

6-1-2007

## VI. Personal Jurisdiction in Federal Courts over International E-Commerce Cases

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### Recommended Citation

Jeffrey M. Jensen, *VI. Personal Jurisdiction in Federal Courts over International E-Commerce Cases*, 40 Loy. L.A. L. Rev. 1507 (2007).  
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## VI. PERSONAL JURISDICTION IN FEDERAL COURTS OVER INTERNATIONAL E-COMMERCE CASES

*Jeffrey M. Jensen\**

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### *A. Introduction*

In 1997, the United States Supreme Court called the Internet a “wholly new medium of worldwide human communication.”<sup>1</sup> Nearly ten years later, the Internet is no longer new, but certain areas, such as international electronic commerce, are still developing.

Electronic commerce, commonly called e-commerce, is growing by leaps and bounds. In the second quarter of 2006, e-commerce accounted for \$26.3 billion, or 2.7% of all retail sales in the United States.<sup>2</sup> Forrester Research, a leader in researching technology’s effect on business, projected that online retail sales will increase annually at 14% compounded between now and 2010.<sup>3</sup> As purchasers become more comfortable with Internet transactions, the rate of purchases from international sources will surely increase.

Currently, there is no universally accepted definition of “international e-commerce.”<sup>4</sup> Some consider international e-commerce to include activities such as sending a fax internationally to complete a transaction.<sup>5</sup> However, international e-commerce “generally involves an online commitment to import or export goods and services.”<sup>6</sup>

1. *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

2. *Quarterly Retail E-Commerce Sales 2nd Quarter 2006*, U.S. CENSUS BUREAU NEWS (U.S. Dep’t of Commerce, Washington, D.C.), Aug. 17, 2006, at 2 tbl.1, available at <http://www.census.gov/mrts/www/data/pdf/06Q2.pdf>.

3. CARRIE A. JOHNSON, FORRESTER RESEARCH, US E-COMMERCE: 2005 TO 2010 (2005), executive summary available at <http://www.forrester.com/Research/Document/Excerpt/0,7211,37626,00.html>.

4. RITA TEHAN, CONG. RESEARCH SERV., E-COMMERCE STATISTICS: EXPLANATION AND SOURCES 6 (2003), available at [http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL31293\\_06042003.pdf](http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL31293_06042003.pdf).

5. *Id.*

6. *Id.* at 7.

Although the U.S. government does not collect official data on international e-commerce,<sup>7</sup> Forrester Research estimates that electronic commerce accounted for \$16.2 billion of imports and \$7.4 billion of exports as early as the year 2000.<sup>8</sup> More recent data is not available, but this same 2002 report projected that international e-commerce would account for 20.5% of total U.S. exports and 25.6% of total U.S. imports by 2004.<sup>9</sup> This increase in transactions with foreign parties suggests that a corresponding increase in litigation related to international e-commerce is forthcoming.

Many of these cases will be either filed in or removed to federal courts. Foreign parties typically prefer to litigate in federal courts, due to fears of bias for the local party.<sup>10</sup> This is particularly true in rural areas.<sup>11</sup> Indeed, diversity of citizenship jurisdiction<sup>12</sup> was created to prevent discrimination in state courts against parties who were not citizens of the state.<sup>13</sup> E-commerce cases often involve state claims, like contract or tort, which are removable under diversity.<sup>14</sup> Additionally, e-commerce cases often involve federal question<sup>15</sup> claims such as trademark, copyright, or patent infringement.<sup>16</sup>

This article focuses on personal jurisdiction issues in litigating international e-commerce disputes in federal courts. Part B examines the types of Internet activities that expose a foreign company to personal jurisdiction in U.S. courts. Part B also discusses the

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7. U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL ELECTRONIC COMMERCE DEFINITIONS AND POLICY IMPLICATIONS 15 (2002), available at <http://www.gao.gov/new.items/d02404.pdf>.

8. *Id.* at 11.

9. *Id.*

10. Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 965–66 (1995).

11. *Id.* at 966–67.

12. Diversity jurisdiction grants federal courts subject matter jurisdiction over controversies exceeding \$75,000 between a citizen of a U.S. state and a citizen of a foreign state. 28 U.S.C. § 1332(a)(2) (2000).

13. *Erie R.R. v. Tompkins*, 304 U.S. 64, 74 (1938).

14. *See, e.g., Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999) (contract and torts); *Allojet PLC v. Vantage Assocs.*, No. 04 Civ. 05223, 2005 U.S. Dist. LEXIS 4006 (S.D.N.Y. Mar. 15, 2005) (contracts).

15. 28 U.S.C. § 1331.

16. *See, e.g., Rio Props. v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002) (trademark); *Bible & Gospel Trust v. Wyman*, 354 F. Supp. 2d 1025 (D. Minn. 2005) (copyright); *Commissariat a l'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315 (Fed. Cir. 2005) (patent).

personal jurisdiction tests that have developed for Internet cases and proposes that geo-identification technology should be considered in the analysis. Part C examines the effect of forum selection clauses on the federal courts' willingness to try cases. This includes a discussion on the effectiveness of forum selection clauses contained in webpage user agreements. Finally, Part D will conclude that, as commercial transactions over the Internet increase, existing personal jurisdiction analyses requires modification.

*B. Asserting Personal Jurisdiction over  
Foreign Parties to E-Commerce Transactions*

The American Bar Association surveyed hundreds of companies, large and small, from forty-five countries about issues related to doing business across multiple jurisdictions over the Internet.<sup>17</sup> These companies listed the threat of being haled into court in a foreign jurisdiction as their primary concern.<sup>18</sup> This section examines the types of Internet activities that expose a foreign company to personal jurisdiction in federal courts. Part 1 begins by describing the basics of personal jurisdiction, and then describes the development of the personal jurisdiction analysis based on Internet activities, with emphasis on the sliding scale approach developed in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*<sup>19</sup> Part 2 then explains how some courts have modified the sliding scale approach to require "something more" than an interactive website to indicate that the defendant targeted the forum state. The discussion in Part 3 focuses on the effects test from *Calder v. Jones*,<sup>20</sup> another common Internet personal jurisdiction test, and examines the relationship between the effects test and the sliding scale. Similarly, Part 4 discusses how the sliding scale has been incorporated into the stream-of-commerce test by some courts. Finally, Part 5 describes geolocation technology—a relatively new technology that has been largely ignored by the courts—and argues that it should be considered as a factor in the personal jurisdiction analysis.

