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Beyond Zippo's Sliding Scale - The Third Circuit Clarifies Internet-Based Personal Jurisdiction Analysis

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BEYOND ZIPPO'S "SLIDING SCALE"—THE THIRD CIRCUIT
CLARIFIES INTERNET-BASED PERSONAL
JURISDICTION ANALYSIS

I. INTRODUCTION

As early as 1958, the Supreme Court noted that “[a]s technological progress has increased the flow of commerce . . . the need for jurisdiction over nonresidents has undergone a similar increase But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.”¹ The expansion of traditional limits on personal jurisdiction in the face of modern communications entered a dramatic new phase with the Internet boom of the 1990s.² The ability of the Internet to connect parties in “cyberspace” and allow them to conduct business and enter into legal agreements in a virtual environment creates unique challenges for the geographically based rules that traditionally define a court’s jurisdiction.³

When one creates a public website, the Internet makes it accessible to anyone with a web connection and a computer.⁴ This gives parties the ability to share information and create legal relationships without regard to the geographic borders that ordinarily define the logical limits of a

1. *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958).

2. See Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1107 (1996) (“The personal jurisdiction problems posed by virtual commerce and Internet telepresence are in many ways the culmination of a long evolution of legal doctrine occasioned by changing technology.”); see also *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123 (W.D. Pa. 1997) (noting that “with this global [information] revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages”).

3. See Mark C. Dearing, *Personal Jurisdiction and the Internet: Can the Traditional Principles and Landmark Cases Guide the Legal System into the 21st Century?*, 4 J. TECH. L. & POL’Y 4, 4–5 (1999) (noting potential liabilities of placing information on Internet). Due to the global nature of the Internet, merely creating a website may expose the party responsible for that website to worldwide liabilities. See *id.* (noting expansive global potential for liability arising from Internet activity). The Second Circuit characterized the application of established personal jurisdiction law “in the fast-developing world of the internet [as] somewhat like trying to board a moving bus.” *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997).

4. See Joseph S. Burns & Richard A. Bales, *Personal Jurisdiction and the Web*, 53 ME. L. REV. 29, 40 (2001) (noting some courts hold parties “present” at every location where their web-based information is accessed). See also David M. Fritch, Article, *Click Here for Lawsuit – Trespass to Chattels in Cyberspace*, 9 J. TECH. L. & POL’Y 31, 33–34 (2004) (“Today, the Internet is unparalleled as the world’s largest repository of content, accessible to anyone with a computer and a browser.”).

court's jurisdiction.⁵ Even a local website can connect visitors around the world with the site's owner, whether the owner specifically intended such connections or not.⁶

Cyberspace, with its expansive reach and lack of a geographical situs, often confounds courts trying to apply traditional doctrines of personal jurisdiction.⁷ Courts deciding early Internet jurisdiction cases were reluctant to adapt conventional personal jurisdiction rules to accommodate the far-reaching potential of online contacts.⁸ The continuing growth of the Internet, and the accompanying proliferation of Internet-based transactions, required courts to develop an evolving approach to jurisdiction that adapts customary notions of personal jurisdiction to the realities of cyberspace.⁹ Although technology creates new ways to make meaningful contacts—and generate disputes—between local plaintiffs and nonresident defendants, the traditional jurisdictional paradigms remain unchanged.¹⁰ The touchstone for constitutionally asserting jurisdiction over nonresident defendants remains whether they made a purposeful connection with the forum.¹¹ This requires broad judicial inquiry into both online and offline activities to uncover a nonresident defendant's intent to conduct activities in the forum state.¹²

5. See John P. Collins, *Trying to Board a Moving Volkswagen*, 16 YALE L. & POL'Y REV. 535, 537–38 (1998) (noting challenges of applying traditional personal jurisdiction rules in cyberspace).

6. See Burns & Bales, *supra* note 4, at 40 (noting expansive nature of web contacts). The following example illustrates the potentially expansive nature of web contacts: "If, for example, X from Kentucky places information on the Web, and that information is accessed from New York, California, and Texas, X is present, for purposes of personal jurisdiction, in New York, California, Texas, and Kentucky." *Id.*

7. See Collins, *supra* note 5, at 538 (noting difficulty of applying personal jurisdiction rules to web transactions).

8. See, e.g., *Pres-Kap v. Sys. One, Direct Access*, 636 So. 2d 1351, 1353 (Fla. Dist. Ct. App. 1994) (declining to exercise personal jurisdiction for out-of-state online database service). In rejecting the use of online contacts as grounds for personal jurisdiction, the *Pres-Kap* court noted "a contrary decision would, we think, have far-reaching implications for business and professional people who use 'on-line' computer services for which payments are made to out-of-state companies where the database is located." *Id.*

9. See generally *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (examining whether electronic contacts are, by their nature, sufficient under Due Process Clause to support personal jurisdiction).

10. See Allan Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW. 1167, 1191 (1998) (noting complexity of applying traditional laws in cyberspace is not "uniquely problematic").

11. See *id.* at 1182 (noting that defendant's amenability to jurisdiction "must be the product of his own volition").

12. See *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003) (requiring evidence that website owners "purposefully avail themselves of conducting activity in the forum state").

This Casebrief examines the Third Circuit's approach to applying personal jurisdiction rules to cyberspace.¹³ Part II of this Casebrief reviews the traditional rules of personal jurisdiction, as well as the emerging case law applying these rules to questions of Internet-based personal jurisdiction, both within the Third Circuit and beyond.¹⁴ Part III discusses the Third Circuit's approach to Internet-based personal jurisdiction, as applied in *Toys "R" Us, Inc. v. Step Two, S.A.*¹⁵ Finally, Part IV discusses the impact of the Third Circuit's decision on personal jurisdiction issues as applied to the operation of a commercial website.¹⁶

II. EVOLUTION AND APPLICATION OF PERSONAL JURISDICTION TO THE INTERNET

A. *Traditional Rules of Personal Jurisdiction*

Whenever defendants reach out beyond the borders of their home states (or countries) to conduct activities that create legal relationships and obligations with persons in another state, they may subject themselves to jurisdiction in that foreign state's courts for disputes arising from those activities.¹⁷ The reach of a court's jurisdiction over nonresident defendants, however, is limited.¹⁸ To protect the interests of nonresident defendants, numerous restrictions are placed on the scope of a court's jurisdiction.¹⁹ If jurisdiction is not prohibited by a forum-specific long-arm statute, a court's ability to assert authority over nonresident defendants remains subject to constitutional due process limitations, embodied in the rules of general and specific personal jurisdiction.²⁰

13. For a discussion of the *Toys "R" Us* decision and the Third Circuit's analysis, see *infra* notes 88–127 and accompanying text.

14. For a discussion of the traditional rules of personal jurisdiction, see *infra* notes 17–35 and accompanying text. For a discussion of the emerging framework of personal jurisdiction based on Internet-based activities, see *infra* notes 36–87 and accompanying text.

15. 318 F.3d 446 (3d Cir. 2003). For a discussion of the Third Circuit's approach to extending personal jurisdiction for Internet-based activities, see *infra* notes 88–127 and accompanying text.

16. For a discussion of the practical impact of the Third Circuit's ruling for practitioners in evaluating personal jurisdiction questions stemming from operation of a commercial website, see *infra* notes 128–41 and accompanying text.

17. See *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950) (noting purpose of personal jurisdiction).

18. See *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (noting due process limitations on personal jurisdiction).

19. See *United States v. Morton*, 467 U.S. 822, 828 (1984) (“[P]ersonal jurisdiction protects the individual interest that is implicated when a nonresident defendant is haled into a distant and possibly inconvenient forum.”).

20. See *Dearing*, *supra* note 3, at 6–7 (describing traditional jurisdictional rules).

1. *General Jurisdiction*

General jurisdiction permits courts to exercise their authority over nonresident defendants even when the defendants' contacts with the state are unrelated to the plaintiffs' claims.²¹ General jurisdiction is limited to nonresident defendants who have "substantial contacts" with the forum state, allowing jurisdiction only when nonresident defendants engage in "continuous and systematic" activities within the state where the court sits.²² Generally, courts have held that maintaining an Internet website accessible to persons within the forum state is not sufficient in-state activity to justify general jurisdiction over a nonresident defendant.²³ In the absence of general jurisdiction, however, courts may still exercise specific personal jurisdiction—the doctrine most often relied upon in cases requiring Internet-based personal jurisdiction over nonresident defendants.²⁴

2. *Specific Personal Jurisdiction*

Unlike general jurisdiction, specific personal jurisdiction requires a "basic nexus" between a plaintiff's cause of action and the defendant's contacts with the forum state.²⁵ Provided that such a nexus exists, courts must examine the nature and extent of a nonresident defendant's contacts with the state to determine whether they satisfy the "minimum contacts" required to constitutionally justify a local court's exercise of jurisdiction.²⁶

21. See Burk, *supra* note 2, at 1108 (describing general jurisdiction analysis).

22. See *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414–16 (1984) (providing general jurisdiction standard).

23. See, e.g., *ALS Scan, Inc. v. Digital Serv. Consultants*, 293 F.3d 707, 715 (4th Cir. 2002) ("We are not prepared at this time to recognize that a State may obtain general jurisdiction over out-of-state persons who regularly and systematically transmit electronic signals into the State via the Internet based solely on those transmissions."); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998) (concluding Internet activities are not substantial or systematic to justify general jurisdiction); *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 833 (N.D. Ill. 2000) (declining general jurisdiction over out-of-state website operator); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122 (W.D. Pa. 1997) ("[I]f personal jurisdiction exists in this case, it must be specific.").

24. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (providing framework for specific personal jurisdiction). Most courts extending personal jurisdiction over nonresident defendants based on their Internet-based activities have applied specific personal jurisdiction. See *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1268–69 (6th Cir. 1996) (exercising specific jurisdiction over nonresident defendant for Internet-based activities); see also *Euromarket Designs, Inc.*, 96 F. Supp. 2d at 833 (same); *Zippo*, 952 F. Supp. at 1127 (same); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1334 (E.D. Mo. 1996) (same).

25. See *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 451 (3d Cir. 2003) (detailing nexus requirements described in *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir. 2002)).

26. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (citing *Int'l Shoe Co.*, 326 U.S. at 316) (noting requirement for constitutionally sufficient minimum contacts with forum to sustain personal jurisdiction); see also U.S. CONST.

a. Minimum Contacts Test

The minimum contacts test requires defendants, by their actions, to “purposefully avail” themselves of the privilege of conducting business in the state.²⁷ While defendants need not physically enter the state, constitutional due process requires nonresident defendants to purposefully and deliberately establish minimum contacts with the forum state before a court can justify the exercise of jurisdiction.²⁸ These requirements are designed to prevent unwary defendants from being brought under a foreign or out-of-state court’s jurisdiction due to random or isolated contacts, and to ensure that the exercise of jurisdiction “comports with traditional notions of fair play and substantial justice.”²⁹

b. Effects Test

In *Calder v. Jones*,³⁰ the Supreme Court presented an alternative to the traditional purposeful availment test for specific personal jurisdiction.³¹ This “effects test” allows courts to extend jurisdiction over nonresident defendants when their tortious actions, and the resultant effects, are expressly targeted at in-state plaintiffs.³² The Court in *Calder* applied this effects test to affirm a California court’s exercise of jurisdiction over two Florida defendants based on a libelous article they wrote in a national pub-

amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty or property, without due process of law . . .”).

27. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (explaining purposeful availment requirement for personal jurisdiction). The Court in *Hanson* explained:

The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant’s activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Id.

28. See *Euromarket Designs, Inc.*, 96 F. Supp. 2d at 834 (citing *Burger King Corp.*, 471 U.S. at 475). The Supreme Court summarized the challenge of expanding personal jurisdiction in the face of technological change, noting “it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.” *Burger King Corp.*, 471 U.S. at 476.

29. *Int’l Shoe Co.*, 326 U.S. at 316; see also *Helicopteros Nacionales de Colum., S.A. v. Hall*, 466 U.S. 408, 417 (1984) (noting desire to avoid personal jurisdiction based on unilateral activity of third parties); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984) (noting need to avoid jurisdiction based on random or attenuated contacts).

30. 465 U.S. 783 (1984).

31. See *id.* at 790 (“An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause injury in California.”).

32. See *id.* at 789 (noting Florida resident defendants “expressly aimed” their tortious actions at California resident).

lication regarding a California resident.³³ The Court sustained jurisdiction—despite a lack of substantial contacts between the defendants and the forum state—based on the defendants’ knowledge that their article might have an injurious effect on the plaintiff in the state where she lived and worked.³⁴ Courts in subsequent cases have used the effects test to extend jurisdiction whenever a nonresident defendant’s activities (1) are intentional; (2) are expressly and knowingly aimed at the forum state; (3) cause harm that is primarily felt in the forum state; and (4) are known, by the defendant, to be likely to inflict harm in the forum state.³⁵

B. *Personal Jurisdiction in Cyberspace*

The near universal ability of the Internet to connect website owners with website visitors around the world, without regard to geographical boundaries, creates the potential to expose website owners to liability vir-

33. See *id.* at 786 (reciting facts of case). The article at issue in *Calder* was written and edited in Florida, but the story concerned the California-based activity of a California resident. See *id.* at 788 (describing plaintiff’s connection to California).

34. See *id.* at 789–90 (sustaining jurisdiction). The Court stated:

[T]he brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California.

Id. at 788–89. The Ninth Circuit has held, however, in a defamation case similar to *Calder*, that jurisdiction over a Swedish resident was improper under the effects test where the plaintiff was a corporation rather than an individual. See *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1487 (9th Cir. 1993) (denying personal jurisdiction). The *Core-Vent* court required corporate plaintiffs to demonstrate both that they were headquartered in the forum and that the economic impact of the defendant’s actions was felt primarily in that state. See *id.* at 1487 (noting plaintiff did not allege effects were felt most significantly in California). Other courts, including the Third Circuit, however, have applied the effects test from *Calder* without distinguishing between corporate and individual plaintiffs. See *First Am. First, Inc. v. Nat’l Ass’n of Bank Women*, 802 F.2d 1511, 1517 (4th Cir. 1985) (extending personal jurisdiction under effects test for plaintiff corporation); see also *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 837 (N.D. Ill. 2000) (“[T]he state of a company’s principal place of business is where the injury is most likely to occur. Therefore, personal jurisdiction is proper under the effects doctrine.”). The Third Circuit summarized its position on this issue, noting that it “is questionable judicial policy to apply a different jurisdictional rule to individuals than to corporations, to small enterprises than to large ones. To indulge in such *ad hoc* determinations creates confusion where there should be certainty” *IMO Indus. Inc. v. Kiekert AG*, 155 F.3d 254, 265 n.9 (3d Cir. 1998) (quoting *Dollar Savings Bank v. First Sec. Bank of Utah*, 746 F.2d 208, 214 (3d Cir. 1984)).

35. See *Core-Vent*, 11 F.3d at 1486 (summarizing effects test from *Calder*). The *Core-Vent* court summarized the *Calder* effects test, noting that “personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and the defendant knows is likely to be suffered—in the forum state.” *Id.*

tually anywhere.³⁶ When website owners place information on public websites, they cannot control the location of persons accessing the site or effectively limit their sites' geographic reach.³⁷ Fortunately for website owners, personal jurisdiction analysis extends beyond questions of mere accessibility to persons in foreign or remote jurisdictions.³⁸ Because prac-

36. See *Osteotech, Inc. v. GenSci Regeneration Scis., Inc.*, 6 F. Supp. 2d 349, 356 (D.N.J. 1998) (declining to find personal jurisdiction based on operation of website). "[A] finding of jurisdiction . . . based on an Internet website would mean that there would be nationwide (indeed, worldwide) jurisdiction over anyone and everyone who establishes an Internet website [and] . . . [s]uch nationwide jurisdiction would be wholly inconsistent with traditional personal jurisdiction case law." *Id.* (quoting *Hearst Corp. v. Goldberger*, No. 96 CIV. 3620, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 27, 1997)). "The internet is an exemplar of recent technological progress that tests the personal jurisdiction standard developed by *International Shoe* because it is not restricted by distance or territorial boundaries." *Hy Cite Corp. v. Badbusinessbureau.Com, L.L.C.*, 297 F. Supp. 2d 1154, 1158 (W.D. Wis. 2004); see also *HALE & DORR LLP, U.S. Federal Court Lacks Jurisdiction Over Spanish Company Whose Web Site Is Not Purposefully Directed at the U.S.*, EMAIL ALERTS (Sept. 7, 2001), at www.haledorr.com/publications/pub_detail.aspx?ID=1016&Type=5543 (noting practical limits to Internet-based personal jurisdiction).

37. See *Burk*, *supra* note 2, at 1112 ("Internet protocols were not designed to facilitate geographic documentation; in general, they ignore it."). While the Internet utilizes a system of addresses to identify machines in cyberspace, these addresses are logical, rather than physical, and bear little or no relationship to geographic location. See *id.* at 1112-13 (noting difficulty of applying purposeful availment rationale in cyberspace).

38. See *ALS Scan, Inc. v. Digital Serv. Consultants*, 293 F.3d 707, 712 (4th Cir. 2002) (noting limitations on personal jurisdiction). The *ALS Scan* court noted: [U]nder current Supreme Court jurisprudence, despite advances in technology, State judicial power over persons appears to remain limited to persons within the State's boundaries and to those persons outside of the State who have minimum contacts with the State such that the State's exercise of judicial power over the person would not offend traditional notions of fair play and substantial justice.

Id. Courts continue to struggle with reconciling Internet technology and minimum contacts required for personal jurisdiction. See, e.g., *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (requiring more than simply posting on Internet to exercise personal jurisdiction over out-of-state party). Merely placing information on the Internet has been likened to placing items in the stream of commerce—which is insufficient, by itself, to support personal jurisdiction. See *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (holding national, or even worldwide, impact of creating publicly accessible website insufficient to support personal jurisdiction); see also *Asahi Metal Indus. Co. v. Super. Ct. of Solano County*, 480 U.S. 102, 112 (1987) (requiring additional conduct, beyond placing product into stream of commerce, for purposeful availment). Under *Asahi*, a defendant must engage in additional actions towards the forum state, such as advertising or designing the product for marketing in the forum state, to support personal jurisdiction. See *id.* at 112 (noting that "[a]dditional conduct" may be sufficient to show defendants' intent to engage in forum state's market, such as, "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State"). The court in *Bensusan* similarly held that to extend personal jurisdiction in New York over a Missouri club owner's website, it must be shown that the club owner actively sought to encourage

tical limits are needed, courts must draw the lines to determine what, beyond accessibility, is necessary in order for the exercise of personal jurisdiction in distant forums to meet with the constitutionally established limits—only exercising jurisdiction in forums where a defendant “should reasonably anticipate being haled into court.”³⁹

The Internet is distinct from the offline world because it operates outside of the spatial and geographic borders that traditionally define the limits of a court’s jurisdiction.⁴⁰ Courts are accustomed to analyzing non-physical contacts to determine whether they are purposefully directed at the forum, however, cyberspace presents a unique challenge.⁴¹ When evaluating traditional non-physical contacts, such as making a phone call or corresponding through the mail, it is easy to determine whether a party intends to reach out to communicate or transact business with foreign jurisdictions.⁴² Web contacts, however, are more difficult to conceptualize because public Internet sites do not deliver their information in a focused or directed manner.⁴³ When a person makes information available or

New Yorkers to access the club’s website or that he conducted business in New York. See *Bensusan*, 937 F. Supp. at 301 (noting that defendant’s ability to foresee that persons in remote forums would access its website was insufficient to sustain personal jurisdiction in those forums).

