁷ or is “about Texas”¹¹⁸ rather than whether the alleged tort has targeted and harmed the plaintiff in a manner the *Calder* “effects” test deems relevant. Each of these deficiencies will be discussed in turn.

A. *The Presumption of Aimlessness*

A primary flaw of the prevailing approach is its rejection of the ubiquitous nature of Internet activity in favor of a fictitious presumption that Internet activity is targeted nowhere. Two undercurrents of thought have led courts to adopt this view. First, many courts espousing *Zippo*-based approaches have indicated concern that embracing Internet activity’s omnipresence would eliminate all limits on personal jurisdiction. For example, when faced with the prospect that Internet activity might supply the basis for minimum contacts with a state, the Fourth Circuit replied, “[I]f that broad interpretation of minimum contacts were adopted, State jurisdiction over persons would be universal, and notions of limited State sovereignty and personal jurisdiction would be eviscerated.”¹¹⁹ Such a posture of fear toward the Internet is consistent with the view of many who see the Internet as a pernicious force in our society.¹²⁰ However, such fears are unwarranted. As discussed below,¹²¹ accepting the Internet’s ubiquity need only create a rebuttable presumption that Internet activity is directed at every state for purposes of purposeful availment, a presumption that defendants can overcome by demonstrating that they took specific steps to limit the reach of the virtual conduct into the forum. Further, under a traditional analysis, courts would still be required to determine whether the Internet activity meets the other requirements for specific jurisdiction—relatedness and reasonableness.

The second strain of thinking that apparently undergirds the presumption of aimlessness is the ill-conceived perception of the Internet as sufficiently analogous to the conventional stream of commerce to warrant imposing standards developed for that sphere on the Internet. Rather than conceive of cyberspace as a separate “place,”¹²² courts have

117. *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 400 (4th Cir. 2003).

118. *Revell v. Lidov*, 317 F.3d 467, 476 (5th Cir. 2002).

119. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 713 (4th Cir. 2002); *see also* *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 550 (7th Cir. 2004) (“Premising personal jurisdiction on the maintenance of a Web site, without requiring some level of ‘interactivity’ between the defendant and consumers in the forum state, would create almost universal personal jurisdiction because of the virtually unlimited accessibility of websites across the country.”).

120. Throughout his book, *Cyber Rights*, Mike Godwin provides an insightful discussion of the array of fears—both rational and irrational—held by the government, business, and individuals regarding the problems arising out of the advent of the Internet, such as increased exposure to pornography, copyright infringement on a massive scale, more widely publicized libel, a retreat from real to virtual communities, and the decline of privacy, to name a few. *See* GODWIN, *supra* note 4, at 298–301.

121. *See infra* Part IV.A.

122. Outside of the personal jurisdiction context, the Internet has been analogized to physical space as a separate “place.” *See, e.g.*, Josh A. Goldfoot, *Antitrust Implications of Internet Administra-*

sought to understand the Internet for purposes of personal jurisdiction by comparing it to the conventional stream of commerce. Courts find the placement of goods into a global distribution system that can take those goods anywhere (the stream of commerce) to be similar to the placement of information on the global data network (the Internet).¹²³ This comparison has led courts to import Justice O'Connor's view of purposeful availment for stream of commerce cases—that simply availing oneself of the stream of commerce without a specific intent to serve the forum market is insufficient to support an assertion of jurisdiction in the forum where goods may ultimately be delivered¹²⁴—into the Internet context and to require the very same showing before Internet activity can support jurisdiction. The district court in *Bensusan Restaurant Corp. v. King*¹²⁵ expressly did so when it wrote, “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.”¹²⁶ The Fourth Circuit's analogous statement that “a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received”¹²⁷ is strikingly similar to Justice O'Connor's remark in *Asahi* that “[t]he placement of a product into the stream of

tion, 84 VA. L. REV. 909, 919 (1998) (“A popular analogy that follows from the adoption of the term ‘cyberspace’ is the comparison of the Internet, and the resources available through it, to physical space.”); Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L.J. 1207, 1210 (2002) (“Of the many metaphors that have been applied to the Internet, the most prominent and influential has been the imagination of the Internet as a separate, new physical place known as ‘cyberspace’ . . .”). Many have argued that analogizing the Internet to a physical place is inappropriate. See, e.g., Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 442 (2003) (explaining that “the cyberspace as place metaphor leads to undesirable private control of the previously commons-like Internet and the emergence of a digital anticommons”); Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 523 (2003) (arguing that “the CYBERSPACE AS PLACE metaphor is not a particularly good one”). Such an analogy has not found its way into views of how to conceptualize the Internet for purposes of personal jurisdiction, with analogies to the conventional stream of commerce taking root instead.

123. See, e.g., *Shamsuddin v. Vitamin Research Prods.*, 346 F. Supp. 2d 804, 815 (D. Md. 2004) (“VRP's choice to sell its products over the Internet—a sort of global ‘distributor’—is similar to placing its products into the stream of commerce with the knowledge that the stream may or will sweep the product[s] into the forum State. . . . Insofar as VRP targets no particular forum and will sell to whoever [sic] wishes to buy, VRP's placement of its products for sale through its website is no more purposeful than placing products for sale on an Internet auction site.” (internal quotation marks and footnote omitted)).

124. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

125. 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

126. *Id.* at 301. Commentators have explicitly made the comparison as well. See, e.g., Gwenn M. Kalow, Note, *From the Internet to Court: Exercising Jurisdiction over World Wide Web Communications*, 65 FORDHAM L. REV. 2241, 2243 (1997) (“[C]ourts confronting the issue of whether to exercise personal jurisdiction for Internet-related activity, specifically in the context of World Wide Web communications, should follow a purposeful availment approach as outlined in Justice O'Connor's plurality opinion in *Asahi Metal Industry v. Superior Court*.”); Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 927 (1998) (“The something-more requirement is derived from Justice O'Connor's plurality opinion in *Asahi Metal Industry Co. v. Superior Court* . . .”).

127. *ALS Scan v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”¹²⁸ The standard ultimately adopted by the Fourth Circuit—that defendants “direct[] electronic activity into the State . . . with the manifested intent of engaging in business or other interactions within the State”¹²⁹—is certainly derived from Justice O’Connor’s stream of commerce theory—which requires “an intent or purpose to serve the market in the forum State.”¹³⁰

But the analogy of the Internet to the stream of commerce is inapt.¹³¹ The conventional, real world stream of commerce is a distribution network connecting producers of raw materials, component parts, and finished goods with wholesalers, regional distributors, and retail outlets.¹³² Entities participating at one point in the network cannot always or necessarily control or predict where their product will be transported once it is has left them. Indeed, many participants in the process may have little reason to concern themselves with such information.¹³³ There is thus good reason not to equate mere participation in this distribution network with purposeful availment in a particular state.¹³⁴ Contrast these attributes of the stream of commerce with the Internet. The Internet is not a complex distribution network moving products through a chain of producers, manufacturers, and purveyors of goods; rather, the Internet is a ubiquitous medium that facilitates global communication, data trans-

128. *Asahi*, 480 U.S. at 112.

129. *ALS Scan*, 293 F.3d at 714.

130. *Asahi*, 480 U.S. at 112.

131. This is not to say that constructing metaphors for the Internet is per se inappropriate. But the metaphor adopted should be fitting and should not unduly stifle thought about the medium. Further, reference to nontechnical concepts to describe a technical construct can lead to confused misunderstandings. Goldfoot, *supra* note 122, at 921 (“Reasoning from unscientific terms divorced from technical reality can lead to unfounded conclusions.”). As one commentator eloquently put it:

The application of metaphor to the Internet is entirely sensible. It is an unavoidable and useful human habit to compare unfamiliar objects to familiar ones. People use apt metaphors because they stimulate the imagination, drawing attention to patterns and possibilities that would otherwise have escaped attention. If perceptions stimulated by metaphor become sufficiently ingrained, people may adopt them as reality and make them the basis for future beliefs and actions. At the same time, however, it is important to separate the application of metaphor from the complete apprehension of reality. Metaphors work because they provide perspective, but the adoption of one perspective necessarily omits insights offered by other perspectives. Accordingly, insight gets lost when one metaphor assumes enough prominence to crowd other ones out, especially if the prominent metaphor has misleading qualities.

Yen, *supra* note 122, at 1209.

132. Justice Brennan defined the stream of commerce as the “regular and anticipated flow of products from manufacture to distribution to retail.” *Asahi*, 480 U.S. at 117.

133. For example, a component part manufacturer has little reason to concern itself with where final products containing its parts will be marketed and sold where its compensation is unrelated to the volume of sales of the final product.

134. Simple insertion of goods into the stream of commerce, without any knowledge of their eventual destination does not purposefully connect an entity with any locale the goods may find themselves in down the line. However, whether purposeful availment can be imputed if the participant is aware of where its products will be taken by the stream of commerce was the central disagreement between Justices O’Connor and Brennan in *Asahi*. *Id.* at 112, 117.

mission, interaction, and financial/commercial transactions.¹³⁵ Publishing a Web site on the Internet does not infuse it into an uncontrollable and unpredictable stream that can sweep the site hither and yon. To the contrary, simple Web site publication instantly makes the information on the Web site available globally.

If a Web publisher wishes to restrict the global availability of its content to a more limited geographical area than otherwise results from simply posting information on the Internet, a whole host of geographic mapping technologies¹³⁶ enable the site operator to limit access. The technology exists to identify the geographical location of prospective users (for example, through the user's IP address¹³⁷ or digital certificates¹³⁸) and to deny entry to undesirable users.¹³⁹ Alternatively, in the Web site context the site operator could require visitors to agree to the terms of a "click-wrap" agreement¹⁴⁰ that includes a forum selection clause identify-

135. Or, to put it more blandly, "The Internet is merely a simple computer protocol, a piece of code that permits computer users to transmit data between their computers using existing communications networks." Lemley, *supra* note 122, at 523 ("At best, 'cyberspace' is a convenient term describing a set of communications achieved through the Internet." (citing Goldfoot, *supra* note 122, at 920)); see also Matwyshyn, *supra* note 16, at 495 (describing the Internet and other "communications networks" as "dynamic environments of information transmission within and with which groups of actors interact").

136. For a thorough analysis of various geographic mapping techniques, see Venkata N. Padmanabhan & Lakshminarayanan Subramanian, *An Investigation of Geographic Mapping Techniques for Internet Hosts*, SIGCOMM '01, 173 (2001), <http://www.acm.org/sigs/sigcomm/sigcomm2001/p14-pabmanabhan.pdf>.

137. "[A]n IP address is a 32-bit number that identifies each sender or receiver of information that is sent in packets across the Internet." Whatis.com, IP address, http://searchwebservices.techtarget.com/sDefinition/0,290660,sid26_gci212381,00.html (last visited Sept. 19, 2005). Readers can sample such geographical identification technology by pointing their browsers to <<http://www.ip2location.com/?AfID=17800>>, where the Web site will inform you of your IP address, your geographical location, and your Internet Service Provider (ISP). The operator of this Web site, IP2Location—whose motto is "Bringing Geography to the Internet"—offers software to customers interested in identifying the geographical location of visitors to their web sites. See Our Products, IP2Location, <http://www.ip2location.com/?AfID=17800> (last visited Sept. 19, 2005). It should be noted, however, that IP address-based blocking technologies do have their limitations, including the possibility that users will employ so-called anonymizers, which enable a user to "connect to a site through another server that hides the true origin of the user," thereby preventing detection of their true geographical location. See Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture And The Law*, 79 NOTRE DAME L. REV. 815, 915 (2004). Netscape offers a program called "GhostSurf" that in its words allows users to "Surf Anonymously and Protect your Privacy!" See Netscape, Gadgets & Tech, <http://www.wugnet.com/affiliates/default.asp?pageid=96> (last visited Sept. 19, 2005).

138. Digital certificates are "The digital equivalent of an ID card used in conjunction with a public key encryption system. Also called 'digital IDs,' digital certificates are issued by a trusted third party known as a 'certification authority' or 'certificate authority' (CA) such as VeriSign, Inc." Techweb, Digital Certificate, <http://www.techweb.com/encyclopedia/defineterm.jhtml?term=digital+certificate> (last visited Sept. 19, 2005).

139. Geist, *supra* note 16, at 1395–98.

140. A click-wrap agreement is an online agreement presented by a Web site that requires users to click on a button or hyperlink—such as an "I agree" or "I accept" button—that indicates their assent to its terms; "the terms of use are generally non-negotiable and presented to the end user on a take it or leave it basis prior to he or she having to accept them, and thus, the burden has been placed on the end user to read and understand the terms that are presented prior to acceptance." Peter Brown, *The Validity of Click-Wrap Agreements*, 765 PRAC. L. INST. 111, 119 (Sept. 2003). These are to

ing the jurisdiction where any resultant disputes must be litigated.¹⁴¹ Or more simply—but less effectively—Web site operators can employ geographical disclaimers (for example, statements indicating that the site is not intended for visitors from certain jurisdictions), require users to identify their location and deny service to those from undesired areas,¹⁴² or make their sites incapable of transacting business with people from a given location.¹⁴³ Indeed, a recent survey of companies around the globe revealed that a substantial portion already employ a host of “jurisdiction avoidance mechanisms” to control the jurisdictional exposure deriving from their Web activities.¹⁴⁴ These technologies are certainly not perfect and do not enable Web publishers to control completely the geographical reach of their sites. A report commissioned by the Parisian court in *LICRA v. Yahoo! Inc.*¹⁴⁵ estimated that a combination of geographic blocking techniques could successfully block only ninety percent of the users from a particular undesirable locale.¹⁴⁶ Though blocking might not

be distinguished from “browse-wrap” agreements, which present terms of use for visitors but do not require users to assent to their terms before they may proceed to use the site.

