Catholic University Law Review

Volume 51
Issue 1 *Fall 2001*

Article 12

2001

Traditional Notions of Fair Play and Substantial Justice Lost in Cyberspace: Personal Jurisdiction and On-Line Defamatory Statements

Rachael T. Krueger

TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE LOST IN CYBERSPACE: PERSONAL JURISDICTION AND ON-LINE DEFAMATORY STATEMENTS

Rachael T. Krueger[+]

"Do not waste your time looking up the law in advance, because you can find some federal district court that will sustain any proposition you make."[1] Enter the world of cyberspace jurisdiction. As the Supreme Court remains silent on the issue of personal jurisdiction and the Internet, courts throughout the country attempt to remedy jurisdictional confrontations by relying on existing precedent and inventive jurisdictional tests of their own.[2] The mass of inconsistent decisions and circuit splits provides fresh legal questions that prove chaotic for judicial benches.[3]

"The Internet is a unique and wholly new medium of worldwide human communication."[4] The Internet allows users to transmit text,

---

[+] J.D. Candidate, May 2002, Catholic University, Columbus School of Law.

1. Sam Ervin, Jr., Senate Watergate Hearings, reported in the DALLAS TIMES HERALD, June 20, 1973, *quoted in* ELIZABETH FROST-KNAPPMAN & DAVID S. SHRAGER, THE QUOTABLE LAWYER 277 (Rev. ed. 1998).

2. *See, e.g.*, Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (formulating a test to apply to on-line jurisdictional problems).

3. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 850-52 (1997) (explaining and defining the Internet's history and implications). "The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(e)(1) (Supp. III 1998). "The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks." *See* Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997); *see also* Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997) (stating that "[t]he unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed"); Rodney A. Smolla, Dun & Bradstreet, Hepps *and* Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1519 (1987) (describing defamation law as "dripping with contradictions and confusion").

4. Blumenthal v. Drudge, 992 F. Supp. 44, 48 (D.D.C. 1998) (quoting *Reno*, 521 U.S. at 850). *See generally* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Bochan v. La Fontaine, 68 F. Supp. 2d 692 (E.D. Va. 1999); Barrett v. Catacombs Press, 44 F. Supp. 2d 717 (E.D. Pa. 1999); Mallinckrodt Med., Inc. v. Sonus Pharms., Inc., 989 F. Supp. 265 (D.D.C. 1998); Telco Communications v. An Apple a Day, 977 F. Supp. 404

images, sound, and video through "cyberspace,"[5] utilizing one of many Internet service providers (ISPs).[6] Both commercial and private entities employ the international scope of the World Wide Web, "revolutioniz[ing] the global marketplace."[7]

The United States District Court for the District of Massachusetts noted that the Internet possesses no "territorial boundaries."[8] Judge Nance Gertner stated that "[t]o paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps 'no there there,' the 'there' is everywhere where there is Internet access."[9] This concept of omnipresence underlies the problem associated with defamatory statements[10] on the Internet.[11] Although Internet access is nationwide, no

---

(E.D. Va. 1997); Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456 (D. Mass. 1997); Zippo Mfg. Co v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997); Edias Software Int'l, LLC. v. Basis Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996); Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996); Jewish Def. Org., Inc. v. Superior Court, 85 Cal. Rptr. 2d 611 (Cal. Ct. App. 1999); Blakey v. Cont'l Airlines, Inc., 751 A.2d 538 (N.J. 2000).

5. *See* WILLIAM GIBSON, NEUROMANCER 4 (1984) (referring to a virtual world within a computer and the network to which it is attached); *see also* I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 994-95 (1994) (evaluating how legal problems in cyberspace differ from those of actual space).

6. Blakey, 751 A.2d at 544 n.4 (defining ISP as "a company that provides access to the Internet") (quoting *Webopedia*, *at* http://webopedia.com (last visited Mar. 30, 2000)).

7. AMERICAN BAR ASSOCIATION GLOBAL CYBERSPACE JURISDICTION PROJECT, LONDON MEETING DRAFT 1 (1998) (observing global changes as a result of the Internet); *see also Blumenthal*, 992 F. Supp. at 48 n.6 (defining the "web" as "a vast decentralized collection of documents containing text, visual images, and even audio clips," which is "designed to be inherently accessible from every Internet site in the world"); *Reno*, 521 U.S. at 852 (describing the World Wide Web as a network "which allows users to search for and retrieve information stored in remote computers . . . and consist[ing] of a vast number of documents stored in different computers all over the world").

8. *Digital Equip.*, 960 F. Supp. at 462 (explaining that cyberspace defies traditional contacts). The *Digital* court stated that "commercial use of the Internet tests the limits of these traditional, territorial-based concepts even further." *Id.*

9. *Id.* at 462; *see also* Libraries Ass'n v. Pataki, 969 F. Supp. 160, 161 (S.D.N.Y. 1997) (stating that "[t]he Internet may well be the premier technological innovation of the present age").

10. RESTATEMENT (SECOND) OF TORTS § 581 (1938) (stating that the common law elements of defamation are: (1) publication, (2) a false and defamatory statement, (3) about another); BLACK'S LAW DICTIONARY 428 (7th ed. 1999) (defining "defamatory statement" as "[a] statement that tends to injure the reputation of a person referred to in it . . . [t]he statement is likely to lower that person in the estimation of reasonable people and in particular to cause that person to be regarded with feelings of hatred, contempt, ridicule, fear, or dislike"); *see also* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 69 (1967) (noting that "[a] member of a civilized society should have some measure of protection against unwarranted attack upon his honor, his dignity and his standing in the community").

nationwide jurisdiction for defamation actions exists.[12]

"[An on-line] defamatory statement . . . can be distributed worldwide in a matter of minutes."[13] By the year 2003, the estimated on-line population will be "153.9 million people."[14] Individuals sending messages into cyberspace, defamatory or not, cannot "purposefully avail" themselves to all jurisdictions in this country and beyond if a lawsuit should arise as a result of messages sent over the Internet.[15] However, each year courts bring non-resident defendants charged with on-line defamation into their jurisdiction for litigation concerning a simple message or posting.[16]

---

11. Lilian Edwards, *Defamation and the Internet: Name-calling in Cyberspace*, *in* LAW AND THE INTERNET: REGULATING CYBERSPACE 183 (Lillian Edwards & Charlotte Waelde eds., 1997) (stating that problems arise from the Internet's "speedy transmission of huge amounts of data simultaneously to multiple destinations, and general lack of respect for national borders").

12. Mallinckrodt Med., Inc. v. Sonus Pharms. Inc., 989 F. Supp. 265, 273 (D.D.C. 1998); *see also* 143 CONG. REC. E1633 (daily ed. Sept. 3, 1997). Rep. Goodlatte stated that: "the Internet is a challenge to the sovereignty of civilized communities, States, and nations to decide what is appropriate and decent behavior." *Id.*

13. Jonathan D. Bick, *Why Should the Internet Be Any Different?*, 19 PACE L. REV. 41, 45 (1998) (stating that intentional and unintentional communication are widely available to "a vast number of people"); *see also* Edwards, *supra* note 11, at 183 (asserting that "users of the Internet are more likely than ordinary citizens to be found publishing comments which are actionable as defamatory").

14. *eMarketer eBusiness Report*, *available at* http://www.emarketer.com/ereports/edemographics/sample1.html (last visited Sept. 27, 2000) (showing an increase from 102.4 million people using the Internet in the year 2000); *see also* Shea v. Reno, 930 F. Supp. 916, 926 (S.D.N.Y. 1996) (explaining two types of Internet users: (1) those who "can correspond or exchange views with one or many other Internet users," and (2) those who can locate and retrieve information available on other computers").

15. *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (stating that "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"); *see also* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (stating that jurisdiction exists if the alleged injury "arise[s] out of or relates[s] to" the purposeful activities of the defendant); Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984) (holding that jurisdiction exists because defendant "purposefully directed" activities at the forum state's residents); Kulko v. Superior Court, 436 U.S. 84, 94 (1978) (suggesting that if a defendant purposefully derives benefit from his or her activities, a court may hold him or her responsible for any resulting injury).

16. Blakey v. Cont'l Airlines, Inc., 751 A.2d 538, 555-58 (N.J. 2000) (holding that posting a defamatory statement on an electronic bulletin board is sufficient grounds to constitute minimum contacts because the defendants knew the statements would hurt the plaintiff in the forum state); *see also* Bochan v. La Fontaine, 68 F. Supp. 2d 692, 701-702 (E.D. Va. 1999) (holding that posting libelous messages on-line from New Mexico justifies jurisdiction in Virginia because the Web site was accessible twenty-four hours a day); Telco Communications v. An Apple a Day, 977 F. Supp. 404, 406-408 (E.D. Va. 1997) (holding that a defamatory on-line press release and advertisement constituted grounds for jurisdiction because of its perpetual accessibility). *But see* Washington Post Co. v.

The past provides an uncertain legal framework for the future, and the future finds itself amidst the rise of Internet lawsuits.[17] Without guidance from the Supreme Court in the area of on-line defamation and without an established jurisdictional test for such crime, the resulting precedent produced by courts across the country remains inconsistent.[18] These inconsistencies allow some computer users and potential plaintiffs a clever way of gaining jurisdiction over defendants they would otherwise have to travel across the country to sue.[19]

This Comment first explains the law concerning personal jurisdiction prior to the popular use of the Internet, including the prevalent tests and existing precedent for defamation actions. Next, this Comment examines the manner in which United States courts have applied the established law of personal jurisdiction to cases involving defamatory statements on the Internet. This Comment then examines recent case law pertaining to on-line defamation and the application of specific jurisdictional tests employed by courts across the country. This Comment's analysis includes a discussion of the problems that arise when courts attempt to define new technology by legal standards. While recognizing that technological advances often alter societal and judicial norms, this Comment asserts that the existing precedent set by the Supreme Court satisfies all jurisdictional situations of today, including those situations

---

Chaloner, 250 U.S. 290, 294 (1919) (declaring that "[w]hatever a man publishes he publishes at his peril").

17. *See* Steven Betensky, *Jurisdiction and the Internet*, 19 PACE L. REV. 1, 2 (1998) (exploring why there have been so many cases involving Internet jurisdiction in the recent past).

18. *Compare Bochan*, 68 F. Supp. 2d at 702-03 (holding jurisdiction is proper); Blumenthal v. Drudge, 992 F. Supp. 44, 57-58 (D.D.C. 1998) (holding jurisdiction is proper); *Telco Communications*, 977 F. Supp. at 408 (holding jurisdiction is proper); Edias Software Int'l v. Basis Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996) (holding jurisdiction is proper), *with* GTE New Media Servs., Inc. v. BellSouth Corp., 199 F.3d 1343, 1352 (D.C. Cir. 2000) (holding that jurisdiction does not exist); Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 731 (E.D. Pa. 1999) (holding that jurisdiction does not exist); Mallinckrodt Med. Inc. v. Sonus Pharms., Inc., 989 F. Supp. 265, 272-73 (D.D.C. 1998) (holding that jurisdiction does not exist); Jewish Def. Org., Inc. v. Superior Court, 85 Cal. Rptr. 2d 611, 621-22 (Cal. Ct. App. 1999) (holding that jurisdiction does not exist).