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17. Michael Geist, *Global Internet Jurisdiction: The ABA/ICC Survey*, A.B.A. SEC. BUS. L., Apr. 2004, at 2, available at <http://www.abanet.org/buslaw/newsletter/0023/materials/js.pdf>.

18. *Id.* at 2.

19. 952 F. Supp. 1119 (W.D. Pa. 1997).

20. 465 U.S. 783 (1984).

1. Asserting Personal Jurisdiction over Foreign Defendants Based on Internet Activities: An Introduction to the Sliding Scale

Judgments entered without personal jurisdiction are void.<sup>21</sup> Two reasons exist for requiring personal jurisdiction. The first is to place a geographical border on the power of a sovereign entity.<sup>22</sup> However, this theory of placing territorial limits on a court is in tension with the Internet, which is by nature borderless. It is perhaps for this reason that courts have struggled to develop a proper framework for analyzing personal jurisdiction in Internet cases.<sup>23</sup>

The second reason for requiring personal jurisdiction is to satisfy the due process requirements of the Fifth<sup>24</sup> and Fourteenth<sup>25</sup> Amendments to the U.S. Constitution.<sup>26</sup> Due process requires that a party be subject to suit in a forum only when that party's actions connect it to the forum such that the party should reasonably anticipate being sued there.<sup>27</sup> This allows parties to act with a degree of certainty as to whether their actions might subject them to a lawsuit in the forum.<sup>28</sup>

To assert personal jurisdiction over a defendant, a federal court must comply with both the state long-arm jurisdiction statute<sup>29</sup> and the requirements of the Due Process Clause.<sup>30</sup> Assuming the state statute is satisfied, the analysis turns to due process. The requirements of due process differ for general and specific personal jurisdiction.

General personal jurisdiction exists when the defendant's contacts with the forum are "continuous and systematic," such that a defendant may be sued in the forum state on a cause of action

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21. *Pennoy v. Neff*, 95 U.S. 714, 731 (1877).

22. *Id.*

23. *See infra* Part B.1.a.

24. U.S. CONST. amend. V.

25. U.S. CONST. amend. XIV, § 1.

26. *Pennoy*, 95 U.S. at 733.

27. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

28. *Id.*

29. FED R. CIV. P. 4(e). Specifically, this rule requires that service of process be in accordance with the law of the forum state. Because a suit cannot proceed without proper service, federal courts must comply with the long-arm personal jurisdiction statute of the forum state.

30. *Pennoy*, 95 U.S. at 733.

unrelated to the defendant's forum contacts.<sup>31</sup> The U.S. Supreme Court has not precisely defined the activities that constitute "continuous and systematic" contacts with the forum, but case law has provided examples such as domicile for an individual,<sup>32</sup> physical presence in the forum when served upon an individual,<sup>33</sup> and brick and mortar for a company.<sup>34</sup> Internet activities rarely supply the "continuous and systematic" contacts that would support general personal jurisdiction over a foreign defendant.<sup>35</sup>

In contrast to general jurisdiction, specific personal jurisdiction allows a defendant to be sued in the forum only on causes of action related to the defendant's forum contacts.<sup>36</sup> A court may assert specific personal jurisdiction where the defendant has established minimum contacts with the forum, the litigation arises from those contacts,<sup>37</sup> and asserting personal jurisdiction is reasonable.<sup>38</sup> Minimum contacts arise from conduct and a connection with the forum state that are sufficient such that the defendant "should reasonably anticipate being haled into court there."<sup>39</sup> Thus, a defendant who satisfies this requirement may be subject to personal jurisdiction even though she has never physically entered the forum state.<sup>40</sup> Moreover, even a single contact with the forum can serve as

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31. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414–15 (1984) (quoting *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952)).

32. *Pennoyer*, 95 U.S. at 723.

33. *Burnham v. Superior Court*, 495 U.S. 604, 610, 619 (1990).

34. *See Bryant v. Finnish Nat'l Airline*, 208 N.E.2d 439, 441–42 (N.Y. 1965).

35. *See infra* Part B.1.c.

36. *Helicopteros*, 466 U.S. at 414.

37. *See id.* at 414 ("When a controversy is related to or 'arises out of' a defendant's contacts with the forum, . . . a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction." (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977))).

38. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987). Reasonableness depends on the defendant's burden, the plaintiff's interest in obtaining relief, the forum's interests, and the interstate judicial system's interest in obtaining efficient resolution of controversies. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

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

40. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

Jurisdiction [where minimum contacts are present] may not be avoided merely because the defendant did not *physically* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire



the basis for personal jurisdiction.<sup>41</sup> However, applying the minimum contacts analysis to e-commerce transactions raises the question: What is a “contact” as applied to the Internet?

*a. Exercising specific personal  
jurisdiction based on Internet activities*

While applying the minimum contacts analysis to Internet activities is novel, modifying the analysis in response to technological advances is not. Indeed, the minimum contacts analysis itself was developed because the Court recognized that evolving technology was making out-of-state commerce more common while simultaneously making it easier for parties to defend suits in foreign fora.<sup>42</sup>

Nevertheless, applying the minimum contacts analysis to e-commerce cases proved challenging to the courts in the early years of the Internet.<sup>43</sup> Then, in 1997, the Western District of Pennsylvania delivered the first compelling analysis of personal jurisdiction related to the Internet in the celebrated case of *Zippo Manufacturing Co. v. Zippo Dot Com*.<sup>44</sup> There, Zippo Manufacturing, a Pennsylvania company that manufactures cigarette lighters, sued Zippo Dot Com, a California based newsgroup and website publisher.<sup>45</sup> Zippo Manufacturing alleged trademark infringement because Zippo Dot Com registered the domain names “zippo.com,” “zippo.net,” and “zipponews.com.”<sup>46</sup> When Zippo Dot Com moved to dismiss for lack of personal jurisdiction, the court noted that the company’s

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communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.

