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Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law I would like to thank Professor Marc Arkin for her valuable help with this Note.

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NOTES

GENERAL JURISDICTION AND INTERNET CONTACTS: WHAT ROLE, IF ANY, SHOULD THE *ZIPPO* SLIDING SCALE TEST PLAY IN THE ANALYSIS?

*Eric C. Hawkins**

INTRODUCTION

Since the mid-1990s, courts have struggled with the issue of whether to assert personal jurisdiction over an out of state defendant who has established contacts with the forum state via the Internet. As courts searched for a way to apply the conventional "minimum contacts" rule to Internet activity, the "sliding scale" test of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[1] emerged as the most popular framework for analyzing Internet contacts. But since *Zippo* was decided in 1997, numerous flaws have emerged in the sliding scale test, and critics have questioned the test's continuing usefulness.[2] Courts disagree as to whether *Zippo* is the proper standard for general jurisdiction cases.[3] This Note focuses on that question.

Part I of this Note provides background material on the concept of personal jurisdiction and the "minimum contacts" test used to determine when a court has jurisdiction over an out of state defendant. Part I also examines the emergence of the *Zippo* test and some reactions to it. Part II explores the split among courts over what role, if any, *Zippo* should play in a general jurisdiction analysis. Part III argues that the *Zippo* test is inconsistent with the Supreme Court's general jurisdiction doctrine and is under-protective of due process rights in the general jurisdiction context. Therefore, this Note proposes that courts abandon *Zippo* in general jurisdiction cases and refocus the analysis on traditional minimum contacts doctrine.

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* J.D. Candidate, 2007, Fordham University School of Law. I would like to thank Professor Marc Arkin for her valuable help with this Note.

1. 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (introducing a "sliding scale test" for determining whether to assert personal jurisdiction over an out of state defendant in the Internet context).
2. *See infra* Part I.B.3.
3. *See infra* Part II.

I. PERSONAL JURISDICTION BACKGROUND

Part I of this Note surveys fundamental personal jurisdiction concepts and their application in the Internet age. First, it covers the evolution of the U.S. Supreme Court's minimum contacts framework, from the origin of the minimum contacts concept in *International Shoe Co. v. Washington*[4] through the Court's most recent major refinement of it in *Asahi Metal Industry Co. v. Superior Court of California*.[5] Next, this part examines the Zippo sliding scale test, which attempts to adapt minimum contacts analysis to Internet activities.[6] Part I concludes by presenting some reactions to *Zippo* and post-*Zippo* trends in Internet-based personal jurisdiction.

A. *Due Process and the Evolution of Minimum Contacts*

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to issue binding judgments on out of state defendants who do not have sufficient connections with that state.[7] This section of the Note examines the ways in which the Supreme Court has defined that limitation.

1. The Minimum Contacts Rule

The Supreme Court addressed the constitutional limitations on the exercise of personal jurisdiction over an out of state defendant in *International Shoe*.[8] In *International Shoe*, the state of Washington sought personal jurisdiction over the International Shoe Company, a Delaware corporation that had its principal place of business in St. Louis, Missouri, but sold its products in Washington.[9] The state was attempting to recover from International Shoe unpaid contributions to the state unemployment fund.[10] The company argued that it did not have to contribute because it was not an employer within the meaning of the relevant statute.[11]

4. 326 U.S. 310, 316 (1945) (stating that due process requires that an out of state defendant have "certain minimum contacts" with the forum state in order to support personal jurisdiction).

5. 480 U.S. 102, 112 (1987). For further discussion of *Asahi*, see *infra* Part I.A.2.d.

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

7. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985); *cf.* U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."). The U.S. Supreme Court has repeatedly reaffirmed this constitutional limitation on jurisdiction. *See Asahi*, 480 U.S. at 108 ("The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant."); *see also* Calder v. Jones, 465 U.S. 783, 788 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant."); *Int'l Shoe*, 326 U.S. at 316.

8. 326 U.S. at 316.

9. *Id.* at 313.

10. *Id.* at 312.

11. *Id.*

International Shoe did not have an office or inventory in Washington.[12] Instead, the company employed between eleven and thirteen salesmen, working on commission, who displayed samples there.[13] When a customer made an order, the salesman would relay it to International Shoe's office in St. Louis, and the company would ship the merchandise to the customer.[14]

In deciding the case, the *International Shoe* Court formally articulated the due process protection to which an out of state defendant is entitled: A state may only exercise jurisdiction over a defendant that has "certain minimum contacts" with the state.[15] This is the "minimum contacts" rule. The rule is based on the premise that enjoying the benefits of acting within a state gives rise to certain responsibilities.[16] As the Court stated, "[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations . . . ."[17]

The purpose of the minimum contacts requirement is to ensure that an exercise of personal jurisdiction does not violate "'traditional notions of fair play and substantial justice.'"[18] To this end, the Court identified a range of levels of contact between a corporation and a forum.[19] Jurisdiction is proper when the corporation's activities in the forum are "continuous and systematic" and also give rise to the plaintiff's cause of action.[20] In that

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12. *Id.* at 313.
13. *Id.* at 313-14.
14. *Id.* at 314.
15. *See id.* at 316. Prior to *International Shoe*, personal jurisdiction was based on a defendant's physical presence in the forum state, although this rule was subject to numerous exceptions. *See* Jack H. Friedenthal et al., Civil Procedure § 3.10 (4th ed. 2005); *cf.* Pennoyer v. Neff, 95 U.S. 714 (1877). *International Shoe* was the Supreme Court's attempt to craft a more flexible personal jurisdiction standard that would be better suited for a mobile society. Friedenthal et al., *supra*, § 3.10. The Court moved away from the legal fiction of the "presence" requirement, reasoning that a measurement of the defendant's activities in the forum could take its place. *See id.*
16. *See Int'l Shoe*, 326 U.S. at 319. The Court has observed that, where a defendant has deliberately engaged in "significant activities" within a state or created "continuing obligations" between himself and residents of the state, he has "availed himself of the privilege of conducting business there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (citation omitted). Because such a person's activities are shielded by the benefits and protections of the state's laws, it is presumptively reasonable for him to be haled into court there. *See id.*
17. *Int'l Shoe*, 326 U.S. at 319.
18. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
19. *See id.* at 317-18. In one of the many post-*International Shoe* refinements of the minimum contacts rule, courts (including the Supreme Court) have conceptually separated "minimum contacts" from "fair play and substantial justice." Friedenthal et al., *supra* note 15, § 3.10. The result is a two-step test, in which a court first determines whether the defendant has sufficient minimum contacts and then decides whether exercising jurisdiction would offend "traditional notions of fair play and substantial justice." *Id.*; *see also Burger King*, 471 U.S. at 476 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" (quoting *Int'l Shoe*, 326 U.S. at 320)).
20. *See Int'l Shoe*, 326 U.S. at 317.

situation, a court may exercise specific jurisdiction over the out of state defendant, or, in other words, jurisdiction over the defendant with regard to a claim arising out of the defendant's contacts with the forum.[21] Additionally, specific jurisdiction may be available based on "the commission of some single or occasional acts of the corporate agent in [the] state," depending on the nature, quality, and circumstances of those acts.[22] The Court also introduced the possibility of exercising jurisdiction over a claim unrelated to the defendant's contacts with the forum if those contacts are sufficiently "substantial."[23] This last form of jurisdiction is known as "general jurisdiction."[24]

Applying the minimum contacts test, the Court found International Shoe's contacts with Washington to be "neither irregular nor casual," but rather "systematic and continuous."[25] Because the dispute arose out of those contacts, the Court did not address the issue of whether they were substantial enough to support general jurisdiction.[26] The Court concluded that the Washington state court could exercise jurisdiction over International Shoe consistent with traditional concepts of "fair play and substantial justice."[27]

2. Post-*International Shoe* Refinements of the Minimum Contacts Rule

The Supreme Court has clarified the minimum contacts doctrine several times since its 1945 ruling in *International Shoe*. Those refinements are discussed in this section.

a. *The* Calder *Effects Test*

The Supreme Court addressed personal jurisdiction in the tort context in *Calder v. Jones*.[28] In *Calder*, the actress Shirley Jones sued the National Enquirer and two of its employees, John South and Iain Calder, over an article that appeared in that magazine.[29] Jones brought claims in California state court for libel, invasion of privacy, and intentional infliction of emotional distress.[30] The Enquirer, which had a weekly circulation in

21. *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, 58 (2004).

22. *See Int'l Shoe*, 326 U.S. at 318; *see also* Condlin, *supra* note 21, at 58 (describing the exercise of jurisdiction in such a situation as specific jurisdiction). This form of specific jurisdiction, which covers cases in which the defendant's activity in the forum is sporadic or consists of only a single act, has often been used in tort claims against out of state motorists. *See* Friedenthal et al., *supra* note 15, § 3.10.

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

24. *See infra* Part I.A.3.

25. *Int'l Shoe*, 326 U.S. at 320.

26. *See id.* ("The obligation which is here sued upon arose out of those very activities.").

27. *Id.*

28. 465 U.S. 783 (1984).

29. *See id.* at 784-86.

30. *Id.* at 785.

California of approximately 600,000 copies, did not contest personal jurisdiction.[31] However, South (the writer) and Calder (the editor), both Florida residents, objected to personal jurisdiction.[32]

South researched the article primarily by making calls from Florida to California.[33] There was a dispute as to whether South had traveled to California in connection with the article, but the Court did not consider the issue, because doing so was unnecessary to resolve the case.[34] Calder, who approved the subject of the article and edited its final form, had no other relevant contacts with California.[35]

Despite what appeared to be limited direct contact between the defendants and the forum state, the Court upheld jurisdiction.[36] The Court based this result on the effects that the defendants' out of state conduct had within the forum and the fact that the defendants had targeted the forum state with their conduct.[37] The brunt of the harm that the defendants caused was felt in California, and the Court concluded that the defendants had "expressly aimed" their intentional actions there.[38] Because the defendants could reasonably anticipate being haled into court in California, jurisdiction was proper.[39]

b. World-Wide Volkswagen Co. v. Woodson *and Foreseeability*

World-Wide Volkswagen presented the Supreme Court with the issue of whether a defendant that sells a product in interstate commerce is subject to suit wherever the product creates a cause of action.[40] In *World-Wide Volkswagen*, the plaintiffs bought an Audi from a car dealer in New York.[41] While the plaintiffs were driving through Oklahoma, another car struck theirs, causing a fire that severely injured them.[42] The plaintiffs brought suit in Oklahoma state court against, among others, the retail distributor, World-Wide Volkswagen, and the retail dealer, Seaway, both of which were incorporated in New York and had their places of business there.[43]

The Court held that, despite the fact that the defendants' product could foreseeably cause injury in Oklahoma, the defendants were not subject to personal jurisdiction there.[44] To rule otherwise, the Court reasoned, would

31. *Id.*
32. *Id.* at 785-86.
33. *Id.* at 785.
34. *Id.* at 785 n.4.
35. *See id.* at 786.
36. *Id.* at 791.
37. *See id.* at 789.
38. *See id.*
39. *Id.* at 790 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).
40. *See World-Wide Volkswagen*, 444 U.S. at 287.
41. *Id.* at 288.
42. *Id.*
43. *See id.* at 288-89.
44. *See id.* at 295.

mean that every seller of chattels would be subject to suit wherever his chattels were taken.[45] The Court did not hold that foreseeability was totally irrelevant in the personal jurisdiction analysis, however.[46] But the foreseeability that matters for purposes of personal jurisdiction is not the possibility that the defendant's product could somehow end up in the forum state.[47] Instead, the issue was whether the defendant "should reasonably anticipate being haled into court [in the forum state]."[48] Contacts sufficient to establish personal jurisdiction exist when the defendant has purposefully availed itself of the benefits and privileges of conducting activities within the forum state.[49] The *World-Wide Volkswagen* defendants did not have those kinds of contacts with Oklahoma, so the Court refused to authorize jurisdiction.[50]

c. Burger King Corp. v. Rudzewicz*'s Two-Part Test*

Burger King involved a breach of contract claim by Burger King, a Florida corporation, against a Michigan franchisee.[51] Burger King brought suit in the U.S. District Court for the Southern District of Florida.[52] The district court took jurisdiction, but the U.S. Court of Appeals for the Eleventh Circuit reversed.[53] The Supreme Court reversed the Eleventh Circuit, allowing the district court to exercise personal jurisdiction over the out of state defendant.[54] In reaching this conclusion, the Court announced a two-part personal jurisdiction test. First, a court should look to the defendant's actions to determine whether he has purposefully availed himself of the privilege of conducting business in the forum state, thereby enjoying the benefits and protections of that state's laws.[55] Second, if the court determines that the defendant has purposefully established minimum contacts, the court should consider whether the exercise of personal jurisdiction would be consistent with traditional notions of "'fair play and substantial justice.'"[56]

In applying the second prong of the test, a court can consider a multitude of factors, including the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interests, the interstate judicial system's interest in the efficient resolution of controversies, and the shared

45. *See id.* at 296.
46. *See id.* at 297.
47. *See id.*
48. *Id.*
49. *See id.* (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
50. *See id.* at 299.
51. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464 (1985).
52. *Id.* at 468.
53. *Id.* at 469-70.
54. *See id.* at 487.
55. *See id.* at 476.
56. *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).

interests of the states in furthering fundamental social policies.[57] If those considerations favor jurisdiction, then jurisdiction will exist under a lesser showing of minimum contacts than would otherwise be required.[58] But where a defendant has purposefully directed his activities at the forum state, he must show a high level of unreasonableness in order to defeat jurisdiction.[59]

d. Asahi Metal Industry Co. v. Superior Court of California *and the Stream of Commerce*

In *Asahi*, the Court addressed the issue of whether a defendant establishes minimum contacts with a forum state by placing its product in the "stream of commerce" with knowledge that the product might end up in the forum.[60] *Asahi* was a products-liability case arising out of a motorcycle accident.[61] The plaintiff brought suit in California state court, and one of the defendants sought to implead Asahi, a Japanese corporation that had manufactured a component part of the motorcycle.[62] A small percentage of Asahi's annual sales were to Cheng Shin, a Taiwanese firm that manufactured part of the plaintiff's motorcycle, and approximately twenty percent of Cheng Shin's sales were to California.[63]

The Court did not allow California to take jurisdiction over Asahi.[64] Writing for a plurality, Justice Sandra Day O'Connor reiterated the Court's statement in *Burger King* that minimum contacts require "an action of the defendant purposefully directed toward the forum State."[65] The placement of a product in the stream of commerce, without more, is not an act purposefully directed at the forum state.[66] As the Court held in *World-Wide Volkswagen*, the mere fact that the defendant's product had created a cause of action in the forum did not create personal jurisdiction over the defendant there.[67] However, a defendant could, through additional conduct, indicate an intent to serve the forum.[68] Such conduct might include designing the product for the forum market, advertising in the forum, establishing channels to provide regular advice to customers in the forum, or marketing the product through a distributor in the forum.[69]

57. *See id.* at 477 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).
58. *Id.*
59. *Id.* For more on the reasonableness requirement, see *infra* Part I.A.3.b.
60. *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 105 (1987).
61. *See id.* at 105-06.
62. *See id.* at 106.
63. *See id.*
64. *Id.* at 116.
65. *Id.* at 112 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)) (emphasis omitted).
66. *Id.*
67. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).
68. *Id.*
69. *Asahi*, 480 U.S. at 112.

3. General Jurisdiction

When the Supreme Court articulated the minimum contacts rule in *International Shoe*, it acknowledged the possibility that a court could, consistent with due process, exercise personal jurisdiction over an out of state defendant on a cause of action unrelated to the defendant's contacts with the forum state.[70] That form of jurisdiction has come to be known as general jurisdiction.[71] This section explores the evolution of general jurisdiction in the sixty-one years since *International Shoe.*

a. *The Supreme Court's Major General Jurisdiction Cases*

Although *International Shoe* clearly stated that courts may in certain circumstances exercise jurisdiction over a defendant on a cause of action unrelated to the defendant's forum state activities,[72] the Supreme Court has done little to further develop the concept of general jurisdiction.[73] In fact, the Court directly addressed general jurisdiction only twice since deciding *International Shoe* in 1945.[74] As a result, some commentators feel that the Court has provided insufficient guidance as to when general jurisdiction exists.[75]

i. *Perkins v. Benguet Consolidated Mining Co.*

The Court's first general jurisdiction case, and the only one in which it has upheld general jurisdiction, was *Perkins v. Benguet Consolidated Mining Co.*[76] *Perkins* was a shareholder suit brought in Ohio state court against a mining company based in the Philippine Islands.[77] During the Korean War, the company carried on a "continuous and systematic, but

70. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

71. Condlin, *supra* note 21, at 58; *see also* Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408 (1984).

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

73. *See* Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 Seton Hall L. Rev. 807, 808 (2004).