141. Such agreements can be enforceable if, among other things, they provide fair notice that the pending transaction will be subject to the agreement, if they require an affirmative act of assent on the part of the end user prior to the user taking action on the site, provide for cancellation of the transaction in the event of nonassent, and do not contain any overly restrictive clauses. *See id.* at 131–32.

142. Self-identification clearly is subject to users misrepresenting their geographical location, making it a much less effective approach than a more technologically based method. *See Solum & Chung, supra* note 137, at 915 (“Among the methods of identifying the nationality of the users, voluntary registration is most likely to be an ineffective method. Only the IP address based method would have any significant basis for success.”). However, in the event that users misrepresent where they are located, such users may be estopped from asserting (or challenging) jurisdiction based on their true location in light of the misrepresentation. If a defendant’s Web site is only available within the forum state if users misrepresent their location, jurisdiction would not be permissible because the forum would be exercising jurisdiction based on the “unilateral activity” of those users rather than the defendant. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

143. This was the approach adopted by the defendant in *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003) (employing a Web site that only permitted deliveries to addresses in Spain to limit its reach). There are ways to circumvent these less effective methods, which means that Web site operators committed to barring access beyond certain geographical areas should employ the more effective geographical mapping technologies described above. *See Geist, supra* note 16, at 1391–1401 for a full discussion of approaches to the problem of user identification.

144. *Internet Jurisdiction Fears Affecting Global Business Strategy, Experts Say*, 72 U.S.L.W. 2614, 2614 (Apr. 13, 2004) [hereinafter *Fears Affecting Global Business Strategy*] (discussing a survey that found that sixty-nine percent of North American companies, forty-one percent of Asian companies and twenty-nine percent of European companies responding to the survey use techniques “to pinpoint the geographic location of specific users and block access by users hailing from that jurisdiction”); *see also* International Chamber of Commerce, *Jurisdiction and Applicable Law in Electronic Commerce* (June 6, 2001), available at http://www.iccwbo.org/home/statements_rules/statements/2001/jurisdiction_and_applicable_law.asp [hereinafter *ICC Policy Statement*] (“[C]ompanies are limiting the use of their websites in terms of both products and geography, and they engage in e-commerce, if at all, largely through closed systems with established partners or sales to residents of the territories where the companies are already well established.”).

145. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (order demanding compliance with injunction).

146. *Id.* (“The combination of two procedures, namely geographical identification of the IP address and declaration of nationality, would be likely to achieve a filtering success rate approaching 90%.”).

be complete, such efforts would generally enable a defendant to rebut the presumption that it targeted a particular area and argue against a finding of purposeful availment based solely on their Web site. Furthermore, as it becomes necessary for businesses and individuals operating through the Internet to control and limit the geographical reach of their actions, market demand for improved and more effective geographical identification techniques should increase to an extent sufficient to encourage the development of such technology.

Thus, when geographically restrictive techniques are not employed, the global availability of an Internet posting is not only predictable, it is a known consequence of Web publishing. The portion of the Internet where most Web sites are published is known as the World Wide Web;¹⁴⁷ this moniker derives from its global accessibility.¹⁴⁸ Indeed, the absence of geographical (and temporal) constraints on the delivery of Web-based information is one of the most well known and valuable attributes of the Web. The High Court of Australia made this point best in a recent Internet defamation case:

However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.¹⁴⁹

Because persons simply posting information on the Internet knowingly make the information instantaneously available throughout the world, Web publishing bears little similarity to placing a product into the stream of commerce.

147. The World Wide Web and the Internet should be distinguished; “The World Wide Web, or simply Web, is a way of accessing information over the medium of the Internet. It is an information-sharing model that is built on top of the Internet. . . . The Web also utilizes browsers, such as Internet Explorer or Netscape, to access Web documents called Web pages that are linked to each other via hyperlinks. Web documents also contain graphics, sounds, text and video. The Web is just one of the ways that information can be disseminated over the Internet. The Internet, not the Web, is also used for e-mail, which relies on SMTP, Usenet news groups, instant messaging and FTP. So the Web is just a portion of the Internet, albeit a large portion, but the two terms are not synonymous and should not be confused.” Webopedia, *The Difference Between the Internet and the World Wide Web*, http://www.webopedia.com/DidYouKnow/Internet/2002/Web_vs_Internet.asp (last visited Sept. 19, 2005).

148. Tim Berners-Lee, credited as the inventor of the World Wide Web (to be distinguished from the inventors of the Internet, Vint Cerf and Bob Kahn), has written that he created, “in 1990 a program called ‘WorldWideWeb’ with the ‘dream’ of creating ‘a common information space in which we communicate by sharing information. Its universality is essential: the fact that a hypertext link can point to anything, be it personal, local or global. . . .’” Tim Berners-Lee, *The World Wide Web: A Very Short Personal History*, <http://www.w3.org/People/Berners-Lee/ShortHistory.html> (last visited Jan. 22, 2005). When asked directly why he called his creation the World Wide Web, Berners-Lee responded, “Looking for a name for a global hypertext system, an essential element I wanted to stress was its decentralized form allowing anything to link to anything. This form is mathematically a graph, or web. It was designed to be global of course.” Tim Berners-Lee, *Frequently Asked Questions*, <http://www.w3.org/People/Berners-Lee/FAQ.html> (last visited Sept. 19, 2005).

149. *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575, 605, available at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html.

More importantly, these attributes of Web publishing render the issue of foreseeability, which divided the justices in *Asahi*,¹⁵⁰ irrelevant in the Internet context; the global reach of Web-based activity is not merely foreseeable, it is a well-understood fact. Thus, it seems inappropriate to import Justice O'Connor's approach in *Asahi*—which was meant to require more than mere foreseeability as the basis for jurisdiction—to Internet cases where simply posting information on the Internet knowingly directs information into every state.¹⁵¹ To the contrary, Internet actors not employing geographically restrictive techniques should anticipate being haled into court wherever their network-mediated conduct gives rise to a cause of action.¹⁵²

The analogy to the stream of commerce is particularly inappropriate for Web publishing that is accompanied by the use of invasive software that is pushed onto the computers of those visiting a Web site. Spyware,¹⁵³ adware,¹⁵⁴ Trojan horses,¹⁵⁵ and persistent cookies¹⁵⁶ are examples

150. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109–12 (1987) (discussing the debate among the lower courts and settling on the requirement that the defendant must intend to serve the forum market); *id.* at 121 (Brennan, J., dissenting) (supporting only the requirement that the defendant has to be aware of the marketing of its products in the forum market).

151. The analogy of Web publishing to placing an item into the stream of commerce has also supported arguments against regulatory jurisdiction. As one commentator explained, in the charitable solicitation context, many charities with passive Web sites would be subject to regulation for solicitation in every state unless some limiting principle was applied to regulation based on network-mediated activity. Charles Nave, *Charitable State Registration and the Dormant Commerce Clause*, 31 WM. MITCHELL L. REV. 227, 231–32 n.20 (2004). The *Asahi* analogy provided just such a principle: “[E]ven though the charities could reasonably expect that residents of numerous jurisdictions would access the website and perhaps contribute, the charities had not purposefully availed themselves of the jurisdictions’ markets or courts and had no other contact with it. Under such circumstances, regulatory jurisdiction over the charities would be unconstitutional.” *Id.* (citing *Asahi*, 480 U.S. at 112–14). The National Association of State Charities Officials (NASCO) has adopted this logic and proposed the “Charleston Principles” which suggest that charities should be regulated in a particular state only if “(a) the charity used the Internet to specifically target (via email or other methods) donors in that jurisdiction or (b) the charity received contributions from that jurisdiction on a ‘repeated and ongoing basis or a substantial basis through its Web site.’” *Id.* (quoting NASCO, THE CHARLESTON PRINCIPLES § III.B.1 (2001), available at <http://www.nasconet.org/public.php?pubsec=4&curdoc=10>).

152. See Robert J. Condlin, “Defendant Veto” Or “Totality Of The Circumstances”? *It’s Time For The Supreme Court To Straighten Out The Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 138 (2004) (“If a defendant does not want this kind of contact with a particular state, it has only to make its website inaccessible to customers in that state.”).

153. Spyware is defined as “[a]ny software that covertly gathers user information through the user’s Internet connection without his or her knowledge, usually for advertising purposes. Spyware applications are typically bundled as a hidden component of freeware or shareware programs that can be downloaded from the Internet . . .” Webopedia, Spyware, <http://www.webopedia.com/TERM/s/spyware.html> (last visited Sept. 19, 2005).

154. Adware is defined as “[a] form of spyware that collects information about the user in order to display advertisements in the Web browser based on the information it collects from the user’s browsing patterns.” Webopedia, Adware, <http://www.webopedia.com/TERM/a/adware.html> (last visited Sept. 19, 2005).

155. A Trojan horse is “[a] destructive program that masquerades as a benign application. Unlike viruses, Trojan horses do not replicate themselves but they can be just as destructive. One of the most insidious types of Trojan horse is a program that claims to rid your computer of viruses but instead introduces viruses onto your computer.” Webopedia, Trojan Horse, http://www.webopedia.com/TERM/T/Trojan_horse.html (last visited Sept. 19, 2005).

of such software. Internet actors employing these technologies clearly are not simply setting their Web sites adrift in an unpredictable stream; rather, they are—through their Web sites—intentionally reaching out to all computers accessing those sites in a manner that surpasses mere foreseeability.

The same can be said regarding the pushing of pop-up windows¹⁵⁷ to the computers of those who visit a particular site. Progenitors of pop-up Web pages are deliberately pushing material to a particular computer in response to some triggering event, such as the visitation of a particular Web site or the typing of certain search terms in a search engine.¹⁵⁸ Purveyors of pop-ups are more active than simple Web publishers in pushing electronic information to computer users, but only slightly more selective in their geographical reach. Pop-up windows are not always available everywhere but rather are available everywhere the triggering Web-event occurs. Resolving whether a given pop-up window actually presented itself within a particular jurisdiction should typically not be an issue, however, because in litigation arising out of pop-up material, it should be clear where the litigation-instigating pop-up presented and was viewed. In any event, because distributors of pop-up windows intentionally make the pop-up information available globally—provided the requisite triggering event occurs—they too should anticipate being haled into court wherever their pop-up material gives rise to a cause of action.¹⁵⁹

156. A cookie is a message given by a Web server to a computer's Web browser. Webopedia, *Cookie*, <http://www.webopedia.com/TERM/C/cookie.html> (last visited Sept. 19, 2005). The primary purpose is to identify users and prepare customized Web pages for them. *Id.* A persistent cookie is "a cookie that is stored on a user's hard drive until it expires . . . or until the user deletes the cookie. Persistent cookies are used to collect identifying information about the user, such as Web surfing behavior or user preferences for a specific Web site." Webopedia, *Persistent Cookie*, http://www.webopedia.com/TERM/P/persistent_cookie.html (last visited Sept. 19, 2005).

157. A "pop-up window" is defined as "[a] window that suddenly appears (pops up) when you select an option with a mouse or press a special function key." Webopedia, *Pop-up Window*, http://www.webopedia.com/TERM/p/pop_up_window.html (last visited Sept. 19, 2005). A pop-up ad is a special type of pop-up window that appears on top of a Web browser to display advertisements. Webopedia, *Pop-up Ad*, http://www.webopedia.com/TERM/p/popup_ad.html (last visited Sept. 19, 2005). Such ads have proliferated significantly and have become quite pernicious. *See, e.g.*, Tom Spring, *Sneaky New Form of Online Ads Pops Up*, PCWORLD.COM, Dec. 6, 2002, <http://www.pcworld.com/news/article/0,aid,107754,00.asp> ("A new breed of pop-up messages is proliferating that can evade ad-blocking programs and may indicate a security risk as well as present a nuisance.").

158. Pop-up windows can be also be initiated by "a single or double mouse click or rollover (sometimes called a mouseover), and also possibly by voice command or can simply be timed to occur." Whatis.com, *Pop-up*, http://whatis.techtarget.com/definition/0,,sid9_gci212806,00.html (last visited Sept. 19, 2005).

159. Indeed, in *LICRA v. Yahoo! Inc.*, Yahoo! was found to be engaging in this practice by pushing French pop-up advertisements to Web site visitors whose servers were located in France. Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, *available at* <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (order demanding compliance with injunction) ("YAHOO is aware that it is addressing French parties because upon making a connection to its auctions site from a terminal located in France it responds by transmitting advertising banners written in the French language.").