39. See *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 451 (3d Cir. 2003) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

40. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1371 (1996) (noting lack of terrestrial boundaries in cyberspace). Due to the virtual nature of cyberspace, none of the traditional barriers that typically separate geographically remote persons apply. See *id.* at 1370–71 (same). This is why “[t]he power to control activity in Cyberspace has only the most tenuous connections to physical location.” *Id.* at 1371.

41. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (“[J]urisdiction . . . may not be avoided merely because the defendant did not physically enter the forum State.”). Personal jurisdiction analysis requires courts to expand jurisdictional inquiry to accommodate non-physical communications, like mail and telephone contacts. See *id.* (recognizing that “it is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a State in which business is conducted”). Unlike these types of transactions that take place in the physical world, persons conducting business in cyberspace are often unaware of the other party’s physical location. See *Burk*, *supra* note 2, at 1110 (noting “veil of ignorance” in Internet transactions).

42. See *Burns & Bales*, *supra* note 4, at 39 (noting important differences between web contacts and traditional non-physical contacts).

43. See *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 926 (S.D.N.Y. 1996) (noting nature of Internet).

Because the Internet links together independent networks that merely use the same data transfer protocols, it cannot be said that any single entity or group of entities controls, or can control, the content made publicly available on the Internet or limits, or can limit, the ability of others to access public content.

Id.

Through the use of computers, corporations can now transact business and communicate with individuals in several states simultaneously. Un-

conducts business via a public website, anyone with an Internet connection can engage in transactions with that person, regardless of geographic boundaries or the website owner's intent.⁴⁴ This phenomenon requires courts to engage in a complex analysis to determine when Internet-based activity gives rise to the level of purposeful availment required to justify exercising specific personal jurisdiction.⁴⁵

like communication by mail or telephone, messages sent through computers are available to the recipient and anyone else who may be watching. Thus, while modern technology has made nationwide commercial transactions simpler and more feasible, even for small businesses, it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts.

Cal. Software Inc. v. Reliability Research, Inc., 631 F. Supp. 1356, 1363 (C.D. Cal. 1986) (noting effects of Internet on business transactions).

44. See Burns & Bales, *supra* note 4, at 39–40 (describing “spider web” nature of web accessibility); see also Burk, *supra* note 2, at 1111 (highlighting difficulty of purposeful availment analysis in cyberspace).

[I]t is difficult to assert with a straight face that the remote [Internet] user has purposefully or knowingly availed himself of [a] particular jurisdiction's benefits.

It is similarly difficult to seriously assert that an Internet business should “reasonably anticipate” being haled into court in a geographical location concerning which it was ignorant, or at least indifferent, with regard to contact.

Burk, *supra* note 2, at 1111.

45. See Burns & Bales, *supra* note 4, at 40 (describing approaches used to conceptualize web contacts). The two major approaches that are applied to web contacts parallel the *Asahi* debate over personal jurisdiction that stems from placing products into the stream of commerce. See *id.* at 39–40 (“[T]he spider web approach is highly expansive and tends to mirror Justice Brennan's reasoning from *Asahi*, the highway approach provides a much narrower view and tends to reflect Justice O'Connor's reasoning from *Asahi*.”). The broader “spider web” approach, holding persons liable in all jurisdictions where their websites can be accessed, parallels Justice Brennan's dissent in *Asahi*, arguing that placing products into the stream of commerce is sufficient to sustain personal jurisdiction in whatever jurisdictions the product reaches. See *id.* at 40 (describing “spider web” approach to Internet-based jurisdiction); see also *Asahi Metal Indus. Co. v. Super. Ct. of Solano County*, 480 U.S. 102, 117 (1987) (Brennan, J., dissenting) (“[J]urisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and [does] not require [] a showing of additional conduct.”). The narrower “highway approach” to web contacts requires more than a user's unilateral contact with a website to justify jurisdiction. See Burns & Bales, *supra* note 4, at 46 (describing “highway” approach). Under the highway approach to personal jurisdiction:

[T]he operator of a Web site is jurisdictionally present in a foreign state only if the operator has somehow ‘reached out’ to a person or entity in the foreign state, such as by soliciting information from or selling a product over the Web to a person or entity in the foreign state.

Id. It is akin to Justice O'Connor's plurality opinion in *Asahi*, which required more than placing products into the stream of commerce to justify jurisdiction. See *id.* at 46 (noting parallels between “highway approach” and plurality opinion in *Asahi*); see also *Asahi*, 480 U.S. at 112 (holding “[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State”). The analysis is similar to the intent requirement of the *Calder* effects test. See, e.g., *Ford Motor Co. v. Great Domains, Inc.*, 141

1. *The Sliding Scale of Internet Contacts*—Zippo Manufacturing Co. v. Zippo Dot Com, Inc.⁴⁶

In *Zippo*, a landmark case for shaping personal jurisdiction rules for cyberspace, the Western District of Pennsylvania held that “the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the [nonresident defendant’s website].”⁴⁷ Under the *Zippo* analysis, websites are placed on a “sliding scale,” based on the nature and quality of commercial activity conducted via the Internet, to determine whether the exercise of personal jurisdiction is proper.⁴⁸

On one end of the *Zippo* sliding scale are passive websites.⁴⁹ These are sites on which a defendant posts information on the web, and the information is openly accessible to parties in foreign jurisdictions.⁵⁰ Under

F. Supp. 2d 763, 774 (E.D. Mich. 2001) (weighing what is necessary for act of registering another’s trademark as domain name to constitute intentional injury in forum where trademark owner is located). The court in *Ford Motor* found that registering another’s trademarks as Internet domain names alone does not show sufficient intent to harm the trademark owners in their home forums. *See id.* at 776 (rejecting “argument that, merely by incorporating a famous mark into a domain name, the registrant assumes the risk of being subjected to jurisdiction in the trademark owner’s home forum”). The *Ford Motor* court required a case-by-case assessment of whether the registration of the domain name was expressly aimed at the trademark owner in order to support personal jurisdiction in the trademark owner’s home forum. *See id.* at 776 (“Concluding otherwise would shift the focus in personal jurisdiction determinations away from the ‘traditional [due process] notions of fair play and substantial justice,’ where it properly belongs and instead create an automatic ‘home-court’ advantage for plaintiffs, a result not intended by *Calder*.”) (citations omitted).

46. 952 F. Supp. 1119 (W.D. Pa. 1997).

47. *Id.* at 1124 (concluding that, where defendant clearly does business through its website with forum state and claim relates to use of website, personal jurisdiction exists). The *Zippo* court relied on *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), which found sufficient basis for personal jurisdiction where a commercial website’s interactivity specifically intended interaction with residents of the forum state. *See id.* (citing *CompuServe*, 89 F.3d at 1264–66).

48. *See id.* at 1124 (noting likelihood that personal jurisdiction is properly exercised is “directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet”).

49. *See id.* (categorizing websites where defendant simply posts information that is available to users in foreign jurisdictions as “passive”).

50. *See, e.g., Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (finding defendant’s website insufficient to support personal jurisdiction). The website at issue in *Bensusan* was a “general access site, which mean[t] that it require[d] no authentication or access code for entry, and [was] accessible to anyone around the world who ha[d] access to the Internet.” *Id.* at 297.

[The defendant], like numerous others, simply created a Website and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, is not an act purposefully directed at the forum state.

Id. at 301 (referencing stream of commerce requirement from *Asahi*, 480 U.S. at 112).

the *Zippo* analysis, merely placing information on a public website is insufficient to sustain jurisdiction over nonresident defendants.⁵¹ At the other end of the *Zippo* scale are sites that go beyond passively providing information and are used to conduct business with residents of foreign jurisdictions.⁵² Under *Zippo*, when websites permit people to enter into "contracts with residents of a foreign jurisdiction . . . personal jurisdiction [in that forum] is [deemed] proper."⁵³

In between these two extremes lies a range of interactive websites, where users can exchange all manner of information with a host computer in a foreign state.⁵⁴ In these cases, the *Zippo* court held that the exercise

51. See *Zippo*, 952 F. Supp. at 1124 (characterizing passive websites as "outer limits of the exercise of personal jurisdiction based on the Internet"). While the *Zippo* approach to denying personal jurisdiction based on a passive website has been adopted by many other jurisdictions, it is not universally accepted. See, e.g., *Inset Sys. Inc. v. Instruction Set Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (reasoning that posting information on website constitutes purposeful doing of business in forum where information is accessed). The expansive approach to extending personal jurisdiction to every location where a website is accessed has been described as a "spider web" approach. See *Burns & Bales*, *supra* note 4, at 40 (describing "spider web" approach to personal jurisdiction). For a discussion of the "spider web" approach to Internet based personal jurisdiction, see *supra* note 45 and accompanying text.