74. *See* 16 James Wm. Moore et al., Moore's Federal Practice § 108.41[3] (3d ed. 2005) ("Beyond *Perkins* and *Helicopteros*, the Supreme Court has offered little guidance on the issue of general jurisdiction . . . .").

75. *See* Rhodes, *supra* note 73, at 808, 810 ("Unfortunately, neither decision [*Helicopteros* or *Perkins*] provided much illumination regarding the due process strictures for general *in personam* jurisdiction, as the Court never developed either a theoretical foundation or a framework for resolving this query. . . . The resulting lack of predictability contravenes notions of both fairness and efficiency . . . ."); *see also* Walter W. Heiser, *Toward Reasonable Limitations on the Exercise of General Jurisdiction*, 41 San Diego L. Rev. 1035, 1041-42 (2004) (arguing that the Supreme Court has provided limited guidance and a lack of direction regarding the reasonableness inquiry in general jurisdiction cases).

76. 342 U.S. 437 (1952). The Court did not uphold general jurisdiction in the only other case in which it focused on the issue. *See Helicopteros*, 466 U.S. at 418-19.

77. *Perkins*, 342 U.S. at 439.

limited" part of its business in Ohio; the cause of action was unrelated to those activities.[78]

In *Perkins*, the Court reaffirmed its position (as stated in *International Shoe*) regarding the availability of general jurisdiction: There are situations where a corporation's activities in a state justify subjecting it to suit on an unrelated cause of action.[79] The test is simple, if somewhat vague: Are the defendant's activities in the forum substantial enough to justify such a suit?[80] The *Perkins* defendant's activities[81] met this standard, and therefore Ohio could take jurisdiction consistent with due process.[82]

ii. *Helicopteros Nacionales de Colombia, S.A. v. Hall*

The Court next took up general jurisdiction thirty-two years later in *Helicopteros Nacionales de Colombia, S.A. v. Hall.*[83] Although the Court claimed to be following *Perkins*, and discussed that case at length,[84] it subtly but significantly reformulated the general jurisdiction test. In *Perkins*, the Court described the defendant's contacts with the forum as "continuous and systematic,"[85] but it clearly stated that the appropriateness of general jurisdiction would depend on whether they were "sufficiently substantial."[86] In *Helicopteros*, however, the Court described the general jurisdiction test as whether the defendant's contacts with the forum "constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*."[87] This was a rhetorical break not only with *Perkins*, but with *International Shoe* as well, which had also stated that general jurisdiction requires substantial contacts with the forum.[88]

b. Metropolitan Life Insurance Co. v. Robertson-Ceco Corp. *and the Reasonableness Requirement*

In addition to the requirement that the defendant's contacts with the forum be continuous, systematic, and substantial, due process also requires

78. *Id.* at 438.

79. *See id.* at 446 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 318-19 (1945)).

80. *See id.* at 447.

81. *See id.* at 447-48. The company had effectively relocated its headquarters to Ohio for the duration of the Korean War. The company president had engaged in the following activities in Ohio: maintaining an interim office, carrying on correspondence, drawing on checks, maintaining two bank accounts, holding directors' meetings, and generally discharging his presidential duties. *Id.*

82. *Id.* at 448.

83. 466 U.S. 408 (1984).

84. *See id.* at 414-15.

85. *See Perkins*, 342 U.S. at 438.

86. *See id.* at 447.

87. *Helicopteros*, 466 U.S. at 416.

88. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945). For more on the difference between "substantial" and "continuous and systematic," see *infra* notes 101-08 and accompanying text.

that the exercise of general jurisdiction be reasonable.[89] The Supreme Court has deemed a number of factors relevant to the reasonableness inquiry: the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining 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 substantive social policies.[90] The more reasonable that personal jurisdiction would be in light of these factors, the fewer contacts necessary.[91] Conversely, a defendant who has purposefully directed activities at the forum state will have to show a high degree of unreasonableness in order to defeat jurisdiction.[92] The Supreme Court has provided only limited guidance as to what the various reasonableness factors mean and how they should be weighed, leading some to criticize the reasonableness inquiry as ambiguous and unpredictable.[93]

The reasonableness inquiry rarely prevents the exercise of general jurisdiction when the defendant's contacts with the forum are otherwise sufficient.[94] However, it is not completely toothless.[95] The Second Circuit used it to decline general jurisdiction in *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*[96] In that case, Metropolitan Life Insurance Co. ("Met Life"), a New York corporation with its principal place of business in New York, brought suit in Vermont against Robertson-Ceco, a Delaware corporation with its principal place of business in Pennsylvania, based on events that occurred in Florida.[97]

The court found the defendant's contacts with the forum to be sufficient for general jurisdiction, although it was a close case, falling somewhere between *Perkins* and *Helicopteros*.[98] Despite the contacts, the court

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89. *See* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 113-14 (1987) (listing factors that determine the reasonableness of asserting personal jurisdiction over an out of state defendant); *see also* 16 Moore et al., *supra* note 74, § 108.41[1].

90. *Asahi*, 480 U.S. at 113 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (listing the same factors as *Asahi*).

91. *See Burger King*, 471 U.S. at 477.

92. *See id.*

93. *See* Heiser, *supra* note 75, at 1041. Professor Walter W. Heiser believes, however, that a clearer picture of the meanings of the reasonableness requirement is emerging from the lower courts. *Id.* at 1042.

94. 16 Moore et al., *supra* note 74, § 108.41[1]. Reasonableness is a more important factor in specific jurisdiction cases. *Id.* While *Asahi* and *Burger King* were specific jurisdiction cases, there is a clear consensus among the federal circuits that the reasonableness inquiry applies to general jurisdiction as well. *See* Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 573 (2d Cir. 1996). However, the Second Circuit has interpreted *Burger King* as standing for the proposition that dismissals based on unreasonableness should be "few and far between." *Id.* at 575.

95. *Cf. Met Life*, 84 F.3d at 573-75 (finding sufficient contacts for general jurisdiction, but declining to assert general jurisdiction because doing so would be unreasonable).

96. *See id.*

97. *Id.* at 564-65. Met Life brought suit in Vermont for statute of limitations purposes. *Id.* at 565.

98. *See id.* at 571-73.

declined to assert general jurisdiction over Robertson-Ceco in Vermont, because doing so would be "decidedly unreasonable."[99] Among other factors, the dispute "implicate[d] absolutely no interest of the State of Vermont," and Met Life failed to show that trying the case there would further any substantive social policy.[100]

c. *Scholarly Analysis of the Supreme Court's General Jurisdiction Doctrine*

According to *International Shoe*, general jurisdiction is available when the defendant's contacts with the forum are sufficiently "substantial."[101] In subsequent cases, however, both the Supreme Court and lower courts have strayed from this formulation, using the phrase "continuous and systematic" instead.[102] This shift in terminology has caused further confusion in the already poorly defined area of general jurisdiction.[103] As Professor Robert J. Condlin points out, the term "substantial" was the key difference between specific and general jurisdiction in *International Shoe*:[104] "[T]o interpret the requirement of 'continuous and systematic' contacts to mean the same thing as 'substantial' contacts is just a mistake, no matter how frequently it is made."[105] And it is a mistake with serious implications:

> Lower courts (and even the Supreme Court, in *Burger King*) routinely quote *Helicopteros* for the proposition that general jurisdiction requires only "continuous and systematic" in-state activity, find this requirement satisfied by some form of doing business in the state, and then routinely take general jurisdiction over corporations carrying on any minimal amount of commercial activity in the state. This is a mistake not only for reasons of policy and principle . . . but also because it gets the doctrinal standard wrong.[106]

Condlin argues that, as a result of this confusion, the concept of general jurisdiction has become so "watered down" that it is often actually easier to satisfy its requirements than to satisfy the requirements of specific jurisdiction, which were intended to be less restrictive.[107] As a result, many

99. *Id.* at 575.
100. *Id.* at 574-75.
101. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).
102. *See supra* Part I.A.3.a.ii.
103. *See* Condlin, *supra* note 21, at 71.
104. *Id.*
105. *Id.* at 72.
106. *Id.* at 100.
107. *Id.* at 120. Condlin claims that lower courts "often find general jurisdiction present when a defendant has engaged in just about any kind of regular business in a state, no matter how minimal." *Id.* at 124 & n.474 (listing courts that have done this). One student commentator has drawn the opposite conclusion, arguing that the lack of Supreme Court guidance has caused courts to "virtually abandon" general jurisdiction. *See* Kristina L. Angus, Note, *The Demise of General Jurisdiction: Why the Supreme Court Must Define the Parameters of General Jurisdiction*, 36 Suffolk U. L. Rev. 63, 65 (2002).

courts treat *Helicopteros* as holding that simply doing business in a state is sufficient to support general jurisdiction.[108]

B. *The Internet: Courts Struggle to Adapt the Minimum Contacts Rule to a New Technological Medium*

The Supreme Court has refined the minimum contacts framework approximately once every twenty years since deciding *International Shoe* in 1945.[109] In the twenty-one years since *Burger King*, which the Court decided in 1985, the Internet has dramatically transformed commerce and communication.[110] By one estimate, over sixty-eight percent of the U.S population uses the Internet.[111] The U.S. Census Bureau estimates that, in the third quarter of 2005, online commerce in the U.S. amounted to $22.3 billion, or 2.3 percent of total sales in the economy.[112] Five years ago, the portion of total U.S. sales attributed to e-commerce was about one percent.[113] Yet the Supreme Court has not adapted the minimum contacts framework to the Internet age. This section of the Note examines the attempts of lower courts to do so.

1. Pre-*Zippo* Internet Jurisdiction

Determining when Internet activity can constitute sufficient minimum contacts for personal jurisdiction has been a challenge for courts,[114] and the early results were met with "widespread academic despair."[115] *Inset Systems, Inc. v. Instruction Set, Inc.*,[116] a major pre-*Zippo* Internet jurisdiction case,[117] is an early example of a court struggling with this challenge. *Inset* was a trademark infringement case.[118] After the plaintiff had already registered "Inset" as its trademark, the defendant registered the Internet domain name "inset.com."[119] The defendant had few non-Internet

108. Condlin, *supra* note 21, at 125.

109. *See id.* at 147.

110. *See* Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DePaul L. Rev. 1147, 1148 (2005). For an explanation of how the Internet functions, see *id.* at 1153-56.

111. Internet World Stats: Usage and Population Statistics, Internet Usage Statistics for the Americas, http://www.internetworldstats.com/stats2.htm (last visited Jan. 19, 2006).

112. U.S. Census Bureau News, Quarterly Retail E-Commerce Sales, 3rd Quarter 2005 (2005), *available at* http://www.census.gov/mrts/www/data/html/05Q3.html.

113. *Id.*

114. *See* 16 Moore et al., *supra* note 74, § 108.44[1]; *see also* Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L.J. 1345, 1345 (2001); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 Nw. U. L. Rev. 411, 429 (2004) ("The challenge of the Internet is that it has blurred the line between local and global actions.").

115. Stein, *supra* note 114, at 411.

116. 937 F. Supp. 161 (D. Conn. 1996).

117. *See* Yokoyama, *supra* note 110, at 1156 (referring to *Inset* as a "significant precursor" to *Zippo*).

118. *Inset*, 937 F. Supp. at 162.

119. *Id.* at 163.

contacts with the forum state (Connecticut).[120] The plaintiff argued that the defendant's 1-800 number and web site, both of which the defendant had allegedly used to conduct business in Connecticut, were sufficient contacts to establish personal jurisdiction.[121]

The court agreed, indicating that the web site alone was enough to support the result.[122] What made this case so disturbing to those who advocate limited state powers of personal jurisdiction[123] was the court's exceedingly broad view of Internet jurisdiction.[124] The defendant had used its web site, which was continuously available in Connecticut, to direct advertising toward the state.[125] According to the court, that meant the defendant had purposefully availed itself of the privilege of doing business with the state and could reasonably anticipate being haled into court there.[126] Therefore, Connecticut could assert personal jurisdiction.[127]

Although some other courts approved of *Inset*,[128] scholars have generally been critical of it.[129] Professor Dennis T. Yokoyama, for example, believes that *Inset* and its progeny were leading courts towards establishing universal personal jurisdiction, because under their reasoning a web site operator would be subject to jurisdiction wherever the site could be viewed.[130] Yokoyama and others argue further that the premise of *Inset*—that Internet advertising alone establishes personal jurisdiction—is contrary to the Supreme Court's concept of purposeful availment.[131] Yokoyama maintains that *Inset*'s expansive approach to Internet jurisdiction would have stifled e-commerce and significantly harmed smaller merchants.[132]

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120. *See id.* at 162-63.

121. *Id.* at 164.

122. *See id.* ("The court concludes that advertising via the Internet is solicitation of a sufficient repetitive nature to satisfy . . . the Connecticut long-arm statute . . . thereby conferring Connecticut's long-arm jurisdiction . . . .").

123. *See infra* notes 377-82 and accompanying text.

124. *Cf. Inset*, 937 F. Supp. at 165.

125. *Id.*

126. *Id.*

127. *Id.* at 166.

128. *See* Yokoyama, *supra* note 110, at 1157 (citing TELCO Commc'ns Group, Inc. v. An Apple a Day, Inc., 977 F. Supp. 404, 406 (E.D. Va. 1997); Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 4 (D.D.C. 1996)).

129. *See id.* at 1160; *see also* Geist, *supra* note 114, at 1362 (arguing that *Inset*'s conclusion that creating a web site amounts to purposeful availment in every jurisdiction where the site is accessible "distorts the fundamental principle of jurisdiction").

130. *See* Yokoyama, *supra* note 110, at 1161.

131. *See id.* at 1159-62; *see also* Bunmi Awoyemi, Zippo *Is Dying, Should It Be Dead?: The Exercise of Personal Jurisdiction by U.S. Federal Courts Over Non-Domiciliary Defendants in Trademark Infringement Lawsuits Arising Out of Cyberspace*, 9 Marq. Intell. Prop. L. Rev. 37, 46 (2005) (referring to *Inset*'s "over-expansion" of the personal jurisdiction doctrine).

132. Yokoyama, *supra* note 110, at 1165-66.

2. *Zippo* and the Sliding Scale Test

In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[133] the Western District of Pennsylvania announced a new personal jurisdiction framework for evaluating Internet contacts, a framework that a majority of federal courts have since adopted.[134] The case involved a series of trademark claims by Zippo Manufacturing (maker of Zippo lighters) against Zippo Dot Com.[135] Zippo Manufacturing filed suit in the Western District of Pennsylvania.[136] Zippo Dot Com, a California corporation that ran an Internet news web site, moved to dismiss for lack of personal jurisdiction.[137] The defendant's contacts with the forum state "occurred almost exclusively over the Internet": The defendant did not have offices, employees, or agents in the forum; it advertised there only through its web site; and only two percent of its news service subscribers lived there.[138]

Because the dispute arose from the name of the web site itself, the plaintiff sought specific, not general, jurisdiction over Zippo Dot Com.[139] After reviewing the major personal jurisdiction cases (including *World-Wide Volkswagen*, *International Shoe*, and *Burger King*), the court sought to apply the principles behind those cases to the new technological medium with which it was faced.[140] Reasoning that the constitutionality of an exercise of personal jurisdiction is proportionate to the "nature and quality of commercial activity that an entity conducts over the Internet," the court announced a "sliding scale" test for Internet-based personal jurisdiction:

> 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

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133. 952 F. Supp. 1119 (W.D. Pa. 1997).

134. *See infra* note 208; *see also* 16 Moore et al., *supra* note 74, § 108.44[1] (observing that most courts apply the sliding scale).

135. *Zippo*, 952 F. Supp. at 1121. Zippo Dot Com had been maintaining a web site on which the word "Zippo" appeared numerous times. *Id.*

136. *Id.* at 1119.

137. *Id.* at 1121.

138. *Id.*

139. *Id.* at 1122.

140. *See id.* at 1124 ("This sliding scale is consistent with well developed personal jurisdiction principles.").