Forwarded emails, on the other hand, are generally more susceptible to the stream of commerce analogy. Although the author of an email can control whom the original recipients of an email message are,¹⁶⁰ once an email is sent, the sender of the message has no control over the eventual transmission of the email to other recipients and as a result, one cannot predict where one's email will eventually be sent.¹⁶¹ Under such circumstances, the author of the email cannot be charged with responsibility for purposeful availment of a particular locale unless the author directly intended to send it there or requested that recipients send it there.¹⁶² However, where an email creates in the intended recipient of email a cause of action against the sender, the author of the email more reasonably can expect to be liable in the jurisdiction with which the recipient is affiliated (as opposed to wherever the email simply may have been read).¹⁶³

Thus, placing information on the Internet is clearly different from what occurs when one places a product into the stream of commerce; in the latter context there is little or no control over where goods end up. Discarding this distinction in favor of an erroneous view of the Internet as akin to the conventional stream of commerce has supplied courts with a means of bridging towards a requirement beyond mere Web publishing, rendering the Internet's ubiquity irrelevant. That requirement has become the state-specific targeting that courts have identified as a requisite characteristic of Internet contacts before they will acknowledge the relevance of those contacts to a jurisdictional analysis.¹⁶⁴

Although courts may believe that state-specific targeting of activity should be required to support a finding of minimum contacts beyond the mere placement of a product into the stream of commerce, a similar insistence on state-specific targeting of Internet activity is unwarranted when evaluating network-mediated contacts. As previously discussed, unrestricted Web publishing knowingly and immediately pushes material to computers in every state. Thus, such activity creates a direct and known connection between these actors and every jurisdiction that par-

160. See, e.g., *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d, 773, 777 (S.D. Miss. 2001) (“[T]he Court finds that the active as opposed to passive nature of e-mail weighs in favor of finding personal jurisdiction.”).

161. This is because one has no control over a recipient's independent decision regarding whether and to whom a received email will be forwarded. Thus, although it is foreseeable that an email can end up in an unintended destination, email authors ordinarily will lack a specific intent to direct their email to that place.

162. An author of an email could also arguably be charged with directed activity toward a state if he deliberately infuses the email with technology that will enable the email to forward itself to other email accounts against the will of the recipient, a common technique used in email viruses.

163. See Stravitz, *supra* note 126, at 934 (“If the Internet is used to direct communication to a particular forum state resident, for example, when an e-mail message is sent and delivered, the Internet is not any different than other forms of direct communication. Courts have had little difficulty applying conventional analysis in these circumstances.”).

164. See, e.g., *Revell v. Lidov*, 317 F.3d 467, 475–76 (5th Cir. 2002) (declining to find purposeful availment because the Internet posting targeted the whole world, rather than that forum in particular).

ticipants in the conventional stream of commerce arguably lack. No further targeting besides the act of posting information on the Internet should be required to connect an Internet actor's conduct with any given state.

B. The Irrelevance of Interactivity

The presumption of aimlessness has also led courts to give more weight to Internet activity that takes place in the context of "interactive" Web sites than activity occurring within "passive" Web sites. The reasoning behind this preference seems to be that passive sites are perceived as being incapable of demonstrating the state-specific targeting generally required to support an assertion of jurisdiction under contemporary formulations of the *Zippo*-influenced jurisdictional tests.¹⁶⁵ In other words, given that Internet activity is presumed to target no state because it is broadcast to every state, the degree to which the Web site permits forum residents to interact with it—and then the extent to which such interaction actually occurs—is treated as evidence that the Web site has deliberately engaged the forum in a way that a passive Web site (seemingly) cannot.

The difficulty here is that the interactivity of a Web site actually bears no relationship to whether the defendant has purposefully availed itself of the forum state, particularly once the presumption of aimlessness is discarded. Rather, the conduct relevant to a purposeful availment analysis is that which gives rise to the cause of action. Network-mediated contacts can give rise to several different types of claims: breach of contract claims; tort claims, including negligence, products liability, and intentional torts such as defamation or fraud, breach of implied warranty, etc.; and intellectual property claims such as patent, trademark, and copyright infringement. For none of these claims does the degree of interactivity of the Web sites—the medium through which contacts giving rise to the cause of action are mediated—determine whether those contacts will be credited for purposeful availment purposes under the Supreme Court's standards.

For example, when a breach of contract claim is at issue, Supreme Court precedents such as *McGee v. International Life Insurance Co.*¹⁶⁶ and *Burger King Corp. v. Rudzewicz*¹⁶⁷ instruct courts to consider the connection the contract has with the state, such as whether the defendant has knowingly entered into a contract with a forum resident, and whether

165. See, e.g., *Neogen Corp. v. Neo Gen screening, Inc.*, 282 F.3d 883, 890 (6th cir. 2002) ("Such intentional interaction with the residents of a forum state, the *Zippo* court concluded, is evidence of a conscious choice to transact business with inhabitants of a forum state in a way that the passive posting of information accessible from anywhere in the world is not." (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126 (W.D. Pa. 1997))).

166. 355 U.S. 220 (1957).

167. 471 U.S. 462 (1985).

the defendant has undertaken obligations or performed actions under the contract that may be fairly located in or connected with the forum state.¹⁶⁸ Thus, the Court has stated, where the defendant has

created “continuing obligations” between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by “the benefits and protections” of the forum’s laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.¹⁶⁹

A passive Web site is as capable of originating a contractual relationship with forum residents as is an interactive Web site. To illustrate, consider a hypothetical Web site that simply advertises a product and encourages readers to contact the purveyor of the product for more information or to purchase that product. That Web site—though “passive” under prevailing parlance—can be the instigator of what becomes a contractual relationship, a relationship that arises out of the passive Web site and the seller’s additional actions placing itself into an actual contractual relationship with forum residents. The seller in this example has directed activity toward forum residents by (1) posting an unrestricted Web site on the Internet that is accessible in the forum; (2) soliciting all visitors to the site, including those residing within the forum, to purchase the product; and (3) entering into a contract with the forum resident by selling and delivering the product. The underlying Web site’s passivity in no way undermines the strength of these contacts or even colors the analysis under traditional principles.

The level of interactivity exhibited by a Web site is of even less relevance when the claim sounds in tort or asserts an intellectual property violation. Passive Web sites are fully capable of facilitating the commission of fraud, defamation, trademark infringement, and the like because these wrongs can be committed through words, images, and sounds, phenomena that passive Web sites can display. The relevant contacts in such cases are the allegedly wrongful acts that give rise to the claims, such as false statements, libelous comments, or the use of a protected mark. The medium through which these contacts are transmitted into the forum can be an interactive Web site, but it need not be; these contacts are as easily directed into a forum via passive Web sites.

The requirement of interactivity is also problematic because it is rooted in a Web-centric view of Internet activity that does not reflect the full breadth of network-mediated activity possible through the Internet.

168. *See id.* at 473 (“[W]ith respect to interstate contractual obligations, we have emphasized that parties who ‘reach out beyond one state and create continuing relationships and obligations with citizens of another state’ are subject to regulation and sanctions in the other State for the consequences of their activities.” (quoting *Travelers Health Ass’n v. Virginia*, 339 U.S. 643, 647 (1950))); *McGee*, 355 U.S. at 223 (“It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.”).

169. *Burger King*, 471 U.S. at 476 (citation omitted).

That is, courts conceive the Internet largely as a system of Web sites and the relevant question for them becomes what type of Web site is at issue. But a broader view of the Internet as a network that facilitates a wide range of activity beyond the publication of Web sites—such as the transmission of data, the facilitation of person-to-person communication (through email, instant messaging, chat rooms/discussion groups, online telephony, etc.), or the performance of services—is closer to the reality of the medium. Under this broader and more accurate view, defendants can utilize the Internet to engage in harmful activity without having to publish a Web site that forum residents must visit. Emphasizing what really matters—such as the defendant’s actions of soliciting and entering into a contract, the making of false statements, the misuse of protected material—rather than Web sites—which are merely one vehicle through which these actions may be mediated—should enable courts to recognize that Web site interactivity has a very limited role in determining whether a defendant has purposefully availed itself of the forum. At bottom, the interactivity requirement is an extraneous requirement that is not required by the Supreme Court’s jurisprudence.

C. *The Frustration of the Calder “Effects” Test*

Finally, in the context of alleged intentional wrongdoing, *Zippo*-based approaches wrongly fixate on the degree to which the content of Web sites targets a state, instead of on the proper focus under the standard articulated in *Calder v. Jones*:¹⁷⁰ the residence of the victim and the place of his or her harm. In *Calder*, the Supreme Court addressed the issue of whether out-of-state defendants could be subjected to jurisdiction in California for allegedly defaming Shirley Jones, a California resident, in articles published in the *National Enquirer*, which had a national circulation including California.¹⁷¹ The Court first indicated that when engaging in a specific jurisdiction analysis “a court properly focuses on ‘the relationship among the defendant, the forum, and the litigation’” and added that a plaintiff’s contacts “may be so manifold as to permit jurisdiction when it would not exist in their absence.”¹⁷² After finding that the plaintiff’s harm was suffered in California where she worked and resided, the court concluded “[j]urisdiction over petitioners is therefore proper in California based on the ‘effects’ of their Florida conduct in California.”¹⁷³ When the defendants claimed that they were not responsible for the California circulation of the articles as mere employees of the *Enquirer*, the Court replied as follows:

170. 465 U.S. 783 (1984).

171. *Id.* at 784–86.

172. *Id.* at 788 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

173. *Calder*, 465 U.S. at 789–90.

[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. . . . [The defendants] edited an article that they knew would have a potentially devastating impact upon [Shirley Jones]. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation.¹⁷⁴

It was the targeting of the defendants' "allegedly tortious[]" actions" that mattered most here; as the Court concluded, "In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis."¹⁷⁵ *Calder* thus provided a standard for evaluating assertions of jurisdiction based on intentional torts, making it clear that intentional tortfeasors would be amenable to jurisdiction where the targets of their wrongdoing reside and suffer harm.¹⁷⁶

Prevailing approaches to evaluating assertions of jurisdiction based on Internet activity frustrate *Calder*'s proper application where an intentional tort is at issue because they focus on the target audience for Web content rather than the target of wrongdoing—the alleged victim in the case. But Internet activity can cause harm in a state regardless of whether the activity occurs within a Web site whose content is targeted at that state.¹⁷⁷ For example, where a Web site defames a person within a state or infringes a patent held by a state resident, that Web site causes harm to the victim in that state, even if the Web site targets viewers from or seeks interaction with persons in other places.¹⁷⁸ The geographical targets of the Web publisher's enterprise bear no necessary and exclusive relationship to who the victims of a Web site's harm may actually be. Where the location of the victim diverges from the locales intended to be served by the defendant's Web site, that victim's connection with the state, the defendant's knowing delivery of the Web site into the victim's

174. *Id.*

175. *Id.*

176. Elsewhere I have argued that there are three important principles that can be distilled from *Calder*:

First, the . . . Court indicated that a plaintiff's contacts with a forum are not only relevant to a minimum contacts analysis, but they can be of sufficient quantity and quality so as to provide a sufficient basis for the assertion of personal jurisdiction. Second, out-of-state conduct that focuses its harmful effects toward an individual residing in a particular state affords that state the right to assert jurisdiction over the out-of-state wrongdoer. Third, perpetrators of intentional torts can "anticipate being haled into court" in the place where the targets of their wrongful actions reside.

A. Benjamin Spencer, *Terminating Calder: "Effects" Based Jurisdiction in the Ninth Circuit After Schwarzenegger v. Fred Martin Motor Co.*, 26 WHITTIER L. REV. 197, 201–02 (2004) (citations omitted).

177. See, e.g., *Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd. P'ship*, 34 F.3d 410, 411–12 (7th Cir. 1994) (finding that the use of an in-state company's trademark by an out-of-state entity creates personal jurisdiction because "the injury will be felt mainly in" the forum).

178. Andrea Matwysyn has also made the point that the *Zippo*-inspired approach does not typically allow courts to exercise jurisdiction over those who use the Internet to commit defamation. See Matwysyn, *supra* note 16, at 496 n.13.

state via the Internet, and the relationship between the Web site and the victim's cause of action, should establish jurisdiction under the principles described in *Calder*.

The problem is that courts have consistently applied the *Zippo*-based approaches in a way that conflicts with the standard established in *Calder* by ignoring the targeting of the harmful conduct at issue.¹⁷⁹ For example, in *Young v. New Haven Advocate*,¹⁸⁰ a case involving alleged defamation by a local Connecticut newspaper of a Virginia prison warden, the allegation was that defamatory statements were made about a Virginia resident and published in Virginia via the Internet.¹⁸¹ Instead of inquiring about the targeting of the defendants' "allegedly tortious[] actions" as is appropriate under *Calder*, the court asked about the target audience for the defendants' Web content.¹⁸² This focus came not from *Calder*, but *ALS Scan*, where the Fourth Circuit concluded that "application of *Calder* in the Internet context requires proof that the out-of-state defendant's Internet activity is expressly targeted at or directed to the forum state."¹⁸³ Having focused on the newspapers' target audience, the *Young* court concluded, "The newspapers did not post materials on the Internet with the manifest intent of targeting Virginia readers. Accordingly, the newspapers could not have 'reasonably anticipate[d] being haled into court [in Virginia] to answer for the truth of the statements made in their article[s].'"¹⁸⁴

But this is incorrect. By allegedly targeting a victim the publisher knew to work and reside in Virginia, it could anticipate having to answer for the attack in Virginia courts. A skilled marksman who intends to demonstrate his shooting skills to his fellow Kentuckians by shooting across the border into Virginia, is aiming his conduct at a Kentucky audience. But the target of his wrongdoing is the hapless Virginian who happens to get shot in the process. Any person who targets wrongdoing at a victim found residing within a particular state can anticipate having to answer for that wrongdoing in the courts of that state. That is the essential holding and logic of *Calder*. The court in *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*¹⁸⁵—where the Fourth Circuit faced the question "whether an Illinois organization subjected itself to personal jurisdiction in Maryland by operating an Internet website that allegedly infringed the trademark rights of a Maryland insurance company"¹⁸⁶—

179. See Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601, 627-42 (2003), for a discussion of how federal courts have applied the *Calder* "effects" test to evaluate personal jurisdiction in the Internet context.