52. See *Zippo*, 952 F. Supp. at 1125–26 (characterizing case as determining whether conducting electronic commerce with Pennsylvania residents meets purposeful availment requirement).

53. *Id.* at 1124. In *Zippo*, the defendant intentionally issued passwords to its Internet news service to persons in Pennsylvania, knowing that this would result in business relationships with Pennsylvania residents. See *id.* at 1126 (describing basis for jurisdiction). In finding jurisdiction proper, the *Zippo* court noted:

When a defendant makes a conscious choice to conduct business with the residents of a forum state, "it has clear notice that it is subject to suit there." . . . If [the defendant] had not wanted to be amenable to jurisdiction in Pennsylvania, . . . it could have chosen not to sell its services to Pennsylvania residents.

Id. at 1126–27 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

54. See *id.* at 1124 (describing sliding scale to determine personal jurisdiction). The example presented by the *Zippo* court of a website occupying the middle ground of the sliding scale was *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996). See *id.* at 1124 (describing website at issue in *Maritz*). In *Maritz*, a California-based website was used to advertise an upcoming Internet advertising service. See *Maritz*, 947 F. Supp. at 1330 (describing plans for forthcoming Internet advertising business). While the service was not yet operational, the site encouraged users to add their addresses to a mailing list to receive updates about the service and sent email responses to persons signing up for its mailing list. See *id.* (stating that "the website 'invites Missourians to put their names on CyberGold's mailing list and get up-to-date information about the company and its forthcoming Internet service'"). The *Maritz* court found that because the defendant operated a website with the purpose and intent to develop a mailing list of Internet users—including residents of Missouri—for its service, it was more than a passive website. See *id.* at 1333 (analyzing nature of defendant's contacts with forum). The court determined that by indiscriminately responding to all Internet users accessing its site, Cybergold had consciously decided to transmit advertising information globally, including to Missouri residents. See *id.* (stating that "[a]lthough Cybergold

of jurisdiction is properly determined on a case-by-case basis, focusing on the interactivity and exchange of commercial information that occurs on the website.⁵⁵ Although not universally adopted by all jurisdictions, the *Zippo* model has been highly influential in providing a framework for analyzing websites for purposes of establishing personal jurisdiction.⁵⁶

2. *Beyond the Zippo Scale—Examining Intent and Effects*

The *Zippo* scale focuses judicial analysis on defendants' websites and the nature of the defendants' Internet-based contacts with the forum as a basis for jurisdiction.⁵⁷ A website's placement on the *Zippo* scale, however, need not be determinative for personal jurisdiction.⁵⁸ The grounds for personal jurisdiction stemming from the operation of a website often extend beyond an examination of Internet-based contacts.⁵⁹ Several courts, while acknowledging the usefulness of the *Zippo* framework in analyzing online contacts, have moved beyond the *Zippo* scale by scrutinizing both online and offline contacts in a broader context to determine whether a defendant's Internet-based activities were *intentionally directed* at the state.⁶⁰

characterizes its activity as merely maintaining a 'passive website,' its intent is to reach all internet users, regardless of geographic location"). This was deemed sufficient to grant personal jurisdiction in Missouri over the California-based defendant. See *id.* at 1334 (concluding that court has personal jurisdiction over out-of-state defendant).

55. See *Zippo*, 952 F. Supp. at 1124 (discussing standard for websites with intermediate level of interactivity).

56. See, e.g., *ALS Scan, Inc. v. Digital Serv. Consultants*, 293 F.3d 707, 714 (4th Cir. 2002) ("adopting and adapting the *Zippo* model"); *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002) (evaluating website contacts on *Zippo* sliding scale); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999) (applying *Zippo* sliding scale); *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1297 (10th Cir. 1999) (citing *Zippo* standard for passive websites in denying basis for personal jurisdiction); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (using *Zippo* scale to establish personal jurisdiction from website activities); *Hy Cite Corp. v. Badbusinessbureau.Com, L.L.C.*, 297 F. Supp. 2d 1154, 1159–60 (W.D. Wis. 2004) (noting influence of *Zippo* test); *Watchworks, Inc. v. Total Time, Inc.*, No. 01 CIV. 5711, 2002 WL 424631, at *5 (N.D. Ill. March 19, 2002) (placing defendant's website on *Zippo* sliding scale); *Weber v. Jolly Hotels*, 977 F. Supp. 327, 333 (D.N.J. 1997) (applying *Zippo* framework to refuse personal jurisdiction over passive website owner). *Contra Hy Cite Corp.*, 297 F. Supp. 2d at 1161 (declining to adopt *Zippo* as substitute for minimum contact test).

57. See *Zippo*, 952 F. Supp. at 1125–26 (analyzing defendant's Internet-based electronic commerce activities).

58. See, e.g., *GTE New Media Serv., Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1349–50 (D.C. Cir. 2000) (finding interactive commercial website insufficient to support jurisdiction if not aimed at residents in forum state); *Panavision Int'l, L.P. v. Toepfen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (finding passive website capable of supporting jurisdiction when directed at forum state).

59. See *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 453 (3d Cir. 2003) (noting need to analyze non-Internet contacts in Internet-based personal jurisdiction cases).

60. See *Panavision Int'l*, 141 F.3d at 1322 (stating requirements for Internet-based personal jurisdiction). The Ninth Circuit, in *Panavision International*, noted that there should be "something more" to "indicate that the defendant purpose-

This intent, rather than the interactivity of a defendant's website, becomes the dispositive factor in deciding whether the purposeful avilment requirement for personal jurisdiction has been met.⁶¹

a. Finding Intent and Effects in Passive Websites—*Panavision International, L.P. v. Toeppen*⁶²

By moving beyond the *Zippo* website analysis, a defendant's intent can sometimes support jurisdiction over the owner of even the most passive website.⁶³ In *Panavision International*, the Ninth Circuit approved a California court's jurisdiction over an Illinois website operator based on the intended effects of the operator's Internet-based activities rather than the interactivity of its website.⁶⁴ When the plaintiff, Panavision International, attempted to register the Internet domain name *www.panavision.com* in connection with its line of camera equipment, it discovered the domain name was already registered to the defendant.⁶⁵ The plaintiff sued the defendant because it owned the trademark to the Panavision name, which the defendant had already used to establish a website with the *www.panavision.com* domain name.⁶⁶ Although the defendant's website was passive in that it simply displayed photographs without any interactive features, the *Panavision International* court sustained jurisdiction under the effects test set forth in *Calder*.⁶⁷

Finding the passive nature of the defendant's website insufficient to support jurisdiction under the *Zippo* scale, the *Panavision International* court directed its inquiry to the defendant's business practices.⁶⁸ Offline evidence regarding the defendant's business practices led the court to conclude that the defendant purposefully registered Internet domain names corresponding to other parties' trademarks in order to pressure the trademark owners into buying the domain names back from him.⁶⁹ Be-

fully (albeit electronically) directed his activity in a substantial way to the forum state." *Id.* at 1321 (quoting *Cybersell, Inc.*, 130 F.3d at 418).

61. *See id.* at 1322 (basing personal jurisdiction from Internet activities on defendant's intent rather than on interactivity of website).

62. 141 F.3d 1316 (9th Cir. 1998).

63. *See, e.g., id.* at 1322 (affirming California court's jurisdiction over Florida resident defendant based on effects of passive website).

64. *See id.* at 1318 (affirming district court's decision).

65. *See id.* at 1319 (describing facts of case).

66. *See id.* (describing source of plaintiff's claim).

67. *See id.* at 1321 (noting that, without something more to indicate that defendants directed their activity, even electronically, towards forum, jurisdiction was not proper). The defendant's website, *www.panavision.com*, displayed photographs of the City of Pana, Illinois; it had no additional features to allow interaction or transaction of business via the site. *See id.* at 1319 (describing facts of case).

68. *See id.* at 1322 ("[S]imply registering someone else's trademark as a domain name and posting a website on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in another.").

69. *See id.* at 1321 (citing *Calder v. Jones*, 465 U.S. 783 (1984) as "establishing an 'effects test' for intentional action aimed at the forum state"). The *Panavision*

cause the court found that the defendant directed his “cyber squatting” activities at the plaintiff (as the legitimate trademark owner) and knew the plaintiff was based in California, the court concluded that whatever damages resulted from the defendant’s Internet activities were knowingly inflicted in California.⁷⁰ The *Panavision International* court found this sufficient, under the effects test, to satisfy the purposeful avilment requirement necessary to exercise specific personal jurisdiction over the out-of-state defendant.⁷¹

b. Finding Intent and Effects in Active Websites—*Euromarket Designs, Inc. v. Crate & Barrel Ltd.*⁷²

Express intent requirements can also undermine defendants’ efforts to limit their online contacts in order to escape jurisdiction in foreign courts.⁷³ In *Euromarket Designs*, a copycat marketing case, the Northern District of Illinois exercised jurisdiction over an Irish company on the basis of its commercial website activities.⁷⁴ The plaintiff, an Illinois company, owned the trademark to the name Crate & Barrel and operated a commer-

International court noted correspondence from the defendant offering to sell the plaintiff the panavision.com domain and to agree not to acquire other Internet addresses corresponding with Panavision Corporation trademarks for \$13,000. *See id.* at 1319 (noting defendant’s settlement offer). The defendant had also registered domain names corresponding with trademarks for other companies, such as Delta Airlines and Eddie Bauer, and offered to sell them to the trademark owners. *See id.* (noting defendant’s business practice of cyber squatting). For example, the defendant had previously attempted to sell americanstandard.com to American Standard, Inc. for \$15,000. *See id.* (depicting previous instances of cyber squatting on behalf of defendant).