19. Betensky, *supra* note 17, at 2 (stating that the increase of Internet jurisdiction litigation may be the result of a "get on the band wagon" phenomenon). The rapid growth of computer use provokes some to believe that the potential plaintiffs are thinking: "This is a really nifty way of getting jurisdiction over someone that I'd otherwise have to go across the country to sue." *Id.* at 2. *But see* Leonard Klingbaum, *Bensusan Rest. Corp. v. King: An Erroneous Application of Personal Jurisdiction Law to Internet-based Contacts*, 19 PACE L. REV. 149, 187 (1998) (stating that "[t]he fear of being haled into every distant court, however, may be unfounded" because the due process analysis established by the Supreme Court will prevent "unfair assertions of personal jurisdiction, even after an electronic contact is deemed constitutionally satisfactory").

involving on-line defamation. Finally, this Comment suggests a renewed concentration on *human* volition, physical activity and location, and an avoidance of concentrating on the interpretation of *computer* activity on Web sites.

I. PERSONAL JURISDICTION: APPLICATIONS PRECEDING AND SUCCEEDING THE INTRODUCTION OF THE INTERNET

A. Brief Overview of Personal Jurisdiction: From Pennoyer to the Present

As established in *Pennoyer v. Neff*, The Due Process Clause of the Fourteenth Amendment of the United States Constitution limits states' authority to exercise jurisdiction over a non-resident defendant.[20] In the landmark personal jurisdiction case, *International Shoe v. Washington*,[21] the Supreme Court stated that a court must not offend "traditional notions of fair play and substantial justice" in its attempt to obtain jurisdiction over a defendant.[22] An assertion of jurisdiction necessitates that the defendant have minimum "contacts, ties or relations" with the forum state in order for a judgment to be binding.[23] As a result of these

---

20. Pennoyer v. Neff, 95 U.S. 714, 722 (1877), *overruled in part by*, Shaffer v. Heitner, 433 U.S. 186 (1947). The Court held that states may exercise jurisdiction over people within their territory but not over people outside their territory. *Id.*; *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (stating that "[a] judgment rendered in violation of due process is void in the rendering state and is not entitled to full faith and credit elsewhere"); *Kulko*, 436 U.S. at 91 (stating that "[t]he Due Process Clause . . . operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of non-resident defendants").

21. 326 U.S. 310 (1945).

22. *Id.* at 316 (stating that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it") (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987). In the deeply divided plurality opinion of *Asahi*, the Court presented factors used to determine the reasonableness of jurisdiction: "A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief." *Id.* at 113; *see also* Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1487-88 (9th Cir. 1993) (interpreting the Supreme Court standard concerning reasonableness). The *Core-Vent* court listed seven factors necessary in determining the reasonableness of exercising jurisdiction:

> (1) the extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Id. at 1487-88.

23. *Int'l Shoe*, 326 U.S. at 319; *see also* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp.

contacts, the defendant could "reasonably anticipate[] being haled into court there."[24] In addition, personal jurisdiction does not require a defendant's physical presence in the forum state; proper jurisdiction may be found upon a "substantial and continuing relationship" with entities in the forum state.[25]

A court must obtain one of two types of jurisdiction over a defendant: specific or general jurisdiction.[26] A court will exercise general jurisdiction when the defendant's actions that give rise to the lawsuit are unrelated to the defendant's contacts with the forum state.[27] In order to assert general jurisdiction, the defendant's activities with the forum state must be "systematic and continuous."[28] An assertion of specific

---

1328, 1333-34 (E.D. Mo. 1996) (stating that "[w]hether sufficient minimum contacts to obtain personal jurisdiction over a defendant can be established solely through the use of computers and electronic communications is a new issue under due process jurisprudence," and that courts "have recognized that such communications via computer are of a different nature").

24. *World-Wide Volkswagen*, 444 U.S. at 297 (distinguishing foreseeability as "not the mere likelihood that a product will find its way into the forum State," but that "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there"); *see also* Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (ordering "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign").

25. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1985) (finding personal jurisdiction to exist "[b]ecause Rudzewicz established a substantial and continuing relationship with Burger King's Miami headquarters, received fair notice from the contract documents and the course of dealing that he might be subject to suit in Florida, and has failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair"); *see also* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (stating that a "substantial connection" with the forum state sustains jurisdiction).

26. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984). The Court stated that:

> Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.

Id; *see also* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998) (stating that "[p]ersonal jurisdiction may be founded on either general or specific jurisdiction").

27. *See supra* note 26; *see also* Ann K. Moceyunas & Janine Anthony Bowen, *Personal Jurisdiction in the On-line Context*, 5 CYBER. LAW. 5, 6 (2000) ("[T]he Constitution requires that the defendant's contacts with the forum state be 'substantial' or 'continuous and systematic.' General jurisdiction requires more contacts than specific jurisdiction.").

28. *See supra* notes 26-27; *see also* BLACK'S LAW DICTIONARY 856 (7th ed. 1999) (defining "general jurisdiction" as "[a] court's authority to hear all claims against a defendant, at the place of the defendant's domicile or the place of service, without any showing that a connection exists between the claims and the forum state").

jurisdiction necessitates "minimum contacts" with the forum state,[29] and the defendant's alleged actions and forum contacts must be related.[30]

Although all states employ these constitutional ideals, incongruities among jurisdictions emerge when a comparison of long-arm statutes, which control the ability of a state to hale a non-resident defendant into court, is undertaken.[31] Generally, a defendant must satisfy both the constitutional "minimum contacts" requirement and the state's long-arm statute to be brought to court within its boundaries.[32] These statutes

---

29. Int'l Shoe v. Washington, 326 U.S. 310, 319 (1945); *see also* BLACK'S LAW DICTIONARY 857 (7th ed. 1999) (defining "specific jurisdiction" as "[j]urisdiction that stems from the defendant's having certain minimum contacts with the forum state so that the court may hear a case whose issues arise from those minimum contacts"); *Panavision*, 141 F.3d at 1320 (applying a three-part test for specific jurisdiction in an Internet trademark action). The *Panavision* court's test stated that:

> (1) The non-resident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposely avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable.

Id.

30. *Burger King Corp.*, 471 U.S. at 478-80; Calder v. Jones, 465 U.S. 783, 788 (1984); *see also* Moceyunas & Bowen, *supra* note 27, at 6 (stating that forum contacts "must be the result of 'targeting of the forum state and its residents.' Contacts that are random, fortuitous, and attenuated are insufficient").

31. BLACK'S LAW DICTIONARY 953 (7th ed. 1999) (defining a "long arm statute" as "[a] statute providing for jurisdiction over a non-resident defendant . . . "). In Virginia, for example, a court may establish jurisdiction over a non-resident that, among aforementioned constitutional requirements, "regularly does or solicits business" in Virginia. VA. CODE ANN. § 8.01-328.1(A)(i) (Michie 2000). Conversely, California's long-arm statute simply mirrors the constitutional requirements. *See* CAL. CIV. PRO. CODE § 410.10 (Deering 1991) (stating that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"); *see also* Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-first Century*, 66 U. CIN. L. REV. 385, 392 (1998) (asserting that long-arm jurisdiction presents courts with the most problems).

32. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996) (stating that "federal courts apply the law of the forum state, subject to the limits of the Due Process Clause of the Fourteenth Amendment"); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1329 (E.D. Mo. 1996) (stating that "[w]hether the Court can exercise personal jurisdiction over a defendant requires a two-part inquiry" that "first examines whether personal jurisdiction exists under [the forum state's] long-arm statute," and then "the Court must determine whether the exercise of personal jurisdiction is consistent with due process"); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1990) (stating that "[t]he Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a non-resident defendant"); *Int'l Shoe*, 326 U.S. at 316 (declaring that a defendant must "have certain minimum contacts with [the forum]"); *see also* Moceyunas & Bowen, *supra* note 27, at 6 (stating that a "non-resident defendant is amenable to personal jurisdiction in a federal court to the extent permitted by

provide one reason for conflicting decisions among courts concerning their jurisdictional holdings in on-line defamation cases.[33] Therefore, in order to gain personal jurisdiction over a defendant, a court must find either specific or general jurisdiction and that the action falls under the state's long-arm statute.

B. Traditional Approaches to the Problem of Personal Jurisdiction in Defamation Actions

1. Prior to the Internet: The Supreme Court's Standard

The Court's concentration on "the relationship among the defendant, the forum, and the litigation"[34] is a fundamental tenant in determining personal jurisdiction in defamation actions.[35] Courts also determine whether a forum is proper by ascertaining where the defamatory statement occurred.[36] For example, in *Keeton v. Hustler Magazine*,[37] the Court analyzed both circulation and distribution of a magazine, determining that *Hustler's* regular activities (i.e., circulation) in the forum state established personal jurisdiction over the defendant in the libel action.[38]

Calder v. Jones,[39] a separate libel action that posed a jurisdictional question similar to *Keeton*, was decided the same day.[40] In *Calder*, the *National Enquirer* published an allegedly defamatory article about Shirley Jones, a California resident.[41] The petitioners, including the newspaper, its editor, and the author of the article, resided in Florida[42]

---

the state court in which the federal court resides").

33. *See supra* note 31 (defining long-arm statute with examples).

34. Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

35. *Calder*, 465 U.S. at 788 (citing this relationship as necessary in judging minimum contacts in the defamation action before the Court); *see also* Keeton v. Hustler Mag., 465 U.S. 770, 775 (1984) (stating that "a court properly focuses on" this relationship in judging minimum contacts).

36. *Keeton*, 465 U.S. at 777 (stating that "[t]he tort of libel is generally held to occur wherever the offending material is circulated") (quoting RESTATEMENT (SECOND) OF TORTS § 577A, cmt. A (1977)); *see supra* note 10 (defining defamatory statement).

37. 465 U.S. 770 (1984).

38. *Id.* at 781 (stating that the defendant had "continuously and deliberately exploited the [forum state's] market," and therefore should expect such a suit to arise).

39. 465 U.S. 783 (1984).

40. Both *Keeton* and *Calder*'s decisions dealt with libelous statements made by magazine distributors. *See generally* Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler, 465 U.S. 770 (1984).

41. *Calder*, 465 U.S. at 788 n.9 ("The article alleged that the respondent drank so heavily as to prevent her from fulfilling her professional obligations.").

42. *Id.* at 785-86.

and attempted to escape the reach of California's jurisdiction.[43] However, the Court held that California was the proper jurisdiction because the state was "the focal point of both the story and of the harm suffered."[44]

The Court determined that the "effects" of the petitioners' activities in California provided a sufficient basis for jurisdiction.[45] The *Calder* Court employed a three-part test that defined the requirements for exercising jurisdiction in tortious cases:

> (1) The defendant committed an intentional tort; (2) [t]he plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; (3) [t]he defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.[46]

This test is still employed by courts facing jurisdictional questions in defamation actions, including the new breed of Internet defamation cases.[47] *Calder* stands as a useful, analytical method for courts navigating through on-line defamation cases.[48]

2. *After the Rise of the Internet: Traditional Applications and the Implementation of Calder*

The United States District Court for the District of Arizona, in *Edias Software International, LLC v. Basis International Ltd.*,[49] analyzed non-

---

43. *Id.* at 789 (explaining the petitioners' argument "that they are not responsible for the circulation of the article in California," and that mere foreseeability cannot suffice for jurisdiction).