180. 315 F.3d 256 (4th Cir. 2002).

181. *Id.* at 260.

182. *Id.* at 263.

183. *Id.* at 262-63 (citing *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002)).

184. *Id.* (quoting *Calder v. Jones*, 465 U.S. 783, 790 (1984)).

185. 334 F.3d 390 (4th Cir. 2003).

186. *Id.* at 393.

committed the same mistake. Faced with allegations of trademark infringement, the court evaluated the targeting of the defendant's Web site rather than of its infringing conduct,¹⁸⁷ again conflicting with *Calder's* admonition that it is the target of the tortious actions that is relevant to a jurisdictional analysis. As discussed previously, other circuits also require that Web sites generally target states or their residents as a group in the context of intentional torts to support jurisdiction.¹⁸⁸

Requiring the targeting of activity in these types of cases toward "Marylanders" or the "State of Maryland" is not a sensible requirement. The targets of wrongdoing are those victimized by it. Courts should not evaluate whether a wrongdoer has targeted the victim's fellow state residents or the State itself because *Calder* accords such considerations little relevance: "Jurisdiction is about contacts with a forum, not comments about *it*, and comments do not have a greater connection with a forum simply because they mention or discuss it (or fail to)."¹⁸⁹ What should be and is relevant under *Calder* is that the victim was the target of the wrongdoing and whether that victim is a resident of the forum State. It is the status of the victim as a resident of the State that renders the State the focal point of the victim's injury and gives the State its interest in adjudicating the dispute.¹⁹⁰ Those who intentionally violate copyrights or defame others are not targeting the State of X or the People of the State of X; rather, they are targeting their victims. Continued reliance on an analysis that focuses on the targeting of these irrelevant others only denies jurisdiction where it should be upheld. Further, requiring specialized state-specific targeting of Web sites seemingly insulates those operating Web sites with a more generalized national focus from jurisdiction in any state, a result that is contrary to logic and provides too facile a method for web operators to avoid local jurisdiction.

The focus of circuit decisions on the targeting of Web sites instead of the harmful actions alleged to reside within them likely owes much to the circumspect view that the courts have of *Calder* in general.¹⁹¹ Many

187. *Id.* at 400–01 (4th Cir. 2003) ("CPC must have acted with the 'manifest intent' of targeting Marylanders. . . . [W]e find it pertinent that the overall content of CPC's website has a strongly local [metropolitan Chicago] character. . . .").

188. *See supra* Part III.

189. Conklin, *supra* note 152, at 143–44.

190. *See id.* at 143 (2004) ("Defamatory comments destroy a person's reputation whether they mention the forum state or not, and whether residents of that state read them or not. The 'focal point' of a defamation is usually where the defamed person has the most highly developed reputation (because that is where there is the greatest potential for reputational harm to be done), and typically that is the person's home state.")

191. As one district court within the Fourth Circuit recently observed, "the Fourth Circuit has seemed to require more than the *Calder* 'effects-test' to hold exercises of jurisdiction over foreign tortfeasors constitutional." *Cole-Tuve, Inc. v. Am. Mach. Tools Corp.*, 342 F. Supp. 2d 362, 367 (D. Md. 2004). Indeed, there has been a larger discussion about the strength of *Calder* as a jurisdictional precedent, with some suggesting that the decision is too out of step with other personal jurisdiction case law to serve as the grounding for an approach to resolving problems of jurisdiction in the Internet context. *See, e.g.,* Matwyshyn, *supra* note 16, at 517 ("*Calder* is a fatally-flawed jurisdictional precedent; reliance upon it weakens the potency of any approach."); *see also* Redish, *supra* note 16, at 597

circuits have interpreted *Calder* in a way that uncouples a defendant's tortious conduct from other state-affiliating conduct by the defendant.¹⁹² Thus, apart from the fact that a defendant's conduct causes injury to the plaintiff in his or her state of residence, these courts require "the defendant's own [sufficient minimum] contacts with the state if jurisdiction . . . is to be upheld."¹⁹³ That requirement has led courts to discount the targeting of the defendants' "allegedly tortious[] actions"¹⁹⁴ and look instead for "other contacts."¹⁹⁵ That is, courts are evaluating who the defendant's target "audience" is rather than who the victim of the allegedly intentionally tortious conduct is. But as the *Calder* Court made clear, it is the targeting of wrongdoing, not of the medium of its transmission, that matters.¹⁹⁶ In the end, contemporary *Zippo*-based approaches to evaluating Internet contacts simply import a confused interpretation of *Calder* into the Internet context, which largely explains how courts have evaluated jurisdiction in Internet cases.

("Calder's 'focal point' analysis is inescapably inconsistent with the controlling purposeful availment test . . ."). However, as I have argued elsewhere, *Calder* was consistent with the Court's original articulation of the modern personal jurisdiction standard in *International Shoe*. See Spencer, *supra* note 176, at 219–20 ("[I]n what appeared to be a return to the unitary personal jurisdiction analysis originally contemplated in *International Shoe*, the *Calder* Court engaged in a unified evaluation of the defendants' contacts to determine if jurisdiction would comport with 'fair play and substantial justice' without separately considering purposeful availment and reasonableness."). Further, *Calder* was articulating a standard for intentional torts, conduct not addressed by prior jurisdictional precedent, and thus represents a somewhat unique approach that the Court felt was appropriate in such a context. Thus, the dismissive views of *Calder* do not deserve much credence and certainly should not serve to undermine its strength as sound jurisdictional precedent.

192. See, e.g., *Remick v. Manfredy*, 238 F.3d 248, 258–59 (3d Cir. 2001) (requiring forum targeting beyond mere targeting of a plaintiff residing within the forum); *Brokerwood Int'l (U.S.), Inc. v. Cuisine Crotona, Inc.*, 104 F. App'x 376, 382 (5th Cir. 2004) ("[T]he effects test is not a substitute for a nonresident's minimum contacts that demonstrate purposeful availment of the benefits of the forum state." (quoting *Allied v. Moore & Peterson*, 117 F.3d 278, 286 (5th Cir. 1997))). But see *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 96 n.2 (3d Cir. 2004) ("Under [the *Calder* 'effects'] test, a party is subject to personal jurisdiction in a state when his or her tortious actions were intentionally directed at that state and those actions caused harm in that state."); *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 628 (5th Cir. 1999) ("Even an act done outside the state that has consequences or effects within the state will suffice as a basis of jurisdiction in a suit arising from those consequences if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct."). See Rice & Gladstone, *supra* note 179, at 608–13, for a more complete discussion of how *Calder* has been interpreted and applied in the various federal circuits.

193. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997).

194. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

195. *ESAB Group*, 126 F.3d at 625; see also *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) ("[T]he 'effects' test is but one facet of the ordinary minimum contacts analysis, to be considered as part of the full range of the defendant's contacts with the forum. . . . [T]he plaintiff's residence in the forum, and suffering of harm there, will not alone support jurisdiction under *Calder*." (footnote omitted)).

196. *Calder*, 465 U.S. at 789.

IV. A PROPOSED APPROACH: APPLYING TRADITIONAL ANALYSIS TO INTERNET FACT PATTERNS

Zippo-based approaches to evaluating jurisdiction based on network-mediated contacts are flawed in many respects. However, courts have migrated to the *Zippo* framework and away from traditional analysis in order to forestall universal jurisdiction. But universal jurisdiction does not inevitably result from applying traditional principles to Internet fact patterns. Thus, until Congress or the Supreme Court indicates that traditional analysis deserves alteration in the Internet context, courts should apply traditional principles. This Part will present an analytical approach that will facilitate courts' application of traditional principles to cases involving network-mediated contacts.

A. *The Limiting Aspects of Traditional Analysis*

To support specific jurisdiction,¹⁹⁷ traditional jurisdictional principles require that defendants purposefully availed themselves of the privilege of acting within the state, that such activity gave rise to the cause of action, and that the assertion of jurisdiction is constitutionally reasonable.¹⁹⁸ In the context of intentional torts, the Supreme Court has held that defendants are amenable to personal jurisdiction in states where they direct their intentionally tortious conduct and produce harmful "effects."¹⁹⁹ The circuit courts have shied away from these principles where Internet contacts are concerned for fear that universal jurisdiction would result. "[B]ecause the Internet is omnipresent," the argument goes, permitting electronic contacts to fulfill the minimum contacts requirement would make "[t]he person placing information on the Internet . . . subject to personal jurisdiction in every State."²⁰⁰ Commentators fearing the advent of nationwide jurisdiction have similarly suggested that recognizing Internet contacts as minimum contacts would subject Internet actors to jurisdiction in every state.²⁰¹

197. This article does not address whether a Web site or other Internet activity should suffice to establish general jurisdiction over Internet actors.

198. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 476–77 (1985); *Christian Science Bd. of Dirs. of the First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 216 (4th Cir. 2001).

199. *Calder*, 465 U.S. at 790 ("[P]etitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis."). The *Calder* "effects" test has been applied beyond the strict context of intentional torts to cover cases involving statutory violations akin to torts, for example copyright and trademark infringement. See, e.g., *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (indicating that alleged trademark infringement is "akin to a tort case" and thus warrants application of the *Calder* "effects" test).

200. *ALS Scan Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002); see also *id.* at 713 ("[I]t would be difficult to accept a structural arrangement in which each State has unlimited judicial power over every citizen in each other State who uses the Internet.").

201. See, e.g., Lemley, *supra* note 122, at 529 ("Rote application of personal jurisdiction rules . . . would lead inexorably to the conclusion that anyone who puts up a website is amenable to suit anywhere on the planet, on the theory that they have sent their 'products' into each and every forum."); Stravitz, *supra* note 126, at 939 ("Because a web site is accessible at all times to Internet users

Contrary to these concerns, universal jurisdiction does not inevitably follow from the application of traditional jurisdictional principles to Internet contacts. Acceptance of the true nature of Internet activity as intentional conduct that, absent the employment of restrictive measures, knowingly broadcasts itself globally instead results only in a presumed satisfaction of the purposeful availment requirement in every jurisdiction. Those who engage in activity on the Internet—passive or otherwise—know that the information they post on the Web is available globally, unless they attempt to limit such global availability. The availability of geographic mapping or identification technology²⁰² undermines the argument that posting on the World Wide Web cannot be used at least to presume an intent to serve the entire globe.²⁰³ 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 against being deemed to target the entire globe with a posting on the Web.²⁰⁴ Given the awareness that defendants have of the global reach that Web publishing will give them, and their purposeful availment of the advantages that the ubiquity of the Internet presents, the burden should be on defendants to establish that they did not intend to interact with any persons within a particular forum through their Web activity. If they cannot meet this burden, defendants should be unable to argue that they were not on notice that their conduct would be seen as reaching out to jurisdictions throughout the world.

Although this view of Internet activity supports at least a presumption that such actors have purposefully availed themselves of every jurisdiction, other elements of the standard for asserting specific jurisdic-

in any particular forum, it is reasonable to require additional conduct, beyond putting up the web site, to establish minimum contacts. Otherwise, personal jurisdiction over web site creators would have no rational limits.”); Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1822 (2003) (“In fact, faithful application of the usual test for personal jurisdiction arguably leads to the conclusion that maintaining a website constitutes purposeful availment of every state in the country. This phenomenon threatens to render the purposeful availment prong meaningless when Internet activities serve as the relevant contacts with the forum state.”).

202. See *supra* text accompanying notes 136–46.

203. The existence of such technology also undermines the suggestion that a state seeking to limit the reach of a Web site into that state necessarily will limit the reach of the Web site into every state. See *Salvado*, *supra* note 16, at 76–77 (posing a hypothetical where a Maryland court ordered the removal of a Web site offensive to Maryland law, thereby forcing the Web site operator to shut it down entirely and making the Web site unavailable in any state). Where a court finds that a Web site offends a particular state’s law, geographic mapping technology means that the Web site operator is capable of making the Web site unavailable in that state but still available elsewhere.

204. Geist, *supra* note 16, at 1402 (“Although some authors have suggested that the Internet renders intent and knowledge [of a user’s geographical location] obsolete by virtue of the Internet’s architecture, the geographic identification technologies described above do not support this view.” (footnote omitted)); see also *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 471 (D. Mass. 1997) (finding it “troublesome to allow those who conduct business on the Web to insulate themselves against jurisdiction in every state, except in the state (if any) where they are physically located.”).

tion²⁰⁵ serve to limit the breadth of jurisdictional consequences that such a conclusion might initially suggest. The arising-out-of or “relatedness” requirement connects the relevant network-mediated contact to the cause of action in a way that provides a substantial layer of limitation. That is, Internet actors are not automatically subject to jurisdiction everywhere for anything; rather, jurisdiction only becomes possible in those jurisdictions where the network-mediated activity gives rise to a cause of action.²⁰⁶

The requirement that the assertion of jurisdiction be constitutionally reasonable provides an additional needed check against universal jurisdiction in most instances. When assessing whether an assertion of jurisdiction is constitutionally reasonable, courts evaluate “the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.”²⁰⁷ In the context of a dispute involving a Web site giving rise to a cause of action in a particular state, consideration of these factors will necessarily narrow the otherwise broad scope of jurisdiction based on network-mediated contacts.