*Id.*

41. *See, e.g.,* *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957) (finding that the exercise of personal jurisdiction in California was proper where the defendant insurance company entered into a contract with a California citizen, never had an office or agent in California, and had no insurance policies in California other than the policy giving rise to the suit).

42. *See* *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958) (stating that the requirements for personal jurisdiction have evolved as technological progress has increased the rate of interstate commerce and has made defending a suit in a foreign forum less burdensome).

43. *See, e.g.,* *CompuServe, Inc. v. Patterson*, 1996 FED App. 0228P at 7–20 (6th Cir.); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164–65 (D. Conn. 1996).

44. 952 F. Supp. 1119 (W.D. Pa. 1997).

45. *Id.* at 1121.

46. *Id.*

contacts with the forum had occurred “almost exclusively” over the Internet.<sup>47</sup>

The significant development in *Zippo* was the introduction of the “sliding scale” test for specific personal jurisdiction supported by Internet activities. The scale divides Internet activities into three broad categories.<sup>48</sup> In the first category, the defendant “clearly does business over the Internet” by knowingly entering into contracts to transmit files to a foreign jurisdiction.<sup>49</sup> In such case, the court has jurisdiction over suits arising out of those activities in the forum.<sup>50</sup> The second category lies at the opposite end of the scale, where the defendant’s website is entirely “passive” and does no more than post information accessible to visitors.<sup>51</sup> There, the defendant’s website is not sufficient to support personal jurisdiction.<sup>52</sup> Websites falling into the middle category require a more nuanced analysis. Where the defendant’s website is neither highly interactive nor entirely passive, whether personal jurisdiction is supported “is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”<sup>53</sup> While, there is no clear line, the more interactive and commercial in nature a website is, the more likely a court will be to find that personal jurisdiction is proper.<sup>54</sup>

Today, the *Zippo* sliding scale has found virtually universal acceptance for specific personal jurisdiction analysis in Internet cases.<sup>55</sup> The same sliding scale analysis applies to international cases

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47. *Id.* *Zippo Dot Com’s* news service offered one free level and two paid levels of membership. *Id.* Roughly 3,000 customers (of a total of 140,000 worldwide) were residents of Pennsylvania, and *Zippo Dot Com* entered into an agreement with two Internet service providers located in the Western District of Pennsylvania to permit the providers’ subscribers to access *Zippo’s* news services. *Id.*

48. *Id.* at 1124.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See, e.g.,* *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 400–02 (4th Cir. 2003) (finding that exercise of personal jurisdiction was improper partly because the defendant’s website was “semi-interactive”).

55. *See, e.g.,* *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003) (“The opinion in [*Zippo*] has become a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site.”); *see also* *Cadle Co. v. Schlichtmann*, 123 F. App’x 675, 678 (6th Cir. 2005) (applying *Zippo*); *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1079–80

litigated in U.S. courts,<sup>56</sup> though many courts have modified it to require an indication that the defendant intentionally targeted the forum.<sup>57</sup>

*b. The sliding scale applied to specific personal jurisdiction in international e-commerce cases*

Consistent with the *Zippo* sliding scale, a foreign defendant who maintains a passive website is not subject to specific personal jurisdiction. For example, in *Soma Medical International v. Standard Chartered Bank*,<sup>58</sup> a Utah medical company opened a bank account in a British bank's Hong Kong office.<sup>59</sup> An unauthorized party drained the funds in that account, and the medical company sued the bank in Utah.<sup>60</sup> As a basis for jurisdiction, the plaintiff offered the defendant's website, which was not interactive and merely posted information about the defendant.<sup>61</sup> In rejecting specific personal jurisdiction, the court stated "we cannot conclude that [the defendant's] maintenance of a passive website, merely providing information to interested viewers, constitutes the kind of purposeful availment of the benefits of doing business in Utah, such that [the defendant] could expect to be haled into court in that state."<sup>62</sup> The court thus affirmed the lower court's dismissal of the case for lack of personal jurisdiction.<sup>63</sup>

Just as in domestic Internet cases, *Zippo's* middle category—where personal jurisdiction must be determined based on the level of interactivity—presents the most complex analysis. In *Morris*

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(9th Cir. 2003) (same); *Revell v. Lidov*, 317 F.3d 467, 470 (5th Cir. 2002) (same); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (adopting but adapting the *Zippo* model); *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1296–97 (10th Cir. 1999) (applying *Zippo*).

56. See Warren E. Agin, *Coping with Personal Jurisdiction in Cyberspace: Liability Report of the ABA Subcommittee on Internet Law*, 53 CONSUMER FIN. L.Q. REP. 86, 89 (1999) ("Cases examining whether a Web site maintained outside of the United States can allow a United States court to exercise personal jurisdiction over the Web site owner follow the same analysis as the purely domestic cases.").

57. See *infra* Part B.2.

58. 196 F.3d 1292.

59. *Id.* at 1294.

60. *Id.* at 1294–95.

61. *Id.* at 1297.

62. *Id.* at 1299.

63. *Id.* at 1300.