44. *Id.* at 788-89 (asserting that the article, which used California sources, focused on a California resident whose professional career remained in California).

45. *Id.* at 789 (stating that "the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California").

46. Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265-66 (3d Cir. 1998) (interpreting *Calder*).

47. *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) (using *Calder* to sustain personal jurisdiction over a non-resident who targeted the plaintiff for domain-name extortion); Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 731 (E.D. Pa. 1999) (using the "effects test" of *Calder* to analyze the relationship between the defamatory statements and the forum state); Edias Software Int'l. v. Basis Int'l. Ltd., 947 F. Supp. 413, 420 (D. Ariz. 1996) (citing the "effects test" as support for jurisdiction); Cal. Software, Inc. v. Reliability Research Inc., 631 F. Supp. 1356, 1364 (C.D. Ca. 1986) (using *Calder*'s rationale to find jurisdiction over defendant who sent defamatory statements through an Internet-like network).

48. Sheehan, *supra* note 31, at 401-02 (stating that *Calder* and *Keeton* had "special relevance to potential cyberspace litigation").

49. 947 F. Supp. 413 (D. Ariz. 1996).

Internet related contacts to find jurisdiction over a non-resident defendant in an Internet defamation action.[50] In *Edias*, the defendant, a New Mexico company, posted a defamatory press release message on its CompuServe Web page and in an on-line forum about the plaintiff, an Arizona company.[51] To determine the reasonableness of asserting jurisdiction over the defendant, the court considered four factors: (1) the extent of the defendant's purposeful availment; (2) the burden on the defendant to litigate in Arizona; (3) sovereignty conflicts; and (4) Arizona's interest in adjudicating this dispute.[52]

The *Edias* court, utilizing these four factors and the *Calder* "effects test," focused on the defendant's contacts with the forum state which included email, phone, and fax communications, as well as a contract.[53] The court concluded that these contacts were sufficient to establish a proper exercise of jurisdiction in the forum state, and affirmatively declared the reasonableness of the lawsuit.[54]

Blakey v. Continental Airlines, Inc., a recent case employing *Calder*'s rationale, addressed personal jurisdiction in an on-line defamatory context.[55] In *Blakey*, a female pilot and Washington resident brought a defamation action in New Jersey against her employer, Continental Airlines, for statements posted on the employer's "electronic bulletin board."[56] The appeals court stated that activity on an electronic bulletin

---

50. *Id.* at 421 (stating that "BASIS [defendant] has purposefully availed itself of the protections and privileges of Arizona law based on the contractual relationship between [the defendant] and [the plaintiff], and [the defendant's] accompanying activities in Arizona, in addition to the dissemination of allegedly defamatory statements about [the plaintiff] on [the defendant's Web page").

51. *Id.* at 415.

52. *Id.* at 421-22 (concluding that as a fifth factor, the "most convenient resolution" would occur in Arizona).

53. *Id.* at 417.

54. *Id.* at 421-22 (concluding that "Arizona has an interest in adjudicating a claim that affects an Arizona company"). The *Edias* court also utilized the *Calder* "effects test" in its analysis. *Id.* at 420; *see also* Calder v. Jones, 465 U.S. 783, 789-90 (1984). The effects test "focuses on the tortious act by a non-resident defendant that results in injury in the forum state." *Id.* at 788-89.

55. Blakey v. Cont'l Airlines, Inc., 751 A.2d 538, 555 (N.J. 2000).

56. Blakey v. Cont'l Airlines, Inc., 730 A.2d 854, 854 (N.J. Super. Ct. App. Div. 1999); *see also* Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 951 (C.D. Cal. 1997) (explaining that "one person can reach many other users through bulletin board services, newsgroups and numerous other Internet-based means of communication"); United States v. Riggs, 739 F. Supp. 414, 417 n.4 (N.D. Ill. 1990) (defining "computer bulletin board" as "[a] computer program that simulates an actual bulletin board by allowing computer users who access a particular computer to post messages, read existing messages, and delete messages"); It's in the Cards, Inc. v. Fuschetto, 535 N.W.2d 11, 14 (Wis. Ct. App. 1995) (stating that "[p]osting a message to the SportsNet bulletin board is a

board involves restricted access to a "relatively small group and is further restricted by personal choice, purchase of equipment and payment of a fee [and] is not an act purposefully or foreseeably aimed at this state."[57]

On appeal, the New Jersey Supreme Court reversed and remanded the lower court's decision that prohibited New Jersey jurisdiction.[58] The court determined that defamatory statements published with the intent to inflict harm in the forum state satisfied the minimum contacts and fairness requirements of *International Shoe*, and concluded that the New Jersey court was a proper jurisdiction for the defamation action.[59] This holding imitates the *Calder* effects test. Similarly, the *Blakey* court focused on the intentional effects of the contacts in the forum state.[60]

Conversely, the court in *Mallinckrodt Medical v. Sonus Pharmaceuticals, Inc.*,[61] found no jurisdiction over Sonus, a Seattle corporation that posted defamatory statements about Mallinckrodt on an AOL electronic bulletin board.[62] The court found that Sonus could not be reached by the District of Columbia's long-arm statute, and that posting a message on an AOL electronic bulletin board "is not an act purposefully or foreseeably aimed at the District of Columbia."[63] Although the *Mallinckrodt* court never cited *Calder*, it employed *Calder's* rationale by searching for the effects of the defamatory message in the forum state and concluded that none existed.[64] The *Mallinckrodt* court suggested that "no nationwide jurisdiction for defamation actions" exists,[65] and "the advent of the Internet and Internet service providers

---

random communication of computerized message analogous to posting a written notice on a public bulletin board, not a publication that appears at regular intervals"); James F. Brelsford, *Online Content Liability Issues*, 611 PLI/Pat 505, 514 (2000) (stating that the "riskiest activity is operating [electronic] bulletin boards, because under common law a system operator or Web site owner can face liability for statements made by others on those boards").

57. *Blakey*, 730 A.2d at 867.

58. *Blakey*, 751 A.2d at 558-59.

59. *Id.* at 556. The court further stated that "we do not believe that it is unfair that the forum where the discrimination took place should exercise jurisdiction over the allegations of defamatory retaliatory harassment." *Id.* at 557.

60. *Id.* at 556.

61. 989 F. Supp. 265 (D.D.C. 1998).

62. *Id.* at 272-73.

63. *Id.* at 272 (supporting its position by citing Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419-20 (9th Cir. 1997); CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1261-68 (6th Cir. 1996); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125-27 (W.D. Pa. 1997); Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996)).

64. *Mallinckrodt*, 989 F. Supp. at 272-73.

65. *Id.* at 273 (citing McFarlane v. Esquire Mag., 74 F.3d 1296, 1300 (D.C. Cir. 1996)).

such as AOL does not change that fact."[66]

Recently, the United States Court of Appeals for the District of Columbia, in *GTE New Media Services, Inc. v. BellSouth Corp.*, reinforced the notion that a Web site alone does not by itself suffice for jurisdiction.[67] Initially, the lower court noted the peculiar nature of an interactive Web site as a non-resident defendant's sole contact with the forum,[68] but found jurisdiction over the defendant under the long-arm statute based on that contact.[69] Therefore, the lower court held it could exercise jurisdiction based entirely upon one Internet contact.[70]

On appeal, the circuit court disagreed, stating that despite satisfying the long-arm statute, "a plaintiff must still show that the exercise of personal jurisdiction is within the permissible bounds of the Due Process Clause."[71] The court held that an interactive Web site did not satisfy "minimum contacts," and the theory of holding otherwise "simply cannot hold water."[72] In other words, a non-resident defendant must have more than one on-line contact with a forum to be subject to jurisdiction in the District of Columbia.[73]

In *Northwest Airlines v. Friday*,[74] another recent on-line defamation action, the Court of Appeals of Minnesota ignored the *Calder* principles.[75] Relying upon Minnesota's long-arm statute that contains a provision stating that no jurisdiction shall be found if a defendant

---

66. *Id.* (stating that someone could "have read the message and reacted negatively towards plaintiffs").

67. *GTE*, 199 F.3d 1343 (D.C. Cir. 2000). Although not a defamation action, the court's holding could pertain to future on-line defamation actions.

68. *Id.* at 1345 (stating that "[a]ll of the interactive Website cases reviewed [by the District Court] involved defendants with at least some physical contact with the forum") (quoting GTE New Media Servs., Inc. v. Ameritech Corp., Order Certifying for Interlocutory Appeal the Court's Ruling That Personal Jurisdiction Exists and Staying Proceedings, at 3, reprinted in J.A. 218).

69. *Id.* at 1346. The lower court held that "GTE had sufficiently alleged a tortious injury in the District caused by the defendants' acts outside of the District." *Id.*

70. *Id.* at 1346.

71. *Id.* at 1347; *see also* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1332 (E.D. Mo. 1996) (stating that "[t]he [I]nternet, a new and rapidly developing means of mass communication and information exchange, raises difficult questions regarding the scope of the court's personal jurisdiction in the context of due process jurisprudence").

72. *GTE*, 199 F.3d. at 1350.

73. *See generally* Michele N. Breen, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace into International Shoe*, 8 SETON HALL CONST. L.J. 763, 791 (1998) (noting the judicial split in cases involving jurisdiction based solely on Internet contacts).

74. 617 N.W.2d 590 (Minn. Ct. App. 2000).

75. *Id.* at 592-93 (holding that no jurisdiction exists without any analysis of effects).

"[c]ommits any act outside Minnesota causing injury . . . in Minnesota . . . [if] the cause of action lies in defamation or privacy."[76]

This case involved electronic mail sent by defendants in Washington to "Minnesota and elsewhere," and then published in newspapers circulated in the Twin Cities area.[77] In its analysis, the court focused entirely on the act of making the defamatory statement.[78] Because the defamatory statement originated in Washington, not Minnesota, the applicable law was the long-arm statute "with its explicit exception for defamation actions."[79]

Although the court invited the legislature to reconsider the long-arm statute in anticipation of similar cases in the future, this court rejected the suggestion that "'the phenomenon and power' of the Internet justifies a different result."[80] Although the court did not implement the "effects test," and it ignored the idea of Internet presence in the footsteps of the aforementioned cases, it employed the traditional principles of its long-arm statute to determine the propriety of jurisdiction and ignored the idea of Internet presence in the footsteps of the aforementioned cases.

C. The Introduction of the Zippo Sliding Scale Test

1. The Zippo Court: A Three-Prong Approach to Personal Jurisdiction and the Internet

Although not a defamation case, in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[81] the United States District Court for the Western District

---

76. MINN. STAT. § 543.19, subdivision 1(d)(1999) (stating additionally that jurisdiction shall not be found if "Minnesota has no substantial interest in providing a forum," or "the burden placed on the defendant by being brought under the state's jurisdiction would violate fairness and substantial justice").

77. *Northwest*, 617 N.W.2d at 592. Northwest Airlines sued Friday for "defamation and business disparagement" after a Northwest pilot's wife sent out a press release via email concerning alleged safety violations at Northwest. *Id.*

78. *Id.* at 593 (stating the necessity to focus on the act of making the defamatory statement as "the operative act for the purpose of determining whether the act was 'in Minnesota' for the purpose of the long arm statute").