> commercial nature of the exchange of information that occurs on the Web site.[141]

The court then found Zippo Dot Com's web site to be interactive in nature and upheld jurisdiction.[142] It noted that the defendant was doing business over the Internet and had entered into thousands of electronic contracts with forum residents.[143]

3. Reactions to *Zippo*

The *Zippo* sliding scale test has become the most influential Internet jurisdiction framework by an "overwhelming margin."[144] Part of the reason for the test's widespread acceptance was that courts had been eagerly searching for a single personal jurisdiction standard for all Internet cases.[145] *Zippo*'s approval was not undeserved; Professor Yokoyama argues that *Zippo* was an improvement over the *Inset* line of cases because it was "much more consistent" with established personal jurisdiction doctrine,[146] and because the *Zippo* court extended the minimum contacts rule to the Internet.[147] Although he ultimately advocates minimizing the overall role of the sliding scale test,[148] Yokoyama nevertheless praises *Zippo* for its "incisive questioning and well-reasoned undermining of the *Inset* rationale and its thoughtfulness in creating an alternative approach to Internet jurisdiction."[149]

Carlos J.R. Salvado has described *Zippo* as "a thoughtful opinion that remained true to the established principles of personal jurisdiction."[150] Professor Michael A. Geist believes that the *Zippo* test is "grounded in traditional jurisdictional principles," particularly foreseeability.[151] Geist praises *Zippo* for rejecting the concept of the Internet as a separate jurisdiction and making clear that local law still applies to the Internet.[152]

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141. *Id.* (citations omitted).

142. *Id.* at 1125.

143. *Id.* at 1125-26.

144. Condlin, *supra* note 21, at 133; *see also* Awoyemi, *supra* note 131, at 47 (stating that *Zippo* was, for a time, the seminal case on Internet-based minimum contacts); Yokoyama, *supra* note 110, at 1149.

145. *See* Yokoyama, *supra* note 110, at 1149 (observing that many courts adopted *Zippo* in a "zealous and understandable quest to adopt a single standard for all Internet jurisdiction issues").

146. *Id.* at 1160.

147. *See id.* at 1164.

148. *See id.* at 1195 ("The decision in *Zippo* . . . should not be applied to all personal jurisdiction issues involving the Internet.").

149. *Id.* at 1157.

150. Carlos J.R. Salvado, *An Effective Personal Jurisdiction Doctrine for the Internet*, 12 U. Balt. Intell. Prop. L.J. 75, 103 (2002).

151. Geist, *supra* note 114, at 1371; *cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (discussing the relevance of foreseeability for personal jurisdiction purposes).

152. *See* Geist, *supra* note 114, at 1371; *cf.* Salvado, *supra* note 150, at 76 (rejecting the notion that our legal system must "succumb to cyberspace, accepting it as a distinct area that it can not control" simply because the Internet itself does not respect geographical

While *Zippo* is preferable to the *Inset* rationale, which might have led to universal Internet-based personal jurisdiction,[153] it has nevertheless drawn much criticism. This criticism has come from courts[154] as well as scholars.[155] Some critics are harsh; one commentator described the *Zippo* test as "arbitrary" and "an egregious failure of legal imagination."[156] The critics have pointed out several flaws: The test is inconsistent with established minimum contacts jurisprudence; it is too vague, creating uncertainty; courts have applied it in inappropriate cases; and the test is bad for policy reasons.[157]

a. Zippo *Is Inconsistent with Traditional Minimum Contacts Doctrine*

The U.S. District Court for the District of Oregon issued a thorough critique of the *Zippo* test in *Millennium Enterprises, Inc. v. Millennium Music, LP.*[158] Although the defendant's web site in that case was probably interactive enough to support jurisdiction under the middle range of *Zippo*, the court declined to exercise jurisdiction, finding that the sliding scale test needed "further refinement" in order to be consistent with established minimum contacts doctrine.[159] The test needed "something more" to encapsulate the critical requirement of minimum contacts, which is deliberate action in the forum state or conduct directed at forum residents.[160] The maintenance of a web site does not by itself satisfy the purposeful availment requirement, even if the web site is interactive.[161] The court apparently saw itself as faced with a choice between basing jurisdiction on an interactive web site (which *Zippo* would have authorized) or sticking with the Supreme Court's traditional minimum contacts

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boundaries). For further arguments that conventional laws should remain supreme over Internet technology, see generally Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. Pa. L. Rev. 1951 (2005).

153. *See* Yokoyama, *supra* note 110, at 1160. For discussion of the implications of *Inset*, see *supra* notes 116-32 and accompanying text.

154. *See, e.g.*, Hy Cite Corp. v. Badbusinessbureau.com, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004) ("[A] rigid adherence to the *Zippo* test is likely to lead to erroneous results.").

155. *See* Yokoyama, *supra* note 110, at 1166-67 (observing that courts and commentators have been increasingly attacking *Zippo*).

156. Stein, *supra* note 114, at 430.

157. *See infra* Part I.B.3.a-d.

158. 33 F. Supp. 2d 907 (D. Or. 1999).

159. *Id.* at 921.

160. *See id.*; *cf.* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985) (discussing the "purposeful availment" requirement). Carlos Salvado's proposal for addressing Internet-based personal jurisdiction issues is also based on the requirement of "something more." *See* Salvado, *supra* note 150, at 78. Salvado argues that a state should have the power to assert personal jurisdiction over parties that, by some "additional conduct," cause the effects of the Internet upon the state to be "intensified." *Id.* Salvado identifies three ways in which such intensification can occur: "[c]ommercial sales, contracts, or the infliction of intentional harm through the use of a website." *Id.*

161. *See Millennium Music*, 33 F. Supp. 2d at 923.

requirement of purposeful availment, and the court chose the latter course.[162]

The U.S. District Court for the Western District of Wisconsin has also observed potential inconsistencies between *Zippo* and the Supreme Court's traditional minimum contacts doctrine.[163] In *Hy Cite Corp. v. Badbusinessbureau.com*, a trademark infringement case, the court compared *Zippo* with the established personal jurisdiction concepts of the effects test and purposeful availment.[164] The *Hy Cite* court questioned both the necessity of a separate personal jurisdiction test for Internet contacts and the *Zippo* court's authority to create such a test.[165] The *Hy Cite* court also observed that the Supreme Court has never instructed lower courts to apply different personal jurisdiction standards depending on the type of contacts involved in a case.[166] The court appeared to doubt the usefulness of the sliding scale terminology, arguing that a court cannot determine whether personal jurisdiction is appropriate simply by deciding whether a web site is "passive" or "active":

> Even a "passive" website may support a finding of jurisdiction if the defendant used [it] to harm the plaintiff in the forum state. . . . Similarly, an "interactive" or commercial website may not be sufficient to support jurisdiction if it is not aimed at residents in the forum state. . . . Thus, a rigid adherence to the *Zippo* test is likely to lead to erroneous results.[167]

b. *The Sliding Scale Is Too Vague and Lacks Predictive Value*

Professor Condlin argues that the sliding scale is excessively vague and flexible, effectively giving courts license to apply whatever factors however they want in a totality of the circumstances test.[168] Condlin claims that *Zippo* is

> susceptib[le], in the hands of a willful judge, to being turned into a kind of all-purpose balancing test. Its open-ended and flexible terms permit a judge to take all types of factors into account . . . and to weigh and compare those factors in whatever fashion the judge thinks appropriate, without necessarily having to rank the factors or make any one of them (e.g., the purposefulness of the defendant's forum contacts) first among equals.[169]

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162. *See id.* ("[T]his court will not abandon the basic principle that defendants must have taken some action to direct their activities in the forum so as to 'purposely avail' themselves of the privilege of doing business within [the forum].").

163. *See* Hy Cite Corp. v. Badbusinessbureau.com, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004).

164. *See id.* at 1160-61.

165. *See id.* at 1160 ("[I]n *Zippo*, the court did not explain under what authority it was adopting a specialized test for the internet or even why such a test was necessary.").

166. *See id.*

167. *Id.* (citation omitted).

168. *See* Condlin, *supra* note 21, at 137.

169. *Id.*

The result, Professor Condlin believes, is that the sliding scale test becomes a totality of the circumstances analysis, which is an approach that the Supreme Court has repeatedly rejected for personal jurisdiction.[170] *Zippo* may even undermine the well-settled notion that a defendant can avoid being haled into a particular state court by avoiding purposeful contacts with that state.[171]

Bunmi Awoyemi argues that the *Zippo* test currently offers little predictive value.[172] Few web sites are totally active or passive, so more of them fall into *Zippo*'s middle category, which is less predictive and useful than the two extreme ends of the sliding scale; this makes it hard for online actors to predict where they will be subject to suit.[173] Awoyemi believes that the decreasing usefulness of the sliding scale, combined with courts' increasingly sophisticated understanding of the Internet, has led some courts to move away from *Zippo* and towards a more traditional personal jurisdiction approach in Internet cases.[174] Professor Yokoyama also noted this problem with the *Zippo* test, describing it as having created "a black hole of doubt and confusion" which leaves courts to struggle with the question of whether an interactive web site constitutes purposeful availment.[175] Summarizing these concerns, Professor Geist commented that the *Zippo* test has "proven to be largely unhelpful as it provides parties with only limited guidance."[176]

c. *Courts Have Applied the Sliding Scale Incorrectly*

Several commentators argue that, regardless of the *Zippo* test's inherent value, courts have been misapplying it.[177] Salvado believes that some courts have made the sliding scale categories more important than the *Zippo* court intended.[178] Those categories were not meant to be "neat categorical and jurisdictionally dispositive boxes," but rather a conceptual tool to help a court understand the nature of a web site and its potential uses.[179] Some courts have forgotten that the *Zippo* court considered not only the potential

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170. *See id.*

171. *See id.*

172. *See* Awoyemi, *supra* note 131, at 61-62.

173. *See id.*; *see also* Richard A. Bales & Suzanne Van Wert, *Internet Web Site Jurisdiction*, 20 J. Marshall J. Computer & Info. L. 21, 32 (2001) (observing that *Zippo*'s "interactive" prong is ambiguous and has created problems for courts attempting to apply it). Web sites that are "interactive" fall in the middle of the sliding scale, where the court should decide whether to exercise jurisdiction based on "the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

174. *See* Awoyemi, *supra* note 131, at 62.

175. Yokoyama, *supra* note 110, at 1166-67. For more on the purposeful availment requirement, see *supra* notes 55-59 and accompanying text.

176. Geist, *supra* note 114, at 1348; *see also id.* at 1379.

177. *See, e.g.*, Salvado, *supra* note 150, at 103.

178. *See id.*

179. *Id.*

of the defendant to enter into contacts with the forum through its web site, but also the extent to which the defendant actually did so.[180]

Professor Yokoyama argues that it is a mistake for courts to treat *Zippo* as an all-purpose test for Internet jurisdiction cases.[181] Yokoyama points out that *Zippo* itself involved the more limited issue of specific jurisdiction in a trademark dispute case, yet courts have applied the sliding scale test to other kinds of cases and to general jurisdiction as well.[182] This "one-size-fits-all approach to Internet jurisdiction" is both too simplistic and inconsistent with the Supreme Court's personal jurisdiction jurisprudence, which has produced distinct tests for different substantive issues (such as breach of contract, products liability, and defamation claims) and for general jurisdiction.[183]

d. *Policy Arguments Against* Zippo

Professor Richard A. Bales and Suzanne Van Wert argue that *Zippo* undermines Congress's policy of promoting e-commerce without government interference.[184] According to Bales and Van Wert, *Zippo*'s focus on the medium through which online activity occurs, as opposed to the conduct of the parties, has chilled e-commerce by leaving online actors uncertain as to where their activities may subject them to suit.[185]

Professor Allan R. Stein has observed another negative policy effect of *Zippo*: the "bizarre" incentives that it has created for web site operators.[186] A web site operator seeking to limit its susceptibility to suit in far away jurisdictions is encouraged to reduce the utility of its web site by making it less interactive.[187] For example, a retailer might put product information on its web site but only take orders over the phone, rather than online, in order to reduce the retailer's likelihood of being haled into court in another state.[188] Such behavior, which *Zippo* encourages, does not benefit any person or state.[189] Professor Geist has also commented on this incentive problem and its potentially harmful effect on e-commerce, arguing, as Professor Stein does, that *Zippo* inhibits e-commerce by encouraging web site owners to create passive, rather than interactive, web sites to limit the owners' likelihood of facing lawsuits in other jurisdictions.[190]

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180. *Id.*
181. Yokoyama, *supra* note 110, at 1167, 1173-76.
182. *See id.* at 1167. For more on the issue of whether *Zippo* should apply to general jurisdiction, see *infra* Parts II and III.
183. *See* Yokoyama, *supra* note 110, at 1167.
184. *See* Bales & Van Wert, *supra* note 173, at 49-50.
185. *See id.*
186. *See* Stein, *supra* note 114, at 431.
187. *Id.*
188. *Id.*
189. *Id.*
190. *See* Geist, *supra* note 114, at 1377-78.

4. The Move Away from *Zippo* Towards a *Calder*-Style Effects Test

As the problems with *Zippo* become apparent[191] and courts better understand the Internet, courts have begun to move away from the *Zippo* test and towards other approaches to Internet-based personal jurisdiction.[192] Several commentators have observed a trend towards a *Calder*-like effects test for Internet jurisdiction.[193] Carlos J.R. Salvado advocates this approach, arguing that it would help solve the problem of applying the concept of purposeful availment to Internet cases.[194] Professor Geist, on the other hand, blames the effects test for creating uncertainty in Internet cases, because Internet activity arguably causes an effect in most jurisdictions.[195] Geist advocates a "targeting" analysis instead; this approach would consider the parties' intentions and the steps they took to enter or avoid a particular jurisdiction.[196]

5. General Jurisdiction Based on Internet Activities

Courts[197] and commentators[198] have mostly rejected the idea of basing general jurisdiction solely on the defendant's operation of a web site that is accessible by forum residents. There have been some notable exceptions, in which courts have indicated that the defendant's web site created general jurisdiction.[199] But as one court observed,

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191. *See supra* Part I.B.3.

192. Awoyemi, *supra* note 131, at 62.

193. *See* Charles W. Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a "Generally" Too Broad, but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 Baylor L. Rev. 135, 199 (2005) ("The cases also frequently employ an effects standard based on *Calder* to adjudge intentional torts, such as defamation and unfair competition, committed over the Internet."); *see also* Geist, *supra* note 114, at 1371 ("Numerous judgments reflect that courts in the United States moved toward a broader, effects-based approach when deciding whether or not to assert jurisdiction in the Internet context."); Salvado, *supra* note 150, at 105 (describing the benefits of the effects test in Internet cases). For more on the *Calder* effects test, see *supra* Part I.A.2.a.

194. *See* Salvado, *supra* note 150, at 105-06.

195. *See* Geist, *supra* note 114, at 1380-81.

196. *See id.* at 1380-1404.

197. *See* 16 Moore et al., *supra* note 74, § 108.44[3] ("Internet contacts alone usually can not constitute the type of contacts on which general personal jurisdiction may be based.").

198. *See, e.g.*, Yokoyama, *supra* note 110, at 1187, 1189 ("General jurisdiction should not be exercised over defendants solely because their websites can be accessed and viewed virtually anywhere. . . . [F]ew cases have found that a defendant's operation of a website was sufficient to justify general jurisdiction . . . ."). Professor Allan R. Stein points out two reasons why basing general jurisdiction upon Internet presence in the forum is unfair. *See* Stein, *supra* note 114, at 438. First, the costs of establishing an Internet presence are miniscule compared to the costs of creating a physical presence within a state that is substantial enough to create general jurisdiction. *Id.* Second, an Internet presence in a state does not indicate a deliberate intent to enter that market. *Id.*

199. *See, e.g.*, Gator.com Corp. v. L.L. Bean Inc., 341 F.3d 1072, 1079-80 (9th Cir. 2003), *vacated as moot*, 398 F.3d 1125 (9th Cir. 2004). For more on *Gator*, see *infra* Part II.A.1-2.

> [t]he consensus among courts that have focused explicitly on the issue is that general jurisdiction cannot[] be founded solely on the existence of a defendant's internet web site. As many courts have recognized, to hold that the mere existence of an internet web site establishes general jurisdiction would render any individual or entity that created such a web site subject to personal jurisdiction in every state. Such a rule would eviscerate the personal jurisdiction requirement as it currently exists.[200]

Reactions against the idea of basing general jurisdiction on the operation of a web site have been strong. Professor Charles W. Rhodes warns that doing so would authorize jurisdiction over every nonresident with a web site in every forum in the country, irrespective of any other connections between the defendant and the forum, thus "heralding the demise of constitutional jurisdictional limitations."[201] One court, the U.S. District Court for the Western District of Wisconsin, has strongly rejected the idea of basing general jurisdiction on a web site.[202] In a case in which all but two of the defendant's contacts with the forum arose out of the defendant's web site, the court stated, "Plaintiff's argument that general jurisdiction exists in this case borders on the frivolous."[203]

II. COMPETING APPROACHES TO GENERAL JURISDICTION IN INTERNET CASES: SHOULD THE *ZIPPO* SLIDING SCALE TEST GOVERN THE ANALYSIS?