*Material Handling, Inc. v. KCI Konecranes Plc*,<sup>64</sup> a U.S. crane manufacturer sued a Finnish corporation and its American subsidiary for, among other things, federal trademark infringement and unfair competition.<sup>65</sup> The plaintiff brought the case in federal court in Wisconsin and argued that personal jurisdiction was supported by the defendants' websites.<sup>66</sup>

The court determined that the websites fell "somewhere in the middle of the [sliding] scale."<sup>67</sup> Although the sites did not allow users to complete transactions, one site provided a toll-free phone number for ordering parts, and another provided a products and parts index.<sup>68</sup> One of the sites also provided a hyperlink where a potential customer could click to request a quote, and allowed people to e-mail the company.<sup>69</sup> Therefore, "[t]hough perhaps not rising to the level of online accounts and shopping carts, these web sites offered a level of interactivity."<sup>70</sup>

Based on this information, the court determined that the websites were "at a point on the scale where the Court could exercise jurisdiction."<sup>71</sup> Interestingly, although the court determined that the websites were sufficiently interactive to support personal jurisdiction alone, the court also analyzed other conduct by the defendant and determined that the additional conduct also constituted purposeful availment of the forum.<sup>72</sup> This may indicate that the court was uncomfortable with the middle-of-the-scale interactive website analysis, and was thus looking for additional support for its holding.

In sum, just as in domestic cases, personal jurisdiction can be supported by a foreign defendant's sufficiently interactive website in international e-commerce cases.

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64. 334 F. Supp. 2d 1118 (E.D. Wis. 2004).

65. *Id.* at 1120.

66. *Id.* at 1121.

67. *Id.* at 1125.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

i. A federal question can rescue a plaintiff

From a practical standpoint, another noteworthy aspect of *Morris* is that the plaintiff did not establish that the defendant's forum contacts were related to the suit. Consequently, the defendant was not subject to the forum state's long-arm statute.<sup>73</sup> If the court had been sitting solely on the basis of diversity jurisdiction,<sup>74</sup> the suit would have been dismissed.

However, the plaintiff's case was saved by Federal Rule of Civil Procedure 4(k)(2), which allows a federal court to assert personal jurisdiction in a federal question case over a defendant that has minimum contacts with the United States, but is not subject to personal jurisdiction in any state.<sup>75</sup> The plaintiff, in addition to alleging diversity jurisdiction, alleged federal question jurisdiction based on federal trademark infringement.<sup>76</sup> As a result, personal jurisdiction was proper because the websites provided minimum contacts with the United States,<sup>77</sup> and the defendant was not subject to the personal jurisdiction of any state.<sup>78</sup>

Cases where a foreign defendant does not have sufficient contacts with the forum to satisfy due process, but does have sufficient contacts to satisfy Federal Rule of Civil Procedure 4(k)(2), are fairly common.<sup>79</sup> This is because Rule 4(k)(2) allows a court to view all of the defendant's U.S. contacts in the aggregate, and the evidence need only show that the defendant targeted the United States in general rather than the particular forum.<sup>80</sup>

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73. *Id.* at 1121 n.1.

74. Diversity jurisdiction grants federal courts subject matter jurisdiction over controversies exceeding \$75,000 between a citizen of a U.S. state and a citizen of a foreign state. 28 U.S.C. § 1332(a)-(b) (2000).

75. *Morris*, 334 F. Supp. 2d at 1122 (citing FED R. CIV. P. 4(k)(2)).

76. *See id.*

77. *Id.* at 1125-26.

78. Indeed, the company was "careful" to limit its presence in the United States. *Id.* at 1120. Although the company had a worldwide presence, it was not traded on any U.S. stock exchange; had no bank accounts in the United States; was not registered to do business in the United States; had no registered agent in the United States; had no real estate, offices, or manufacturing facilities in the United States; and had no customer or supplier relationships in the United States. *Id.*

79. *See, e.g.,* Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 458 (3d Cir. 2003); Graduate Mgmt. Admission Council v. Raju, 241 F. Supp. 2d 589, 597 (E.D. Va. 2003); *cf. See, Inc. v. Imago Eyewear Pty, Ltd.*, 167 Fed App'x 518, 523-24 (6th Cir. 2006) (holding that jurisdiction over the defendants pursuant to Rule 4(k)(2) was improper because the defendants did not "purposefully avail" themselves of the forum).

80. *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir. 2001).

- ii. Where the foreign defendant's website is sufficiently interactive, the defendant is unlikely to defeat personal jurisdiction by claiming that jurisdiction is unreasonable

Once the plaintiff has established that personal jurisdiction is otherwise proper, the defendant bears the burden of showing that jurisdiction is unreasonable.<sup>81</sup> Reasonableness is measured in terms of the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the interest of the states in furthering social policies.<sup>82</sup>

Personal jurisdiction is unlikely to be found unreasonable merely because the defendant is a foreign party. For example, in *Trueposition, Inc. v. Sunon, Inc.*,<sup>83</sup> a Taiwanese defendant sold fans to a U.S. distributor who resold them to the plaintiff.<sup>84</sup> The defendant argued that defending a suit in the United States would be unreasonably burdensome because the defendant was a foreign company.<sup>85</sup> After determining that the defendant had minimum contacts with the forum under the stream-of-commerce theory, the court concluded that the interests of the forum and plaintiff outweighed any burden on the defendant.<sup>86</sup>

The defendant is particularly unlikely to prove unreasonableness in a federal question case because of the strong interest the United States has in enforcing its laws. For example, in *Morris*,<sup>87</sup> the defendant argued that defending a suit in the United States would be a significant burden because its agents would have to travel a great distance to defend themselves in an unfamiliar judicial system.<sup>88</sup> The court, however, determined that the United States had a significant interest in adjudicating the dispute because U.S. trademark laws were

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81. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

82. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

83. No. 05-3023, 2006 U.S. Dist. LEXIS 39681 (E.D. Pa. June 14, 2006); see *infra* Part B.4.b.

84. *Id.* at \*4-6.

85. *Id.* at \*28-29.

86. *Id.* at \*29; see also *infra* Part B.4.b.

87. *Morris v. Material Handling, Inc. v. KCI Konecranes Plc*, 334 F. Supp. 2d. 1118 (E.D. Wis. 2004).