79. *Id.* at 594 (clarifying that the act in question "was sending allegedly defamatory email press releases," not receiving the email; therefore, "the relevant provision of the long-arm statute is subdivision 1(d)").

80. *Id.* at 594-95; *see also* Reno v. ACLU, 521 U.S. 844, 890 (1997) (stating that "[c]yberspace is malleable," and therefore, "it is possible to construct barriers in cyberspace . . . "); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, U. CHI. LEGAL F. 207, 207-08 (1996) (arguing that traditional principles can be applied to the Internet, and that a "law of cyberspace" exists no more than a "law of the horse" exists).

81. 952 F. Supp. 1119 (W.D. Pa. 1997). The *Zippo* court faced a jurisdictional

of Pennsylvania produced a "sliding scale" test for Internet jurisdiction that many courts have applied to on-line defamation cases.[82]

According to the *Zippo* sliding scale test, there are three categories of Internet defendants.[83] The first category includes non-resident defendants who are "clearly [doing] business over the Internet" with a resident of the forum state including entering into contracts and "repeated transmission of computer files over the Internet."[84] The court held that "personal jurisdiction is proper" for this category of users.[85] The second category, known as a "passive website," includes a defendant who "[posts] information on an Internet Web site which is accessible to users in foreign jurisdictions," and is not sufficient grounds for jurisdiction.[86] The final category encompasses the "middle ground . . . occupied by interactive Web sites where a user can exchange information with the host computer . . . ."[87] In this situation, the court held that "jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[88]

The *Zippo* court referenced numerous Supreme Court cases before defining an analytical method for personal jurisdiction in the context of the Internet.[89] Building upon that foundation, the *Zippo* court used the analyses of a number of recent, non-controlling precedent to formulate

---

question arising out of an on-line trademark dilution action. *Id.* at 1121. The *Zippo* court noted that "[w]ith this global 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." *Id.* at 1123.

82. *Id.* at 1124; *see, e.g.*, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Barrett v. Catacombs Press, 44 F. Supp. 2d 717 (E.D. Pa. 1999); Bochan v. La Fontaine, 68 F. Supp. 2d 692 (E.D. Va. 1999); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); Mallinckrodt Med., Inc. v. Sonus Pharms., Inc., 989 F. Supp. 265 (D.D.C. 1998); Jewish Def. Org., Inc. v. Superior Court, 72 Cal. App. 4th 1045 (Cal. Ct. App. 1999).

83. *Zippo*, 952 F. Supp. at 1124 (describing characteristics of all three categories in its "sliding scale" test of minimum contacts).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1122-23 (citing Kulko v. Superior Court, 436 U.S. 84, 91 (1978)); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414-16 (1984); Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); Burger King v. Rudzewicz, 471 U.S. 462, 475 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)). The *Zippo* court discussed these cases under a section labeled "*The Traditional Framework.*" *Id.*

its new sliding scale test.[90] The *Zippo* court justified its departure from traditional solutions by quoting the Court in *Hanson v. Denckla*:[91] "[A]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase."[92]

2. Zippo Followers: On-line Defamation Cases in Which Courts Determine Jurisdiction Based on "Passive" Web Sites

In 1997, the district court in *Telco Communications v. An Apple a Day*[93] cited the *Zippo* court's passive Web site definition in its opinion.[94] Despite the defendant's arguable passivity, the *Telco* court determined that a non-resident who utilizes on-line advertising will not escape jurisdiction.[95]

In this case, Telco, a Virginia Corporation, claimed that its stock prices were depressed when the defendant, An Apple a Day, a Missouri corporation, released two defamatory press releases over the Internet.[96] The court found jurisdiction proper because the defendant "conducted [its] advertising and soliciting over the Internet, which could be accessed by a Virginia resident [twenty-four] hours a day . . . ."[97] The court concluded that the defendants' contacts met Virginia's long-arm statute.[98]

---

90. *Id.* at 123-25 (citing CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)); ACLU v. Reno, 929 F. Supp. 824, 830-48 (E.D. Pa. 1996); Panavision Int'l., L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996); Inset Sys., Inc. v. Instruction Set, 937 F. Supp. 161 (D. Conn 1996); Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996); Pres-Kap, Inc. v. Sys. One, Direct Access, Inc., 636 So. 2d 1351(Fla. App. 1994)). The *Zippo* court analyzed these cases under the section "*The Internet and Jurisdiction.*" *Id.*

91. 357 U.S. 235 (1958).

92. *Zippo*, 952 F. Supp. at 1123 (citing *Hanson*, 357 U.S. at 250-51). The *Zippo* court also cited *Burger King* in which the Supreme Court stated that "[i]t is an inescapable fact of modern commercial life that a substantial amount of commercial 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." *Id.* (citing *Burger King*, 471 U.S. at 476).

93. 977 F. Supp. 404 (E.D. Va. 1997).

94. *Id.* at 406 (citing *Zippo* and stating that "[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").

95. *Id.* at 407 (declaring that "posting a Web site advertisement or solicitation constitutes a persistent course of conduct").

96. *Id.* at 405 (stating that Telco alleged defamation, tortious interference, and conspiracy to harm business).

97. *Id.* at 407.

98. *Id.* (stating that "the Defendants [solicited business] regularly for purposes of the long-arm statute"); *see* VA. CODE ANN. § 8.01-328.1(A)(4) (Michie 2001 Supplement) (stating that a court may exercise jurisdiction if a defendant causes "tortious injury in this

The *Telco* court stated that the Internet's effect "expand[ed] jurisdictional bounds."[99] The *Telco* court is not alone in its rationale; similar decisions have preceded and followed *Telco*.[100]

In *Bochan v. La Fontaine*,[101] the court employed logic similar to that in Telco.[102] In 1999, the *Bochan* court faced a libel action "novel" to its bench and unfamiliar to other jurisdictions.[103] Defendants from New Mexico and Texas, through a USENET Internet newsgroup,[104] posted defamatory statements about the plaintiff, a resident of Virginia.[105] The court framed the issue by stating, "the question is whether the La Fontaines [the defendants] committed a tort (i.e., libel) in Virginia by posting certain [defamatory] messages to an Internet newsgroup via AOL and Earthlink.net."[106]

The Virginia court determined that it *could* exercise jurisdiction on non-resident defendants because they use an Internet account on a "Virginia-based service, to publish the allegedly defamatory statements."[107] The New Mexico resident did not use AOL, and could

---

Commonwealth by an act or omission outside this Commonwealth if [that defendant] regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth").

99. *Telco*, 977 F. Supp. at 406.

100. *See, e.g.*, Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn 1996). Although *Inset* is not a defamation case, the *Telco* court relied upon *Inset*'s reasoning in its opinion. *Telco*, 977 F. Supp. at 406. The *Inset* court held that "the posting of an Internet advertisement satisfied a showing of 'repeatedly solicit' under the Connecticut long-arm statute," and the *Telco* court endorsed this holding in its own. *Id.*; *see also* Bochan v. La Fontaine, 68 F. Supp. 2d 692, 701 (E.D. Va. 1999) (stating that the defendant's on-line advertising met Virginia's business solicitation requirements "through its web site accessible to Virginia Internet users 24 hours a day," although no sales are conducted through the Web site).

101. 68 F. Supp. 2d 692 (E.D. Va. 1999).

102. *Id.* at 698, 703 (relying on *Telco* for guidance and ultimately holding that an on-line advertisement accessible twenty-four hours a day satisfied Virginia's long-arm statute for jurisdiction).

103. *Id.* at 698 (stating that "[t]his, as it happens, is a novel question in Virginia and there do not appear to be any decisions from other jurisdictions that are factually identical").

104. ACLU v. Reno, 929 F. Supp. 824, 834-35 (E.D. Pa. 1996), *aff'd*, Reno v. ACLU, 521 U.S. 844 (1997) (describing USENET newsgroups as "peer to peer connections between approximately 200,000 computers . . . around the world").

105. *Bochan*, 68 F. Supp. 2d at 695.

106. *Id.* at 698.

107. *Id.* at 699 (establishing that because "the use of USENET server in Virginia was integral to that publication, there is a sufficient act in Virginia to satisfy § 8.01-328.1(A)(3)" of Virginia's long-arm statute).

not be haled into court under the Virginia long-arm statute.[108] Instead, the court determined that the New Mexico resident "solicited business in Virginia by promoting and advertising his computer hardware company on the Internet through its Website, accessible to Virginia Internet users 24 hours a day."[109] Therefore, the court found proper jurisdiction over the New Mexico resident.[110]

Although on-line advertisements satisfied the jurisdictional thresholds of both the *Telco* and *Bochan* courts, other benches have required more traditional, non-Internet related contacts with the forum state before exercising jurisdiction over non-resident defendants.

D. The Combination of Jurisdictional Tests in On-line Defamation Cases

In *Blumenthal v. Drudge*,[111] the United States District Court for the District of Columbia utilized both a *Zippo* analysis of on-line activity and an analysis of non-Internet related contacts.[112] This defamation action pertained to an article published on an Internet gossip column and distributed to direct subscribers through email.[113] The long-arm statute presented the court with this issue: "whether defendant Drudge (1) regularly does or solicits business in the District of Columbia, *or* (2) derives substantial revenue from goods used or consumed or services rendered in the District, *or* (3) engages in any other persistent course of conduct here."[114]

The *Blumenthal* court stated that the existence of a home page on the Internet does not, by itself, suffice for proper jurisdiction.[115] Instead, the

---

108. *Id.* at 700 (noting that "there is nothing in the record to suggest that Harris committed any tortious act in Virginia within the meaning of" Virginia's long-arm statute).

109. *Id.* at 701 (stating that "Federal courts in Virginia in particular have generally found that Internet advertising accessible to Virginia residents 24 hours a day constitutes solicitation of business in Virginia sufficient to satisfy the requirements of § 8.01-328.1(A)(4)"). *See supra* note 98 (listing the requirements of VA. CODE ANN. § 8.01-328.1(A)(4)).

110. *Bochan*, 68 F. Supp. 2d at 701.

111. 992 F. Supp. 44 (D.D.C. 1998).

112. *Id.*

113. *Id.* at 46-47. Defendant Drudge published the following statement on the Internet: "The DRUDGE REPORT has learned that top GOP operatives who feel there is a double-standard of only reporting republican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up." *Id.* at 40.

114. *Id.* at 53-54 (citing D.C. CODE ANN. § 13-423(a)(4)). This section of the D.C. Code and VA. CODE. ANN. § 8.01-328.1(A)(4) are nearly identical. *See supra* note 98 (listing requirements of VA. CODE. ANN. § 8.01-328.1(A)(4)).

115. *Id.* at 56 (stating that a Web site "must also allow browsers to interact directly with the Web site on some level").