70. *See id.* at 1321 (noting nature of harm to Panavision from defendant’s actions). Even though Panavision was a Delaware limited partnership, it, and the bulk of the motion picture and television industry, was located in California. *See id.* (explaining corporate structure of Panavision). The court used the public knowledge of Panavision’s corporate structure to infer that the defendant knew that the likely harm from his Internet activities would be felt in California. *See id.* (concluding that defendant had knowledge of location of effects of cyber squatting). The *Panavision International* court also cited *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd.*, 34 F.3d 410 (7th Cir. 1994), as a similar effects-based jurisdiction case. *See id.* at 1321 (using effects test to find jurisdiction based on defendant’s knowledge). In *Indianapolis Colts, Inc.*, the Indianapolis Colts professional football team brought suit in Indiana against a Canadian league football team named the “Baltimore CFL Colts” for trademark infringement. *See Indianapolis Colts, Inc.*, 34 F.3d at 411. Because the Indianapolis Colts used their trademarks in Indiana, and any infringement of these marks would knowingly be felt there, the Seventh Circuit held that the Canadian team was subject to personal jurisdiction in an Indiana court. *See id.* (finding defendant’s knowledge of location of effects of trademark infringement as basis for jurisdiction).

71. *See Panavision Int’l*, 141 F.3d at 1322 (finding defendant’s conduct met “something more” requirement for personal jurisdiction).

72. 96 F. Supp. 2d 824 (N.D. Ill. 2000).

73. *See, e.g., id.* at 835 (extending jurisdiction based on defendant’s website activities).

74. *See id.* at 838 (finding sufficient minimum contacts with Illinois to exercise jurisdiction).

cial website at www.crateandbarrel.com.⁷⁵ The defendant, an Irish company, operated a competing website at the domain www.crateandbarrel-ie.com, where it sold housewares and furniture similar to the plaintiff's merchandise, also under the name Crate & Barrel.⁷⁶ Although visitors, including Illinois residents, could browse the defendant's www.crateandbarrel-ie.com website and purchase merchandise online, the defendant took specific steps to limit the reach of its Internet contacts to the Republic of Ireland.⁷⁷ These steps included limiting the shipment of products ordered from the site to addresses within Ireland and pricing these products only in Irish pounds.⁷⁸ Despite these steps, the *Euromarket Designs* court found jurisdiction proper under both the effects and minimum contacts tests.⁷⁹

Like the court in *Panavision International*, the *Euromarket Designs* court looked to the defendant's intent behind its Internet-based activities.⁸⁰ The court found that the defendant's actions, including registering a domain name corresponding to the plaintiff's trademark and using that trademark on its website and merchandise, were sufficient to demonstrate that it knowingly caused injury to the plaintiff at its Illinois headquarters.⁸¹ The court also looked at the defendant's offline activities, including its relationships with the plaintiff's Illinois suppliers and attendance at trade

75. *See id.* at 828 (describing plaintiff's business).

76. *See id.* at 828–29 (describing defendant's business).

77. *See id.* at 829 (describing defendant's website).

78. *See id.* at 838 (finding defendant's website constituted "doing business" via Internet under *Zippo* scale). The limitations the defendant in *Euromarket Designs* placed on its site to limit its impact to Ireland, however, could be seen as minimal. *See id.* at 829 (describing defendant's website activities). Until the commencement of the lawsuit, pricing on the site was in United States dollars, and the pages where users entered shipping and billing information had fields that were "clearly organized for a United States-format address." *See id.* ("There is an entry window for the shipping/billing city, state and zip code—a format unique to the United States."). After the commencement of the lawsuit, the defendant added a statement "Goods Sold Only in the Republic of Ireland" and changed the valuation of its goods to Irish pounds. *See id.* (citing remedial measures taken following start of lawsuit).

79. *See id.* at 835 (finding jurisdiction proper). The *Euromarket Designs* court noted that, "[i]n this case, Defendant's activities demonstrate that it deliberately established minimum contacts with Illinois and purposefully availed itself of the privilege of conducting activities in this forum under both the traditional effects doctrine and the sliding scale analysis developed for Internet activities in trademark infringement suits." *Id.*

80. *Id.* at 836 (justifying jurisdiction under effects test).

[The defendant's] alleged tortious actions establish personal jurisdiction over Limited under the effects doctrine for three reasons: 1) if the Crate & Barrel's trademark has been infringed, the injury will be felt mainly in Illinois; 2) Limited intentionally and purposefully directed its actions toward Illinois and Crate & Barrel, an Illinois corporation, allegedly causing harm to Crate & Barrel in Illinois; and 3) Limited knew that harm would likely be suffered in Illinois.

Id.

81. *See id.* (citing parallels to *Panavision International* for evidence of directed activity towards forum state).

shows in the state, as additional evidence of the defendant's intent to copy the plaintiff's trademarks—supporting an exercise of jurisdiction under the effects test.⁸²

When analyzing whether purposeful availment existed, the *Euromarket Designs* court noted that the defendant's website was used for conducting business over the Internet.⁸³ The www.crateandbarrel-ie.com site actively solicited visitors, including residents of Illinois, to browse and purchase products.⁸⁴ The court, applying the *Zippo* scale, deemed this level of website interactivity sufficient to meet the purposeful availment requirement to sustain personal jurisdiction.⁸⁵ The *Euromarket Designs* court, however, bolstered its jurisdictional finding by also examining the defendant's non-Internet activities, like its use of Illinois suppliers, its advertisements in European publications that were circulated in the United States (including Illinois) and documented incidents of billing and collecting revenues from Illinois residents.⁸⁶ This offline activity, the court concluded, was indicative of the defendant's intent behind its Internet activities and demonstrated its purposeful availment of the privilege of doing business in Illinois.⁸⁷

III. THE THIRD CIRCUIT APPROACH TO INTERNET-BASED PERSONAL JURISDICTION IN *TOYS "R" US, INC. v. STEP TWO, S.A.*

In a case of first impression, the Third Circuit Court of Appeals, in *Toys "R" Us*, addressed the question of when the operation of an Internet

82. *See id.* (noting non-Internet activities also intentionally directed toward plaintiff in Illinois).

83. *See id.* at 838 (finding defendant's website allows it to conduct business and enter into contracts with residents of foreign jurisdictions).

84. *See id.* (describing defendant's website).

[Defendant] purposefully and deliberately designed and now maintains a website with a high level of interactivity, enabling customers to browse through an online catalog and place orders via the Internet. The website actively solicits all users, including residents of Illinois, to purchase goods. Defendant clearly is doing business over the website.

Id. The plaintiff presented evidence of an Illinois resident who was able to buy merchandise from the defendant's website by entering an order from a computer located in Illinois, using an Illinois billing address, and paying for the merchandise with a credit card registered in Illinois—even though the goods were shipped to an address in Ireland. *See id.* at 832 (stating that sale of goods and shipment to Ireland constituted "sale and transportation of goods in commerce"). The *Euromarket Designs* court was not persuaded by the defendant's argument that it was not conducting business in Illinois when it limited shipment of goods to the Republic of Ireland. *See id.* (noting that defendant entered into sales contract with, and collected revenue from, Illinois residents). The fact that the defendant billed, collected revenues and recorded sales on goods ordered from Illinois was sufficient to meet the interactivity requirement under *Zippo*. *See id.* (stating that sales and collection of revenue are essential parts of definition of commerce).

85. *See id.* at 838 (applying *Zippo* scale to defendant's website).

86. *See id.* (noting non-Internet contacts with forum).

87. *See id.* (finding purposeful availment).

website is sufficient to subject a nonresident defendant to personal jurisdiction.⁸⁸ The court considered the role of evidence, both online and offline, in its personal jurisdiction analysis to show that a defendant had purposefully availed itself of the privilege of conducting business in the state through the use of a commercial website.⁸⁹

A. *Facts and Procedural Posture*

In February 2001, Toys “R” Us filed suit in the District Court of New Jersey, alleging that Step Two, S.A. (“Step Two”), a Spanish company, used its website to engage in trademark infringement and unlawful cyber squatting.⁹⁰ Among its allegations, Toys “R” Us claimed that Step Two (1) copied the Imaginarium concept from them; (2) sold a mix of toys identical to those sold by Toys “R” Us under the Imaginarium brand; (3) mimicked Toys “R” Us’s marketing plans and practices in development of the Imaginarium brand; and (4) tried to expand its global business, including business in the United States, by operating websites that capitalized on the goodwill and reputation of Toys “R” Us’s Imaginarium brand.⁹¹

Step Two is a Spanish company that, at the time of the suit, owned or franchised more than 160 retail toy stores in ten non-U.S. countries under the name “Imaginarium.”⁹² Beginning in 1991, the company registered the Imaginarium trademark in several countries, but never registered this trademark in the United States.⁹³ Toys “R” Us is a New Jersey-based com-

88. See PITNEY HARDIN, *Internet Jurisdiction – The Third Circuit Clarifies the Standard by Which Website Owners Can Be Subject to Personal Jurisdiction*, ALERT, (Jan. 30, 2003), at <http://www.pitneyhardin.com/news/litigation013003.html> (summarizing court’s decision). The *Toys “R” Us* court summarized the issue before it as follows:

The precise question raised by this case is whether the operation of a commercially interactive website accessible in the forum state is sufficient to support specific personal jurisdiction, or whether there must be additional evidence that the defendant has “purposefully availed” itself of the privilege of engaging in activity in that state.