Given the underdeveloped and confusing nature of the general jurisdiction doctrine that existed prior to the rise of the Internet,[204] it is unsurprising that courts have not developed a coherent approach to general jurisdiction where Internet contacts are involved. As with Internet-based jurisdiction in general, the issue revolves mostly around *Zippo*. Courts are split over what role, if any, the sliding scale test should play in a general jurisdiction analysis; some apply the test, others limit it to specific jurisdiction, and still others apply it as part of a multifactor hybrid analysis that combines the sliding scale with a more conventional minimum contacts analysis.[205]

Part II of this Note examines the role of the *Zippo* sliding scale test in general jurisdiction cases, an issue over which courts have split.[206] Part II.A reviews cases in which courts have applied *Zippo* to general jurisdiction, including *Gator.com Corp. v. L.L. Bean, Inc.*, in which the Ninth Circuit indicated that a web site alone can be enough to establish

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200. Dagesse v. Plant Hotel N.V., 113 F. Supp. 2d 211, 221 (D.N.H. 2000) (citations and internal quotations omitted); *see also* Yokoyama, *supra* note 110, at 1193 ("[E]stablishing general jurisdiction simply because the defendant's website is accessible in the forum state and interactive would essentially establish universal jurisdiction.").

201. Rhodes, *supra* note 193, at 232.

202. *See* Hy Cite Corp. v. Badbusinessbureau.com, 297 F. Supp. 2d 1154, 1161 (W.D. Wis. 2004).

203. *Id.*

204. *See supra* Part I.A.3.c.

205. *See infra* Part II.A-C.

206. *See infra* Part II.A-B.

general jurisdiction.[207] Part II.B looks at cases in which courts have declined to apply *Zippo* to general jurisdiction. Finally, Part II.C examines hybrid approaches, in which courts have blended *Zippo* with conventional minimum contacts analysis.

A. *Cases that Apply* Zippo *to General Jurisdiction*

The *Zippo* sliding scale test has become a staple of Internet-related personal jurisdiction analysis, and many U.S. courts of appeals apply it in one form or another.[208] Although *Zippo* was a specific jurisdiction case,[209] several district courts and courts of appeals have applied the sliding scale test to general jurisdiction.[210] Few courts, however, have actually used *Zippo* to base general jurisdiction on Internet activity alone.[211]

1. *Gator.com Corp. v. L.L. Bean*

In *Gator.com Corp. v. L.L. Bean*,[212] the Ninth Circuit centered its general jurisdiction analysis on *Zippo*'s sliding scale test and indicated that Internet contacts alone could support the exercise of general jurisdiction over an out of state defendant.[213] *Gator* was a trademark dispute case; Gator's software caused pop-up ads for an L.L. Bean competitor (Eddie Bauer) to appear on L.L. Bean's web site.[214] L.L. Bean sent Gator a cease and desist letter, and Gator sought a declaratory judgment in the U.S. District Court for the Northern District of California stating that its software did not infringe or dilute L.L. Bean's trademark or violate any state or federal law.[215]

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207. Gator.com Corp. v. L.L. Bean Inc., 341 F.3d 1072, 1079-80 (9th Cir. 2003), *vacated as moot*, 398 F.3d 1125 (9th Cir. 2004).

208. *See* Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003) (recognizing that *Zippo* has become the "seminal" authority for Internet jurisdiction cases); *see also Gator*, 341 F.3d at 1079; Lakin v. Prudential Sec., Inc., 348 F.3d 704, 711 (8th Cir. 2003); Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 712-14 (4th Cir. 2002); Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 513 (D.C. Cir. 2002); Mink v. AAAA Dev. L.L.C., 190 F.3d 333, 336-37 (5th Cir. 1999); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1297 (10th Cir. 1999); 16 Moore et al., *supra* note 74, § 108.44[1].

209. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1122 (W.D. Pa. 1997). The *Zippo* court did not indicate, however, that its sliding scale test was limited to specific jurisdiction cases. *See id.* at 1124 (explaining the test and using the phrase "personal jurisdiction").

210. *See infra* Part II.A.1, 3.

211. *But see Gator*, 341 F.3d at 1078-79 (upholding general jurisdiction based on a combination of Internet and non-Internet contacts, but indicating that the defendant's web site alone would have supported general jurisdiction).

212. *Id.*

213. *See id.* at 1079.

214. *Id.* at 1075.

215. *Id.* L.L. Bean claimed that Gator's pop-up ads unlawfully appropriated the goodwill associated with L.L. Bean's trademark, created confusion about the source of the products offered on L.L. Bean's web site, and improperly suggested an association between L.L. Bean, Gator, and Eddie Bauer that did not actually exist. *Id.* Gator sought a declaratory judgment stating that its program did not infringe or dilute any L.L. Bean trademark and did

L.L. Bean is a Maine corporation; at the time of the case, it had few physical contacts with California, but it engaged in a significant amount of mail-order commerce with residents of the state.[216] L.L. Bean did not have an agent for service of process in California and was not required to pay taxes there.[217] However, L.L. Bean sold "millions of dollars worth" of its products in California; it also mailed a "substantial number" of packages and catalogues to California residents, targeted residents with direct e-mail solicitations, and maintained online accounts for residents.[218]

The district court granted L.L. Bean's motion to dismiss for lack of personal jurisdiction, and Gator appealed.[219] Although the dispute arguably arose out of L.L. Bean's contacts with the forum, the Ninth Circuit's analysis began and ended with general jurisdiction.[220] While the court relied heavily on *Zippo*, its overall approach actually adopted a hybrid framework[221] that blended traditional minimum contacts analysis with *Zippo*'s sliding scale.

In considering whether general jurisdiction existed over L.L. Bean, the Ninth Circuit framed the issue as whether L.L. Bean's contacts with the forum were substantial or continuous and systematic; the court appeared to be treating the two concepts as having the same meaning.[222] To this end, it sought to determine whether L.L. Bean had established some kind of deliberate presence in the forum (including, but not limited to, physical presence),[223] and whether the defendant "engaged in active solicitation toward and participation in the state's markets."[224]

While acknowledging that the Ninth Circuit sets a high bar for the exercise of general jurisdiction and that this was a close case,[225] the court ultimately held L.L. Bean subject to general jurisdiction in California.[226] It based this result on both Internet and non-Internet contacts. The latter included L.L. Bean's extensive marketing and sales in California, its

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not constitute unfair competition, a deceptive or unfair trade or sale practice, false advertising, fraud, or any other violation of federal or state law. *Id.*

216. *See id.* at 1074.

217. *Id.*

218. *Id.*

219. *Id.* at 1075.

220. *See id.* at 1076. The court did not explain why it took this approach, other than to state, "We begin with an analysis of whether L.L. Bean's contacts with California were sufficient to confer general jurisdiction." *Id.* The court explained in a footnote that, because it held there was general jurisdiction, it did not reach the issue of whether L.L. Bean's cease and desist letter would support specific jurisdiction. *Id.* at 1076 n.2.

221. *See infra* Part II.C.

222. *See Gator*, 341 F.3d at 1077 ("In applying the 'substantial' or 'continuous and systematic' contacts test, courts have focused primarily on two areas."). For the relevance of the distinction between "substantial" and "continuous and systematic," see *supra* Part I.A.3.c.

223. For a discussion of the implications of treating Internet activity as a metaphor for physical presence, see *infra* notes 252-59 and accompanying text.

224. *See Gator*, 341 F.3d at 1077.

225. *Id.* at 1078.

226. *Id.* at 1078-79.

extensive contacts with California vendors, and its shipment of a "very large" number of products to California.[227] These contacts were part of a "consistent, ongoing, and sophisticated sales effort that has included California for a number of years."[228]

The court also applied the *Zippo* sliding scale test to determine the quality of L.L. Bean's Internet contacts with California.[229] While other courts have refused to apply *Zippo* to general jurisdiction or have expressed reservations about doing so,[230] here the Ninth Circuit did not hesitate.[231] The court's analysis of L.L. Bean's Internet contacts rested on the sliding scale: "[A] finding of general jurisdiction in the instant case would be consistent with the 'sliding scale' test that both our own and other circuits have applied to internet-based companies."[232] Under the *Zippo* framework, the court found L.L. Bean's web site to be "highly interactive"[233] and concluded that the company was "'clearly'" doing business over the Internet.[234]

Neither the Ninth Circuit's application of *Zippo* to a general jurisdiction case nor its combination of the sliding scale with traditional minimum contacts analysis is unique.[235] Other courts have applied *Zippo* to general jurisdiction, although the practice of doing so has been controversial.[236] Other courts have also combined the sliding scale test and conventional minimum contacts analysis, creating new "hybrid" tests for Internet-based jurisdiction.[237]

What made *Gator* both unusual and controversial was the following dicta: "[E]ven if the only contacts L.L. Bean had with California were through its virtual store, a finding of general jurisdiction in the instant case would be consistent with the 'sliding scale' test that both our own and other circuits have applied to internet-based companies."[238] In other words, the court indicated that Internet contacts alone may be continuous, systematic, and substantial[239] enough to subject an out of state defendant to general

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227. *Id.* at 1078.

228. *Id.*

229. *See id.* at 1079-80.

230. See *infra* Part II.B for courts that have refused to apply *Zippo* in general jurisdiction cases.

231. *See Gator*, 341 F.3d at 1080.

232. *Id.* at 1079; *see also id.* at 1080 ("Under the sliding-scale analysis, L.L. Bean's contacts with California are sufficient to confer general jurisdiction.").

233. *Id.* at 1080.

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

235. See *infra* Part II.A.3 for a discussion of other courts that apply *Zippo* to general jurisdiction and Part II.C for a discussion of hybrid approaches.

236. *See infra* Part II.A.3.

237. *See infra* Part II.C.

238. *Gator*, 341 F.3d at 1079; *see also id.* at 1080 ("Under the sliding-scale analysis, L.L. Bean's contacts with California are sufficient to confer general jurisdiction.").

239. *Cf.* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952) (observing that general jurisdiction requires the defendant to have contacts with the forum state that are sufficiently substantial).

jurisdiction, a proposition that other courts and scholars have mostly rejected.[240]

Throughout its *Gator* opinion, the Ninth Circuit treated L.L. Bean's web site as a kind of constructive physical presence.[241] Although it acknowledged that L.L. Bean had few of the factors traditionally associated with physical presence, such as an official agent or incorporation in the forum state,[242] the court focused heavily on the idea of L.L. Bean's web site as a "virtual store" operating within the forum.[243] This was consistent with *Zippo*, which the court understood not to require physical presence in the forum, because the sliding scale test was based on the idea that a web site can operate as the "functional equivalent of a physical store."[244] *Zippo*, the court reasoned, requires only that the commercial activity involved be so substantial as to "'approximate[] physical presence.'"[245]

2. Reactions to *Gator*

a. *Reactions to the Implications of the Ruling*

Observers have found *Gator* controversial and even alarming, both for its holding that an out of state defendant was subject to general jurisdiction primarily because of the defendant's Internet contacts with the forum and for its dictum that the web site alone would have conferred general jurisdiction.[246] Most courts and commentators have rejected the idea of basing general jurisdiction solely on a web site.[247] One law firm's media law bulletin warned readers that, in light of the *Gator* ruling, businesses

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240. *See supra* Part I.B.5.

241. *See Gator*, 341 F.3d at 1079.

242. *Id.* at 1078.

243. *See id.* ("[I]ts website is clearly and deliberately structured to operate as a sophisticated virtual store in California."); *id.* at 1079 (observing that *Zippo* recognizes that "an online store can operate as the functional equivalent of a physical store").

244. *Id.* at 1079.

245. *Id.* at 1079-80 (quoting Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)).

246. *See* Stacey R. Goldscher, *'E-Merchants' Beware. The Ninth Circuit Has Opened Up the Pandora's Box of General Jurisdiction*, Media L. Bull. (Sedgwick, Detert, Moran & Arnold LLP, S.F., Cal.), Nov. 2003, *available at* http://www.sdma.com/media/attachments/2003_11medialaw.pdf (warning online businesses that, under the reasoning of *Gator*, they may be subject to suit in every state in the nation); *see also* Dean A. Morehous & Marlene J. Williams, *E-Commerce Alert: Ninth Circuit Finds Retailer's Online Contacts Sufficient to Confer General Jurisdiction*, Intell. Prop. & Trade Reg. J., Summer/Fall 2003, at 7, *available at* http://www.thelenreid.com/articles/IP%20Trade%20Reg%20Journal_3-103.pdf (warning online retailers that they should be prepared to defend suits in California if they do significant business there); *Interactive Website Sales Sufficient to Establish General Jurisdiction*, Bull. No. 03-11 (Pillsbury Winthrop LLP, S.F., Cal.), Nov. 12, 2003, *available at* http://www.pillsburylaw.com/content/portal/publications/2003/11/0000622E/bulletin03-11.pdf (observing that not all courts have adopted *Zippo* and predicting that the law on Internet-based jurisdiction will continue to evolve).

247. *See supra* Part I.B.5.

must balance the benefits of doing business online against "the very real possibility that the company will be open to lawsuits of every variety, in every state in the nation."[248] The bulletin therefore advised companies to consider how important an Internet presence is to their business in light of this risk and predicted that the *Gator* decision could force some companies to revert to pre-Internet business practices.[249]

Given this reaction, *Gator* could be a step towards a result that many have feared: excessively broad Internet-based personal jurisdiction.[250] One survey indicated that businesses have become worried about the risk of increased legal liability resulting from Internet-based jurisdiction and that businesses have altered their behavior to manage that risk.[251]

b. *Criticisms of the Constructive Physical Presence Metaphor*

The *Gator* court drew on the metaphor of L.L. Bean's web site as a constructive physical presence in the forum.[252] But this sort of constructive physical presence rationale for personal jurisdiction has its critics.[253] Professor Stein has characterized its application in *Zippo* as "an egregious failure of legal imagination."[254] Professor Rhodes criticizes the constructive physical presence approach as unhelpful and somewhat circular.[255] Because the corporate "presence" is a legal fiction, a corporation's amenability to suit in a given forum depends on the level of its activities there; for general jurisdiction, the activities must be

248. Goldscher, *supra* note 246.

249. *See id.*

250. *See* Peter P. Swire, *Elephants and Mice Revisited: Law and Choice of Law on the Internet*, 153 U. Pa. L. Rev. 1975, 1982 (2005) (describing concern in the business community over the prospect of being subject to suit in numerous jurisdictions and the steps that some companies have taken to avoid that possibility); *cf.* Geist, *supra* note 114, at 1362 (arguing that the *Inset* court's very broad approach to Internet jurisdiction distorted the principle of purposeful availment and has the potential to stifle Internet growth). *But see* Reidenberg, *supra* note 152, at 1953 (arguing that Internet separatists have wrongly sought to deny jurisdiction over many online actions and that states should more aggressively assert jurisdiction over those accused of violating their laws); Stein, *supra* note 114, at 453 ("[T]he current freedom enjoyed by Internet users is also fertile territory for scam artists, software pirates, and other wrongdoers. A due process doctrine that empowers states to remedy those injuries is essential to the Internet's survival.").

251. *See* Michael Geist, Internet Jurisdiction Sub-Comm., Am. Bar Ass'n, Global Internet Jurisdiction: The ABA/ICC Survey 2 (2004), *available at* http://www.michaelgeist.ca/dmdocuments/Global%20Internet%20Survey.pdf. U.S. companies felt, by a margin of six to one, that Internet jurisdiction had gotten "worse" between 2002 and 2004, and four out of five expected the situation to worsen further in the future. *Id.* Asian and European businesses, on the other hand, felt that Internet jurisdiction had been improving and would continue to improve. *Id.* The risk companies feared most was litigation, in other words, being haled into court because of their online activities. *See id.* Companies have begun taking steps to avoid targeting "higher risk" jurisdictions. *Id.*

252. *See* Gator.com Corp. v. L.L. Bean, 341 F.3d 1072, 1079 (9th Cir. 2003).

253. *See, e.g.*, Rhodes, *supra* note 73, at 849-51.

254. Stein, *supra* note 114, at 430.

255. *See* Rhodes, *supra* note 73, at 849-51.

continuous, systematic, and substantial.[256] To describe the level of activity necessary to confer jurisdiction as that which is equivalent to a constructive physical presence leads nowhere, other than back to the original inquiry of whether the defendant's forum activities are continuous, systematic, and substantial.[257]

Furthermore, casting contacts in terms of physical presence is inconsistent with the overall trend in the Supreme Court's personal jurisdiction jurisprudence, which has been an attempt to "de-physicalize" the required relationship between the forum and the out of state defendant.[258] Salvado has suggested that courts can limit confusion by seeing the Internet for what it really is: a means of communication.[259]

3. Other Courts that Have Applied *Zippo* to General Jurisdiction

The outcome in *Gator* was unusual and controversial, as was the court's broad approach to Internet-based jurisdiction.[260] But the premise of the court's analysis, that the *Zippo* sliding scale test governs general jurisdiction, was not novel. Other courts have applied *Zippo* to general jurisdiction, but have declined to uphold general jurisdiction on the facts before them. A sample of those cases is examined below.

a. *Courts of Appeals*

i. Fifth Circuit

The Fifth Circuit applied *Zippo* to general jurisdiction in *Mink v. AAAA Development Corp. LLC*,[261] a copyright violation case. The plaintiff, Mink, alleged that defendants AAAA Development and Middlebrook conspired to copy Mink's copyrighted, patent-pending computer program.[262] Mink, a resident of Texas, brought suit in the Southern District of Texas; the defendants were Vermont residents.[263]

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256. *See id.* at 850-51; *see also* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945) (noting that corporate "presence" can only be manifested by activities carried out on behalf of the corporation by those authorized to act for it).