88. *Id.* at 1126; see also *supra* Part B.1.b.

at issue.<sup>89</sup> In holding that the exercise of personal jurisdiction was reasonable, the court cited the U.S. Supreme Court's statement that the interests of the forum and the plaintiff usually outweigh the burden on the defendant.<sup>90</sup>

The law is now well settled that a court can assert specific personal jurisdiction over a defendant based on the defendant's website. However, a plaintiff wishing to claim specific personal jurisdiction must establish a connection between the website and the cause of action in the forum.<sup>91</sup> If the plaintiff cannot do so, jurisdiction may still be proper if the suit involves a federal question and the defendant has minimum contacts with the United States as a whole.<sup>92</sup> If personal jurisdiction is supported, the defendant will likely be unable to claim that personal jurisdiction is unreasonable because he or she is a foreigner.<sup>93</sup>

*c. Exercising general personal jurisdiction based on Internet activities, and the debated relevance of the sliding scale*

Where general personal jurisdiction exists, a defendant may be sued in the forum for an injury wholly unrelated to the defendant's forum contacts.<sup>94</sup> Therefore, "the standard for general [personal] jurisdiction is considerably more stringent" than the standard for specific personal jurisdiction.<sup>95</sup> Consequently, general personal jurisdiction is proper only where the defendant has "continuous and systematic" contacts with the forum,<sup>96</sup> and where exercising personal jurisdiction is reasonable.<sup>97</sup> In determining whether the defendant's contacts with the forum are continuous and systematic, courts focus on the quality and quantity of the defendant's forum contacts.<sup>98</sup> Courts generally disfavor a broad construction of the general

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89. *Morris*, 334 F. Supp. 2d at 1126.

90. *Id.* (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987)).

91. *Id.* at 1124–25.

92. See FED. R. CIV. P. 4(k)(2).

93. See *Morris*, 334 F. Supp. 2d at 1126.

94. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 (1984) (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)).

95. *Glater v. Eli Lilly & Co.*, 744 F.2d 213, 216 (1st Cir. 1984).

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

97. See *Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 465 (1st Cir. 1990).

98. *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir. 1999).

personal jurisdiction doctrine.<sup>99</sup> To assert general personal jurisdiction over an out-of-forum defendant, a court must find that the defendant's minimum contacts with the forum are so systematic that they serve as a proxy for physical presence.<sup>100</sup> It should be no surprise then, that Internet activities rarely satisfy the requirements of general personal jurisdiction. Indeed, the circuit courts disagree as to whether to even apply the sliding scale approach to a general jurisdiction analysis.

i. Circuits that reject the sliding  
scale for general personal jurisdiction

Some courts simply will not apply the sliding scale to a general personal jurisdiction analysis. The Fifth Circuit has taken this position, stating that "this sliding scale . . . is not well adapted to the general jurisdiction inquiry, because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction."<sup>101</sup> Similarly, the Fourth Circuit has held that it is "not prepared at this time to recognize that a State may obtain general jurisdiction over out-of-state persons who regularly and systematically transmit electronic signals into the State via the Internet based solely on those transmissions."<sup>102</sup> The Sixth Circuit has also rejected the sliding scale approach in the general personal jurisdiction analysis, stating that "a website that is accessible to anyone over the Internet is insufficient to justify general

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99. *Cf. Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1200 (4th Cir. 1993) (explaining that general personal jurisdiction functioned to ensure that plaintiffs would have a forum for their claims, but that it has been rendered largely unnecessary because the expansion of specific personal jurisdiction has enabled most plaintiffs to sue in the forum where the injury occurred).

100. *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (noting that "[t]he standard for establishing general jurisdiction is 'fairly high'" (quoting *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986))).

101. *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002) (citation omitted).

102. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 715 (4th Cir. 2002).



jurisdiction.”<sup>103</sup> Similarly, the trend of the district courts within the Second Circuit is against using the sliding scale approach.<sup>104</sup>

ii. Circuits that have adopted the sliding scale for general personal jurisdiction

Although many circuits have incorporated the sliding scale into their analysis of general personal jurisdiction, precedent for asserting jurisdiction based solely on a website is scarce. The Ninth Circuit found such jurisdiction in *Gator.com Corp. v. L.L. Bean, Inc.*,<sup>105</sup> but the court granted rehearing en banc,<sup>106</sup> which rendered the case non-citable. The parties subsequently settled before the rehearing took place, thereby rendering the case moot.<sup>107</sup> In the first appeal, the court concluded that general personal jurisdiction was proper because the defendant’s “website is clearly and deliberately structured to operate as a sophisticated virtual store in California.”<sup>108</sup> The court cited the defendant’s highly interactive website, e-mail solicitations, and millions of dollars of sales to California as relevant factors that supported a finding of general personal jurisdiction under the sliding scale.<sup>109</sup>

Similarly, the D.C. Circuit adopted the sliding scale and found that general personal jurisdiction was proper in *Gorman v. Ameritrade Holding Corp.*,<sup>110</sup> but dismissed the action for ineffective service of process.<sup>111</sup> Interestingly, rather than quickly dispose of the case for the insufficient service, the court opined at length that it could properly exercise personal jurisdiction in the action.<sup>112</sup> The court recited the many ways in which defendant Ameritrade Holding

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103. *Bird v. Parsons*, 2002 FED App. 0177P at 11 (6th Cir.) (citing *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419–20 (9th Cir. 1997)); see also *See, Inc. v. Imago Eyewear Party, Ltd.*, 167 F. App’x 518, 523 (6th Cir. 2006); *Cadle Co. v. Schlichtmann*, 123 F. App’x 675, 677 (6th Cir. 2005).

104. See *Heidle v. Prospect Reef Resort, Ltd.*, 364 F. Supp. 2d 312, 318 n.18 (W.D.N.Y. 2005) (“[C]ourts in [the Second] Circuit appear to apply the *Zippo* analysis only in the specific jurisdiction context.”).