Toys “R” Us, Inc. v. Step Two, S.A., 318 F.3d 446, 451 (3d Cir. 2003).

89. See *Toys “R” Us*, 318 F.3d at 451 (articulating standard for when personal jurisdiction can be based on defendant’s operation of website). The *Toys “R” Us* court found that evidence of intentional interaction with the forum state is needed to demonstrate that a defendant purposefully availed itself of the privilege of doing business with the forum state. See *id.* at 452 (stating requirements for purposeful availment). “If a defendant website operator intentionally targets the site to the forum state, and/or knowingly conducts business with forum state residents via the site, then the ‘purposeful availment’ requirement is satisfied.” *Id.*

90. See Intellectual Property Professional Information Center, *Without Purposeful Availment, Operation of Interactive Site Not Enough for Jurisdiction*, 8 ELECTRONIC COM. & L. REP. NO. 5 (Feb. 5, 2003), at <http://ipcenter.bna.com/pic2/ip.nsf/id/BNAP-5JAJJC?OpenDocument> (describing Toys “R” Us’s allegations).

91. *Toys “R” Us*, 318 F.3d at 456–57 (outlining allegations that supported Toys “R” Us’s claim for jurisdictional discovery).

92. See HALE & DORR LLP, *supra* note 36 (summarizing facts of case).

93. See *id.* (noting Step Two’s lack of contacts with United States). “[Step Two] first registered the Imaginarium mark in Spain in 1991, and it opened its first

pany that acquired Imaginarium Toy Centers Inc., a maker of educational toys and games, in 1999.⁹⁴ Imaginarium Toy Centers had marketed toys under the Imaginarium name since 1985 and registered the Imaginarium trademark with the U.S. Patent and Trademark office in 1989.⁹⁵ At the time of the lawsuit, Toys “R” Us operated thirty-seven stand-alone Imaginarium stores as well as Imaginarium-branded shops within 175 of its Toys “R” Us stores throughout the United States.⁹⁶ Both Toys “R” Us’s and Step Two’s Imaginarium stores employed a similarly distinctive appearance, and both companies sold similar merchandise under the Imaginarium brand.⁹⁷

In 1995, four years before being acquired by Toys “R” Us, Imaginarium Toy Centers registered the domain name *imaginarius.com* and began selling its merchandise over the Internet.⁹⁸ The following year, Step Two began its own Spanish-language website, *imaginarius.es*, featuring products from its European stores.⁹⁹ At the time of the lawsuit, Step Two operated multiple Imaginarium-branded websites.¹⁰⁰

Imaginarium store in the Spanish city of Zaragoza in November 1992.” Shannon P. Duffy, *Web Activity Gives Plaintiff Chance for Jurisdictional Discovery*, LAW.COM (Jan. 28, 2003), at <http://www.law.com/jsp/article.jsp?id=1043457920839> (summarizing Step Two’s business practices).

94. See Duffy, *supra* note 93 (highlighting Toys “R” Us’s interest in Imaginarium trademark).

95. See *id.* (noting U.S. history of Imaginarium trademark).

96. See *id.* (noting use of Imaginarium brand). In November 2003, Toys “R” Us announced that it was closing its thirty-six free-standing Imaginarium stores. See *Toys “R” Us to Shutter Kids “R” Us, Imaginarium Stores*, L.A. BUS. (Nov. 18, 2003), at <http://losangeles.bizjournals.com/losangeles/stories/2003/11/17/daily13.html> (outlining Toys “R” Us’ future plans for Imaginarium stores).

97. See BAZERMAN & DRANGEL, P.C., *U.S. Intellectual Property and New Media Law Update*, Vol. VII, Issue II (Mar. 4, 2003), at <http://www.ipcounselors.com/20030304.html> (noting similarities between Step Two and Toys “R” Us’s use of Imaginarium brand).

98. See Duffy, *supra* note 93 (summarizing history of case).

99. See *id.* (describing Step Two’s online use of Imaginarium brand). Step Two also registered multiple other Imaginarium-branded domain names. See *id.* (noting use of other Imaginarium-branded domains such as *imaginariunworld.com*, *imaginarius-world.com*, *imaginariunet.com*, *imaginariusnet.net* and *imaginariusnet.org*). Step Two began offering products for sale via the web in November 2000. See *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 449 n.1 (3d Cir. 2003) (noting that before November 2000, products were advertised but not sold online).

100. See *Toys “R” Us*, 318 F.3d at 459–50 (describing management of Step Two’s myriad websites). Domain names are identified by a “top-level domain” (“TLD”). See ICANN, *Top-Level Domains (gTLDs)*, at <http://www.icann.org/tlds> (last visited May 13, 2004) (describing domain name standards). There are three public “generic” TLDs that are used globally without restriction: *.com*, *.net* and *.org*. See *id.* (noting that other TLDs have limited purposes). TLDs with two letters (such as *.de* (Germany), *.us* (United States), *.jp* (Japan), etc.) have been established for over 240 countries and territories to create “country code” TLDs, which are managed by local policies of the country or territory involved. See *id.* (noting that designated managers operate TLDs in accordance with economic, cultural, linguistic and legal circumstances of country or territory involved). Step Two

Step Two did not maintain any stores, offices, accounts or employ any persons within the United States.¹⁰¹ The company also claimed that it made no effort to advertise or conduct sales in the United States.¹⁰² While four of Step Two's Imaginarium-branded websites were interactive, permitting online purchases, these sites contained multiple features to discourage, if not prevent, Internet sales to the United States.¹⁰³ These features included pricing products only in Spanish pesetas or Euros, offering shipment of goods ordered from these sites only to addresses in Spain and exclusively using the Spanish language on its websites.¹⁰⁴

Despite these hurdles, Step Two's websites were still accessible to consumers around the world, and it was possible for American consumers to purchase items from them.¹⁰⁵ Prior to the lawsuit, Toys "R" Us initiated purchases from two of Step Two's Imaginarium-branded websites.¹⁰⁶ These purchases were made by New Jersey residents utilizing credit cards

maintained Imaginarium-branded websites employing both generic and country code domain names. See Brief of Appellees, Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446 (3d Cir. 2003) (No. 01-3390), available at 2002 WL 32129308, at *11 (outlining Step Two's global website presence). In addition to the domain *imaginariu.es* (whose top level domain ".es" stands for España (Spain)), Step Two maintained multiple "universal" domains, including *imaginariuworld.com*, *imaginariu_world.com*, *imaginariu.net.com*, *imaginariu.net.net* and *imaginariu.net.org*. See *id.* (listing Imaginarium-branded domain names). In addition to the six domain names at issue in the suit, Step Two also maintained a number of other country code domains around the world, including *imaginariu.com.co* (Columbia), *imaginariu.com.cr* (Costa Rica), *imaginariu.cu* (Cuba), *imaginariu.com.gt* (Guatemala), *imaginariu.hn* (Honduras), *imaginariu.lv* (Letonia), *imaginariu.com.ni* (Nicaragua), *imaginariu.com.pe* (Peru), *imaginariu.com.uy* (Uruguay), *imaginariu.com.ro* (Romania), *imaginariu.sv* (El Salvador), *imaginariu.com.pt* (Portugal), *imaginariu.com.do* (Dominican Republic), *imaginariu.co.il* (Israel), *imaginariuworld.pl* (Poland) and *imaginariuworld.dk* (Denmark). See *id.* at *11 n.5 (noting global reach of Step Two's websites).

101. See PITNEY HARDIN, *supra* note 88 (noting Step Two's seeming absence of jurisdictional contacts within United States).

102. See *Toys "R" Us*, 318 F.3d at 449 (noting Step Two's claim that it directed no advertising at United States customers).

103. See *id.* at 450 (describing Step Two's website offerings).

104. See *id.* (describing Step Two's Imaginarium-branded websites). Step Two's Imaginarium websites provided a contact phone number in Spain but did not include the country code that would be needed in order for a caller to access the number from outside Spain. See *id.* (noting features of Step Two's Imaginarium-branded websites designed to limit their reach to Spain). The site also contained a voluntary registration form, which was designed to accommodate only Spanish addresses (containing pull-down menus of Spanish provinces and lacking proper fields to accommodate U.S. addresses). See *id.* (same).