257. *See* Rhodes, *supra* note 73, at 850-51.

258. *See id.* at 851; *cf.* Salvado, *supra* note 150, at 95 (arguing that, because of this trend, there is no need to treat the Internet as a distinct "place" for the purpose of legal analysis). For more on the Supreme Court's movement away from a physical presence requirement for personal jurisdiction, see *supra* note 15.

259. Salvado, *supra* note 150, at 95.

260. *See supra* notes 238-59 and accompanying text.

261. 190 F.3d 333, 335-36 (5th Cir. 1999). The Fifth Circuit went on to reject the use of *Zippo* for general jurisdiction in *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002) ("While we deployed this sliding scale in *Mink v. AAAA Development, LLC*, it is not well adapted to the general jurisdiction inquiry . . . ."). For a discussion of *Revell*, see *infra* notes 323-34 and accompanying text.

262. *Mink*, 190 F.3d at 335.

263. *Id.* at 334-35.

Mink did not show that the suit arose from the defendants' contacts with Texas, so the court found specific jurisdiction to be lacking.[264] The remaining issue was whether the defendants' web site could support general jurisdiction.[265] The web site featured an email address, a printable mail order form, and a toll-free telephone number.[266]

The court's analysis was straightforward: It officially adopted the *Zippo* sliding scale test,[267] found the defendant's web site to be passive, and held that the defendant was therefore not subject to general jurisdiction.[268] Notably, the court did not express any doubt as to the applicability of the sliding scale to a general jurisdiction case.[269]

ii. D.C. Circuit

The District of Columbia Circuit relied on *Mink*, a Fifth Circuit case, to justify its application of *Zippo* to general jurisdiction in *Gorman v. Ameritrade Holding Corp.*[270] *Gorman* involved a breach of contract claim against Ameritrade, an online securities broker-dealer.[271] Gorman argued that Ameritrade had violated an agreement to provide his sole proprietorship with advertising space on a web site that Ameritrade owned.[272] Specific jurisdiction was unavailable because the dispute did not arise out of any of Ameritrade's contacts with the District of Columbia.[273] Thus, the court proceeded to a general jurisdiction analysis.[274]

The court stated that it was following a traditional general jurisdiction analysis by determining whether Ameritrade's contacts with the forum were continuous and systematic.[275] The court emphasized this point repeatedly, stating that "nothing about the Ameritrade web site need alter our traditional approach to personal jurisdiction."[276] Yet the court relied heavily on *Zippo* and other Internet cases in evaluating whether Ameritrade's contacts were continuous and systematic.[277]

Ameritrade argued that, although it had entered into electronic transactions with D.C. residents,[278] there was no personal jurisdiction in Washington, D.C., because those transactions had actually taken place "in

264. *Id.* at 336.
265. *Id.*
266. *Id.* at 337.
267. *See id.* at 336 ("We find that the reasoning of *Zippo* is persuasive and adopt it in this Circuit.").
268. *See id.* at 336-37.
269. *See id.* at 336.
270. 293 F.3d 506, 513 (D.C. Cir. 2002).
271. *Id.* at 508.
272. *Id.*
273. *Id.* at 509.
274. *Id.*
275. *Id.* at 511-12.
276. *Id.* at 513; *see also id.* at 512 ("[T]he test we will apply to determine whether the District has general personal jurisdiction in this case is the traditional one . . . .").
277. *See id.* at 512-13.
278. *Id.* at 510.

the borderless environment of cyberspace."[279] The court was unmoved by this futuristic argument. It responded that

> "[c]yberspace," ... is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar. Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet.[280]

Ameritrade had been using its web site to engage in a series of electronic transactions with forum residents.[281] The *Gorman* court quoted from *Zippo* in observing that the record appeared to indicate that Ameritrade was "enter[ing] into contracts ... that involved the knowing and repeated transmission of computer files over the Internet" to and from forum residents.[282] These contacts may have been continuous and systematic.[283] The court concluded that, by doing business over the Internet, Ameritrade could become subject to general jurisdiction in Washington, D.C.[284] However, the court affirmed the district court's dismissal on other procedural grounds, making most of the *Gorman* analysis dicta.[285]

iii. Tenth Circuit

In *Soma Medical International v. Standard Chartered Bank*,[286] the Tenth Circuit applied *Zippo* to general jurisdiction—thereby acknowledging that Internet contacts could support general jurisdiction—but ultimately found that the defendant's contacts with the forum were insufficient. *Soma* involved a series of claims arising out of a banking relationship gone sour, including breach of contract, negligence, and civil conspiracy.[287] The defendant's only contact with the forum state, Utah, was its maintenance of a web site accessible to Utah residents.[288]

Just as the Fifth Circuit did in *Mink*,[289] the Tenth Circuit in *Soma* applied *Zippo* to general jurisdiction without hesitation.[290] The court did not analyze the larger issues of whether Internet contacts could be substantial

279. *Id.*

280. *Id.* at 510-11 (citation omitted). For further arguments that Internet technology should not allow defendants to escape accountability by defeating personal jurisdiction, see generally Reidenberg, *supra* note 152.

281. *Gorman*, 293 F.3d at 512. These included, among other things, customers opening brokerage accounts, buying and selling securities, and borrowing from Ameritrade to buy on margin. *Id.*

282. *Id.* at 513 (quoting Zippo Mfg., Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

283. *Id.*

284. *Id.*

285. *See id.* at 508. The court affirmed the district court's dismissal for insufficient service of process. *Id.*

286. 196 F.3d 1292 (10th Cir. 1999).

287. *See id.* at 1295.

288. *Id.* at 1297.

289. Mink v. AAAA Dev., LLC, 190 F.3d 333, 336 (5th Cir. 1999).

290. *See Soma*, 196 F.3d at 1297.

enough to support general jurisdiction, or whether *Zippo* was the proper analytical framework.[291] Instead, it performed a straightforward application of the sliding scale test and found the defendant's web site to be purely passive.[292] Based on that finding, the court held that the defendant had not established the kind of continuous and systematic contacts necessary for general jurisdiction.[293]

b. *District Courts*

i. District of New Jersey

The U.S. District Court for the District of New Jersey is one of several districts courts that have applied *Zippo* to general jurisdiction but stopped short of actually finding general jurisdiction on the facts of the case.[294] *Decker v. Circus Circus Hotel*, the case in which the District of New Jersey took that approach, involved a personal injury claim by New Jersey residents against a Nevada hotel.[295] Citing *Zippo*, the court observed that the defendant's web site was clearly commercial in nature.[296] In fact, the court reasoned that by accepting reservations online, the defendants had "effectively placed their hotel and its services into an endless stream of commerce."[297] The court was willing to uphold general jurisdiction based on this stream of commerce analogy[298] but ultimately declined to do so because the web site contained a forum selection clause.[299]

ii. Eastern District of Louisiana

Planet Beach Franchising Corp. v. C3UBIT, Inc. involved an allegedly libelous posting on the defendant's web site.[300] The plaintiffs were Louisiana residents; the defendants were residents of Pennsylvania.[301]

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291. *See id.*; *cf.* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952) (describing the issue in general jurisdiction analysis as whether the defendant's contacts with the forum state are sufficiently substantial).

292. *See Soma*, 196 F.3d at 1297.

293. *See id.*

294. *See* Decker v. Circus Circus Hotel, 49 F. Supp. 2d 743 (D.N.J. 1999). The court also ruled that the plaintiffs had failed to demonstrate that the defendant had minimum contacts sufficient for specific jurisdiction. *See id.* at 750.

295. *Id.* at 745.

296. *Id.* at 748.

297. *Id.*

298. *See id.* (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980)). In *World-Wide Volkswagen*, the Supreme Court stated that due process allows a forum state to exercise personal jurisdiction over an out of state defendant that delivers its products into the stream of commerce with the expectation that they will be purchased by forum residents. 444 U.S. at 298.

299. *Decker*, 49 F. Supp. 2d at 748.

300. Planet Beach Franchising Corp. v. C3UBIT, Inc., No. Civ.A. 02-1859, 2002 U.S. Dist. LEXIS 18349, at *3 (E.D. La. Aug. 12, 2002).

301. *Id.* at *1-*2.

Although it had already found specific jurisdiction by applying the *Calder* effects test,[302] the court proceeded to address the issue of whether there was general jurisdiction as well.[303] The defendant had little contact with the forum state, other than through its web site.[304]

Following the Fifth Circuit's approach in *Mink v. AAAA Development, LLC*,[305] the *Planet Beach Franchising* court applied *Zippo* to decide the issue of general jurisdiction.[306] The defendant's web site was "certainly more than 'passive,'" falling somewhere in the middle of the sliding scale.[307] Visitors to the site could post news, engage in discussions, and email the defendants.[308] The defendants did not buy or sell products or services over the web site, although they did solicit sales of banner advertisement space.[309]

The court held that the site was inadequate to support general jurisdiction.[310] It did not rise to the level of "continuous and systematic" contact with the forum state.[311] The plaintiffs had failed to show to what extent, if any, the defendant's web site had "penetrated" the forum state.[312] The court listed several factors which the plaintiffs might have used to make that showing, including subscriber data, web site hits, or sales of products and advertisements.[313]

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302. *Id.* at *8-*17. The Supreme Court upheld personal jurisdiction based on conduct that had a foreseeably harmful effect in the forum state in *Calder v. Jones*, 465 U.S. 783, 789-90 (1984). The dispute in *Calder* arose out of a National Enquirer article that allegedly libeled an actress, Shirley Jones, who lived and worked in California. *Id.* at 785. Although most of the defendants' relevant conduct took place outside of California, the Court upheld jurisdiction because the defendants targeted their tortious conduct at California and knew its harmful effects would be felt there. *Id.* at 789-90. For more on the *Calder* effects test, see *supra* Part I.A.2.a.

303. *Planet Beach Franchising*, 2002 U.S. Dist. LEXIS 18349, at *17.

304. *Id.*

305. 190 F.3d 333 (5th Cir. 1999). For a discussion of *Mink*, see *supra* notes 261-69 and accompanying text.

306. *See Planet Beach Franchising*, 2002 U.S. Dist. LEXIS 18349, at *17-*20.

307. *Id.* at *19. The *Zippo* sliding scale test classifies web sites along a spectrum based on their level of interactivity and commercial nature. The spectrum ranges from "passive" to "interactive" to "clearly do[ing] business over the Internet." Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). For further discussion of the *Zippo* test, see *supra* Part I.B.2.

308. *Planet Beach Franchising*, 2002 U.S. Dist. LEXIS 18349, at *19.

309. *Id.* at *20.

310. *Id.* at *19-*20.

311. *Id.*

312. *Id.* at *20.

313. *Id.*

B. *Cases Where Courts Have Refused to Apply* Zippo *to General Jurisdiction*

Despite *Zippo*'s widespread acceptance,[314] courts disagree over the extent of its usefulness. While a number of courts have adopted the sliding scale test for general as well as for specific jurisdiction cases,[315] a substantial number have refused to do so, limiting *Zippo* to specific jurisdiction. Some courts in the latter category have concluded that the sliding scale test can be inconsistent with established general jurisdiction doctrine.[316] This reluctance is perhaps unsurprising, given that most courts have refused to base general jurisdiction solely on Internet contacts.[317] And several scholars have argued that *Zippo* should not apply in the general jurisdiction context.[318] The result of these concerns is that *Zippo* is inconsistently applied, leaving online actors with uncertainty as to where they are subject to suit.[319]

Of those courts that have declined to apply *Zippo* to general jurisdiction, some have made a point of addressing the reasons why the sliding scale test is inappropriate for that purpose.[320] Others have simply ignored *Zippo* and proceeded with a more traditional minimum contacts analysis.[321] The courts that have addressed the issue in some depth have raised serious

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314. *See* Condlin, *supra* note 21, at 133 (describing *Zippo* as the most popular Internet jurisdiction framework by an "overwhelming margin"). For a list of federal circuit court cases that have applied *Zippo*, see *supra* note 208.

315. *See supra* Part II.A.

316. *See, e.g.*, Revell v. Lidov, 317 F.3d 467, 471 (5th Cir. 2002).

317. *See* 16 Moore et al., *supra* note 74, § 108.44[3] ("Internet contacts alone usually can not constitute the type of contacts on which general jurisdiction may be based."); *see also* Lora M. Jennings, Note, *Finding Legal Certainty for E-Commerce: Traditional Personal Jurisdiction Analysis and the Scope of the* Zippo *Sliding Scale*, 44 Washburn L.J. 381, 408 (2005) ("Asserting general jurisdiction based solely on the existence of a Web site has been strongly rejected by many courts."). For further discussion, see *supra* Part I.B.5.

318. *See* Awoyemi, *supra* note 131, at 62 (stating that courts have misapplied *Zippo* by using it for general jurisdiction, where it has no value); Rhodes, *supra* note 73, at 884-85 ("[C]ontorting the *Zippo* framework to apply to general jurisdiction would render countless businesses around the globe subject to the general jurisdiction of every state in the United States.... [M]erely because a website is interactive and *could be* accessed by forum residents does not mean that the nonresident has engaged in the requisite continuous and substantial forum activities necessary for general jurisdiction."); Yokoyama, *supra* note 110, at 1193-94 (arguing that to apply *Zippo* to general jurisdiction would be a mistake because doing so would equate the potential for conducting online transactions with actually setting up a brick and mortar store in the forum); Kristin Woeste, Comment, *General Jurisdiction and the Internet: Sliding Too Far?*, 73 U. Cin. L. Rev. 793, 808 (2004) ("The use of the *Zippo* sliding scale alone... cannot be the best way to make the general jurisdiction determination.").

319. *See supra* Part I.B.3.b for discussion of *Zippo*'s confusing nature and unpredictable results.

320. *See Revell*, 317 F.3d at 471; *see also* Bell v. Imperial Palace Hotel/Casino, Inc., 200 F. Supp. 2d 1082, 1091-92 (E.D. Mo. 2001). These cases are discussed *infra* Part II.B.1.

321. *See, e.g.*, Bird v. Parsons, 289 F.3d 865, 873-74 (6th Cir. 2002); Hockerson-Halberstadt, Inc. v. Costco Wholesale Corp., No. 91-1720, 2000 U.S. Dist. LEXIS 8290, at *7-*10 (E.D. La. June 5, 2000). These cases are discussed *infra* Part II.B.2.

questions about the ability of the sliding scale test to measure the kind of contacts necessary for general jurisdiction.[322]

1. Courts that Have Explained *Zippo*'s Shortcomings in the General Jurisdiction Context

a. *The Fifth Circuit Changes Its Position on* Zippo

In *Revell v. Lidov*, the Fifth Circuit disclaimed the *Zippo* sliding scale test for general jurisdiction cases.[323] This was a departure from its decision three years earlier in *Mink v. AAAA Development LLC*,[324] in which that court had applied the sliding scale test in its general jurisdiction analysis. *Revell* involved a defamation claim arising out of an article that the defendant had posted on an Internet bulletin board.[325] The plaintiff, Revell, a Texas resident, brought suit in the Northern District of Texas against Lidov, the poster and a resident of Massachusetts, and Columbia University, which maintained the online bulletin board and has its main offices in New York.[326]

Revell argued for both specific and general jurisdiction.[327] The court quickly rejected *Zippo* for general jurisdiction.[328] At the beginning of its general jurisdiction analysis, it made the following observation about *Zippo*'s limitations in the general jurisdiction context:

> While we deployed this sliding scale in *Mink v. AAAA Development, LLC*, it is not well adapted to the general jurisdiction inquiry, because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction—in other words, while it may be doing business *with* Texas, it is not doing business *in* Texas.[329]

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322. *See infra* Part II.B.1.

323. *Revell*, 317 F.3d at 471.

324. 190 F.3d 333, 336 (5th Cir. 1999). See also *supra* notes 261-69 and accompanying text for further discussion of *Mink*.

325. *Revell*, 317 F.3d at 469.