105. 341 F.3d 1072, 1078 (9th Cir. 2003).

106. *Gator.com Corp. v. L.L. Bean, Inc.*, 366 F.3d 789, 789 (9th Cir. 2004).

107. *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1132 (9th Cir. 2005).

108. *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1078 (9th Cir. 2003).

109. *Id.* at 1080.

110. 293 F.3d 506, 513 (D.C. Cir. 2002).

111. *Id.*

112. *Id.* at 515–16.

Corporation's ("Ameritrade") website was interactive: the website allowed customers to open accounts online, make electronic deposits, buy and sell securities, borrow on margin, and pay commissions and interest.<sup>113</sup> The court determined that this interaction, along with the twenty-four-hour home or work access to the website, allowed Ameritrade to have forum contacts that were "continuous and systematic" to a degree that traditional corporations could never rival.<sup>114</sup> The court concluded by stating:

Ameritrade is quite wrong in treating "cyberspace" as if it were a kingdom floating in the mysterious ether, immune from the jurisdiction of earthly courts. Nevertheless, in this case Ameritrade is saved from the jurisdiction of the district court by a much more mundane problem: the plaintiff simply failed to serve the corporation properly.<sup>115</sup>

Therefore, although the court's analysis of general personal jurisdiction is clear, it is mere dicta.

In cases where the court ruled on general personal jurisdiction using the sliding scale approach, jurisdiction has typically not been proper. For instance, the Tenth Circuit reached this result in *Soma Medical International v. Standard Chartered Bank*.<sup>116</sup> Although the court applied the sliding scale, it determined that the defendant's website was passive, and, therefore, could not provide the "substantial and continuous" contacts necessary for general personal jurisdiction.<sup>117</sup>

Not surprisingly, the Pennsylvania district courts, where the sliding scale was first developed in *Zippo*, have produced a line of cases adopting the sliding scale approach in general personal jurisdiction cases.<sup>118</sup> However, there too, the trend is against

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113. *Id.* at 512 (internal quotation marks omitted).

114. *Id.* at 513.

115. *Id.* at 516.

116. 196 F.3d 1292, 1296-97 (10th Cir. 1999); *see supra* Part B.1.b.

117. *Id.* at 1297 (internal quotation marks omitted).

118. *See, e.g.,* Molnlycke Health Care AB v. Dumex Med. Surgical Prods. Ltd., 64 F. Supp. 2d 448, 451 (E.D. Pa. 1999) (finding that general jurisdiction was not supported by the facts, but stating that "[w]hile plaintiff correctly acknowledges that most of the cases applying [the sliding scale] framework have looked to specific jurisdiction, the court agrees that it may also properly be used in cases asserting general jurisdiction" (citation omitted)); Desktop Techs., Inc. v. Colorworks Reprod. & Design, Inc., No. 98-5029, 1999 U.S. Dist. LEXIS 1934, at \*6-10 (E.D. Pa. Feb. 25, 1999) (applying the sliding scale analysis and determining that the defendant's website was entirely passive, and thus did not support a finding of general personal jurisdiction);

asserting general personal jurisdiction.<sup>119</sup> For example, in *Hlavac v. DGG Properties Co.*,<sup>120</sup> the defendants' website fell into the middle category of the sliding scale,<sup>121</sup> but the court nevertheless refused to assert personal jurisdiction.<sup>122</sup> There, the plaintiffs sued the defendants for injuries suffered at the defendants' Connecticut resort where the plaintiffs were vacationing.<sup>123</sup> The defendants' website sold gift certificates and provided a hyperlink allowing potential guests to make reservations via e-mail.<sup>124</sup> However, it did not allow visitors to make reservations online.<sup>125</sup> After weighing these contacts, the court determined that the exercise of general personal jurisdiction was not proper.<sup>126</sup>

Although the U.S. district courts of Pennsylvania have leaned against asserting general personal jurisdiction based solely on the sliding scale analysis, a Pennsylvania Superior Court produced one of the few cases that held such jurisdiction to be proper. In *Mar-Eco, Inc. v. T & R & Sons Towing & Recovery, Inc.*,<sup>127</sup> a Pennsylvania motor vehicle dealer sued a Maryland motor vehicle dealer for negligence and unjust enrichment.<sup>128</sup> The dispute arose from a vehicle financing transaction related to a sale in Maryland in which the defendant failed to file the plaintiff's security interest, allowing the purchaser to receive the vehicle free and clear of any liens.<sup>129</sup>

In its opinion, the court noted the interactive features of the defendant's website: the website permitted users to apply for employment, search vehicle inventories, apply for financing,

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Grutkowski v. Steamboat Lake Guides & Outfitters, No. 98-1453, 1998 U.S. Dist. LEXIS 20255, at \*10-15 (E.D. Pa. Dec. 30, 1998) (also applying sliding scale analysis and finding no general personal jurisdiction because the websites amounted to nothing more than "passive advertisements").

119. See cases cited *supra* note 118.

120. No. 04-6112, 2005 U.S. Dist. LEXIS 6081 (E.D. Pa. Apr. 8, 2005).

121. *Id.* at \*16-17.

122. *Id.* at \*20-21.

123. *Id.* at \*1-4.

124. *Id.* at \*16.

125. *Id.*

126. *Id.* at \*20-21. However, instead of dismissing the case, the court transferred the case to the District Court for the District of Connecticut, where personal jurisdiction was supported. *Id.* at \*32-33.

127. 837 A.2d 512 (Pa. Super. Ct. 2003).

128. *Id.* at 513-14.