Web site must be interactive, and there must be "other non-Internet related contacts between the defendant and the forum state . . . ."[116] The court determined that the defendant's interactive, national Web site, which was "accessible to and used by District of Columbia residents," and the defendant's "persistent course of conduct" in D.C., including interviews and visits met both the necessary threshold factors of an interactive Web site and non-Internet related contacts.[117]

In *Barrett v. Catacombs Press*,[118] the court utilized both *Zippo* and *Calder*.[119] In *Barrett*, the defendant published defamatory statements on two informational Web sites and posted links to these Web sites on national listserves and discussion groups.[120] The *Barrett* court utilized the *Zippo* sliding scale and labeled the defendant's Web sites as "passive," and, therefore, denied jurisdiction over the defendant.[121]

Employing *Calder*, the *Barrett* court found that the defendant did not direct the on-line defamatory statements to the forum state.[122] The court stated that although the forum state received the defamatory statement at issue, the forum state's residents "are but a fraction of other worldwide Internet users who have received or viewed such statements."[123]

A few months after *Barrett*, the Courts of Appeal of California similarly combined the rationales of *Zippo* and *Calder*.[124] The court used the "passive" quality of a Web site to deny jurisdiction over a defendant in *Jewish Defense Fund Organization, Inc. v. Superior Court*.[125] This court reiterated that "the appropriate jurisdictional analysis should be to determine whether or not it was foreseeable that a risk of injury by

---

116. *Id.*

117. *Id.* The court stated that the political nature of the defendant's Web site automatically targeted D.C., that the defendant "solicited contributions from District residents via the Drudge Report's homepage," and that the "non-Internet related" visits to and interviews in D.C. contributed to establishing personal jurisdiction. *Id.* at 57.

118. 44 F. Supp. 2d 717 (E.D. Pa. 1999).

119. *Id.* at 727-30.

120. *Id.* at 727.

121. *Id.* (stating "passive" Web sites are insufficient as grounds for jurisdiction).

122. *Id.* at 731 (maintaining that "[u]nder the 'effects test' of *Calder*, we do not find that such defamatory statements amount to actions 'expressly aimed' at Pennsylvania, [the forum state]").

123. *Id.* (stating further that the forum state must be "targeted" by a non-resident in order "to satisfy due process," despite "the fact that harm is felt" in the forum state).

124. Jewish Def. Fund Org., Inc. v. Superior Court, 72 Cal. App. 4th 1045, 1057-61 (Cal. Cat. App. 1999).

125. *Id.* at 1060.

defamation would arise in the forum state."[126] The court denied jurisdiction, concluding that the effects of a passive Web site are not foreseeable in its forum.[127]

II. AN ANALYSIS OF TRADITIONAL CONTACTS, THE *CALDER* EFFECTS TEST AND THE *ZIPPO* SLIDING SCALE, AS USED BY COURTS IN ON-LINE DEFAMATION ACTIONS

A. Traditional Contacts, Traditional Standards: Ignoring Internet Presence

The majority of courts that employed traditional personal jurisdiction standards acknowledged the phenomenon of the Internet, but refused to allow new technology to change their holdings.[128] Other courts realized that on-line contacts often did not satisfy minimum contacts, and, therefore reached beyond the defendant's computer terminal in order to exercise jurisdiction over non-resident defendants.[129]

The tests to be satisfied in these courts remain identical to those found above in the discussion surrounding traditional applications.[130] For example, a defendant must have certain contact with the forum state.[131]

---

126. *Id.* at 1058 (citing Evangelize China Fellowship, Inc. v. Evangelize China Fellowship, 146 Cal. App. 3d 440 (Cal. Ct. App. 1983)). The court also established that "the 'purposeful availment' requirement for specific jurisdiction can be satisfied by the 'effects test,' set out in *Calder v. Jones*." *Id.* at 1057.

127. *Id.* at 1060; *see also* Alex Gigante, *Internet Defamation and Personal Jurisdiction*, 601 PLI/Pat 309, 318 (2000) (stating that "[i]n the Internet context . . . the 'effects test' does not change the passive-active dichotomy," and citing *Jewish Defense Organization* for support).

128. New York v. Lipsitz, 663 N.Y.S.2d 468, 475 (N.Y. Sup. Ct. 1997) (stating that "although Internet transactions might appear to pose novel jurisdictional issues, traditional jurisdictional standards have proved to be sufficient to resolve all civil Internet jurisdictional issues raised to date, refuting the view of '[s]ome commentators [who] believe a new body of jurisprudence is needed to address' questions of personal jurisdiction and the Internet") (citation omitted); *see also* sources cited *supra* note 80 and accompanying text (stating that the introduction of the Internet does not change the nature of personal jurisdiction); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW. 1167, 1167 (1998) (stating that "there is nothing about legal relations over computer networks that in any way challenges our conventional notions about how sovereign authority is allocated in the world").

129. *See, e.g.*, Blumenthal v. Drudge, 992 F. Supp. 44, 56 (D.D.C. 1998) (explaining other non-Internet related contacts must exist in addition to an interactive Web site); Edias Software Int'l, LLC v. Basis Int'l, Ltd., 947 F. Supp. 413, 417 (D. Ariz. 1996) (including off-line contacts such as phone calls, faxes, and contracts to find jurisdiction over the defendant).

130. *See supra* notes 34-48 (discussing traditional personal jurisdiction tests prior to the Internet).

131. *See* Int'l Shoe v. Washington, 326 U.S. 313, 319 (1945).

Likewise, the Supreme Court stated that a non-resident must have "fair notice"[132] that he or she may be brought into a foreign jurisdiction.[133] In addition, the Supreme Court accepted the exercise of jurisdiction even if "the defendant did not *physically* enter the forum State,"[134] a mantra necessary in on-line defamation cases in which the defendant rarely visits the forum state.[135]

The on-line defamation cases that employed traditional concepts of jurisdiction followed Supreme Court precedent and applied the ideals of "minimum contacts" and "purposeful availment" in the name of due process.[136] Additionally, the long-arm statutes of each state must establish detailed guidelines and explanations of such contacts and availment.[137] For example, soliciting business in a forum state suffices for jurisdiction in most states.[138] In another action, the long-arm statute dictated jurisdiction on the basis of a defamatory statement's origin.[139]

The Supreme Court recognized as early as 1958 that the "technological progress" affecting commerce, communications, and transportation required more flexible personal jurisdiction standards.[140] However, the

---

132. Burger King v. Rudzewicz, 471 U.S. 462, 487 (1985); *supra* note 25 (giving a detailed explanation of *Burger King*); *see also* Shea v. Reno, 930 F. Supp. 916, 935 (S.D.N.Y. 1996) (declaring that "[w]here a federal statute or regulation fails to supply a fair warning of what will give rise to criminal liability, it violates the Due Process Clause of the Fifth Amendment").

133. *Burger King*, 471 U.S. at 472 (quoting Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984)).

134. *Id.* at 476 (emphasis added) (stating that "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").

135. BRUCE STERLING, THE HACKER CRACKDOWN: LAW AND DISORDER ON THE ELECTRONIC FRONTIER xi-xii (1992) (defining "cyberspace" as "[t]he *place between* the phones . . . [t]he indefinite place out *there*, where the two of you, two human beings, actually meet and communicate").

136. *See* discussion *supra* notes 15, 20-26 (explaining the history of personal jurisdiction); Panavision Int'l, Inc. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998) (stating that "[t]he purposeful availment requirement ensures that a non-resident defendant will not be haled into court based upon 'random, fortuitous or attenuated' contacts with the forum state") (citing *Burger King*, 471 U.S. at 475). *But see* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn 1996) (holding that the defendant "purposely availed itself of the privilege of doing business with [the forum state]" by posting on-line advertisements continuously available to all Internet users which is an arguably random contact with a forum state).

137. *See supra* note 31 (defining long-arm statute and giving examples).

138. *See supra* note 31.

139. *See supra* note 78 (explaining that the *Northwest* court based its decision to deny jurisdiction on Minnesota's long-arm statute concerning the origin of defamation).

140. Hanson v. Denckla, 357 U.S. 235, 251 (1958) (acknowledging that defending an

Court acknowledged that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[141] This mentality is echoed by those courts falling under the "traditional" category: the Internet will not change jurisdictional restrictions.[142]

B. The Use of the Calder Effects Test: Keeping Traditional Defamation Standards

Established in 1984, the *Calder* effects test is one component of the traditional Supreme Court precedent discussed above.[143] Courts implementing *Calder* do so in a manner similar to the subset of courts in the previous section with a caveat, these courts do not ignore the Internet's role in sending, posting, or relaying defamatory statements.[144]

The *Calder* court articulated that "[e]ach defendant's contacts with the forum State must be assessed individually,"[145] and that if a victim felt the "brunt of the harm," i.e., the "effects," of the injury in the forum state, jurisdiction may be proper.[146] In on-line defamation cases, defendants effectuate harm through using the Internet. Courts implementing the *Calder* test assess the effects of that on-line harm by analyzing case-

---

action "in a foreign tribunal [is] less burdensome" than it was in the past).

141. *Id.* at 251 (quoting Vanderbilt v. Vanderbilt, 354 U.S. 416, 418 (1957)); *see also Developments In the Law--The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1617 (1999) (stating that "[t]he emergence of cyberspace as a new locus for defamation does not mean that Internet defamation is an entirely 'new' legal issue that necessarily requires radical changes in constitutional doctrine").

142. *See* sources cited and discussion *supra* note 80 (stating that the introduction of the Internet does not change the nature of personal jurisdiction); *see also* Sheehan, *supra* note 31, at 438 n.320 (stating that "[i]t is not clear why the result of technology expanding one's contacts and transactions should be a rule contracting one's exposure to suit"); Stein, *supra* note 128, at 1179 (stating that "on both a practical and conceptual level, resolving personal jurisdiction issues is crucial to our assessment of whether cyberspace challenges existing jurisdictional paradigms").

143. *See generally* Calder v. Jones, 465 U.S. 783, 789 (1984) (creating an "effects test" to be used in personal jurisdiction queries involving defamation).

144. *See, e.g.*, Edias Software Int'l, LLC v. Basis Int'l, Lts., 947 F. Supp. 413, 420 (D. Ariz. 1996) (finding that not only did the defendant direct the email, Web page, and defamatory messages at the forum state, but also that the plaintiff felt injury from the on-line defamatory statements within the forum state); *see also* Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565, 574 (1999) (stating that the Court in *Calder* "appeared to be moving away from the 'purposeful availment' reasoning and toward a simpler principle of cause and effect").

145. *Calder*, 465 U.S. at 790.

146. *Id.* at 789 (explaining that both the "respondent's emotional distress and the injury to her professional reputation was suffered in [the forum state]").

specific facts and the outcome of the on-line defamatory statement(s).[147]

Calder emphasizes reasonableness and foreseeability in assessing jurisdictional standards.[148] Certain courts, when faced with the challenge of interpreting on-line activity, turn to *Calder*.[149]

The test to be fulfilled is as follows:

> (1) The defendant committed an intentional tort; (2) [t]he plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; (3) [t]he defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.[150]

In this test, the emphasis is placed on human volition and intention, rather than the analysis of the technology of a Web site.

C. The Advent of the Zippo Sliding Scale: Nationwide Interpretations

Zippo's three-pronged sliding scale test allows courts to categorize Web sites as passive, interactive, or commercially active.[151] In a strict application of *Zippo* in on-line defamation actions, courts would deny jurisdiction when faced with informational Web sites as sole contacts, and would find jurisdiction appropriate in cases involving commercial activity.

In cases involving Web sites falling into the "middle ground" of interactivity, *Zippo* suggests a proportionality test to resolve jurisdictional uncertainties.[152] Incongruously, *Zippo* followers have actually exercised jurisdiction based on arguably informational Web

---

147. *Id.* at 788 (stating that "the plaintiff is the focus of the activities of the defendants out of which the suit arises").

148. Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 726-27 (E.D. Pa. 1999) (stating that a defendant should reasonably anticipate being brought into court in the forum state in order for the court to exercise personal jurisdiction); Blumenthal v. Drudge, 992 F. Supp. 44, 57-58 (D.D.C. 1998) (same).

149. *See, e.g.*, Panavision Int'l, Inc. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998) (stating that "jurisdiction may attach if the defendant's conduct is aimed at or has an effect in the forum state"); *Barrett*, 44 F. Supp. 2d at 731 (maintaining that "[u]nder the 'effects test' of *Calder*, we do not find that such defamatory statements amount to actions 'expressly aimed' at Pennsylvania, [the forum state]"); *Edias*, 947 F. Supp. at 420 (stating that the plaintiff felt economic injury from the on-line defamation within the forum state).

150. *Barrett*, 44 F. Supp. at 729-30 (citing *Calder* and Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265-66 (3d Cir. 1998) (organizing *Calder* into three prongs)).

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

152. *Id.*; *see also* Leitstein, *supra* note 144, at 582 (challenging how the interactive prong of *Zippo* "can be distinguished from the doing business rationale," since "doing business requires commercial activity as well").

sites.

As demonstrated by the aforementioned cases, courts often ignore a Web site's passivity if the Web site advertises, or may be categorized as interactive, in order to exercise jurisdiction over a non-resident defendant.[153] In other cases, courts find jurisdiction applicable whenever a combination of on-line *and* offline contacts exists within the forum.[154] These inconsistent approaches render the assessment and application of the *Zippo* test difficult.[155] Such variation suggests that the current trend in on-line jurisdiction tests is that no trend exists.[156]

III. REFOCUSING ON "TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE"

The Supreme Court recognized that in the analysis of jurisdiction, "few answers will be written 'in black and white.' The greys are dominant and even among them the shades are innumerable."[157] As the Internet does little to clear any of that for courts, the concept of due process remains a pillar for courts to lean on throughout the transition into the age of the Internet.[158]

---

153. *See* discussion *supra* Part I.C.2. *But see* MICHAEL D. SCOTT, INTERNET AND TECHNOLOGY LAW DESK REFERENCE 260 (1999) (defining "interactive advertising" as "[a] type of advertising in which the user chooses and interacts with the advertisement, instead of being a passive recipient"). The on-line advertisements discussed above, however, did not have such interactive components. *See supra* Part I.C.2.

154. *Blumenthal*, 992 F. Supp. at 56 (finding jurisdiction as a result of defendant's interactive Web site and non-Internet related contacts); *Edias*, 947 F. Supp. at 421 (same).

155. *Compare* GTE New Media Servs., Inc. v. BellSouth Corp., 199 F.3d 1343, 1345 (D.C. Cir. 2000) (holding no minimum contacts with the forum state and therefore no jurisdiction); Mink v. AAAA Dev. LLC, 190 F.3d 333, 337 (5th Cir. 1999) (holding no minimum contacts); Cybersell Inc. v. Cybersell Inc., 130 F.3d 414, 420 (9th Cir. 1997) (holding no minimum contacts); Millennium Enters., Inc. v. Millennium Music LP, 33 F. Supp. 2d 907, 974 (D. Ore. 1999) (holding no minimum contacts); Patriot Sys., Inc. v. C-Cubed Corp., 21 F. Supp. 2d 1318, 1325 (D. Utah 1998) (holding no minimum contacts), *with* CompuServe Inc. v. Patterson, 89 F.3d 1257, 1268-69 (6th Cir. 1996) (finding minimum contacts); *Blumenthal*, 992 F. Supp. at 58 (finding minimum contacts); Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738 (W.D. Tex. 1998) (finding minimum contacts); Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 5 (D.D.C. 1996) (finding minimum contacts).

156. Matthew Oetker, Note, *Personal Jurisdiction and the Internet*, 47 DRAKE L. REV. 613, 630-33 (explaining that "amidst the uncertainty of [Internet jurisdiction]," many legal scholars have attempted to solve problems surrounding Internet jurisdiction, developing different theories such as: stream of commerce, virtual presence, and single-point presence).

157. Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (stating that the *International Shoe* "minimum contacts" test "is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine" the existence of jurisdiction).

158. *See, e.g.*, Blakey v. Cont'l Airlines, Inc., 751 A.2d 538, 553 (N.J. 2000) (stating that

A. The Ideas Behind the Zippo Sliding Scale: More Harmful than Helpful

1. Premature Categorization of Web Sites

Although the *Zippo* sliding scale test proved helpful to a number of courts in the initial on-line defamation cases,[159] the vague characterization of Web sites is premature.[160] Depending on the approach, any one Web site might be considered passive, interactive, and commercially active simultaneously.[161]

A Web site contains only information,[162] and no human exists behind the screen pulling levers and pushing buttons to provide responses.[163] Computers themselves *are* "passive" until individuals create Internet activity.[164] Conversely, Web sites may be labeled "interactive"[165] due to

---

"[r]ather than to attempt to create a new order of jurisdictional analysis adapted to the Internet, we prefer in this case to adhere to the basics").

159. *See supra* note 82 (listing cases which applied the *Zippo* sliding scale test).

160. Anindita Dutta, *Trademark: Personal Jurisdiction: Minimum Contacts: Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 13 BERKELEY TECH. L.J. 289, 303 (1998) (noting that "it is understandable why the court's opinion in *Zippo* breeds only more confusion," and that "[t]he problem is not only with how the court applies the traditional analysis of personal jurisdiction to the Internet, but also with how the court ignores the fact that Dot Com is a unique type of business that exists almost exclusively in cyberspace").

161. For example, one company's Web page may simply post information on the Internet (passive). *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (defining "passive"). However, that information may be advertisements (commercially active/soliciting business). *See generally* Bochan v. La Fontaine, 68 F. Supp. 2d 692, 701-02 (E.D. Va. 1999) (finding an on-line advertisement solicited business in the forum state); Telco Communications v. An Apple a Day, 977 F. Supp. 404 (E.D. Va. 1997) (same). In addition, the Web page may have a link to an email address (interactive). *See* ACLU v. Reno, 929 F. Supp. 824, 843 (E.D. Pa. 1996) (noting that "[c]hat rooms, email, and newsgroups are interactive forms of communication, providing the user with the opportunity both to speak and to listen"), *aff'd*, 521 U.S. 844 (1997).

162. Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 459 n.2 (D. Mass. 1997) (defining "Web site" as a "group of related documents sharing a Web 'address'").

163. *In re* Walter, 618 F.2d 758, 765 (C.C.P.A. 1980) (stating that "[a] computer is nothing more than an electronic machine"); *see also* Telex Corp. v. IBM Corp., 367 F. Supp. 258, 274 (N.D. Okla. 1973) (explaining that a computer needs an "input device" to "convert data from an 'ordinary' language form (i.e., English and numbers) to 'machine' language or electronic signals which are then understandable to a computer").

164. *See infra* notes 210-11 (explaining how a computer must receive human input in order to produce a Web site); *see also Zippo*, 952 F. Supp. at 1124 (defining "passive" as when a defendant "[posts] information on an Internet Web site which is accessible to users in foreign jurisdictions").

165. *Reno*, 929 F. Supp. at 843 (noting that "[c]hat rooms, email, and newsgroups are interactive forums of communication, providing the user with the opportunity both to speak and to listen"); *see also Zippo*, 952 F. Supp. at 1124 (defining the "middle ground [as] occupied by interactive Web sites where a user can exchange information with the host computer").

routine entries of home or email addresses by Internet users, or by providing various types of on-line games. Applying this rationale, courts could hale non-resident defendants into court as a result of a non-resident defendant's on-line card game habit, if the game originated in the forum state.

Zippo suggests that a "repeated transmission of computer files over the Internet" bestows the status of "clearly [doing] business over the Internet."[166] The *Zippo* court geared this prong toward commercial activity; however, those engaging in commercial activity are becoming so numerous as to render the label worthless.[167]

Traditional contacts remain the only reliable source of determining minimum contacts with a forum state.[168] Until the Supreme Court or Congress provides guidance in the text of an opinion or statute, courts are left to grapple with existing precedent and should forgo the categorization of Web sites.[169]

2. *Commercial Web Sites: The Growth of the Internet Broadens Applicability*

Zippo provides a questionable framework for courts in on-line defamation cases. The *Zippo* court recognized that those individuals clearly doing business over the Internet deserve to be brought into almost any jurisdiction.[170] A bright-line test seems to present itself, but that presumption proves misleading.[171] The explanation of this prong's difficulty results from the amount of Web sites that are commercially-

---

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

167. *See infra* note 172 (noting the exponential rise in on-line commercial activity); *see also* Christopher McWhinney, et al., *The "Sliding Scale" of Personal Jurisdiction Via the Internet*, 2000 STAN. TECH. L. REV. 1, 3 (2000) (warning "smaller start-up companies" to be "especially wary of the possibility of being named a defendant in a distant forum due to the company's Internet activity"); Intermatic, Inc. v. Toeppen, 947 F. Supp. 1227, 1239 (N.D. Ill. 1996) (stating that "[b]ecause Internet communications transmit instantaneously on a worldwide basis there is little question that the 'in commerce' requirement would be met in a typical Internet message, be it trademark infringement of false advertising") (quoting 1 GILSON, TRADEMARK PROTECTION AND PRACTICE. § 5.11[2], 5-234 (1996)).

168. *But see* Sheehan, *supra* note 31, at 434 (claiming that "[a]fter fifty years of doctrinal development, the minimum contacts test remains so fact-specific and uncertain that the outcome of the jurisdictional analysis in any particular case is unpredictable").

169. *Cf.* U.S. CONST. art. IV, § 1 (providing authority to intervene in an Internet crisis, stating that "And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof").

170. *See supra* note 166 and text accompanying (explaining that a commercially active Web site is sufficient to exercise jurisdiction).

171. Leitstein, *supra* note 144 (stating that the "doing business" prong of the *Zippo* sliding scale test "is the least helpful").

active and growing exponentially each year.[172]

In *CompuServe, Inc. v. Patterson*,[173] the Sixth Circuit recognized the ease with which anyone may begin an on-line business, stating that "[i]t enables anyone with the right equipment and knowledge . . . to operate an international business cheaply, and from a desktop."[174] If courts follow *Zippo*, therefore, it appears that each of these emerging commercial on-line entities, big and small, may be brought into any jurisdiction in the United States.[175] This emerging standard suggests a marked departure from the notions of traditional jurisdiction which limit a courts' ability to reach commercial defendants from any jurisdiction.[176]

3. The Zippo Sliding Scale Does Not Recognize Traditional Notions

The Internet jurisdiction rules of *Zippo* and its progeny enable courts to veer off the path of fairness and foreseeability in order to accommodate expanding litigation.[177] Frequently, on-line defamation opinions exclude discussion of the forum state's interests in jurisdiction, the plaintiff's interests, judicial economy, and public policy.[178] However,

---

172. ABA Jurisdiction in Cyberspace Project, *Achieving Legal and Business Order in Cyberspace* 1 (1998) (asserting that "[a]s adaptation to electronic commerce transpires, it is becoming commonplace to refer to its growth and that of the economy it is creating as exponential") (quoting *Enter the New Web Advisor*, MONEY MARKETING, Sept. 9, 1999).