326. *Id.*

327. *See id.* at 470, 472. Revell argued that the *Calder* effects test supported specific jurisdiction. *See id.* at 473. The court disagreed, holding that the online posting here, unlike the newspaper article at issue in *Calder*, was not sufficiently directed at the plaintiff's home state. *See id.*; *id.* at 475 ("Knowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm forms an essential part of the *Calder* test."). The court observed that "Lidov must have known that the harm of the article would hit home wherever Revell resided. But that is the case with virtually any defamation. A more direct aim is required than we have here." *Id.* at 476. The plaintiff had argued that the court should abandon *Zippo* for defamation cases because it is in tension with *Calder*, an argument that the court ultimately rejected. *See id.* at 471-72. For further discussion of *Zippo*'s potential incompatibility with *Calder*, see *infra* Part III.B.2.

328. *See Revell*, 317 F.3d at 471.

329. *Id.*

After dispensing with the sliding scale test, the court next addressed the issue of whether Columbia's web site was enough to support general jurisdiction under any other jurisdictional standard.[330] The site allowed users to subscribe to the *Columbia Journalism Review*, purchase advertising on the web site or in the journal, and apply electronically for admission to Columbia.[331] The court held that the web site did not support general jurisdiction.[332] The court's reasoning turned on the substantiality requirement:[333] While a web site may be a form of continuous presence everywhere throughout the world, Columbia's web site did not establish "substantial" contact with Texas.[334]

b. *The District Court for the Eastern District of Missouri Recognizes the Quantity of Contacts/Substantiality Issue*

In *Bell v. Imperial Palace Hotel/Casino, Inc.*, the plaintiffs sought to assert general jurisdiction over the defendant hotel corporation based on the fact that its web site was accessible in their home state, Missouri.[335] The plaintiff sustained an injury in a slip and fall accident in the defendant's hotel.[336] The cause of action therefore arose in Nevada (the location of the hotel).[337] The plaintiffs sought to assert personal jurisdiction by alleging that the defendant solicited business in Missouri via its web site.[338] The site offered information about the hotel and invited customers to make reservations either through a toll free telephone number or online.[339]

Because a broad view of Internet-based jurisdiction could subject those who maintain web sites to personal jurisdiction in every forum in the country, the court felt the need to proceed cautiously.[340] Given these high stakes, the court was reluctant to give too much weight to the *Zippo* test.[341] The court's analysis implied that the sliding scale was too simplistic to

330. *See id.*

331. *Id.* at 470.

332. *See id.* at 471.

333. For more on the substantiality requirement, see *supra* Part I.A.3.c. *See also* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952) (stating that general jurisdiction requires substantial contacts between the defendant and the forum state).

334. *See Revell*, 317 F.3d at 471. The court also declined to exercise specific jurisdiction under the *Calder* effects test, finding that the web site was not sufficiently directed at the forum. *Id.* at 475-76.

335. Bell v. Imperial Palace Hotel/Casino, Inc., 200 F. Supp. 2d 1082, 1084-85 (E.D. Mo. 2001).

336. *See id.* at 1084.

337. *See id.* at 1084-85. The court declined to exercise specific jurisdiction because the plaintiffs did not demonstrate that their cause of action arose out of the defendant's contacts with Missouri. *See id.* at 1088.

338. *Id.* at 1085.

339. *Id.* The plaintiffs made their reservation through a travel agent, not through the web site. *Id.*

340. *See id.* at 1091.

341. *See id.* at 1091-92.

handle general jurisdiction: "The analysis cannot begin and end with the 'active' and 'passive' labels."[342]

The *Bell* court did not reject *Zippo* as strongly as the Fifth Circuit did in *Revell*.[343] However, it suggested that the sliding scale test should have at most a limited role in general jurisdiction analysis.[344] The court stated that the *Zippo* test "may be a relevant factor in assessing general jurisdiction."[345] But that relevance requires more than just a certain kind of web site: "The fact that a site is classified as 'interactive' is irrelevant to the analysis of general jurisdiction if no one from the forum state has ever used the site."[346] In fact, the court stated that "much more" contact with the forum than the maintenance of an interactive web site is necessary to establish general jurisdiction.[347]

i. Commentary on the Quantity of the Contacts/Substantiality Issue

Bell raises an issue that commentators and other courts have also noted: The sliding scale may not adequately measure the quantity and substantiality of a defendant's contacts with the forum.[348]

The Eighth Circuit has observed that "[u]nder the *Zippo* test, it is possible for a Web site to be very interactive, but to have no quantity of contacts. In other words, the contacts would be continuous but not *substantial*."[349] The Fifth Circuit has made a similar observation, noting that a web site can be a form of continuous and systematic contact with the forum, but not necessarily a substantial contact.[350]

Carlos J.R. Salvado has noted this quality of web site versus quantity of contacts problem:[351] "The *Zippo* scale does nothing to discover the actual intended contacts with the forum by a defendant's use of a web site. What it does do is attempt to measure the potential of a website to be used by a defendant in a particular way."[352] Salvado argues that, while the qualitative

342. *Id.* at 1091.

343. *Compare id. with* Revell v. Lidov, 317 F.3d 467, 471 (5th Cir. 2002) (stating that *Zippo* is "not well adapted to the general jurisdiction inquiry").

344. *See Bell*, 200 F. Supp. 2d at 1091-92. By contrast, the court relied heavily on *Zippo* in its specific jurisdiction analysis. *See id.* at 1087.

345. *Id.* at 1091.

346. *Id* at 1091-92.

347. *Id.* at 1092.

348. *See id.* at 1091-92 (stating that the interactive nature of a web site is irrelevant if no one from the forum has actually accessed the site).

349. Lakin v. Prudential Sec., Inc., 348 F.3d 704, 712 (8th Cir. 2003). For further discussion of *Lakin*, see *infra* notes 405-21 and accompanying text.

350. *See* Revell v. Lidov, 317 F.3d 467, 471 (5th Cir. 2002). For further discussion of *Revell*, see *supra* notes 323-34 and accompanying text.

351. *See* Salvado, *supra* note 150, at 103-05; *see also* Jennings, *supra* note 317, at 384; Woeste, *supra* note 318, at 808. This is not to say that the quality of contacts is irrelevant; the Supreme Court has indicated that the general jurisdiction test has both quantitative and qualitative aspects. *See* Rhodes, *supra* note 73, at 816 (describing the substantiality requirement as part of the qualitative analysis).

352. Salvado, *supra* note 150, at 104.

nature of the defendant's web site may be dispositive in some cases, in most situations courts must supplement the *Zippo* test in order to be able to analyze the defendant's actual, intended contacts with the forum.[353]

Professor Yokoyama has also commented on the quantity versus quality of contacts issue.[354] He argues that the general jurisdiction analysis must look beyond the potential for marketing and sales that an interactive web site provides.[355] Simply maintaining an "interactive" web site, even one that targets the forum state, is not enough to create general jurisdiction.[356] To decide whether general jurisdiction exists, a court must look to the quantity of business that the defendant does with the forum state and determine whether the business generates continuous and substantial revenue.[357]

2. Courts that Have Declined to Apply *Zippo* to General Jurisdiction Without Explanation

a. *Sixth Circuit*

The Sixth Circuit applied *Zippo* to specific but not general jurisdiction in *Bird v. Parsons*.[358] The case involved a dispute over an Internet domain name; the plaintiff argued that the defendant was subject to suit in the forum (Ohio) because the defendant had registered 4666 domain names there and its web site was available there.[359]

The court clearly applied the sliding scale test to its specific jurisdiction analysis.[360] It cited *Zippo* to support the assertion that the defendant's doing business with forum residents via its web site made it subject to specific jurisdiction under the sliding scale test.[361] But the court did not refer to *Zippo* or apply the sliding scale test in addressing general jurisdiction.[362]

First, the court applied *Helicopteros* and found that the defendant's contacts with Ohio were similar in scope to those that the Supreme Court had held inadequate for general jurisdiction in that case.[363] It then cited *Cybersell, Inc. v. Cybersell, Inc.*[364] for the proposition that a web site alone

353. *Id.* at 104-05.
354. *See* Yokoyama, *supra* note 110, at 1195.
355. *Id.* at 1194.
356. *Id.*
357. *Id.* at 1195.
358. 289 F.3d 865 (6th Cir. 2002).
359. *See id.* at 872.
360. *See id.* at 874-75. The court upheld specific jurisdiction. *Id.* at 876.
361. *See id.* at 875.
362. *See id.* at 873-74.
363. *See id.* (citing Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408 (1984)).
364. 130 F.3d 414, 419-20 (9th Cir. 1997).

is insufficient to establish general jurisdiction.[365] The ability of visitors to register domain names on the site did not change the result; the fact that the site enabled the defendant to do business with forum residents was not enough.[366]

At least one scholar sees *Bird* as an indication that *Zippo* is on the way out.[367] According to Awoyemi, the Sixth Circuit paid lip service to *Zippo* while actually discarding the sliding scale test; the defendant's interactive web site had "virtually nothing" to do with the outcome in *Bird*.[368] *Bird* is therefore yet another sign that litigants cannot look to the sliding scale test for dependable guidance on personal jurisdiction issues.[369]

b. *Eastern District of Louisiana*

Bird is not the only case in which a court has bypassed *Zippo* in addressing Internet-based general jurisdiction. In *Hockerson-Halberstadt, Inc. v. Costco Wholesale Corp.*,[370] the Eastern District of Louisiana did so as well, citing both Internet and non-Internet cases in its analysis, but not *Zippo*. The case involved an alleged patent infringement, and the defendant, Costco, had no non-Internet contacts with Louisiana, the forum state.[371] Because the suit did not arise out of Costco's Internet contacts with Louisiana, the only potential ground for personal jurisdiction was general jurisdiction based on Costco's rather limited online sales to the state's residents.[372]

The court found personal jurisdiction to be lacking.[373] In doing so, it not only ignored the *Zippo* sliding scale, but did not consider the quality of Costco's web site at all.[374] Instead, the court zeroed in on the quantity of the wholesaler's Internet sales in Louisiana (or lack thereof), citing both Internet and non-Internet cases in which courts declined to exercise general jurisdiction over out of state defendants with similarly small volumes of sales to the forum.[375]

Although the court did not apply *Zippo*, it did address the issue of basing general jurisdiction on Internet activity, observing that

365. *See Bird*, 289 F.3d at 874.

366. *See id.*

367. *See* Awoyemi, *supra* note 131, at 55.

368. *See id.*

369. *See id.*

370. No. 91-1720, 2000 U.S. Dist. LEXIS 8290, at *7-*10 (E.D. La. June 5, 2000).

371. *See id.* at *3, *7. Costco is a Washington corporation with its principal place of business in Washington State; at the time of the case it had never operated a warehouse in Louisiana and had no bank accounts, property, offices, or agents there. *Id.* at *3.

372. *See id.* at *3-*4. In the approximately two years leading up to the decision, Costco had shipped $32,252.32 worth of merchandise from online sales to Louisiana, an amount that represented less than 0.0000008 of the company's total sales during that time period. *See id.*

373. *Id.* at *10.

374. *See id.* at *7-*9.

375. *See id.* at *7-*8.

> [t]o subject a nonresident corporate defendant to suit in Louisiana solely on the basis of a miniscule number of internet sales that are unrelated to the cause of the plaintiff's alleged injury would render established jurisdictional boundaries meaningless. Further, defendants that operate websites accessible to online purchasers would be deprived of the ability to predict with any certainty where they may be subject to suit.[376]

With this statement, the court touched on what are perhaps the two most widely feared dangers of excessively broad Internet-based jurisdiction: the erosion of traditional geographically based limitations on courts' jurisdictions, and a lack of foreseeability for online actors.[377] The latter issue is a problem because businesses engaged in e-commerce need some predictability regarding where they are subject to jurisdiction.[378]

While uncertainty is troubling due to economic efficiency concerns, the breakdown of jurisdictional boundaries raises serious constitutional issues.[379] After all, as Salvado has explained, "The existence of boundary lines between states is a fact of our constitutional life and their significance to each other lies at the core of Federalism. . . . Our legal system is, and always will be, based upon boundaries."[380] A very broad conception of Internet-based jurisdiction could effectively destroy the idea that states have geographically limited judicial power.[381] As the Fourth Circuit put it, "notions of limited State sovereignty and personal jurisdiction would be eviscerated."[382]

C. *Hybrid Approaches*

Perhaps more common than cases clearly embracing the *Zippo* sliding scale for general jurisdiction,[383] or explicitly rejecting it for that purpose,[384] are those that have made it one part of a multifactor, hybrid analysis. The typical hybrid framework involves assessing the quality of the defendant's web site under *Zippo* and then measuring the level of the defendant's non-Internet contacts with the forum.[385] Some courts that have adopted this kind of hybrid approach have done so explicitly, announcing that they are

376. *Id.* at *9.

377. *See id.*

378. *Cf.* Swire, *supra* note 250, at 1982 (describing the steps that online businesses have taken to limit their amenity to suit in multiple jurisdictions).

379. *Cf.* Salvado, *supra* note 150, at 75.

380. *Id.* at 75-76; *see also* ALS Scan, Inc. v. Digital Servs. Consultants, Inc., 293 F.3d 707, 713 (4th Cir. 2002) (warning that excessively broad personal jurisdiction based on Internet activities could eviscerate traditional notions of limited state sovereignty).

381. *See ALS*, 293 F.3d at 713.

382. *Id.* For more on the geographical limitations on states' judicial authority, see generally Burnham v. Superior Court, 495 U.S. 604 (1990).

383. *See, e.g.*, Mink v. AAAA Dev. Corp. LLC, 190 F.3d 333, 336 (5th Cir. 1999).

384. *See, e.g.*, Revell v. Lidov, 317 F.3d 467, 471 (5th Cir. 2002).

385. *See* Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 451-53 (3d Cir. 2003); *see also* Lakin v. Prudential Sec., Inc., 348 F.3d 704, 711-12 (8th Cir. 2003); Publ'ns Int'l, Ltd. v. Burke/Triolo, Inc., 121 F. Supp. 2d 1178, 1182-83 (N.D. Ill. 2000); Mieczkowski v. Masco Corp., 997 F. Supp. 782, 788 (E.D. Tex. 1998).

formulating a new test.[386] And while some courts have recognized the need for hybrid analysis in the specific jurisdiction context,[387] others have gone to a hybrid analysis because of *Zippo*'s potential incompatibility with the traditional general jurisdiction framework.[388] The reasoning of hybrid approaches has been persuasive, and several commentators have advocated such frameworks.[389]

1. Cases that Have Adopted a Hybrid Framework but Not Exercised Personal Jurisdiction

a. *Third Circuit*

Toys "R" Us, Inc. v. Step Two, S.A. involved a series of trademark violation and cybersquatting claims by Toys "R" Us against Step Two, a Spanish toy store corporation.[390] Toys "R" Us acquired a subsidiary that operated a network of stores under the name "Imaginarium"; Step Two also had stores called "Imaginarium."[391] Both companies registered Internet domain names with variations on the word "Imaginarium."[392] Four of Step Two's web sites allowed visitors to make online purchases.[393] The defendant had few contacts with the forum state, New Jersey, other than shipping to Spain two orders placed by New Jersey residents.[394] In its decision, the Third Circuit directly addressed only the issue of specific jurisdiction, although it used the broader term "personal jurisdiction" throughout its analysis.[395]

The *Toys "R" Us* court cast its analysis largely in terms of the traditional "purposeful availment" test,[396] although it cited *Zippo* as well.[397] The court observed that other circuits had applied purposeful availment tests that were

386. *See, e.g.*, *ALS*, 293 F.3d at 714 ("Thus, adopting and adapting the *Zippo* model, we conclude . . . .").

387. *See id.*; *see also Toys "R" Us*, 318 F.3d at 451-53. The *Toys "R" Us* court observed that "[i]n deciding whether to exercise jurisdiction over a cause of action arising from a defendant's operation of a website, a court may consider the defendant's related non-Internet activities as part of the 'purposeful availment' calculus." *Id.* at 453.

388. *See Lakin*, 348 F.3d at 711-12 (noting problems with applying *Zippo* to general jurisdiction but making the sliding scale test one of several factors in the analysis).

389. *See* Salvado, *supra* note 150, at 113-14; *see also* Jennings, *supra* note 317, at 411; Woeste, *supra* note 318, at 814-15.

390. *Toys "R" Us*, 318 F.3d at 448-49. "[C]ybersquatting [is] the practice of registering a domain name known to be another's trademark, [in order to sell the] domain name to the trademark holder." Yokoyama, *supra* note 110, at 1168.

391. *Toys "R" Us*, 318 F.3d at 449.

392. *Id.*

393. *Id.* at 450.

394. *See id.*

395. *See id.* at 451 (stating that specific jurisdiction is the precise issue in the case); *id.* at 453 (referring to the level of contacts necessary for "personal jurisdiction").