105. See PITNEY HARDIN, *supra* note 88 (describing background of case).

106. See *Toys "R" Us*, 318 F.3d at 450 (describing evidence of U.S. purchases from Step Two's websites). The purchases were initiated by Toys "R" Us and made by an employee of Toys "R" Us and an employee of its law firm. See *id.* (describing New Jersey-based purchases from Step Two's websites).

drawn on U.S. banks for payment.¹⁰⁷ While the website orders were shipped to an address in Spain, the purchased merchandise was subsequently forwarded to Toys “R” Us’s New Jersey offices.¹⁰⁸ After purchasing the items, Step Two sent confirmation emails to the buyers’ New Jersey computers and a login and password to access Step Two’s online newsletter, “Club Imaginarium,” which could be accessed via the Internet from the buyers’ computers in New Jersey.¹⁰⁹

On July 31, 2001, the district court dismissed the action on the grounds that the court lacked specific personal jurisdiction over Step Two.¹¹⁰ Based on an examination of Step Two’s websites, the district court held that it would “turn the law of personal jurisdiction on its head, if you look carefully at this website and decide that it is designed to get U.S. buyers.”¹¹¹ Toys “R” Us also made numerous discovery requests to examine Step Two’s business plans, supplier contracts and other internal documents in an effort to further investigate Step Two’s alleged mimicry of Toys “R” Us’s Imaginarium brand and the known effects of these activities in New Jersey.¹¹² The court denied these requests, finding that they “had no relationship to the website activities of Step Two, which was the only focus of Toy’s claim that jurisdiction existed.”¹¹³ On August 28, 2001, Toys “R” Us filed an appeal in the U.S. Court of Appeals for the Third Circuit.¹¹⁴

107. *See id.* (describing affidavit from Toys “R” Us outlining New Jersey purchases orchestrated from Step Two). Both persons accessed Step Two’s websites, *imaginariumpworld.com* and *imaginariumpworld.es*, from New Jersey to make their purchases. *See id.* (same).

108. *See id.* (describing Toys “R” Us’s claim that Step Two’s websites were capable of accommodating sales in New Jersey). The purchased items were shipped to a Toys “R” Us employee located in Madrid, Spain who then forwarded the merchandise to Toys “R” Us’s New Jersey offices. *See id.* (same).

109. *See id.* at 450 (noting additional electronic contacts between Step Two’s websites and New Jersey). One of the purchasers also exchanged emails (sent from her New Jersey location) with a Step Two employee in Spain about her purchase. *See id.* (same). Other than these two sales, there was no record of U.S.-based purchases from Step Two’s websites, but the company only kept records of the shipping addresses of its customers, not their residential addresses because such information is not apparent from an email address. *See id.* at 451 (noting Step Two’s claim that it had no records of online purchases from New Jersey).

110. *See id.* (reviewing district court’s holding).

111. Brief of Appellees, *supra* note 100, at *8 (quoting district court’s decision). In denying jurisdiction over Step Two, the district court noted that the defendant’s website was not a part of a stream of commerce directed at New Jersey, was in a foreign language, offered terms for sale in Spanish currency and did not offer shipment of products to the United States. *See id.* at *7 (describing district court’s jurisdictional review).

112. *See* Brief for Appellant, *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003) (No. 01-3390), *available at* 2002 WL 32129310, at *17–18 (arguing that district court gave insufficient weight to Step Two’s intentional copying of Toys “R” Us’s trademarks, selection of domain names, etc. and impact of these actions felt in New Jersey).

113. Brief of Appellees, *supra* note 100, at *8 (citing district court’s decision).

114. *See id.* at *2 (detailing procedural history).

B. *The Third Circuit's Analysis*

The Third Circuit departed from the “straight” application of the *Zippo* sliding scale that other courts have applied to Internet-based jurisdiction.¹¹⁵ Rather than using website interactivity as a litmus test for personal jurisdiction—never extending jurisdiction for passive sites, while always extending it for commercially interactive sites—the *Toys “R” Us* court looked beyond the interactivity of a defendant’s website, making the intent behind the defendant’s contacts with the state the determinative factor in exercising, or declining to exercise, jurisdiction.¹¹⁶ Consistent with the emerging trend in other circuits, the court held that in order to satisfy the purposeful availment requirement, the plaintiff must offer evidence of the defendant’s *intentional* interaction with the forum, regardless of the level of interactivity of the defendant’s website.¹¹⁷

115. See *Toys “R” Us*, 318 F.3d at 453 (outlining requirements for purposeful availment via commercial website operation). In *Toys “R” Us*, the Third Circuit termed the ruling in *Zippo* “a seminal authority regarding personal jurisdiction based upon the operation of an Internet [website].” *Id.* at 452. While the *Toys “R” Us* court described *Zippo* as implicitly requiring evidence of intent by the defendant to conduct activity within the forum state, some courts have interpreted *Zippo* more mechanically. See *id.* at 454 (noting *Zippo* “underscored the intentional nature of the defendant’s conduct vis-à-vis the forum state”). “Under *Zippo*, a defendant operating a fully interactive [website] accessible in the forum state almost automatically was subject to jurisdiction in any state where the site could be accessed. By contrast, an entirely passive site was deemed insufficient by *Zippo* to justify exercise of personal jurisdiction.” See MITCHELL SILBERG & KNUFF LLP, *Intellectual Property & Technology Newsletter*, Apr. 2003, at http://www.msk.com/download_files/IPTechIssue9B.pdf (describing “straight *Zippo* analysis”). Some commentators have derided courts’ strict adherence to the *Zippo* scale as an “almost mechanical reliance on an analysis of the interactivity or passivity of a [website].” *Id.*; see also, e.g., *Hy Cite Corp. v. Badbusinessbureau.Com*, L.L.C., 297 F. Supp. 2d 1154, 1159 (W.D. Wis. 2004) (describing *Zippo*’s sliding scale).

On one end of the spectrum are defendants that “clearly” conduct business over the internet. . . . At this end, personal jurisdiction is proper. At the opposite end of the spectrum are defendants whose websites are “passive”. . . . Whether personal jurisdiction should be asserted over defendants falling into th[e] middle ground depends on the “level of interactivity and commercial nature of the exchange of information that occurs on the Website.”

Hy Cite Corp., 297 F. Supp. 2d at 1159.

116. See *Toys “R” Us*, 318 F.3d at 452 (noting *Zippo* court’s reliance on *Compuserve* in finding personal jurisdiction proper when commercial website’s interactivity reflects specific intent to interact with residents of forum state).

117. See *id.* at 451–52 (noting how other circuits expressly adopted intent requirements when evaluating Internet-based personal jurisdiction). The *Zippo* court noted the intentional nature of that defendant’s conduct of doing business in Pennsylvania based on the interactivity of that defendant’s website as supporting jurisdiction. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1126 (W.D. Pa. 1997) (holding defendant’s contacts with state not “fortuitous” or “coincidental”). In *Zippo*, the defendant knowingly issued passwords to Pennsylvania residents, intending to develop business relationships with in-state residents. See *id.* at 1126 (describing basis for jurisdiction). In determining that jurisdiction was proper, the *Zippo* court stated:

1. *Evidence of a Defendant's Intent, Rather Than Interactivity of Its Website, Is the Proper Focus for Analyzing Internet-Based Contacts in Personal Jurisdiction Analysis*

Agreeing with the lower court, the Third Circuit held that, based on the facts presented, Toys "R" Us failed to show the purposeful availment required to extend personal jurisdiction over Step Two.¹¹⁸ Noting that the design of Step Two's websites did not readily accommodate American visitors, the court concluded that these websites, "while commercial and interactive, [did] not appear to have been designed or intended to reach customers in New Jersey."¹¹⁹ Further concurring with the district court's analysis, the Third Circuit also disregarded the two Internet sales and confirmation emails that Toys "R" Us arranged from Step Two's websites as trivial contacts that were insufficient to support personal jurisdiction over Step Two.¹²⁰

2. *Analyzing a Defendant's Intent Behind Its Internet-Based Contacts with a Forum Requires a Comprehensive Case-by-Case Inquiry into Online and Offline Activities*

While the Third Circuit concurred with the majority of the district court's analysis, it found that the lower court was too quick to deny Toys

When a defendant makes a conscious choice to conduct business with the residents of a forum state, "it has clear notice that it is subject to suit there." . . . If [the defendant] had not wanted to be amenable to jurisdiction in Pennsylvania, . . . it could have chosen not to sell its services to Pennsylvania residents.

Id. at 1126–27 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

118. *See Toys "R" Us*, 318 F.3d at 454 (finding defendant failed to satisfy purposeful availment requirement).

119. *Id.* (examining Step Two's website activities). The *Toys "R" Us* court noted that Step Two's websites were entirely in Spanish, merchandise was priced only in Euros and could be shipped only to addresses in Spain and, most importantly, none of the areas of the site that allowed address entry were designed to accommodate U.S. addresses. *See id.* (describing evidence suggesting Step Two's websites were targeting New Jersey residents as "inconclusive" and "circumstantial").

120. *See id.* at 455–56 (addressing additional grounds for jurisdiction presented by Toys "R" Us). The *Toys "R" Us* court characterized the two sales to New Jersey consumers orchestrated by Toys "R" Us as the type of "fortuitous," "random," and "attenuated" contacts that the Supreme Court has held insufficient to warrant the exercise of jurisdiction." *Id.* at 455 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) (noting that non-Internet contacts may provide "something more" needed to properly exercise jurisdiction). The court similarly noted that the electronic newsletters and other electronic correspondence could not form a basis for personal jurisdiction unless they demonstrated purposeful availment. *See id.* at 455 (citing *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 729 (E.D. Pa. 1999) (finding that an Internet site and two emails do not constitute purposeful availment)); *see also Machulsky v. Hall*, 210 F. Supp. 2d 531, 542 (D.N.J. 2002) (noting minimal email correspondence, by itself or in conjunction with single Internet purchase, does not constitute minimum contacts with forum).