173. 89 F.3d 1257 (6th Cir. 1996).

174. *Id.* at 1262.

175. *See* ABA Jurisdiction in Cyberspace Project, *supra* note 172, at 10 (asserting that "[t]he hard question for business is which law do (and should) apply to regulate its on-line activities and what states will enforce those applicable laws or judgments based upon them").

176. *Id.* at 10 (claiming that "the need to accommodate traditional governmental interests in the void created by the apparent transcendence of borders that is an earmark of on-line commerce"); *see also* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 296 (1980) (stating that a merchant does not "appoint the chattel his agent for service of process"). *But see* Callaway Golf Corp. v. Royal Canadian Golf Ass'n, 125 F. Supp. 2d 1194 (C.D. Cal. 2000). In this case, a California court denied jurisdiction because of the Web site's passivity *despite* its on-line commercial activity, stating that "plaintiff's claims do not arise from that on-line commercial activity, as required for a federal court to exercise specific jurisdiction." *Id.* at 1204.

177. *World-Wide Volkswagen*, 444 U.S. at 297 (stating that "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"). Although the *Zippo* court divided its opinion into controlling pre-Internet and merely persuasive post-Internet jurisdictional precedent, the court proceeded to focus only on the latter in its holding, thus catalyzing the confusion surrounding the ultimate approach to Internet activity. *See Zippo*, 952 F. Supp. at 1124.

178. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (quoting evaluative qualities from *World-Wide Volkswagen*, 444 U.S. at 292). After consideration of these factors, the *Asahi* Court found jurisdiction over the defendant unreasonable as a

not all courts are swayed by new technology.[179]

For example, the *Barrett* court recognized an unfairness in the on-line libel case before it and asserted that "non-commercial on-line speech that does not purposefully target any forum" would not warrant a proper exercise of jurisdiction.[180] The *Barrett* court utilized Supreme Court precedent, including *Calder*, to support its decision to deny jurisdiction in an on-line defamation action,[181] thus sparing the judicial system unnecessary litigation.[182]

B. Traditional Contacts: Employing Existing Precedent

"The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust; forthough their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration."[183]

Precedent prevents additional problems beyond those already inherent in the breadth of traditional personal jurisdiction examinations. Those courts relying almost entirely on pre-Internet precedent benefit from terminology that is general enough to be applied to the Internet.[184]

On-line defamation obviates the need for rules pertaining to those persons never physically entering the forum, but demands reasonableness and "fair warning,"[185] as both concepts remain quite

---

result of the burdens put on the defendant if litigation in the forum state continued. *Id.* at 114; *see also* Colleen Reilly, *Trademark: Personal Jurisdiction: Minimum Contacts: Bensusan Rest. Corp. v. King*, 13 BERKELEY TECH. L.J. 271, 286 (1998) (asserting that "[a] 'knew or should have known' standard is essential in Internet personal jurisdiction cases because of the borderless nature of the medium").

179. *See generally* Barrett v. Catacombs Press, 44 F. Supp. 2d 717 (E.D. Pa. 1999).

180. *Id.* at 731 (finding that the plaintiff's failure to prove the defendant's minimum contacts with the forum was sufficient to deny jurisdiction, and therefore the court was not required to reach the issue of fairness although it briefly addressed the issue).

181. *Id.* at 729 (finding that the defendant did not "purposefully avail[] herself of the privilege of conducting activities within the forum state through her Internet activity").

182. *Id.* (quoting Burger King v. Rudzewicz, 471 U.S. 462, 475 (1985)).

183. 1 WILLIAM BLACKSTONE, COMMENTARIES *70 (1765).

184. *See, e.g.*, Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (providing the phrase "arise out of or relate to" the purposeful activities of the defendant); Kulko v. Superior Court, 436 U.S. 84, 94 (1958) (providing the phrase "purposefully derive" benefit); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (providing that a defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State"); Int'l Shoe v. Washington, 326 U.S. 313, 316 (1945) (providing language for "minimum contacts").

185. Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (ordering "fair warning that a particular activity may subject a [non-resident] to the jurisdiction of a foreign sovereign"); *see also* Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 470 (D. Mass. 1997) (stating that "a strong showing of reasonableness may serve to fortify a more marginal

fragile in the realm of cyberspace. A stronger implementation of a "fair warning" standard alone would prevent litigious plaintiffs from using the Internet as a net to ensnare non-resident defendants in frivolous lawsuits.[186]

Supporting the notion of fairness in *International Shoe*,[187] the Court declared that jurisdictional tests cannot be "simply mechanical or quantitative," but should focus on the nature of the activity.[188] Although the technical nature of on-line defamation has changed significantly with the rise of the Internet, the "effects test" articulated in Calder, in 1984, remains useful."[189]

The specific nature of on-line defamation, that is, simple words on a Web site or Web page, remains a tort that easily escapes commercially-based contacts as well as the necessity of a defendant's physical presence in the forum state at any time prior or subsequent to its posting. The passivity of a suspect Web site would eliminate it from a foreign court's jurisdiction under *Zippo* principles; however, using traditional contacts and concepts, a defendant may be more easily brought to justice, regardless of the categorization of the Web site.[190]

C. Calder Provides a Satisfactory Standard for On-line Defamation Actions

Within on-line defamation actions, the *Calder* test allows a court to assess the *effects* of Web sites in defamation actions, a discretion necessary for the new technology of the Internet. This tortious branch of traditional jurisdiction precedent proves essential to all on-line

---

showing of relatedness and purposefulness") (citing Ticketmaster - N.Y. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994).

186. *See supra* note 19 (noting the increase of Internet litigation because plaintiffs take advantage of the new medium in the Internet); *see also* Jonathan D. Bick, *supra* note 13 (suggesting that "[l]egislatures may want to act to restrain frivolous [law]suits").

187. 326 U.S. 310 (1945).

188. *Id.* at 319; *see also* Keeton v. Hustler Mag., Inc., 465 U.S. 770, 780 (1984) (emphasizing the necessity to inquire about the nature of the defendant's connection with the forum).

189. Calder v. Jones, 465 U.S. 783, 789-91 (1984).

190. Oasis Corp. v. Judd, 132 F. Supp. 2d 612, 622 n.9 (S.D. 2001) (recognizing that the "vast majority of the 'Internet jurisdiction' case law at this time . . . addresses the jurisdictional question in the context of *commercial* Web sites"). The *Oasis* court determined that, "[w]hen, as here, the site in question is non-commercial in nature, the *Zippo* analysis which seems to be gaining favor in the courts of appeal offers little to supplement the traditional framework for considering questions of personal jurisdiction." *Id.*; *see also* Mink v. AAAA Dev., LLC, 190 F.3d 333, 336-37 (5th Cir. 1999).

defamation actions. The courts in *Blumenthal*,[191] *Telco*,[192] and *Edias*,[193] for example, used *Calder* principles in the on-line defamation actions before them. By utilizing the "effects test," arbitrary categories such as "passive" and "interactive" do not restrict a court's ability to exercise jurisdiction. The *Telco* court determined that it could exercise jurisdiction over a defendant, despite the Web site's arguable passivity. If the *Telco* court had exercised jurisdiction under the *Zippo* approach, it would have precluded the state from exercising jurisdiction over the non-resident defendant.[194]

Defamatory statements potentially invade all computers worldwide.[195] In addition, the idea behind *Calder* (i.e., studying the effects of defamation in the forum state) emphasizes that human motivations and responses often are ignored in on-line defamation cases. For example, if a defendant directs Internet contacts at the forum state and causes foreseeable harm there, it is reasonable for him to anticipate being haled into court in that state.[196]

The Third Circuit recently established a three-part test that plaintiffs must fulfill in order to rely upon *Calder* principles.[197] The Third Circuit set up its prongs in the fashion of *Imo Industries, Inc v. Kiekert AG*.[198] The test demands that an intentional tort exists, that the brunt of the harm caused by the tort be felt in the forum state (i.e., the "focal point" of the harm), and that "the defendant must have expressly aimed the tortious conduct at the forum" state (the "focal point of the tortious

---

191. 992 F. Supp. 44, 57 (D.D.C. 1998) (citing Telco Communications v. An Apple a Day, 977 F. Supp. 404, 407 (E.D. Va. 1997) (finding jurisdiction over defendant because the plaintiff experienced "the primary and most devastating effects" in the forum state).

192. 977 F. Supp. at 408 (finding jurisdiction because the plaintiff suffered harm in the forum state as a result of defamatory statements posted on-line).

193. 947 F. Supp. 413, 420 (D. Ariz. 1996) (citing *Calder* and finding jurisdiction over the defendant because the plaintiff felt the harm of the defamation in the forum state); *see also* Barrett v. Catacombs Press, 44 F. Supp. 717, 729-30 (E.D. Pa. 1999) (citing *Calder* and Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265-66 (3d Cir. 1999), organizing *Calder* into three prongs).

194. *Compare Telco*, 977 F. Supp. at 408 (finding jurisdiction based on the harm suffered in the forum state regardless of the passivity of the defendant's Web site), *with* Zippo Mfg. Co. v. Zippo Dot Com, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (explaining that a passive Web site precludes jurisdiction).

195. *See supra* notes 11, 13, 14 (noting the exceptional speed and peculiar nature of the Internet).

196. *See id.*

197. Metallic Ceramic Coatings, Inc. v. Precision Prods., Inc., No. 00-CV-4941, 2001 U.S. Dist. LEXIS 1224 (E.D. Pa. Feb. 13, 2001) (relying upon Remick v. Manfredy, 238 F.3d 248 (3d Cir. 2001)).

198. *Id.*; *see also Imo Indus.*, 155 F.3d at 256.

activity").[199]

In sum, the *Imo* test relies upon a statement on which the Third Circuit and this Comment relies: the defendant must "manifest behavior intentionally targeted at and focused on [the forum]" for Calder to be satisfied."[200]

Some courts turn away from an "effects" standard in favor of a long-arm statute.[201] For example, the *Northwest* court denied jurisdiction based on *where* the defamatory statement originated and never touched upon the effects of that defamation.[202] The danger of rejecting defamation actions without analyzing the extent of the effects in the forum state becomes evident if non-resident defendants target a forum with defamation and escape punishment.[203] However, the *Northwest* court may prove utilitarian if this ruling prevents frivolous lawsuits instigated by those attempting to bring non-residents into court solely in the name of the Internet.

D. Avoiding Analysis of Web Site Activity: Refocusing on Human, Volitional Conduct

In order to stay within the bounds of "traditional notions of fair play and substantial justice,"[204] it is necessary to emphasize volitional, physical, and human contacts.[205] As an Oregon district court recently stated, "there must be 'deliberate action' by the defendant within the

---

199. *Metallic*, 2001 U.S. Dist. LEXIS 1224, at *14-15 (citing *Imo Indus.*, 155 F.3d at 256).

200. ESAB Group, Inc. v. Centricut, 126 F.3d 617, 625 (4th Cir. 1997). This statement was quoted in both the *Imo* and *Metallic* courts. *Imo Indus.*, 155 F.3d at 265; *Metallic*, 2001 U.S. Dist. LEXIS 1224, at *14.

201. *See, e.g.*, Northwest Airlines v. Friday, 617 N.W.2d 590 (Minn. Ct. App. 2000).