129. *Id.* at 514.

calculate payments, order parts, and schedule service appointments.<sup>130</sup> Further, the website stated: “This page allows you to handle nearly all of the financial aspects of a vehicle purchase. We’ve made shopping for a car much easier for you by allowing you to shop and virtually complete the entire transaction via your computer.”<sup>131</sup> Additionally, the website notified users that it might disclose to third parties the non-public information that users entered into the website.<sup>132</sup> Citing the extensive interaction and commercial nature of the website, the court concluded that general personal jurisdiction was proper.<sup>133</sup>

The Eighth Circuit has incorporated the sliding scale analysis of the defendant’s website into its general personal jurisdiction analysis,<sup>134</sup> but has determined that “the *Zippo* test alone is insufficient for the general jurisdiction setting.”<sup>135</sup> The Eighth Circuit uses a multi-factored test for personal jurisdiction, and in the general personal jurisdiction context, the primary factors are the “nature and quality of the contacts” and the “quantity of the contacts.”<sup>136</sup> The Eighth Circuit determined that, under the *Zippo* test, a highly interactive website may have continuous contacts, but that does not determine whether the contacts are substantial.<sup>137</sup> Therefore, the Eighth Circuit first applies the sliding scale, and then analyzes the quantity of forum contacts that result from the website.<sup>138</sup>

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130. *Id.* at 517.

131. *Id.* (internal quotation marks omitted).

132. *Id.* at 518.

133. *Id.*

134. *Lakin v. Prudential Secs., Inc.*, 348 F.3d 704, 711 (8th Cir. 2003).

135. *Id.* at 712.

136. *Id.* at 711–12.

137. *Id.*

138. *Id.* Though the record did not contain the information, the court stated that it would have considered

the number of times that Missouri consumers have accessed the Web site; the number of Missouri consumers that have requested further information about Prudential Savings’ services; the number of Missouri consumers that have utilized the online loan-application services; the number of times that a Prudential Savings representative has responded to Missouri residents after they have applied for a loan; the number and amounts of home-equity or other loans that resulted from online-application submission by Missouri consumers, or which are secured by Missouri property.

*Id.* at 712–13.

In summary, some jurisdictions allow general personal jurisdiction based on a defendant's website, even where the website is unrelated to the cause of action.<sup>139</sup> However, the court is much more likely to assert personal jurisdiction if the plaintiff alleges specific personal jurisdiction, provided the plaintiff has a plausible claim that the defendant's website is related to the suit.<sup>140</sup>

iii. The sliding scale applied to general personal jurisdiction in international e-commerce cases

Courts that incorporate the sliding scale into a general personal jurisdiction analysis will do so in the international context as well. For example, the Tenth Circuit used the sliding scale in *Soma Medical International v. Standard Chartered Bank*.<sup>141</sup> That case involved a dispute between a Utah company and the foreign bank that allowed a third party to siphon funds from the company's account.<sup>142</sup> In addition to alleging specific personal jurisdiction,<sup>143</sup> the plaintiff argued that general personal jurisdiction was proper because, among other things, the defendant's website constituted substantial and continuous local activity within the forum.<sup>144</sup> However, the court concluded that the website was passive,<sup>145</sup> which ended the general personal jurisdiction inquiry. Given the high standard of contacts required for general personal jurisdiction and low degree of interactivity of the defendant's website, the court concluded that the plaintiff could not make even a prima facie showing of general personal jurisdiction.<sup>146</sup>

A closer case was *Allojet PLC v. Vantage Associates*.<sup>147</sup> Interestingly, this case involved a British plaintiff suing an Oklahoma defendant in the Southern District of New York regarding

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139. See *supra* text accompanying notes 126–132.

140. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (noting that the “fair warning” requirement of specific jurisdiction is satisfied if the defendant has “purposefully directed” his activities at residents of the forum and the litigation results from alleged injuries that “arise out of or relate to” those activities).

141. 196 F.3d 1292, 1296–97 (10th Cir. 1999); see also discussion *supra* Part B.1.b.

142. *Soma*, 196 F.3d at 1294–95.

143. See discussion *supra* Part B.1.b.

144. *Soma*, 196 F.3d at 1296.

145. *Id.* at 1237.

146. *Id.*

147. No. 04 Civ. 05223, 2005 U.S. Dist. LEXIS 4006 (S.D.N.Y. Mar. 15, 2005).

sales to Europe.<sup>148</sup> Once again, the plaintiff alleged that general jurisdiction was proper because of the defendant's website.<sup>149</sup> However, in this case, the website was interactive.<sup>150</sup> Indeed, the court stated: "On the spectrum of company websites that courts have analyzed, [the defendant's] website falls into at least the intermediate category of 'interactive' websites and possibly into the most active category of websites where the defendant 'clearly does business over the [I]nternet.'"<sup>151</sup> The court acknowledged the trend of district courts in the Second Circuit against applying the sliding scale in the context of general personal jurisdiction.<sup>152</sup> However, the court also acknowledged that other courts do use such an analysis.<sup>153</sup> Perhaps as a compromise, the court proceeded to apply the sliding scale in a manner similar to the Eighth Circuit's test—which emphasizes the quantity of forum contacts in addition to the level of interactivity—and determined that the defendant's website could support general personal jurisdiction if the resulting sales were substantial and continuous.<sup>154</sup>

However, the plaintiff failed to present any such evidence, and the court concluded that general personal jurisdiction was lacking.<sup>155</sup> In dicta, the court stated that it would have considered evidence such as repeated shipments of products to New York or substantial solicitation of New York customers.<sup>156</sup>

Cases where the plaintiff alleges general personal jurisdiction based on the defendant's website are quite common.<sup>157</sup> They are the

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148. *Id.* at \*3. A California corporation was a second defendant, but this is not material to the sliding scale discussion.

149. *Id.* at \*24.

150. *Id.* at \*27–28.

151. *Id.* at \*27.

152. *Id.* at \*21–22 (citing *In re Ski Train Fire in Kaprun, Austria*, 230 F. Supp. 2d 403, 408 (S.D.N.Y. 2002); *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 570–71 (S.D.N.Y. 2000)).