For many defendants, defending in terribly distant locales may be deemed so “gravely difficult” that they suffer a constitutionally significant disadvantage in presenting their case compared with their opponents.²⁰⁸ Although such circumstances should be increasingly rare in modern times,²⁰⁹ particularly for corporate parties, in such a case the rea-

205. The use of Internet contacts as a basis for general jurisdiction is a much more difficult question that courts are only now beginning to address. *See, e.g., Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 710–13 (8th Cir. 2003) (discussing general jurisdiction in the Internet context).

206. *See, e.g., Hockerson-Halberstadt, Inc. v. Propet USA, Inc.*, 62 F. App’x 322, 338 (Fed. Cir. 2003) (“To subject a nonresident corporate defendant, such as Costco, to suit in Louisiana solely on the basis of a minuscule number of e-commerce sales that are *unrelated to the cause of the plaintiff’s alleged injury* would, we think, render established jurisdictional boundaries meaningless.” (emphasis added)). I rely upon the more stringent proximate cause standard of relatedness, which is more consistent with the Supreme Court’s interest in basing jurisdiction on purposeful conduct that will enable defendants to predict where jurisdiction may attach. *See, e.g., Nowak v. Tak How Invs.*, 94 F.3d 708, 715 (1st Cir. 1996) (“Adherence to a proximate cause standard is likely to enable defendants better to anticipate which conduct might subject them to a state’s jurisdiction than a more tenuous link in the chain of causation.”). However, the Supreme Court has not definitively resolved whether the proximate cause or the more tenuous “but for” causation variant of the relatedness requirement is appropriate for jurisdictional analysis. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991) (accepting the case for review to consider the degree of relatedness required for personal jurisdiction analysis but avoiding the question by deciding the case on other grounds).

207. *Christian Sci. Bd. of Dirs. v. Nolan*, 259 F.3d 209, 217 (4th Cir. 2001) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)).

208. *Burger King*, 471 U.S. at 478 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

209. In describing the increasing ease with which parties can litigate in remote locales, one commentator wrote as follows:

[T]he Internet is an efficient and rapid means of communication, and coupled with similar progress in transportation, defending a suit in a remote jurisdiction may be less of a burden today than in the past. For example, some courts allow parties to electronically file their pleadings via

sonableness analysis can serve to prevent the assertion of jurisdiction. Similarly, when a state's interest in adjudicating the dispute is slight, perhaps because vindication of state policies may not be at stake, it may be unreasonable, given burdens on the defendant, to allow jurisdiction under those circumstances.²¹⁰ Indeed, when the plaintiff has little to no relationship with the forum, the defendant's lack of connection with the forum beyond Internet contacts may also serve to undermine the constitutional reasonableness of an assertion of personal jurisdiction. Finally, for extreme situations when the chosen forum is substantially burdensome or inconvenient for the defendant, the defendant may seek a transfer to an alternate venue²¹¹ or dismissal on *forum non conveniens* grounds.²¹² The bottom line is that the 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 burdensome or inappropriate forums.²¹³ Such an approach would enable courts to avoid contorting traditional principles, while channeling their concerns through features of the traditional approach when appropriate.

There are difficulties with the reasonableness prong of the personal jurisdiction test. Specifically, the "fairness factors" may be charged with being no more than a totality-of-the-circumstances test that is infinitely malleable in the hands of different courts. Under such a test, the argument goes, judges are permitted to reach widely divergent jurisdictional outcomes, a result that undermines predictability and suggests that reasonableness may not adequately check jurisdictional excesses.²¹⁴ Although these charges have some validity, they speak to the shortcomings of traditional jurisdictional analysis on the whole, not to its application in the Internet context in particular. Much of what may be wrong with tra-

the Internet, rather than filing in person at the courthouse. Some courts also allow litigants to participate via the telephone. Litigants can also maintain contact with each other and the court via e-mail.

TiTi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKLEY TECH. L.J. 519, 524 (2004) (footnotes omitted).

210. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114–15 (1987) (discussing California's diminished interest in resolving a dispute between two foreign entities).

211. See, e.g., 28 U.S.C. § 1404 (transfer of venue statute); see also, e.g., *Response Reward Systems, L.C. v. Meijer, Inc.*, 189 F. Supp. 2d 1332, 1339–40 (M.D. Fla. 2002) (granting Michigan defendant's motion, in a patent infringement action, to transfer venue where the defendant's only contact with the forum state, Florida, was the availability of infringing material on its Web site).

212. See, e.g., *McNeil v. Stanley Works*, 33 F. App'x 322, 325 (9th Cir. 2002) ("McNeil is a Canadian citizen, and Stanley a Connecticut citizen. . . . The dispute's only tie to California is McNeil's registration of Internet domain names through a registrar whose principal office is in San Francisco, California. . . . Accordingly, we find that the district court did not abuse its discretion in concluding that the private interest factors, such as the residence of the parties and the forum's convenience to the litigants, witnesses, and[] sources of proof, favor litigation in Canada, rather than California.").

213. For an argument suggesting that defendants' concerns regarding burden and inconvenience are more properly accommodated by the doctrines of venue and *forum non conveniens*, see A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. (forthcoming Spring 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=781904.

214. Note, *supra* note 201, at 1838.

ditional jurisdictional analysis can be linked to the problems inherent in the test's reasonableness prong; however, revision of traditional analysis *in toto* will be required to address that issue.²¹⁵ The point here is that network-mediated contacts should not be treated differently than other contacts. Further, when grossly inappropriate assertions of jurisdiction are sought to be avoided in this context, the reasonableness prong should be the means through which courts exercise their judgment to limit or deny jurisdiction, as opposed to utilizing newly fashioned Internet-specific approaches.

When the cause of action involves allegations of intentionally tortious conduct, the threat of universal jurisdiction on the basis of the application of traditional jurisdictional principles is mitigated by the limitations of the principles embodied in the *Calder* "effects" test. Only when the alleged wrongdoer intentionally directed its *tortious* actions at a forum resident can the state exercise jurisdiction under the *Calder* test.²¹⁶ Thus, although a defendant, based on its unrestricted Web site, will be presumed to have availed itself of jurisdictions throughout the world, the target of the tortious conduct will typically be based in only one or a handful of those jurisdictions. As a result, jurisdiction will not be universal but limited to those jurisdictions where the target of the defendant's allegedly tortious conduct resides. For example, in *Young*, application of these principles to the defendant newspapers' Web publication of allegedly defamatory material would only expose them to jurisdiction where the alleged victim of the defamation lived and worked—Virginia.²¹⁷

The jurisdictional consequences of such an application of *Calder* are admittedly broader than those that arise from the more limited interpretation of the "effects" test that require defendants to have their "own [sufficient minimum] contacts with the state" apart from the connection engendered by the commission of an intentional tort against a forum resident.²¹⁸ But, as already mentioned, many circuits' view of *Calder* is out of step with the actual holding in that case, which focuses on the target of the defendant's intentionally tortious conduct.²¹⁹ Indeed, wrongdoers should anticipate being sued where their victims are located and suffer harm, whether they employ the Internet to do so or not. Where the victim is a forum resident, it is the victim's status as a forum resident that gives the defendant its connection with the state and empowers the state to hear the suit under *Calder*.²²⁰

215. See Spencer, *supra* note 213, for a proposed revision to personal jurisdiction doctrine.

216. *Calder v. Jones*, 465 U.S. 783, 790 (1984) ("[P]etitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.")

217. 315 F.3d 256, 261–62 (4th Cir. 2002).

218. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997).

219. *Calder*, 465 U.S. at 789.

220. See *id.* at 788 ("The plaintiff's . . . 'contacts' . . . may be so manifold as to permit jurisdiction when it would not exist in their absence.")

B. A Proposed Approach

The discussion above suggests that no Internet-specific standard is needed to evaluate personal jurisdiction based on Internet contacts. However, one can formulate traditional principles in a way that will facilitate their proper application in the Internet context. Specifically, *Zippo*-based approaches should be discarded in favor of the following: a state may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) purposefully directs activity into the state via virtual networks; (2) that activity gives rise to, in a person within the State, a potential cause of action cognizable in the State's courts; and (3) the assertion of jurisdiction is constitutionally reasonable.

Under the first prong of this test, tortious conduct—whether it be negligent, intentional, or otherwise—is presumed to be directed at a state or its residents if it is made available in the state via the Internet. The same holds true for commercial or contractual contacts mediated through the Internet; commercial activity is presumed to be directed at a state and its residents when it is made available on an unrestricted basis to users of the Internet in that state. Courts in France and Australia recently exercised jurisdiction over two U.S.-based companies based on this reasoning.²²¹

Plaintiffs would bear the initial burden of establishing purposeful availment as they currently do under traditional jurisdictional analysis. However, that burden could be discharged by a showing that the defendant's network-mediated contacts were made available within the forum state on a geographically unrestricted basis. As discussed above, defendants who permit their virtual conduct to be available globally without using existing limiting techniques are presumed to purposefully avail themselves of every jurisdiction in the country. Thus, the inquiry should be whether geographical limiting technology was employed or if the defendant otherwise limited the geographical reach of its virtual conduct in some way, not whether Internet activity is "active" or "passive." If no measures were taken to limit the geographical reach of the virtual activity, the burden shifts to the defendant to disprove universal purposeful availment in the face of the defendant's deliberate exploitation of a global medium without using such limits. Internet actors should no

221. See *Gutnick v. Dow Jones & Co.*, (2001) VSC 305, ¶¶ 73, 79 (Supreme Court of Victoria, Australia), available at <http://www.austlii.edu.au/au/cases/vic/VSC/2001/305.html> ("Dow Jones controls access to its material by reason of the imposition of charges, passwords, and the like, and the conditions of supply of material on the Internet. It can, if it chooses to do so, restrict the dissemination of its publication of *Barrons* on the Internet in a number of respects. . . . I conclude that the State of Victoria has jurisdiction to entertain this proceeding."); Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, available at <http://www.cdt.org/speech/international/001120yahoofrance.pdf> (asserting jurisdiction over Yahoo! for failing to employ geographical identification techniques in order to prevent their Web site—which permitted visitors to purchase outlawed Nazi memorabilia—from being viewable in France).

longer be permitted to deny the global reach of their virtual conduct while simultaneously embracing the very benefits that the global ubiquity of the Internet affords them. However, when Internet actors employ methods aimed at limiting the reach of their virtual activity to avoid a given state, direction of activity into that state would not be presumed.

When the defendant is successful in rebutting the presumption of purposeful availment, the plaintiff then must establish through other evidence that the defendant purposefully availed itself of the forum jurisdiction. This showing would be difficult to make once the defendant has proven the use of techniques that effectively prevent or limit the availability of the defendant's virtual conduct within the forum. However, evidence that such measures were wholly inadequate, or evidence showing extensive in-forum usage or viewing of the Web site or other virtual activity would tend to cast doubt upon the effectiveness of the defendant's efforts to limit geographically the reach of its virtual conduct.

The Supreme Court has embraced such a burden-shifting approach in other contexts. For example, in *McDonnell Douglas Corp. v. Green*,²²² an employment discrimination case, the Supreme Court articulated a burden-shifting approach whereby the plaintiff is required to make a prima facie case of racial discrimination, at which point the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged action.²²³ If the defendant discharges this burden, the burden shifts back to the plaintiff to establish that the articulated reason is a pretext for an unlawful, discriminatory reason.²²⁴ More recently, in *Celotex Corp. v. Catrett*²²⁵ the Supreme Court set forth a burden shifting approach in the context of motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.²²⁶ The Court wrote that once the moving party simply identifies "those portions of the pleadings" and other parts of the record that "demonstrate the absence of a genuine issue of material fact," the nonmoving party must then "go beyond the pleadings" to "designate specific facts showing that there is a genuine issue for trial."²²⁷ Given this familiarity with burden shifting approaches, courts should be able to apply the proposed approach to Internet jurisdiction cases.

The second prong of the proposed test simply embodies the arising-out-of requirement of traditional specific personal jurisdiction analysis.²²⁸ This requirement is critical in preventing the universal jurisdiction feared

222. 411 U.S. 792 (1973).

223. *See id.* at 802-03.

224. *See id.* at 804.

225. 477 U.S. 317 (1986).

226. *Id.* at 323-24 (interpreting FED. R. CIV. P. 56).

227. *Id.*

228. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (indicating that specific jurisdiction requires that "litigation results from alleged injuries that 'arise out of or relate to' those activities" (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984))).

by the courts. Only those states where the Internet activity gives rise to a claim would potentially be permitted to exercise jurisdiction under this approach. Thus, even though the virtual conduct would presumptively be directed at every state in the nation, such conduct will rarely create causes of action in every state as well. Further, the limitation that the cause of action be cognizable within the state's courts—borrowed from the *ALS Scan* test—ensures that the case will involve vindication of rights protected by the forum state, providing the state with a greater interest in adjudicating the dispute than it otherwise might have.