396. *Compare id.* at 452 *with* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

397. *See Toys "R" Us*, 318 F.3d at 452.

consistent with the *Zippo* sliding scale.[398] Purposeful availment analysis is necessary because, without purposeful availment, the mere operation of a commercially interactive web site should not be enough to subject a defendant to personal jurisdiction everywhere in the world.[399] To determine whether there has been purposeful availment, the *Toys "R" Us* court indicated that a court may consider the defendant's relevant non-Internet activities as well.[400] The *Toys "R" Us* court reaffirmed the importance of *Zippo*, citing it for the proposition that a court should make a case-by-case assessment of the nature and quality of the defendant's contacts with the forum.[401] However, the court did not feel the need to determine the precise mix of Internet and non-Internet contacts necessary for personal jurisdiction,[402] as the plaintiff had not been able to show the level of non-Internet contacts necessary for purposeful availment.[403] The court remanded for limited jurisdictional discovery.[404]

b. *Eighth Circuit*

The Eighth Circuit crafted a hybrid approach to Internet-based general jurisdiction in *Lakin v. Prudential Securities, Inc.*[405] *Lakin* involved a series of claims—negligence, breach of contract, and breach of fiduciary duty—all of which were "entirely unrelated" to defendant Prudential's activities in Missouri, the forum state.[406] Those contacts consisted of home equity loans that Prudential had extended to Missouri residents and the fact that Prudential's web site was accessible in Missouri.[407]

Before performing its general jurisdiction analysis, the court voiced its approval of the use of *Zippo* in specific jurisdiction cases, noting that a "great majority" of cases had adopted it for that purpose.[408] However, the court noted the split of authority[409] regarding *Zippo*'s applicability in general jurisdiction cases, and it sided with those courts that limited their use of the sliding scale to specific jurisdiction.[410] The court decided to keep the sliding scale as "an important factor" in its analysis; this way, the nature and quality of the defendant's contacts with the forum would be one of a variety of considerations in the personal jurisdiction analysis.[411]

398. *See id.* at 452-53 (citing ALS Scan v. Digital Serv. Consultants, Inc., 293 F.3d 707 (4th Cir. 2002)).
399. *See id.* at 454.
400. *Id.* at 453.
401. *See id.*
402. *Id.*
403. *Id.* at 454.
404. *Id.* at 458.
405. 348 F.3d 704 (8th Cir. 2003).
406. *See id.* at 705, 707.
407. *Id.* at 706.
408. *See id.* at 710-11.
409. *See supra* Part II.A-B.
410. *See Lakin*, 348 F.3d at 711.
411. *See id.*

The court based its decision on its belief that the sliding scale test does not mesh perfectly with traditional general jurisdiction doctrine.[412] In the general jurisdiction context, a court must consider both the nature and quality of the contacts, as well as the quantity of the contacts.[413] But "[u]nder the *Zippo* test, it is possible for a Web site to be very interactive, but to have no quantity of contacts. In other words, the contacts would be continuous, but not *substantial*. This is untenable in a general jurisdiction analysis."[414] The *Lakin* court's analysis is based on the difference between contacts that are only continuous and systematic and those that are substantial as well.[415] *Zippo* alone is inadequate for general jurisdiction analysis because it only measures the quality of contacts and not the quantity.[416]

The court announced a simple two-part hybrid test as its solution.[417] First, it applied *Zippo* to analyze the quality of Prudential's Internet contacts with Missouri, and then it considered the quantity of those contacts.[418] Under the sliding scale analysis, the court determined that Prudential's site fell into the middle category, "a sophisticated, interactive Web site in which a user can exchange information with the host computer."[419] The web site therefore made it possible for Prudential to have continuous and systematic contacts with Missouri.[420] But that alone would not be enough to establish general jurisdiction; the court still needed to consider the quantity of contacts that actually occurred through the site, which it was unable to do because the trial court had not permitted jurisdictional discovery.[421]

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412. *See id.* at 712.

413. *Id.*

414. *Id.*

415. The Supreme Court's original general jurisdiction case stated that the test was whether the defendant's contacts were substantial. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952). But in a later case, the court recast the test in terms of whether the contacts are "continuous and systematic." *See* Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 416 (1984). For the importance of this distinction, see *supra* Part I.A.3.c.

416. *See Lakin*, 348 F.3d at 712.

417. *See id.*

418. *Id.* For an endorsement of the *Lakin* test, see Woeste, *supra* note 318, at 809.

419. *Lakin*, 348 F.3d at 712. The site allowed users to view information on Prudential financial services, email the company, set up an online account, and apply online for home equity loans and other lines of credit. *Id.*

420. *Id.*

421. *See id.* Relevant contacts would include the number of forum residents that visited the site, requests for information, responses to those requests, online loan applications, and loans resulting from online applications. *Id.* The court ultimately remanded for jurisdictional discovery. *Id.* at 714.

c. *The Fourth Circuit Adapts Traditional Minimum Contacts Doctrine to Internet Contacts*

The Fourth Circuit announced a hybrid framework of its own in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*,[422] a copyright violation case. *ALS* was primarily a specific jurisdiction case, although the court did address the issue of Internet-based general jurisdiction as well.[423] The court began by noting the potential danger of excessively broad personal jurisdiction based on Internet activities: Such an approach could lead to universal personal jurisdiction, eviscerating traditional notions of limited state sovereignty and personal jurisdiction.[424] With those concerns in mind, the court revised *Zippo*'s sliding scale test:[425]

> [W]e conclude that 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.[426]

Other hybrid frameworks tend to keep the different facets of the analysis (such as Internet and non-Internet contacts or *Zippo* and conventional minimum contacts framework) separate and discrete.[427] The *ALS* test is different because it effectively blends the two components into one; the language of the test echoes both *Zippo* and traditional minimum contacts staples such as *Calder*[428] and *Burger King*.[429] As the U.S. District Court for the Eastern District of Virginia observed about the Fourth Circuit's hybrid,

> A comparison of this formulation to the original *Zippo* test indicates that the *ALS* test emphasizes that requirement of *purposeful* targeting of a particular forum, not just the level of interactivity. Under the *ALS* test, the defendant must *direct* activity into the forum state, with the *intent* to engage in business *within the state.* As the *ALS* panel makes clear, personal jurisdiction requires "purposeful availment," that is "*purposeful* conduct directed at the State."[430]

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422. 293 F.3d 707, 714 (4th Cir. 2002).

423. *See id.* at 712, 715.

424. *See id.* at 713; *see also supra* notes 379-82 and accompanying text.

425. *See ALS*, 293 F.3d at 714. District courts within the Fourth Circuit have taken notice that *ALS* introduced a new framework, distinct from the *Zippo* sliding scale. *See* Burleson v. Toback, 391 F. Supp. 2d 401, 409 (M.D.N.C. 2005)); *see also* Graduate Mgmt. Admission Council v. Raju, 241 F. Supp. 2d 589, 594 (E.D. Va. 2003).

426. *ALS*, 293 F.3d at 714.

427. *See* Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 453 (3d Cir. 2003); *see also* Publ'ns Int'l, Ltd. v. Burke/Triolo, Inc., 121 F. Supp. 2d 1178, 1183 (N.D. Ill. 2000); Mieczkowski v. Masco Corp., 997 F. Supp. 782, 788 (E.D. Tex. 1998).

428. Calder v. Jones, 465 U.S. 783 (1984).

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

430. *Raju*, 241 F. Supp. 2d at 594.

Both the *ALS* hybrid itself and the *Raju* court's explanation of it show the influence of *Calder* and *Burger King*.[431] The first two elements of the *ALS* test, directing electronic activity into the state with the manifested intent of engaging in business or other interactions there,[432] are essentially a *Burger King*-like purposeful availment analysis.[433] *Raju*'s emphasis on the defendant's intent to engage in business in the forum[434] is reminiscent of *Burger King*'s observation that a defendant who intentionally establishes a certain level of contacts has "availed himself of the privilege of conducting business" in the forum.[435]

The *ALS* framework also reflects the reasoning of *Calder*.[436] *Calder* upheld jurisdiction because the defendant's "intentional . . . actions were expressly aimed at" the forum.[437] *ALS* requires "a manifested intent" of engaging in business or other interactions with the forum and asks whether the defendant directed electronic activity into the forum.[438] The third prong of the *ALS* framework (whether the defendant's activity creates a potential cause of action in a state resident) bears some resemblance to *Calder*'s effects test, which upheld jurisdiction because the defendants there knew that the harmful effects of their conduct would be felt in the forum.[439]

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431. *Compare id. and ALS*, 293 F.3d at 714, *with Calder*, 465 U.S. at 789-90, *and Burger King*, 471 U.S. at 473-75.

432. *See ALS*, 293 F.3d at 714.

433. *Cf. Burger King*, 471 U.S. at 475 (noting that the requirement of purposeful availment ensures that a defendant will not be haled into a jurisdiction solely on the basis of random, fortuitous, or attenuated contacts); *see also* Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."). *Raju* also emphasized the purposeful availment requirement. *See Raju*, 241 F. Supp. 2d at 594 ("As the *ALS* panel makes clear, personal jurisdiction requires 'purposeful availment,' that is '*purposeful* conduct directed at the State.'" (citation omitted)). For further discussion of the purposeful availment requirement, see *supra* notes 55-59 and accompanying text.

434. *See Raju*, 241 F. Supp. 2d at 594.

435. *See Burger King*, 471 U.S. at 476.

436. *Compare ALS*, 293 F.3d at 714, *with Calder*, 465 U.S. at 789-90. The court in *ALS* made this comparison itself, noting that "[t]his standard . . . is not dissimilar to that applied by the Supreme Court in *Calder v. Jones*." 293 F.3d at 714 (citation omitted). For further discussion of *Calder*, see *supra* Part I.A.2.a.

437. *See Calder*, 465 U.S. at 789.

438. *See ALS*, 293 F.3d at 714. This prong also bears some similarity to Professor Geist's proposed targeting approach to Internet jurisdiction, which seeks to "identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction." *See* Geist, *supra* note 114, at 1380.

439. *Compare ALS*, 293 F.3d at 714 ("[T]hat activity creates, in a person within the State, a potential cause of action cognizable in the State's courts."), *with Calder*, 465 U.S. at 789-90 ("[T]hey knew that the brunt of that injury would be felt by respondent in the State in which she lives and works . . . .").

2. Courts that Have Asserted General Jurisdiction Based on Hybrid Analyses

Although the *Lakin* and *ALS* courts refused to assert general jurisdiction on the records before them,[440] other courts have upheld general jurisdiction based on hybrid analyses.[441]

a. *Eastern District of Texas*

The Eastern District of Texas upheld general jurisdiction using a hybrid analysis in *Mieczkowski v. Masco Corp.*,[442] a products liability case. The defendant Masco had little physical presence in Texas—it had no offices, employees, agents, or property there and did not advertise there.[443] However, in the six years leading up to the case, Masco had shipped over 5.7 million dollars worth of merchandise to Texas, and twice a year it did a direct mailing to its existing customers in the state.[444] Masco also maintained a web site that was, at the time, accessible to approximately 2.2 million Texans.[445]

Internet-based personal jurisdiction was an issue of first impression in both the Eastern District of Texas and the Fifth Circuit.[446] The district court adopted *Zippo*, and though it observed that the majority of cases addressing the issue were specific jurisdiction cases, it saw "no reason" why the sliding scale test should not apply to general jurisdiction as well.[447]

The court found Masco's web site to be in the middle of the *Zippo* scale (interactive).[448] It was "designed to solicit business in a manner that exceed[ed] traditional notions of advertising."[449] However, the court did not reach the issue of whether the web site alone would have been enough to support general jurisdiction.[450] Instead, it employed a hybrid framework, assessing both the nature of the web site and the "traditional business contacts" that Masco had with Texas.[451] These two sets of contacts, taken

440. *See* Lakin v. Prudential Sec., Inc., 348 F.3d 704, 713-14 (8th Cir. 2003); *see also* *ALS*, 293 F.3d at 715.

441. *See* Publ'ns Int'l, Ltd. v. Burke/Triolo, Inc., 121 F. Supp. 2d 1178, 1183 (N.D. Ill. 2000); *see also* Mieczkowski v. Masco Corp., 997 F. Supp. 782, 788 (E.D. Tex. 1998). The District of Columbia Circuit, using a hybrid analysis, would likely have upheld general jurisdiction in *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506 (D.C. Cir. 2002), but it did not officially decide the issue because the plaintiff had failed to perfect service of process. *Id.* at 513.

442. 997 F. Supp. at 787-88.

443. *Id.* at 785. The court found that the plaintiffs had failed to allege facts sufficient to support specific jurisdiction, so the opinion only addressed general jurisdiction. *See id.*

444. *Id.*

445. *Id.*

446. *Id.* at 785-86.

447. *See id.* at 786 & n.3.

448. *See id.* at 786-87.

449. *Id.*

450. *Id.* at 788.

451. *Id.*

together, were continuous, systematic, and substantial enough to subject Masco to general jurisdiction in Texas.[452]

b. *Northern District of Illinois*

Publications International, Inc. v. Burke/Triolo, Inc.[453] is another case in which a district court used a hybrid analysis to uphold general jurisdiction based in part on a defendant's Internet contacts with the forum. The plaintiff, Publications International, sued Burke for breach of contract and copyright violation, alleging that Burke's web site had unlawfully used Publications International's photographs.[454] The plaintiff, an Illinois corporation, brought suit in the U.S. District Court for the Northern District of Illinois; the defendant was a California corporation.[455]

The court performed a straightforward, two-step analysis. It evaluated the quality of the defendant's web site under the *Zippo* sliding scale, and it then considered the defendant's non-Internet contacts with the state.[456] The web site fell into *Zippo*'s middle category; the court characterized it as "promotional" in nature and as an "intentional and continuous business contact."[457] The defendant's non-Internet contacts were also "intentional and continuous" (as opposed to "incidental and sporadic").[458] Therefore, general jurisdiction was proper and consistent with "traditional notions of fair play and substantial justice."[459]

D. *Summary of the* Zippo *Split*

This part of the Note examined the split among federal courts over whether to apply the *Zippo* test to general jurisdiction. Although most courts apply *Zippo* in at least some circumstances,[460] many courts have determined that the sliding scale test is inappropriate for general jurisdiction.[461] Still other courts have sought to adapt minimum contacts analysis to the Internet age by combining *Zippo* with traditional minimum contacts factors in a hybrid analysis.[462]

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452. *See id.*
453. 121 F. Supp. 2d. 1178, 1183 (N.D. Ill. 2000).
454. *Id.* at 1181.
455. *See id.*
456. *See id.* at 1182-83.
457. *Id.*
458. *Id.* at 1183.
459. *Id.* The court also found specific jurisdiction. *Id.* at 1182.
460. For a list of appellate court cases that have applied *Zippo*, see *supra* note 208.
461. *See supra* Part II.B.
462. *See supra* Part II.C.

III. COURTS SHOULD ABANDON *ZIPPO* AND REFOCUS ON TRADITIONAL MINIMUM CONTACTS STANDARDS IN GENERAL JURISDICTION CASES

Part III of this Note argues that courts should stop trying to contort general jurisdiction analysis into the format of *Zippo*'s sliding scale test. There are several reasons to abandon *Zippo* in general jurisdiction cases. First, *Zippo* itself was a specific jurisdiction case.[463] There is reason to doubt whether the sliding scale test is well-suited to handling general jurisdiction, an issue which the court that created the test did not face.[464] Second, the *Zippo* test is inconsistent with and less protective of due process rights than the Supreme Court's established general jurisdiction standards.[465] Finally, while some courts and commentators have sought to prolong *Zippo*'s vitality by making it part of a hybrid framework, the sliding scale test adds little or no value to those analyses.[466]

This Note proposes that courts apply a more traditional minimum contacts analysis when Internet contacts are at issue in a general jurisdiction case. Courts should determine whether the defendant purposefully availed itself of the benefits and privileges of conducting activities in the forum state[467] and whether the defendant's contacts with the forum state are sufficiently continuous, systematic, and substantial to support general jurisdiction.[468] If a court determines that the defendant's contacts support jurisdiction, it must then consider whether the exercise of jurisdiction would be reasonable.[469] Through a web site, an out of state defendant could potentially create contacts with the forum that, taken together with other, non-Internet contacts, might support general jurisdiction. But the web site's level of interactivity should carry little, if any, weight in the analysis.

A. Zippo *Was a Specific Jurisdiction Case*

The *Zippo* plaintiff argued only for specific jurisdiction, conceding that the court did not have general jurisdiction.[470] The court therefore did not have to address the issue of whether the defendant's web site could have supported general jurisdiction.[471] By failing to limit the *Zippo* holding to its facts and apply the sliding scale only to specific jurisdiction cases, courts have created a confusing and inconsistent body of case law.[472] The *Zippo* court itself deserves some of the blame for this confusion. Although the court made clear at the beginning of its opinion that the only issue before it

463. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1122 (W.D. Pa. 1997) (stating that the plaintiff did not argue for general jurisdiction and conceded that, if personal jurisdiction existed in the case, it would be specific jurisdiction).