202. *Id.* at 593 (stating the necessity to focus on the act of making the defamatory statement as the "operative act for the purpose of determining whether the act was [in the forum] for the purpose of [jurisdiction under] the long-arm statute").

203. *Id.* at 592, 596. As a result of Minnesota's long-arm statute, the *Northwest* court stated that defamation through an email is committed in the state in which the message is drafted, and the reception of the message in Minnesota is not sufficient to establish jurisdiction in the state. *Id.* at 594. As a result of assessing the origin of the defamation and not its effects, the non-resident defendants who released the defamatory statements via email escaped their day in court.

204. Int'l Shoe v. Washington, 326 U.S. 313, 316 (1945) (citation omitted).

205. *Cf.* Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 468 (D. Mass. 1997) (declaring that "contacts with the forum state must be voluntary - not based on the unilateral actions of another party or a third person"); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (declaring that a volitional act is one "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").

forum state."[206] Although each on-line defamation case deserves fact-sensitive and circumstantial analysis,[207] certain standards must remain foundational to prevent propulsion toward nationwide jurisdiction.[208]

Courts concerned with a Web page's perpetual accessibility, rather than the non-resident defendant's intentions and an Internet user's actions, go astray.[209] Despite an individual's ability to view an Internet Web site twenty-four hours a day, that Web site must be sought out by the user.[210] The computer must be turned on, and the user must give that computer search information to provoke a specific home page's appearance.[211] User commands and actions must be explored by the court to assess whether minimum contacts with the forum state have been made;[212] however, without knowledge of a user's actions, a forum

---

206. Millennium Enter. v. Millennium Music, LP, 33 F. Supp. 2d 907, 921 (D. Ore. 1999) (stating that "deliberate action" must exist between the defendant and forum state residents in order to exercise jurisdiction) (citing Calder v. Jones, 465 U.S. 783, 788-90 (1984)).

207. Kulko v. Superior Court, 436 U.S. 84, 92 (noting that "the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather the facts of each case must be weighed) (quoting Hanson v Denckla, 357 U.S. 235 (1958)).

208. *See supra* note 12 and accompanying text (stating that no "nationwide jurisdiction for defamation actions" exists).

209. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418-19 (9th Cir. 1999) (rejecting the *Inset* court's holding that continuous on-line advertising is an activity sufficiently directed toward a forum state to justify jurisdiction in that state); *see* Gigante, *supra* note 127, at 315 (using *Inset* as an example of how "[s]ome of the early Internet jurisdiction decisions rested on less-than-rigorous due process analysis").

210. Intermatic, Inc. v. Toeppen, 947 F. Supp. 1227, 1231 (N.D. Ill. 1996) (explaining that "[w]hen the Web server receives an inquiry from the Internet, it returns the Web page data in the file to the computer making the inquiry"); *see also* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998) (explaining that "[e]very Web page has its own Web site, which is its address, similar to a telephone number or street address").

211. ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (noting that "it takes several steps to enter cyberspace"). In *Reno*, the court stated that:

> At the most fundamental level, a user must have access to a computer with the ability to reach the Internet (typically by way of a modem). A user must then direct the computer to connect with the access provider, enter a password, and enter the appropriate commands to find particular data.

Id. at 844; Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 952 (C.D. Cal. 1997) (explaining that "if users know or can deduce the address of a Web site, they can type the address of a Web site as if dialing a telephone number" or a user relies on "'search engines' available on the Web to search for key words and phrases associated with the desired Web site") (quoting *Panavision*, 945 F. Supp. at 1298).

212. Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945) (stating that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it"); *cf.* Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (ordering "fair warning that a particular activity may subject a [non-resident] to the jurisdiction of a foreign sovereign").

should not be deemed proper.[213] The mere possibility of contacts does not satisfy the constitutional threshold of traditional jurisdiction.[214]

None of the courts deciding on-line defamation cases based jurisdiction on on-line advertisements, nor supported their decisions with data or statistics quoting the frequency with which those advertisements were visited by Internet users within the forum.[215] When assessing the applicability of jurisdiction, a court should determine whether or not the on-line advertisement specifically targets the forum state.[216] If the forum state *was* targeted, then traditional rules should apply as necessary; however, if the advertisement is simply accessible to Internet users and no data exists to support forum residents' exposure, the constitutional requirement of minimum contacts has not been met.[217]

---

213. *Cf.* ROBERT B. GELMAN WITH STANTON MCCANDLISH, PROTECTING YOURSELF ON-LINE 29 (1998) (warning Internet users to avoid problems by "remember[ing] that you're using a tool that's part telephone, part postal medium, part broadcasting").

214. *See supra* note 24 and accompanying discussion (stating that a defendant should have contacts sufficient enough with the forum that he or she "reasonably anticipates" being brought to court in that forum state).

215. *See generally* Bochan v. La Fontaine, 68 F. Supp. 2d 692 (E.D. Va. 1999) (finding jurisdiction over a non-resident as a result of advertising over the Internet); Telco Communications v. An Apple a Day, 977 F. Supp. 404 (E.D. Va. 1997) (same); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn 1996) (same).

216. *Telco*, 977 F. Supp. at 406. Although Telco's advertising satisfied Virginia's long-arm statute, the "passive" on-line advertisements were insufficient to provide adequate grounds for jurisdiction because advertising seems only to "make information available to those who are interested in it." VA. CODE ANN. § 8.01-328.1(A)(4) (Michie 1950). If all courts may exercise jurisdiction over those companies or persons possessing on-line advertisements (arguably "passive" sites), the ease with which an individual sends a defamatory message into cyberspace, purposefully or not, soon will equal the ease with which any one court may bring that individual under its jurisdiction. Zippo Mfg. Co. v. Zippo Dot Com Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); *see also* Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998). In this case, an Indian tribe alleged the name of the beer "Crazy Horse Malt Liquor" to be defamatory. *Id.* at 1089. The brewing company advertised the liquor over the Internet; however, the *Hornell* court held that Internet advertising did not directly effect tribal health or welfare. *Id.* at 1093. The court denied that the Indian Tribal Court had jurisdiction, finding Internet use similar to the "use of the airways for national broadcasts over which the Tribe can claim no proprietary interest." *Id.* Therefore, Internet advertisement was *not* sufficient to establish jurisdiction. *Id.* Within a month of the *Hornell* decision, the Ninth Circuit also held that an Internet advertisement did not establish jurisdiction. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997). In this trademark infringement case, the court used *Zippo* for guidance, holding that the "passive nature of [defendant's] activity in posting a home page" could not be categorized as "purposeful." *Id.* at 420. The court declared that exercising jurisdiction as a result of on-line advertising would undermine "traditional notions of fair play and substantial justice." *Id.* at 415.

217. Sears Roebuck & Co. v. Sears, 744 F. Supp. 1289, 1297 (D. Del. 1990) (holding that advertisements appearing in two international magazines were insufficient for

For further illustration, compare on-line defamation and defamation that occurs in a magazine article, as in *Calder*.[218] The Internet is not "circulated" in a state or another country simply because those residents have access to it—those residents must actively seek out the Web site just as they would actively seek out a specific magazine to buy.[219] A Web site's "circulation" in this analogy, therefore, would be equivalent to the number of residents visiting that site.

Some Internet Web sites have "hit counters" that record the number of people visiting the Web site on any particular day, aiding in the determination of a Web site's "circulation" in a defamation action.[220] Further, certain Web sites, typically commercial Web sites, have users electronically sign an on-line contract that warns a user of jurisdictional ramifications.[221] These examples of human contribution allow a court to assess the level of contact existing between a Web site and users in a forum state.[222]

---

establishing personal jurisdiction); Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40, 43 (8th Cir. 1988) (holding that an advertisement placed in a nationally distributed trade publication circulated in the forum state does not constitute a "purposeful availment of the benefits and protections of [the forum's] law"). Attorneys in other countries recognize on-line advertising and Internet jurisdiction to be problematic as well. *See* Monique Conrod, *Website Advertising Raises Troubling Jurisdictional Issues*, THE LAWYERS WEEKLY (Canada), October 31, 1997.

218. Calder v. Jones, 465 U.S. 783 (1984) (finding jurisdiction over defendants who made libelous statements in a magazine article because of the large distribution of that magazine in the forum state).

219. *See supra* notes 210-11 (illustrating how an Internet user seeks out a Web site).

220. SCOTT, *supra* note 153, at 236 (defining "hit" as a "log entry on the Web server that shows that an item was retrieved from a particular Web page on that server . . . [t]he number of hits recorded for a Web site provides a very rough estimate of the number of users who have accessed the Web site"); *see also* EDWARDS & WAELDE, *supra* note 11, at 32 (stating that "[o]ne way to assess [on-line activity] is by the 'hit rate,' [which] is a count of how many times the Web site is accessed in a given period of time"); GELMAN *supra* note 213, at 27 (explaining that "[u]nless you happen to have advanced computer-network knowledge, you leave a trail that a skilled investigator could trace you by every time you log on").

221. *See, e.g.*, LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ON-LINE WORLD, 266 (1995) (providing an example of a contract for "User Agreement for On-line Services" with a choice of law clause). *But see* Lars Davies, *Contract Formation on the Internet: Shattering a few myths*, *in* LAW AND THE INTERNET: REGULATING CYBERSPACE 97, 99 (1997) (stating that "[t]he contractual terms which purport to define the law and jurisdiction must be valid and the validity is determined by the laws of the jurisdiction in which the contract is formed regardless of any term within the contract itself").

222. GELMAN, *supra* note 213, at 44 (stating that on-line services *can* "track and record user activities"). On-line activities such as "which newsgroups or files a subscriber has accessed and which Web sites a subscriber has visited" may be recorded and "collected both by a subscriber's own service provider and by the sysops of remote sites that a subscriber has visited." *Id.*

This jurisdictional problem is not easily solved.[223] As a Minnesota appellate court stated, "[i]t will undoubtedly take some time to determine the precise balance between the rights of those who use the Internet to disseminate information and the powers of the jurisdictions in which receiving computers are located to regulate for the general welfare."[224]

IV. CONCLUSION

The Internet does not exist in a vacuum, but exists as a product of human volition. The courts should treat it as such. An individual should not be subjected to all existing jurisdictions when entering cyberspace, but should be assured that he or she will receive the benefits of constitutional due process.

The Internet provides new technology, but does not provide novel legal questions. The nature of defamation, although technically altered as a result of Internet distribution, retains the same basic tenets as in the pre-Internet era. Therefore, jurisdictional tests for defamation actions should remain in tact as in the days before on-line activity. Just as in 1881, Oliver Wendell Holmes stated in *The Common Law*, "[i]f truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow."[225] As jurisdictional tests are "adjusted" for applicability to Internet defamation, courts must be cautious not to discard the underlying constitutional principles of personal jurisdiction.

---

223. *Cf.* Reno v. ACLU, 521 U.S. 844, 870 (1997) (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996)). The Court stated:

> Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer . . . . "[T]he content on the Internet is as diverse as human thought."

Id.

224. Humphrey v. Granite Gate Resorts, 568 N.W.2d 715, 718 (Minn. Ct. App. 1997) (stating further that "our task here is limited to deciding the question of personal jurisdiction in the instant case").

225. OLIVER WENDELL HOLMES, THE COMMON LAW (1881).