Finally, requiring that the assertion of jurisdiction be constitutionally reasonable comports with traditional analysis,²²⁹ assuring that it will not be asserted where it is unduly burdensome or where the controversy is insufficiently connected with the forum state's interests. Indeed, the reasonableness requirement directly addresses courts' concerns over universal jurisdiction.²³⁰ When Internet-based contacts give rise to a cause of action in the forum, unreasonable or outrageous assertions of jurisdiction need not be permitted.²³¹ Courts can articulate reasons, within the constitutional reasonableness framework, why jurisdiction would be inappropriate in a given case. What is important here is that courts not simply deny jurisdiction by unduly altering traditional principles to prevent Internet contacts from serving as minimum contacts. Rather, they should base their rejection of jurisdiction on the failure of the facts to satisfy established requirements such as the requirement that jurisdiction be constitutionally reasonable.

C. *Virtues and Vices of the Proposed Approach*

1. *Advantages*

The proposed approach is superior in many respects to the *Zippo*-based approaches prevalent among the circuits. First and foremost, it is rooted in traditional jurisdictional analysis rather than an adaptation of the problematic *Zippo* standard. Such a foundation is important most notably because traditional doctrine should govern all evaluations of personal jurisdiction unless and until the Supreme Court alters those princi-

229. See *id.*, 471 U.S. at 476–77 (requiring consideration of “reasonableness” factors once it has been shown that defendant purposefully established minimum contacts with the forum state).

230. One commentator has suggested that the court should place more emphasis on the reasonableness prong in the Internet context. See Christopher M. Kindel, *When Digital Contacts Equal Minimum Contacts: How Fourth Circuit Courts Should Assess Personal Jurisdiction In Trademark Disputes over Internet Domain Names*, 78 N.C. L. REV. 2105, 2140–41 (2000) (“The failure to consider fully whether or not a finding of jurisdiction would comport with ‘traditional notions of fair play and substantial justice’ is a grave mistake. In trademark disputes over Internet domain names, courts should place even more emphasis on the reasonableness prong of the due process analysis than they do in non-Internet-related suits.” (quoting *Int’l Shoe v. Washington*, 326 U.S. 310, 316 (1945))).

231. See Stravitz, *supra* note 126, at 940 (suggesting that the *Burger King* analysis focuses on reasonableness and concluding that “[s]hifting emphasis to the second-branch convenience factors will allow jurisdiction to be asserted unless the chosen forum is fundamentally unfair”).

ples. Traditional principles should not be altered—at least not by lower courts—in the face of technological advances absent a showing that they no longer can be applied under the new circumstances. Grounding in traditional principles would also make it less likely that defendants with network-mediated contacts will be treated differently than those defendants whose contacts are not mediated through cyberspace. When a consistent foundation exists for both Internet and non-Internet cases, Internet actors will not be subjected to either a more stringent or a more lenient standard simply because of the medium through which their connection with the forum is established.

A second advantage of the proposed approach, which derives from its adherence to traditional principles, is that it would avoid the inevitable obsolescence problem that will befall Internet-specific tests not rooted in traditional analysis.²³² The *Zippo* test and its variants are responses to the Internet, and Web sites in particular.²³³ Indeed, it is specific attributes of the Internet and Web sites that have led the courts to alter and adapt an approach for those media.²³⁴ But as one commentator has noted, such a technologically specific approach “do[es] not provide sufficient intellectual flexibility for use with the next generation of Network Communications.”²³⁵ The proposed approach, by abandoning any consideration of the degree of “passivity” that characterizes the Internet activity at issue, is not limited to this technology-specific concern. Rather, it focuses on traditionally considered issues not tied to certain technology. This traditional focus grounds the proposed approach in principles that have proven to be flexible and, thus, renders the approach capable of accommodating future technological changes.

Third, the approach is honest about the implications of Internet activity, eschewing any effort to limit assertions of jurisdiction based on Internet contacts beyond what a traditional analysis would suggest. The result is that Internet actors are no longer given unwarranted protection from the reality of their unrestricted Internet activity—that it is directed into every jurisdiction in the country—and instead incur only the burdens that should accompany the benefits of operating on the Internet. In effect, the *Zippo*-based tests have created somewhat of an exception for those whose contacts with the forum are mediated through the Internet. That is, the courts have taken what would otherwise be deemed to be purposeful availment—for example, the publication of information within a jurisdiction that gives rise to a cause of action—and deemed it not to be so, through the presumption of aimlessness, simply because

232. See Geist, *supra* note 16 at 1359 (“In the context of Internet jurisdiction, using indicia that reflect the current state of the Internet and Internet technologies is a risky proposition since those indicia risk irrelevancy when the technology changes.”).

233. See Matwyshyn, *supra* note 16, at 512 (“The courts have crafted a jurisdictional standard based on websites, a particular manifestation of Network Communications.”).

234. E.g., *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

235. Matwyshyn, *supra* note 16, at 509.

publication occurs other places as well.²³⁶ Such an exception is hardly warranted and unduly protects Internet actors from answering for their conduct in jurisdictions where the use of other media—such as conventional publishing or broadcasting—would render them accountable. The proposed approach eliminates this unfair advantage by affirming, rather than denying, the forum presence of a Web site by virtue of its availability there, making it just as “present” as a conventional publication would be.

Finally, the proposed formulation removes language that permits courts to deny jurisdiction in circumstances when it would be acceptable under *Calder*’s “effects” test. By importing into the analysis of Internet contacts the requirement that a defendant be separately connected with a state, apart from the connection engendered by a defendant’s commission of a tortious act against a forum resident, courts have replicated their limited view of *Calder* in the Internet context. Such a requirement has enabled courts to prevent assertions of jurisdiction against the very type of defendants—intentional tortfeasors—that *Calder* sought to reach. This happens because the prevailing approaches negate the validity of the connection that the tortious conduct itself establishes with the state and require that the substance of the virtual vehicle carrying the tortious conduct—typically a Web site—be intended for consumption within the forum. The proposed approach eliminates this additional requirement, satisfied—as was the *Calder* Court—with a showing that intentional wrongdoing was directed at a forum resident.

2. *Disadvantages*

The proposed approach also has disadvantages. Being amenable to jurisdiction wherever one’s virtual conduct gives rise to a cause of action—provided jurisdiction is reasonable—exposes Internet actors to liability under the laws of any jurisdiction where their Web site can be viewed or their Internet activity is being transmitted. This would subject Internet actors to a wide array of potentially conflicting legal obligations,²³⁷ and the costs of seeking to comply with the laws of every jurisdiction are likely prohibitive.²³⁸ Such high costs, thus, could deter businesses

236. See *ALS Scan*, 293 F.3d at 712.

237. See, e.g., Nguyen, *supra* note 209, at 525 (“A result is that many laws, some of them in conflict with one another, may apply to a defendant’s Internet activities.”).

238. See Matwyshyn, *supra* note 16, at 508 n.78 (“[A]ssuming that an entrepreneur wanted to comply with the law of every jurisdiction where the website was viewable, the legal costs of ascertaining what the law required in each jurisdiction would prove prohibitive.”); *ICC Policy Statement*, *supra* note 144 (“Compliance with the laws of many different countries would impose tremendous costs on business and would be prohibitively expensive for SMEs [Small- and Medium-sized Enterprises].”).

from engaging in activity on the Internet that would otherwise be beneficial to the economy.²³⁹ As one commentator more starkly asserted:

[T]he prospect of multijurisdictional liability may very well raise the price of participation beyond the average citizen's reach. Much of the network's democratizing influence may be lost if liability deters all but the most heavily capitalized entrepreneurs from pursuing all but the most highly profitable ventures. The average user simply cannot afford the cost of defending multiple suits in multiple jurisdictions, or of complying with the regulatory requirements of every jurisdiction she might electronically touch.²⁴⁰

Although the proposed approach's deterrent effect cannot be underestimated, the burden of compliance with the law of the jurisdictions within which a business chooses to act is not new. What is new is the ability of businesses to act within every jurisdiction simultaneously. The question is, should this new capability serve as the basis for absolving businesses of what has traditionally been a responsibility they must undertake, that is, compliance with local law where it is applicable? That is a policy question; the potential adverse commercial consequences of applying traditional jurisdictional doctrine to the Internet are policy concerns that the Supreme Court or Congress must address if an alternate outcome is desired.

In any event, it should not be forgotten that many companies have already recognized the need to tailor their Web sites for the legal regimes in which they will be made available or limit their availability to those locales in which they are willing to be subjected to jurisdiction. For example, Amazon.com, rather than abandon its global reach and the profitable markets that go with such a reach, has decided "to mitigate its risk . . . through the creation of country-specific Web sites, such as amazon.co.uk or amazon.de, that service customers in some of its larger international markets. These sites are run from the local jurisdiction and are designed to be compliant with local laws."²⁴¹ The International Chamber of Commerce reports the response of companies to broad jurisdictional risks on the international level as follows:

[M]any companies today simply are not willing to subject themselves to the costs of investigation and compliance with a myriad of rules in each country, or the risk of sanctions, unenforceable contracts, and adverse publicity in hundreds of countries, states, and provinces. Consequently, as stated above, companies are limiting the use of their websites in terms of both products and geography, and they engage in e-commerce, if at all, largely through closed sys-

239. See Geist, *supra* note 16, at 1362 ("This approach would stifle future Internet growth, as would-be Internet participants would be forced to weigh the advantages of the Internet with the potential of being subject to legal jurisdiction throughout the world.")

240. Burk, *supra* note 38, at 60.

241. *Fears Affecting Global Business Strategy*, *supra* note 144, at 2614.

tems with established partners or sales to residents of the territories where the companies are already well established.²⁴²

This response by companies highlights another disadvantage of the proposed approach: the goal of liability avoidance may lead many businesses to employ the geographic mapping technologies discussed above,²⁴³ which could result in a large number of Web sites, goods, and services being unavailable to people beyond certain geographical areas.²⁴⁴ Such an outcome would balkanize the Internet into more limited geographically oriented spheres, undermining the very ubiquity that is the *sine qua non* of the medium.²⁴⁵ But the ability of Internet activity to satisfy the purposeful availment requirement of the minimum contacts analysis should not be denied simply to achieve certain policy goals. If the promotion of e-commerce and preservation of the omnipresence of the Internet are policies worthy of promotion, Congress or the Supreme Court must intervene to further these interests. Otherwise, the traditional analytical framework should be applied.

The weighing of these varying interests is a task best suited for the political branches.²⁴⁶ However, the balance tips in favor of applying traditional analysis, via the proposed approach, rather than some adulterated version of a minimum contacts analysis designed to limit the jurisdictional consequences of Internet conduct.²⁴⁷ The interest of plaintiffs in being able to redress wrongs effected through electronic activity that reaches into their jurisdiction and the interest of states in providing a forum for the resolution of such disputes is strong. These interests should

242. *ICC Policy Statement*, *supra* note 144.

243. *See supra* text accompanying note 136.

244. *See ICC Policy Statement*, *supra* note 144 (“The negative result of jurisdictional ambiguity in e-commerce, or of aggressive insistence on compliance with detailed local rules when dealing across borders with local residents, is twofold. First, many goods and services are held back entirely from the global electronic marketplace. Second, other goods and services are offered only in a limited number of jurisdictions, and consumers in other places are denied access to competitive products and prices through the online marketplace.”).

245. *See Geist*, *supra* note 16, at 1405 (describing such a future as a “bordered Internet” that could result in “less consumer choice since many sellers may stop selling to consumers in certain jurisdictions where risk analysis suggests that the benefits are not worth the potential legal risks”).

246. This term generally refers to the legislative and executive branches, although some might include the Supreme Court among these cohorts, given that the institution is clearly not apolitical.

247. One court explicitly undertook analysis of the competing policy issues involved in a decision to assert jurisdiction based on network-mediated contacts as follows:

On the one hand, it [] troubles me to force corporations that do business over the Internet, precisely because it is cost-effective, to now factor in the potential costs of defending against litigation in each and every state; anticipating these costs could make the maintenance of a Web-based business more expensive. On the other hand, it is also troublesome to allow those who conduct business on the Web to insulate themselves against jurisdiction in every state, except in the state (if any) where they are physically located.

Massachusetts has an interest in protecting its citizens from confusion, and its corporations from trademark infringement. It has a further interest in alerting its citizens who maintain Web-sites for business purposes that there is a chance that they may be haled into court in any state where their Web-site potentially causes harm or transacts business. On the whole, this factor leans toward this Court’s assertion of jurisdiction over ATI.

Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456, 471 (D. Mass. 1997).

not be sacrificed simply because of the potential cost to businesses²⁴⁸ or to promote the growth of e-commerce and preserve the Internet as a medium of global communication. Furthering such interests is not the purpose of the constitutional law of personal jurisdiction. Rather, the interests of plaintiffs and states should only be trumped by defendants' due process concerns; when Internet actors would be subjected to defending themselves in an unconstitutionally burdensome forum,²⁴⁹ the interests of plaintiffs and states may more appropriately be made to yield. Further, it is not entirely clear that the gloom and doom forecasts of the business community should be heeded. Although businesses seek to avoid expanded regulation and potential liability as a matter of course, they often have been more than capable of adapting to challenging legal environments without sacrificing profitability. Commercial enterprises have proven to be quite diligent with their efforts to expand markets and seek new profits, and they are not likely to allow jurisdictional rules to get in their way.

D. *Applying the Proposed Approach to Paradigm Cases*

Experience has taught us that disputes arising out of network-mediated contacts can be distilled into several paradigm cases that represent the range of possible circumstances out of which actionable claims can arise. These paradigm cases warrant analysis using the proposed approach to illustrate its application. The paradigm cases can be divided into three main categories: (1) claims arising from commercial Web sites; (2) claims arising from noncommercial Web sites; and (3) claims arising from non-Web Internet activity.