464. *See infra* Part III.A.

465. *See infra* Part III.B.

466. *See infra* Part III.C.

467. *See supra* Part I.A.2.

468. *See supra* Part I.A.3.

469. *See supra* Part I.A.3.b.

470. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1122 (W.D. Pa. 1997).

471. *See id.*

472. *See* Awoyemi, *supra* note 131, at 38.

was specific jurisdiction,[473] it presented the sliding scale test almost entirely in terms of the broader phrase "personal jurisdiction," which could indicate general jurisdiction, specific jurisdiction, or both.[474]

Because the *Zippo* test was not created to address the constitutional questions implicit in a general jurisdiction analysis, there is reason to doubt its suitability for that task. The requirements of specific jurisdiction and general jurisdiction are significantly different.[475] There is, therefore, reason to question the ability of any "one size fits all" test to encapsulate both,[476] especially when the court that created the test was not faced with both issues.

B. Zippo *Is Inconsistent with the Supreme Court's General Jurisdiction Doctrine*

The *Zippo* sliding scale test is both inconsistent with the Supreme Court's established general jurisdiction framework and under-protective of due process rights. The Due Process Clause of the Fourteenth Amendment limits the ability of courts to exercise personal jurisdiction over out of state defendants who do not have sufficient contacts with the forum in which the court sits.[477] The threshold for establishing general jurisdiction is "extremely high."[478] General jurisdiction exists only when the out of state defendant's forum contacts are continuous, systematic, and substantial.[479]

1. *Zippo* Is Inconsistent with *Helicopteros* and *Perkins*

It is doubtful that merely maintaining a web site that is accessible in a forum is a contact substantial enough to confer general jurisdiction. In fact, courts and commentators have widely rejected[480] and even ridiculed[481] the

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473. *See Zippo*, 952 F. Supp. at 1122.

474. *See id.* at 1124 ("[T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportional to the nature and quality of commercial activity that an entity conducts over the Internet. . . . If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmissions of computer files over the Internet, personal jurisdiction is proper. . . . A passive Web site . . . is not grounds for the exercise [of] personal jurisdiction."). Additionally, the *Zippo* court cited only specific jurisdiction cases. Woeste, *supra* note 318, at 797.

475. *See supra* Part I.A.

476. *Cf.* Rhodes, *supra* note 193, at 200 ("The courts should . . . not be constrained by the elusive quest for a comprehensive standard . . . ."); Yokoyama, *supra* note 110, at 1173-76 (arguing against a single, all-encompassing standard for Internet jurisdiction cases).

477. *See supra* Part I.A.1.

478. Salvado, *supra* note 150, at 96.

479. The Supreme Court has used these terms inconsistently, creating some confusion. *See supra* Part I.A.3.c. However, the case law shows that general jurisdiction requires contacts that are substantial, not merely continuous and systematic. Condlin, *supra* note 21, at 72.

480. *See supra* notes 197-203 and accompanying text.

481. *See, e.g.*, Hy Cite Corp. v. Badbusinessbureau.com, 297 F. Supp. 2d 1154, 1161 (W.D. Wis. 2004) ("Plaintiff's argument that general jurisdiction exists in this case borders on the frivolous.").

notion of basing general jurisdiction solely on the operation of a web site. The *Zippo* test measures only the nature of a web site, not the quantity or substantiality of the defendant's contacts with the forum.[482] Because of this, the *Zippo* sliding scale ultimately reveals only a defendant's ability to create contacts with the forum, not the defendant's actual contacts.[483] As one court rightly observed, "[t]he fact that a site is classified as 'interactive' is irrelevant to the analysis of general jurisdiction if no one from the forum state has ever used the site."[484]

It is therefore unsurprising that *Zippo* is inconsistent with *Helicopteros*, the Supreme Court's most recent general jurisdiction case, and *Perkins*, the only case in which the Court has found general jurisdiction. Under the *Zippo* sliding scale, personal jurisdiction is proper where a defendant "clearly does business over the Internet . . . enter[ing] into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet."[485] But to apply this terminology to a general jurisdiction analysis begs the key question: Are the contacts continuous, systematic, and substantial?[486] Do "knowing and repeated" transactions entail contacts that are "continuous and systematic"? Does a defendant's "clearly doing business over the internet" show "substantial" contacts with the forum? The plain meaning of these words suggests that *Zippo* sets a lower bar than *Helicopteros* and *Perkins*. Even a transaction that occurs repeatedly may happen less frequently than "continuously and systematically"; the fact that a defendant is "clearly doing business" does not necessarily mean the defendant is conducting a substantial amount of business.

In *Helicopteros*, Helicol was "clearly doing business" in the state of Texas. The company sent its chief executive officer there on business, purchased equipment from a Texas supplier, and sent its employees to Texas for training.[487] Helicol presumably did these things "knowingly," and it did them repeatedly. Yet Helicol's contacts with Texas were insufficient for the Supreme Court to confer general jurisdiction.[488] Had Helicol established the same or similar contacts with Texas over the Internet, the *Zippo* test would likely have authorized jurisdiction.

482. *See supra* notes 348-57 and accompanying text.

483. *See* Salvado, *supra* note 150, at 104 ("The Zippo scale does nothing to discover the actual intended contacts with the forum by a defendant's use of a website. What it does do is attempt to measure the potential of a website to be used by a defendant in a particular way.").

484. Bell v. Imperial Palace Hotel/Casino, Inc., 200 F. Supp. 2d 1082, 1091-92 (E.D. Mo. 2001).

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

486. *See* Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 416 (1984); *see also* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952).

487. *See Helicopteros*, 466 U.S. at 416.

488. *See id.* at 418.

Because it would confer general jurisdiction over out of state defendants in situations where the Supreme Court's minimum contacts framework would not, the *Zippo* test is under-protective of due process rights.

2. *Zippo* Is Inconsistent with the *Calder* Effects Test

The *Zippo* test can also produce results inconsistent with established specific jurisdiction jurisprudence. For example, the Supreme Court held in *Calder* that two National Enquirer employees were subject to specific jurisdiction in California because they had allegedly libeled a resident of that state.[489] *Calder* shows that an out of state defendant can become subject to personal jurisdiction in a forum that he has targeted with conduct that causes a foreseeable, harmful effect therein.[490]

If the allegedly libelous article at issue in *Calder* had appeared online instead of in print, the *Zippo* test would have commanded a result different from the one that the Supreme Court reached. A libelous Internet posting could target a certain forum (for example, by being local in focus and scope) and cause injury that would be felt primarily in that place, just as the harm that the National Enquirer article caused to Shirley Jones was felt primarily in California.[491] And a libelous posting could appear on an entirely "passive" web site; in fact, it is probably more likely that a libelous site would be "passive" rather than "interactive" or "clearly doing business over the internet"[492] (assuming that an online retailer is less likely to libel someone). Yet the *Zippo* test would instruct a court to disregard *Calder* and only examine the nature of the web site: "A passive Web site . . . is not grounds for the exercise [of] personal jurisdiction."[493]

C. *Hybrid Frameworks Are a Poor Solution*

Recognizing *Zippo*'s various shortcomings, many courts and commentators have sought to shore up the sliding scale test by combining it with other factors in multipronged, hybrid analyses.[494] For example, Salvado argues that "[t]he Zippo scale must be supplemented in order to become useful."[495] He proposes a two-pronged test in which a court first uses *Zippo* to determine the nature of the web site and then looks for "something more" to determine whether the defendant has intentionally intensified its Internet contacts with the forum.[496]

489. *See* Calder v. Jones, 465 U.S. 783, 791 (1984). For more on *Calder*, see *supra* Part I.A.2.a.

490. *See Calder*, 465 U.S. at 788-90.

491. *See id.* at 789-90.

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

493. *Id.*

494. *See supra* Part II.C.

495. Salvado, *supra* note 150, at 105.

496. *See id.* at 113-14.

Salvado's proposal is a fairly typical hybrid framework: Apply the *Zippo* test, consider other contacts (Internet or non-Internet), and then determine whether everything taken together supports the exercise of personal jurisdiction.[497] But *Zippo* appears to add little if any value to the general jurisdiction analysis as part of these hybrid tests. If factors other than the quality of the web site (such as other Internet contacts or non-Internet contacts) are continuous, systematic, and substantial, then general jurisdiction exists under *Perkins* and *Helicopteros*. It would not be necessary to evaluate the quality of the web site in order to make that determination, so *Zippo* would add no value. If, on the other hand, those other factors by themselves are insufficient to establish general jurisdiction, then the court is left with a difficult task. It must determine how much weight to give the nature of the web site in determining whether the site tips the scales towards allowing jurisdiction.

For whatever role the court gives *Zippo*, it will probably receive little benefit in return. The web site will most likely fall into *Zippo*'s poorly defined middle category,[498] the category that has created a "black hole of doubt and confusion."[499] And to the extent that terms such as "passive" and "interactive" have any discernable meaning, that meaning is subject to change. As Professor Geist has noted, the entire passive versus active spectrum has shifted since *Zippo* was decided in 1997.[500] A web site that was considered interactive in 1997 may be considered passive now, creating the possibility that web site owners need to constantly reevaluate their positions on the sliding scale.[501]

Courts have a hard enough time determining whether a defendant's contacts are continuous, systematic, and substantial enough to support general jurisdiction.[502] Requiring courts to assess the importance of a "somewhat interactive" web site and then factor this determination into their analyses would not make the process any simpler or more predictable. That sort of discredited "totality of the circumstances" test[503] would leave courts with too much flexibility and too little guidance.

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497. *See supra* note 385 and accompanying text.

498. *See* Geist, *supra* note 114, at 1379 (observing that most sites fall in the middle ground of the *Zippo* scale).

499. Yokoyama, *supra* note 110, at 1166.

500. *See* Geist, *supra* note 114, at 1379-80.

501. *Id.*

502. See *supra* notes 72-75, 101-08 and accompanying text for a discussion of the confusing nature of general jurisdiction.

503. *See* Condlin, *supra* note 21, at 137 (noting that the Supreme Court has repeatedly rejected the notion of a totality of the circumstances test for personal jurisdiction); *cf.* Yokoyama, *supra* note 110, at 1174 (observing that, for specific jurisdiction, the Supreme Court has "refined and tailored [the] personal jurisdiction analysis" in light of the nature of the plaintiff's claim).

D. *Proposed Solution*

Courts should not apply the *Zippo* sliding scale test to general jurisdiction. As discussed above, *Zippo* is inconsistent with the Supreme Court's general jurisdiction doctrine and under-protective of due process rights.[504] Instead of getting bogged down in the *Zippo* terminology, courts should return to traditional minimum contacts principles to determine whether a defendant has (through the Internet or otherwise) established contacts with the forum state that are continuous, systematic, and substantial.

1. A Return to Fundamental Principles

The Supreme Court has made it clear that increases in interstate commerce and communications do not "herald[] the eventual demise of all restrictions on the personal jurisdiction of state courts."[505] To make those restrictions relevant and meaningful in the Internet age, and to protect the due process rights of out of state defendants,[506] courts must return to established minimum contacts jurisprudence. In other words, rather than getting bogged down in terminology such as "interactive," "passive," and "doing business,"[507] courts should return their focus to the issue that the Supreme Court has deemed critical: whether the defendant has purposefully availed itself of the benefits and privileges of doing business in the forum state, thereby invoking the protection of its laws, and whether the exercise of jurisdiction would be reasonable.[508] In a general jurisdiction case, the defendant's contacts with the forum must be continuous, systematic, and substantial.[509]

2. The Fourth Circuit's Solution

The traditional minimum contacts requirements are by no means incompatible with Internet-related issues or incapable of handling the challenges of an Internet-based personal jurisdiction case. The Fourth Circuit successfully applied those traditional requirements to an Internet case in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*[510] Under the *ALS* test,

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504. *See supra* Part III.B.

505. Hanson v. Denckla, 357 U.S. 235, 251 (1958). As Professor Geist has observed, because "technological change is constant, [legal] standards created with specific technologies in mind are likely to become outdated as the technology changes." Geist, *supra* note 114, at 1359.

506. *See supra* Part I.A.1.

507. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc. 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (laying out the sliding scale test).

508. *See supra* Part I.A.

509. *See supra* Part I.A.3.c.

510. 293 F.3d 707 (4th Cir. 2002). For additional discussion of *ALS*, see *supra* notes 422-39 and accompanying text.

> a State may . . . 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.[511]

The *ALS* test borrows concepts from some of the Supreme Court's seminal personal jurisdiction cases, notably *Burger King* and *Calder*.[512] *ALS* rephrases the reasoning of those cases into terminology better suited to Internet cases, while staying faithful to the underlying minimum contacts principles that the Supreme Court sought to advance.

While the Fourth Circuit claimed to be "adopting and adapting" *Zippo*,[513] the *ALS* test bears little resemblance to *Zippo*'s sliding scale.[514] And that is *ALS*'s greatest strength: It moves away from the *Zippo* terminology, which was confusing and unhelpful[515] for anything other than measuring potential contacts,[516] and instead offers a framework for evaluating actual contacts. The *ALS* test would probably require some modification before it could work well in a general jurisdiction case. The third prong of the test examines whether the defendant's contacts created a cause of action in a forum resident,[517] which implies that the test only applies to specific jurisdiction (jurisdiction based on a cause of action related to the defendant's contacts with the forum). In a general jurisdiction case, the test should instead ask whether the defendant's Internet and non-Internet contacts with the forum are continuous, systematic, and substantial.[518]

3. General Jurisdiction

Courts and commentators have rightly rejected the idea of basing general jurisdiction solely on the operation of a web site.[519] A web site may be a form of continuous and systematic contact with the forum if it is always

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511. *ALS*, 293 F.3d at 714.

512. *See supra* notes 431-39 and accompanying text.

513. *ALS*, 293 F.3d at 714.

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

515. *See* Geist, *supra* note 114, at 1379; *see also* Yokoyama, *supra* note 110, at 1166 (stating that *Zippo*'s middle category has created a "black hole of doubt and confusion"). Professor Geist argues that the *Zippo* test has failed at one of its primary objectives, promoting increased legal certainty. Geist, *supra* note 114, at 1378-80. Because so few web sites are entirely active or passive, the majority of sites fall into *Zippo*'s middle category, making it difficult to predict how interactive a court will view a given site to be. *Id.*

516. *See* Salvado, *supra* note 150, at 104 ("The Zippo scale does nothing to discover the actual intended contacts with the forum . . . . What it does do is attempt to measure the potential of a website to be used by a defendant in a particular way."); *see also* Yokoyama, *supra* note 110, at 1193-94 (arguing that to apply *Zippo* to general jurisdiction would be a mistake because doing so would equate the potential for conducting online transactions with actually setting up a "bricks-and-mortar store front in the forum").

517. *See ALS*, 293 F.3d at 714.

518. *See supra* Part I.A.3.c.

519. *See supra* Part I.B.4.

accessible there. But general jurisdiction also requires contacts that are substantial,[520] a high threshold that a web site alone does not meet.

As Professor Rhodes has observed, "the better reasoned opinions focus not on the characteristics of the website, but rather on the nature of the transactions between the nonresident defendant and residents of the forum state."[521] In other words, as Professor Bales and Van Wert put it, "focus on conduct rather than medium."[522] A web site is a communication tool, a vehicle through which a defendant could conceivably create contacts substantial enough to support general jurisdiction. It is on those other contacts, whether they are online (such as the downloading of a computer program) or offline (such as the shipment of a book to the forum to fill an online order) that the general jurisdiction analysis should focus. Whether the web site that facilitates those contacts is "active," "passive," or something in between[523] should not determine the existence of general jurisdiction.

CONCLUSION

The *Zippo* sliding scale test provided useful guidance to courts struggling to apply traditional personal jurisdiction principles to a new technology. But in the years since the test's introduction, its many significant shortcomings have become apparent. As numerous courts and scholars have realized, the sliding scale is not the appropriate framework for a general jurisdiction analysis. Rather than attempt to twist, modify, or supplement the *Zippo* test until it appears up to the task, courts should simply abandon it when addressing general jurisdiction. Courts should return to fundamental minimum contacts principles and focus on the key question of whether the defendant's contacts with the forum are sufficiently continuous, systematic, and substantial to justify subjecting the defendant to suit in the forum on an unrelated matter. Courts need not determine how interactive the defendant's web site is in order to answer that question.

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520. *See supra* Part I.A.3.c.

521. Rhodes, *supra* note 73, at 885.

522. Bales & Van Wert, *supra* note 173, at 55.

523. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc. 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (laying out the sliding scale test).

Notes & Observations