"R" Us's request for additional discovery, noting that the lower court's "unwavering focus on the website precluded consideration of other Internet and non-Internet contacts which . . . might bring Step Two within our jurisdiction."¹²¹ Because Toys "R" Us presented non-frivolous allegations that Step Two engaged in copycat marketing efforts, the Third Circuit held that it would be reasonable to allow more detailed discovery into Step Two's business plans, thereby permitting further investigation into whether Step Two directed its business activities (including, but not limited to, its website) at New Jersey and the United States.¹²² Information regarding both Internet and non-Internet activities and contacts, the court found, "would speak to an essential element of the personal jurisdiction calculus."¹²³

The Third Circuit's rationale in *Toys "R" Us* paralleled the Supreme Court's plurality opinion in *Asahi Metal Industries Co. v. Superior Court of Solano County*.¹²⁴ Just as placing a product into the stream of commerce, without more, is not sufficient to justify jurisdiction in remote forums, creating a website, even one with global reach and interactivity, does not necessarily indicate the required intent to purposefully avail oneself of the privilege of doing business in a foreign jurisdiction.¹²⁵ Consistent with similar rulings in the Fourth, Sixth and Ninth Circuits, the Third Circuit placed the *Zippo* scale into a more holistic context by expressly requiring a website, regardless of its level of interactivity, to be intentionally or knowingly directed at the forum state in order to support jurisdiction over non-resident defendants.¹²⁶ Finding insufficient inquiry by the lower court

121. *Toys "R" Us*, 318 F.3d at 456 ("[A]ny information regarding Step Two's intent vis-à-vis its Internet business and regarding other related contacts is known by Step Two, and can be learned by Toys only through discovery.").

122. *See id.* at 457 (supporting Toys "R" Us's request for jurisdictional discovery). The *Toys "R" Us* court noted, as an example, that Step Two purchased some merchandise for its Imaginarium stores and websites from U.S. vendors, and that further discovery into these relationships and activities with U.S. vendors may shed light on Step Two's intentions. *See id.* (noting district court's error in denying Toys "R" Us jurisdictional discovery). The court characterized Toys "R" Us's request for jurisdictional discovery as "specific, non-frivolous, and a logical follow-up based on the information known to Toys." *Id.* at 458 (analyzing lower court's ruling on Toys "R" Us's jurisdictional discovery request).

123. *Id.* at 457 (noting district court should have investigated possible existence of "something else" needed to exercise personal jurisdiction).

124. 480 U.S. 102 (1987).

125. *See id.* at 102 (requiring additional conduct, beyond placing product into stream of commerce, for purposeful availment). Under *Asahi*, a defendant must engage in additional actions towards the forum state, such as advertising in, or designing the product for marketing in, the forum state to support personal jurisdiction. *See id.* at 112 (noting due process requirements for personal jurisdiction). The Third Circuit similarly looked for specific findings of the defendant's intent to purposefully direct its activity towards the forum state. *See Toys "R" Us*, 318 F.3d at 453 (citing other circuits requiring express evidence of defendant's intent to support jurisdiction).

126. *See Toys "R" Us*, 318 F.3d at 454 (requiring evidence that defendant targeted its website at in-state residents for purposeful availment); *see also* ALS Scan

into the intent behind the defendant's interactions with New Jersey, the Third Circuit remanded the case back to the district court to allow additional jurisdictional discovery and ordered reconsideration of jurisdiction incorporating any new information resulting from that discovery.¹²⁷

IV. CONCLUSION

Over fifty years ago, the Supreme Court warned that determinations of personal jurisdiction cannot be reduced to a purely "mechanical or quantitative" exercise.¹²⁸ The *Zippo* framework presented courts with a useful tool to use in analyzing Internet-based contacts, but it should not be viewed as a replacement for the traditional and far-reaching analysis required in personal jurisdiction determinations.¹²⁹ The Third Circuit, in its ruling in *Toys "R" Us*, confirmed the complexities of Internet-based personal jurisdiction analysis by requiring courts to conduct more expansive and fact-intensive analyses of all attendant circumstances, rather than focusing exclusively on the nature of a defendant's website.¹³⁰ While this can lead to results that diverge from the *Zippo* scale, it is more consistent with traditional personal jurisdiction analysis.¹³¹

Interactivity along the *Zippo* sliding scale remains an important factor in an Internet-based personal jurisdiction analysis because it can often provide evidence of a defendant's intent or knowledge.¹³² Regarding

v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002) (expressly incorporating intentionality requirement for Internet-based jurisdiction); Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002) (requiring nonresident defendant's website reveal "specifically intended interaction" with residents of state to support jurisdiction); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997) (requiring evidence of purposeful direction of nonresident defendant's electronic activity towards forum state to justify jurisdiction).

127. See *Toys "R" Us*, 318 F.3d at 458 (remanding case to lower court).

128. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) ("It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.").

129. For a discussion of the role of the *Zippo* framework in the context of traditional personal jurisdiction analysis, see *supra* notes 124–27 and accompanying text.

130. See MITCHELL SILBERG & KNUPP LLP, *supra* note 115 (commenting on Third Circuit's decision in *Toys "R" Us*).

131. Just as the Supreme Court's holding in *Asahi* required connections between a defendant and the forum state to derive from actions purposefully directed at that state, the *Toys "R" Us* decision similarly makes the defendant's intent behind its activities the determining factor in jurisdiction. See *Asahi*, 480 U.S. at 104 ("[A] finding of minimum contacts must derive from an action *purposefully directed* toward the forum State.") (emphasis added); see also *Toys "R" Us*, 318 F.3d at 454 ("[T]here must be evidence that the defendant 'purposefully availed' itself of conducting activity in the forum state, by directly targeting its website to the state, knowingly interacting with residents of the forum state via its website, or through sufficient other related contacts.").

132. See *Toys "R" Us*, 318 F.3d at 452 ("If a defendant web site operator intentionally targets the[ir] [web]site to the forum state, and/or knowingly conducts

website interactivity as the *only* factor to be weighed, however, leads to results less consistent with contemporary notions of fair play and substantial justice inherent in personal jurisdiction analysis.¹³³ Although the *Toys "R" Us* court did not address the exact mix of Internet and non-Internet contacts required to support jurisdiction, the ruling requires courts to continue evaluating even Internet-based jurisdictional claims on a case-by-case basis, focusing on the nature and quality of online *and* offline contacts to demonstrate the requisite intent needed to establish personal jurisdiction.¹³⁴

This express intent requirement can cut both ways, bringing passive websites under a remote court's jurisdiction *or* placing commercial websites outside a foreign court's reach, depending on the intent of the website owner.¹³⁵ Plaintiffs bear the burden of demonstrating factual support for extending personal jurisdiction, but courts must assist plaintiffs with jurisdictional discovery to investigate non-frivolous claims.¹³⁶ The *Toys "R" Us* ruling gives plaintiffs grounds to support broader jurisdictional discovery into a defendant's business practices allowing examination of online and offline contacts to discern the intent underlying a defendant's Internet-based activities.¹³⁷

Website owners seeking to avoid being haled into distant jurisdictions need to be wary of more than the overt reach of their online contacts.¹³⁸ Limiting online sales or website interactivity alone is not likely to be enough to avoid the exercise of jurisdiction in remote forums.¹³⁹ Any in-

business with forum state residents via the site, then the "purposeful availment" requirement is satisfied.").

133. See generally *Int'l Shoe Co.*, 326 U.S. at 316 (requiring exercise of personal jurisdiction to "comport[] with traditional notions of fair play and substantial justice").

134. See Laura Seeto, *Purposeful Availment Required for US Jurisdiction*, N.S.W. SOC. FOR COMPUTERS AND L. J. (Mar. 2003, Issue 51), at http://www.nswscl.org.au/journal/51/Laura_Seeto.html (discussing case-by-case review required by *Toys "R" Us* ruling).

135. See, e.g., *Toys "R" Us*, 318 F.3d at 453 (finding evidence that, although nonresident defendant's website was interactive, "defendant intentionally and knowingly transacted business with residents of the forum state, and had significant other contacts with the forum besides those generated by its website" still necessary to extend jurisdiction); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (extending jurisdiction over Illinois defendant's passive website based on finding intent to cause injury in California).

136. See *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1042 (3d Cir. 1997) (requiring courts to permit jurisdictional discovery unless plaintiff's claim is "clearly frivolous").

137. See *Toys "R" Us*, 318 F.3d at 456 (noting process for granting request for jurisdictional discovery).

138. See *id.* at 456 (noting non-Internet contacts may provide "something more" to bring foreign defendant under local court's jurisdiction).

139. See, e.g., *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 838 (N.D. Ill. 2000) (finding jurisdiction over foreign website proper despite attempts to limit website's reach). For a discussion of the *Euromarket Designs* court's analysis, see *supra* notes 73-87 and accompanying text.

dicia of a defendant's intentional interactions with a forum state, online or offline, can support a distant plaintiff's jurisdictional claim arising from a defendant's Internet activities.¹⁴⁰ While this may make jurisdictional analysis more complex, *Toys "R" Us* realigns the personal jurisdiction standard for online activities to better comport with the standards applied to offline activities.¹⁴¹

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140. See *Toys "R" Us*, 318 F.3d at 455 n.6 (noting intent requirement is key "component for jurisdiction under either 'minimum contacts' analysis or 'effects' test").

141. For a discussion of the traditional rules of personal jurisdiction applied to offline activities, see *supra* notes 17–35 and accompanying text.