1. *Commercial Web Sites*

The first group of disputes arises from commercial Web sites, with the first paradigm case being the *commercial/contract dispute*. The defendants have used the Internet to distribute a Web site to potential consumers in the hope that they will discover their product or service²⁵⁰ and ultimately make a purchase, either online or through more conventional channels.²⁵¹ When purchases are made online, the defendant is engaging

248. As one commentator aptly stated the point, "Granted, it is somewhat troubling to hold [entities that solicit business through a website] responsible for the potential cost of defending litigation in any forum where transaction of business may be the ultimate objective. However, considering the minimal effort required to establish a Web site and the potential results of Web activities, it is even more troublesome to allow such entities to reap the benefits of conducting business on the Web while avoiding jurisdiction in any state except where they are physically located." Christine E. Mayewski, Note, *The Presence of a Web Site as a Constitutionally Permissible Basis for Personal Jurisdiction*, 73 IND. L.J. 297, 327 (1997).

249. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985).

250. Services as diverse as financial services, email service, or the provision of gambling opportunities are included here.

251. See, e.g., *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003).

in electronic or e-commerce.²⁵² When the purchases are made offline the defendant is engaging in advertising. The plaintiffs in these cases have purchased the product or service and are dissatisfied with what they received, perhaps because the product does not function properly or fails to perform as advertised, or the services were inadequate or not completed.

Whether the Web site is used to engage in e-commerce or advertising, the proposed approach will ordinarily result in a finding of purposeful availment of the state where the plaintiff is located. In these cases, the defendant will be presumed to have reached out into the plaintiff's state by making its Web site available there (assuming the failure, on the part of the defendant, to limit the geographical reach of its Web site into the state) and peddling its products or services online to all potential consumers without regard to where they reside.

Once purposeful availment is established, if the Web site has been used for e-commerce—meaning it is the medium through which the plaintiff's purchase was made—an ensuing commercial dispute can be said to have arisen from the Web site. In the case of mere advertising, however, for the Web site to be charged with having given rise to the cause of action in the state where the plaintiff is located, the Web site would have to have induced the plaintiff to make a purchase and the plaintiff would have to have been able to make that purchase remotely either through the mail or by telephone based on contact information advertised on the site. If, on the other hand, the Internet advertisement left the plaintiff only with the option of traveling to a physical store to purchase the goods, the Web site alone could not be said to have given rise to the claim. Rather, under such circumstances, one would more properly look to the connection the defendant has with the forum through its bricks and mortar operation where the purchase was consummated.

Whether the assertion of jurisdiction is constitutionally reasonable here would depend on the particular circumstances of each case. However, because the plaintiff's interest in a remedy and the state's interest in adjudicating a dispute would ordinarily be compelling, the burden on the defendant would have to be great to trump these other interests.²⁵³

The second paradigm case involves the same type of Internet activity but the resulting *harm to the consumer is tortious*, rather than contractual or commercial. That is, the plaintiff who has either been induced to

252. "Electronic commerce is the paperless exchange of business information using electronic data interchange (EDI), e-mail, electronic bulletin boards, fax transmissions, and electronic funds transfer. It refers to Internet shopping, online stock and bond transactions, the downloading and selling of 'soft merchandise' (software, documents, graphics, music, etc.), and business-to-business transactions." BusinessTown.com, The Definition of E-Commerce, <http://www.businesstown.com/internet/e-comm-definition.asp> (last visited Sept. 23, 2005).

253. See *Burger King*, 471 U.S. at 478 (indicating that a burden can be so high as to make the defendant's presentation of its case "gravely difficult").

purchase a good or service through Web-advertising or who has actually made the purchase via the Web site has somehow been injured by the product received or by its seller. Examples of these claims include fraud, breach of warranty, false/misleading advertising, products liability, and the like. Here, the defendant has purposefully availed itself of the state where the plaintiff resides if it has delivered an unrestricted Web site advertising or selling the good or service in the state. Further, if the consumer's purchase was made through or facilitated by that Web site, the Web site has given rise to the plaintiff's claim. Again, provided that jurisdiction is reasonable in the particular circumstances, jurisdiction where the plaintiff resides will be appropriate.

The third paradigm case in the commercial Web site context involves a commercially oriented Web site as described above; however, rather than having a plaintiff who is a consumer, the plaintiff is a person or entity that has been *injured as a collateral consequence* of the defendant's commercial efforts through the Web site. This can occur, for example, when the defendant is alleged to have defamed the plaintiff or infringed the trademark of a competitor²⁵⁴ or a noncompeting business²⁵⁵ in the course of advertising/selling its product or services. The injury can occur through information posted within the body of the Web site, in the Internet domain address for the site, as is the case in domain name disputes,²⁵⁶ or in the code of a site, which occurs when a Web site uses meta tags²⁵⁷ to signal to online search engines to identify the site as the result of a search.²⁵⁸ The defendant in such cases may be the owner/operator of the Web site, or may simply be someone who has used the Web site to post an advertisement or as a medium for selling goods or services, such as is the case with online auction sites. In this group of cases, the relevant forum contact is not the Web site per se; rather, the relevant contacts are the "allegedly tortious[]" actions" committed by the defendant.²⁵⁹ Where the victim of the defamation or trademark infringement resides and where the injury occurred are the pertinent questions. Because the defendant has committed this alleged wrong through a Web site that was delivered into the plaintiff's home state and thereby caused damage to

254. See, e.g., *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).

255. *Zippo* was this kind of case. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1121 (W.D. Pa. 1997).

256. It seems possible that defamation could occur by virtue of the domain address alone if the defendant had developed an address that itself constituted a defamatory statement, for example "www.John_P_Doe_lies_on_his_tax_returns.com."

257. Meta tags "provide information such as who created the page, how often it is updated, what the page is about, and which keywords represent the page's content. Many search engines use this information when building their indices." Webopedia, Meta tag, http://www.webopedia.com/TERM/M/meta_tag.html (last visited Sept. 22, 2005).

258. See, e.g., *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 465-66 (7th Cir. 2000) (affirming the grant of a preliminary injunction against the defendant whose Web site source code contained the term "Prozac" as a meta tag because such was considered to be evidence of the defendant's intent to confuse and mislead consumers).

259. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

the plaintiff in that state, the proposed approach would permit the finding that the defendant has purposefully availed itself of the state in which the plaintiff resides. This conclusion is reached without regard to whether the Web site has commercially targeted or interacted with any residents within the state. Such contacts are not relevant because it is not those commercial contacts that give rise to the claim; rather, it is the “allegedly tortious actions” that give rise to the claim, whether those be defamatory statements or misuses of protected intellectual property.

2. *Noncommercial Web Sites*

The types of claims that can arise out of noncommercial Web sites are similar to those just discussed. The first paradigm case in the noncommercial Web site context involves contract, tort, or intellectual property claims arising from Web sites that serve as *forums for communication*—which would include, for example, chat rooms, newsgroups,²⁶⁰ and web logs, which are commonly referred to as “blogs”²⁶¹—rather than as a medium for or instigator of commercial exchange. Typical of this type of case is the defamation claim, where one person posts statements to the Web site that defame an individual²⁶² or business²⁶³ in some way. Other torts, such as fraud, interference with prospective business advantage, or infliction of emotional distress, seem perfectly capable of being committed in these virtual forums as well. It is also possible to imagine an intellectual property claim arising in such circumstances, where, for example, a user wrongfully discloses protected trade secrets or copyrighted material.²⁶⁴ Contract actions could also result here, for example, from the breach of a nondisclosure agreement.

For claims in this group, the proposed approach focuses on the statements or conduct alleged to cause harm—rather than the target au-

260. On the other hand, newsgroups exclusively available on USENET are not properly viewed as being “websites” on the World Wide Web because USENET is a distinct system from the Web. Like Web sites, newsgroup postings can be distributed throughout the world, and are accessible globally via the Internet. However, unlike most Web sites, access to the postings is generally restricted to subscribers to the group. *See supra* note 48 for more information regarding USENET.

261. “A weblog (sometimes shortened to blog or written as ‘web log’ or ‘Weblog’) is a Web site of personal or non-commercial origin that uses a dated log format that is updated on a daily or very frequent basis with new information about a particular subject or range of subjects. The information can be written by the site owner, gleaned from other Web sites or other sources, or contributed by users.” Whatis.com, Weblog, http://whatis.techtarget.com/definition/0,,sid9_gci213547,00.html (last visited Mar. 24, 2003).

262. *See, e.g.,* Griffis v. Luban, 646 N.W.2d 527, 529 (Minn. 2002) (involving a case of alleged defamation over an Internet newsgroup against an individual).

263. *See, e.g.,* Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154, 1156 (W.D. Wis. 2004) (addressing alleged defamation of a business via Internet postings).

264. *See, e.g.,* Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc., 923 F. Supp. 1231, 1239 (N.D. Cal. 1995) (alleging copyright infringement and misappropriation of trade secrets based on the posting of information to an Internet newsgroup). A student at Harvard was recently sued by Apple Computer Inc. for disclosing its trade secrets on his Web site, www.ThinkSecret.com. *See* Associated Press, *Teen Sued by Apple in Trade-Secrets Case Gains Legal Help*, Jan. 20, 2005, <http://www.detnews.com/2005/technology/0501/20/technology-64853.htm>.

dience of the Web site or postings to the site—and identifies the victim of that harm and the place where the harm is suffered. Assuming the harmful posting is accessible in the state where the victim resides and suffers harm—which will be the case unless geographical restrictions are employed²⁶⁵—the defendant who posts the information would be deemed to have purposefully availed itself of that state.²⁶⁶ The relatedness requirement would also be satisfied because the contacts of interest—tortious or infringing actions or conduct that constitutes a contractual breach—would be the very contacts that give rise to the claim. Finally, reasonableness—as usual—would depend on the circumstances of each particular case. It is important to emphasize that the operator of the Web site—who merely provides the forum in which the harmful statement is made—would not be considered to have purposefully availed itself of the forum state because the targeting of the posted comment would be the “unilateral activity” of a third party (the person posting the comment) rather than the deliberate action of the site operator.²⁶⁷

In the second paradigm case in the noncommercial Web site context, the Web site is merely a *source of information* that allows visitors to view the information but does not permit them to post any information themselves. Web sites maintained by news organizations, such as newspapers or news-oriented television stations, are included within this group as are other informational sites, such as those maintained by governmental entities, service organizations such as hospitals, or those displaying visual or written material for entertainment value. Claims arising from such Web sites are similar to those possible through Web sites facilitating online communication—contract, tort, or intellectual property claims²⁶⁸—again with defamation serving as the most likely claim to arise in this context.²⁶⁹ However, in this circumstance, the owner/operator of the Web site is responsible for the information being posted and would be the defendant in cases arising out of these Web sites.²⁷⁰ Applying the proposed approach to this group of cases would typically support a finding of personal jurisdiction over the defendants in the state where the alleged victim resides, based on the victim’s residency and the availability

265. Or, if access to the site is restricted to a known group of people, none of whom reside within the forum state, then the site should be deemed to be unavailable in the forum state.

266. See, e.g., *Carlisle v. Sotirin*, No. Civ. A. 04-1549, 2005 WL 78938, at *4 (E.D. La. Jan. 11, 2005) (“[T]he effects of the defamation were aimed at a [forum state] resident and felt within the forum. Based on *Calder* and its progeny, the effects of defendants’ alleged defamation serve as minimum contacts with [the forum] for the purpose of personal jurisdiction.”).

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

268. See, e.g., *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390 (4th Cir. 2003) (trademark infringement claim arising out of alleged misuse of mark on informational Web site).

269. See, e.g., *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) (involving alleged defamation via a newspaper’s Web site).

270. Employees of the Web site operators, such as reporters, would also be included among the group of potential defendants in this context. See *Calder v. Jones*, 465 U.S. 783, 791 (1984) (permitting jurisdiction over reporters responsible for defamatory article appearing in a nationally circulated publication).

of the information in the forum, provided the assertion of jurisdiction were reasonable. *Keeton v. Hustler Magazine, Inc.*,²⁷¹ a non-Internet case, suggests that at least in the defamation context, jurisdiction could also be appropriate in states where the plaintiff does not reside, but the defamatory statements are circulated via the Internet.²⁷² In *Keeton*, the Supreme Court stated, “[*Hustler Magazine*]’s regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine.”²⁷³ The Court indicated that the sale of thousands of magazines (15,000) in the forum state “cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous,” making jurisdiction over claims arising out of such contacts clearly consistent with Due Process.²⁷⁴ Broad circulation of defamatory material via the Internet through unrestricted Web sites should be treated no differently. Thus, under the proposed approach, where defamatory material is directed into a state via the Internet, it harms the plaintiff wherever the material is accessible and gives rise to a claim in each of those places. Jurisdiction in such cases seems to be entirely consistent with the Court’s position in *Keeton* and *Calder*.²⁷⁵

In the third paradigm case in the noncommercial Web site context, a Web site facilitating *cost-free data transfers* gives rise to breach of contract, tort, or intellectual property claims. Web sites offering free software downloads are the model here.²⁷⁶ A contract dispute can arise from the violation of a terms-of-use agreement by the provider of the software. Torts can result from malfunctions of the software that result in harm to one’s computer. Intellectual property problems can arise out of the distribution of protected material through the Web site. In each of these instances, when the defendant makes the free download available in the forum state, permits forum residents to access the data, and a forum resident suffers some harm as a result, the proposed approach would support a finding of purposeful availment and relatedness, with reasonableness requiring attention to specific facts.²⁷⁷

271. 465 U.S. 770 (1984).

272. *Id.* at 780.

273. *Id.* at 773–74.

274. *Id.* at 774.

275. See, e.g., *Carlisle v. Sotirin*, No. Civ. A. 04-1549, 2005 WL 78938, at *4 (E.D. La. Jan. 11, 2005) (“[S]pecific personal jurisdiction over nonresident defendants in defamation cases may be found where the effects of the defamatory statement caused injury.”) (noting *Calder*, 465 U.S. at 783).

276. See www.download.com for an example of a Web site offering visitors access to software downloads at no cost.

277. Under the proposed approach, which treats unrestricted web publishing as purposeful activity that presumptively avails itself of all jurisdictions, it would not matter if the download was the result of the plaintiff visiting a site on his own to seek the file or the result of clicking on a pop-up advertisement pushed onto the plaintiff’s computer. See Natalya Shmulevich, *A Minimum Contacts and Fairness Examination of Personal Jurisdiction over Providers of Free Downloads on the Internet*, 13 MEDIA L. & POL’Y 55, 73–84 (Summer 2004), for a discussion of these two scenarios.

3. *Non-Web Internet Activity*

The final group of paradigm cases involves Internet activity that does not take the form of Web site publication or the use of a Web site. The first paradigm case in this group is a case where the use of *direct communications technology* results in a contract, tort, or intellectual property claim. Email transmissions and instant messaging most readily come to mind here, but online telephony,²⁷⁸ video, and audio technology are growing in use as well. This technology is similar to a telephone or fax machine in that it is specific and directed to chosen recipients rather than generally broadcast to all persons with Internet access. Claims arising out of the use of such technology can be created in the recipients of a message, or the claims may be created in nonrecipients, such as is the case when defamation is transmitted between two people about a third party. In such cases, defendants harming plaintiffs through this technology can only be said to be availing themselves of the places where the intended recipient of the message resides, or, at least in the case of defamation, in the place where the message is circulated by the defendant.²⁷⁹ Where the intended recipient is also the plaintiff bringing the claim, that means the defendant will have satisfied the purposeful availment requirement under the proposed approach by directing the electronic message into the plaintiff's state and inflicting harm there. However, where the plaintiff is not the recipient of the message but rather is a third party, the plaintiff will not generally be able to establish purposeful availment simply based on the plaintiff's state of residence, unless the defendant circulates the message there. The defendant sending a direct message via the Internet cannot be said to have availed himself of any state other than that into which the message was intentionally delivered.

Another paradigm case involving non-Web use of the Internet arises out of the use of software that facilitates *peer-to-peer data transmission*²⁸⁰ at no cost. Examples of such software include online file-sharing programs such as Kazaa²⁸¹ and Morpheus.²⁸² Users who have such programs loaded onto their computers can copy files contained on the hard drives of other users via the Internet without having to visit a Web site. Claims that can arise from the use of online file-sharing programs are principally intellectual property claims by owners of protected

278. Commonly referred to as Voice over Internet Protocol (Voice over IP or VoIP) or IP telephony, this term refers to technology that sends voice information in digital form through the Internet. Whatis.com, VoIP, http://searchenterprisevoice.techtarget.com/sDefinition/0,290660,sid66_gci214148,00.html (last visited Sept. 22, 2005).

279. See *Keeton*, 465 U.S. at 777.

280. "On the Internet, peer-to-peer (referred to as P2P) is a type of transient Internet network that allows a group of computer users with the same networking program to connect with each other and directly access files from one another's hard drives." Whatis.com, Peer-to-peer, http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212769,00.html (last visited Sept. 22, 2005).

281. This software is available for free download at www.kazaa.com.

282. This software is available for free download at www.morpheus.com.

material that is being shared among users of these programs. It is also possible to imagine a tort claim where a file copied by the plaintiff ended up being corrupted or infected, in which case it could cause damage to the plaintiff's computer. In these cases, the defendant will be a user of the software, most likely the sharer of the data—i.e., the provider of corrupt software or copyright-protected material. In such a case, purposeful availment of any particular jurisdiction based on the Internet activity will be difficult to establish under the proposed approach. Users sharing files typically do not receive explicit requests from known parties to copy their files; rather, users consent *ex ante* to making files on their hard drives available to whomever comes along and wants to copy them.²⁸³ In the event that a user begins to copy the files of another user, the sharing user may not be aware that the sharing is occurring and may have no way of determining the location or identity of the copying user. Those users copying data similarly are ignorant of the location of the persons from whom they are gathering data. Under such circumstances, neither user is knowingly engaging in activity that reaches out to a particular state, thus no jurisdiction would be available based simply on the online sharing or copying activity under the proposed approach.²⁸⁴

Finally, in the non-Web site context, disputes may arise out of the use of *online media receivers* that allow users to call up certain audio or video content for viewing through the use of software contained on the user's computer. Prominent examples of such technology are Microsoft's Media Player and Real Networks' Real Player.²⁸⁵ These typically only permit users to experience the media content rather than receive and copy it as is possible with peer-to-peer file sharing programs. Intellectual property claims might be possible here if the media content is being unlawfully transmitted or distributed to users. In such a case the party transmitting the content would only be presumed to have availed itself of the jurisdiction where the intellectual property owner is located, not in every jurisdiction where the content is sent. The results for defamation cases would be similar: those transmitting defamatory material would be presumed to have purposefully availed themselves primarily of the jurisdiction where the defamed party is located. Although *Keeton* suggests broader jurisdiction wherever defamatory material is circulated, that finding depended upon the Court's view of the circulation of the defama-

283. See, e.g., Kazaa.com, *End User License Agreement*, ¶ 4.4, <http://www.kazaa.com/us/eula.htm> (last visited Sept. 22, 2005) ("By saving a file in My Shared Folder, you understand that it will be available for any other user of Kazaa and compatible programs. These users may find your files and subsequently download them from you."). Users are given the option of disabling this feature if they do not wish others to have access to their files. See *id.*

284. Jurisdiction over the provider of the software that permits the sharing would be analyzed as a case based on a Web site permitting cost-free data transfers, the third paradigm case in the noncommercial Web site context.

285. Media Player software is available for free download at www.microsoft.com; Real Player software is available for free download at www.real.com.

tory material as not being “random, isolated, or fortuitous.”²⁸⁶ Online transmission of defamatory statements via online media receiving software is likely to be deemed an isolated contact, thus making the *Keeton* reasoning inapposite.

V. CONCLUSION

The approach for evaluating assertions of personal jurisdiction based on network-mediated contacts proposed in this article simply represents a conclusion that the *Zippo* framework should be rejected and traditional principles should govern the inquiry. Indeed, the time-tested (though admittedly flawed) traditional principles are much more likely to operate better in this area than the newly crafted tests developed by judges attempting to accommodate a nascent, evolving technology and its imagined future.²⁸⁷ The Internet-specific approaches that the circuits have announced have been developed based on the notion that an application of unaltered traditional principles would result in defendants being subject to jurisdiction in every state, simply on the basis of the “omnipresence” of the Internet and information posted on it.²⁸⁸ It was only a desire to limit this perceived outcome that has led courts to stray from traditional principles in the Internet context.²⁸⁹ But the fears of universal jurisdiction appear to have been overblown. Traditional analysis provides several ways to limit the otherwise broad jurisdictional implications of acting in a medium that establishes contacts with every jurisdiction.²⁹⁰ Jurisdiction can only be asserted where the Internet activity serves as the basis for the cause of action and where jurisdiction is otherwise constitutionally reasonable. This will only be the case in a more limited number of jurisdictions than a defendant may have purposefully availed itself of via the Internet. Thus, there is less need for a distinct standard as articulated by the courts espousing a *Zippo*-based approach.

It may be the case that the jurisdictional consequences of applying traditional principles to network-mediated contacts—which are demonstrably not as broad as many courts fear—are not desired by some (or many) courts and commentators. If such is the case, an alteration of tra-

286. *Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984).

287. One author aptly stated the point as follows:

[T]he legal system . . . works best retrospectively, not prospectively. To put it another way, it's easier to learn from history than it is to learn from the future. . . . [T]he law is a tool that is built from the real problems we have already faced, not the imagined problems that, in the worst-case scenarios of the future, we may face someday.

This often means that the best thing to do, when technology opens up a new frontier . . . , is to sit and wait awhile and see how existing laws and institutions cope with the problems. . . . [A]lmost always, the time-tested laws and legal principles already in place are more than adequate to address the new medium.

GODWIN, *supra* note 4, at 299–300.

288. *ALS Scan, Inc. v. Digital Serv. Consultants*, 293 F.3d 707, 712 (4th Cir. 2002).

289. *See id.* at 712–13.

290. *See supra* text accompanying notes 119–213.

ditional principles to achieve more limited results will be necessary. That is what many circuit courts have in fact done.²⁹¹ But until the Supreme Court alters traditional principles, the handiwork of most courts seems to be premature at best, and activist at worst.

There is a larger issue that needs to be addressed, however. That is, what principles should determine a court's jurisdiction to adjudicate in the twenty-first century?²⁹² Are the principles of *International Shoe*²⁹³ of continuing vitality or have the doctrines it spawned become outdated?²⁹⁴ It is no secret that traditional personal jurisdictional doctrine has its shortcomings,²⁹⁵ not the least of which are the reasonableness analysis which has become "hopelessly subjective and unpredictable,"²⁹⁶ and the fact-specific nature of the minimum contacts approach requiring extensive and unpredictable case-by-case analysis.²⁹⁷ Although Justice Scalia once wrote, "There are times when even a bad rule is better than no rule at all," he also stated, "Predictability. . . is a needful characteristic of any law worthy of the name."²⁹⁸ The law of personal jurisdiction continues to be just the opposite—unpredictable—withstanding the Court's stated goal of articulating standards that would provide "a degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will

291. *E.g.*, *ALS Scan*, 293 F.3d at 712 ("Applying the traditional due process principles governing a State's jurisdiction over persons outside of the State based on Internet activity *requires some adaptation of those principles* because the Internet is omnipresent." (emphasis added)).

292. Commentators have begun to address this question. *See, e.g.*, Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 438–40 (1998) (discussing ways that personal jurisdiction doctrine should be realigned to meet the needs of the twenty-first century).

293. 326 U.S. 310 (1945).

294. Justice William Brennan, commenting on the effects of the passage of time on *International Shoe*, remarked, "*International Shoe's* jurisdictional principle . . . may be outdated. . . [B]oth the nationalization of commerce and the ease of transportation and communication have accelerated in the generation since 1957. The model of society on which the *International Shoe* Court based its opinion is no longer accurate." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 307–08 (1980) (Brennan, J., dissenting) (footnote omitted).

295. Many commentators have addressed the problems with the *International Shoe* standard. *See, e.g.*, Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 564 (1995) ("The only fair conclusion is that jurisdiction in the United States is a mess."); Jay Conison, *What Does Due Process Have to Do With Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) (describing the law of personal jurisdiction in the wake of *International Shoe* as "a body of law whose purpose is uncertain, whose rules and standards seem incapable of clarification, and whose connection to the Constitution cannot easily be divined"); McMunigal, *supra* note 41, at 189 ("Ambiguity and incoherence have plagued the minimum contacts test for the more than five decades during which it has served as a cornerstone of the Supreme Court's personal jurisdiction doctrine.").

296. Spencer, *supra* note 176, at 221.

297. *See, e.g.*, Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 767 (2003) ("The irony is that the Court sacrificed predictability for fairness and now the result is only what one judge—or a majority of judges—concludes is fair in an individual case. The minimum contacts test certainly does not guarantee 'fair' decisions. Instead, it guarantees that each case will turn on what one judge thinks fair.").

298. Justice Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

not render them liable to suit.”²⁹⁹ Just as the rule of *Pennoyer v. Neff*³⁰⁰ cracked and ultimately crumbled over time,³⁰¹ so too may the minimum contacts approach of *International Shoe* suffer a similar fate. Consideration of this issue, however, is beyond the scope of this article.³⁰²

For now, suffice it to say that any approach that purports to apply traditional jurisdictional principles to the Internet will inevitably suffer from many of the same flaws that characterize traditional doctrine and its concepts. Thus, when asking what the limits of Internet-based jurisdiction should be, as one commentator aptly put it, “There will be no good answer to this question until the rules for personal jurisdiction in the real world are reformed to make them both coherent and just.”³⁰³ In the meantime, defendants whose contacts with a forum are mediated through cyberspace deserve to be judged by the same traditional jurisdictional standards used to judge assertions of jurisdiction based on contacts made in real space.

299. *World-Wide Volkswagen*, 444 U.S. at 297.

300. 95 U.S. 714, 720 (1877).

301. Christopher D. Cameron & Kevin R. Johnson, *Death of A Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 782 (1995) (describing the demise of the *Pennoyer* regime and explaining that “territoriality proved too inflexible a tool for a developing national economy”).

302. This issue is taken up in a forthcoming article by the author. See Spencer, *supra* note 213.

303. Sheehan, *supra* note 292, at 438.