153. *Id.* at \*27 (citing *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1078 (9th Cir. 2003); *Schottenstein v. Schottenstein*, No. 04 Civ. 5851, 2004 U.S. Dist. LEXIS 23864, at \*11 (S.D.N.Y. Nov. 8, 2004); *Arista Records, Inc. v. Sakfield Holding Co.*, 314 F. Supp. 2d 27, 35 (D. D.C. 2004); *Mieczkowski v. Masco Corp.*, 997 F. Supp. 782, 787 (D. Tex. 1998)).

154. *See id.* at \*27–28.

155. *Id.* at \*30. The court did, however, allow discovery so that the plaintiff could attempt to establish the missing facts. *Id.* at \*31.

156. *Id.* at \*30.

157. *See, e.g., Saudi v. S/T Marine Atl.*, 159 F. Supp. 2d 469, 482 (S.D. Tex. 2000) (concluding that general personal jurisdiction is not supported by the foreign defendant's

logical result of an American plaintiff wanting to sue at home for an injury that is not truly connected to the United States. However, these allegations of personal jurisdiction are long-shots at best, especially where the defendant's website is minimally interactive. Where possible, these plaintiffs might fare better by alleging that the defendant did "something more" than maintain a website.<sup>158</sup>

## 2. Evolution: Modifying the Personal Jurisdiction Analysis by Requiring "Something More" to Indicate that the Defendant Purposefully Targeted the Forum

Since *Zippo* was decided in 1997, highly interactive websites have become far more common.<sup>159</sup> Therefore, a direct application of the sliding scale analysis will support personal jurisdiction at an ever increasing rate, especially where the website is connected to the cause of action and plaintiff can allege specific personal jurisdiction.<sup>160</sup> However, some courts have modified their personal jurisdiction analysis by requiring that, in addition to maintaining a sufficiently interactive website, the defendant did "something more" to indicate purposeful targeting of the forum.<sup>161</sup> Though similar in language and function, this usage of "something more" is distinct from O'Connor's usage in the stream-of-commerce test.<sup>162</sup> The requirement of "something more" can be seen in both specific and general personal jurisdiction cases, and it applies in the international context.

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website); *Weber v. Jolly Hotels*, 977 F. Supp. 327, 334 (D. N.J. 1997) (concluding that an Italian hotel was not subject to New Jersey general personal jurisdiction based on the hotel's website); *Smith v. Hobby Lobby Stores, Inc.*, 968 F. Supp. 1356, 1365 (W.D. Ark. 1997) (concluding that the Hong Kong defendant's Internet advertising, unrelated to the cause of action, could not support personal jurisdiction); *Hitachi Shin Din Cable, Ltd. v. Cain*, 106 S.W.3d 776, 786–87 (Tex. App. 2003) (concluding that the Hong Kong defendant's website did not support general personal jurisdiction).

158. See discussion *infra* Part B.2.

159. In general, lawsuits involving Internet activities have become more common as Internet usage has increased. See Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1095 (1996).

160. See *supra* note 140 and accompanying text.

161. See *infra* Part B.2.a.

162. See *infra* Part B.4.a.

a. "Something more" in the context of  
specific personal jurisdiction in international cases

"Something more" is an indication that the defendant's sales to the forum were the result of intentional targeting, rather than fortuitous and isolated events.<sup>163</sup> For example, the Third Circuit has determined that the operation of a website, even if commercially interactive, does not support specific personal jurisdiction unless there is "additional evidence that the defendant has 'purposefully availed' itself of the privilege of engaging in activity in that state."<sup>164</sup>

The Third Circuit used this approach in *Toys "R" Us, Inc. v. Step Two, S.A.*,<sup>165</sup> where the defendant, a Spanish company, allegedly infringed the copyright of a New Jersey corporation.<sup>166</sup> There, the defendant operated an Internet toy store that clearly fell into the most interactive category of the sliding scale.<sup>167</sup> However, the court made clear its requirement of additional evidence of targeting, stating that "[p]rior decisions indicate that such evidence *is* necessary, and that it should reflect intentional interaction with the forum state."<sup>168</sup>

The court stated that the additional evidence could come from Internet or non-Internet activities.<sup>169</sup> It did not, however, precisely define what evidence would suffice. Examples given included: repeated business trips;<sup>170</sup> telephone and fax communications;<sup>171</sup> purchase contracts with residents;<sup>172</sup> contracts that apply the law of the forum;<sup>173</sup> advertisements in the local newspapers;<sup>174</sup> and business plans or marketing strategies aimed at the forum.<sup>175</sup> The court then remanded the case for limited jurisdictional discovery guided by the court's jurisdictional analysis.<sup>176</sup>

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163. *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454–55 (3d Cir. 2003).

164. *Id.* at 451.

165. *Id.*

166. *Id.* at 448–49.

167. *Id.* at 450.

168. *Id.* at 451–52.

169. *Id.* at 453–54 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

170. *Id.* at 453.

171. *Id.* at 453–54.

172. *Id.* at 454.

173. *Id.*

174. *Id.* (citing *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 726 (E.D. Pa. 1999)).

175. *Id.* at 458.

176. *Id.*



Similarly, the Fourth Circuit “adopt[ed] and adapt[ed] the *Zippo* model” to require “something more.”<sup>177</sup> Indeed, this circuit transformed the sliding scale into a three element test for personal jurisdiction based on an individual’s operation of a website: (1) the defendant directed electronic activity into the forum, (2) with the manifested intent of engaging in business or other interactions within the forum, and (3) that activity creates a cause of action for a person within the forum.<sup>178</sup> A comparison of this test to the original *Zippo* sliding scale shows that the Fourth Circuit “emphasizes that requirement of *purposeful* targeting of a particular forum, not just the level of interactivity.”<sup>179</sup>

This emphasis was apparent in *RZS Holdings AVV v. PDVSA Petroleos S.A.*<sup>180</sup> There, the court did not even analyze whether the defendant’s website was interactive because the court concluded that the website clearly was not aimed at forum residents.<sup>181</sup> The dispute arose between a Virginia company and a Venezuelan bank that refused to honor a letter of credit.<sup>182</sup> The court determined that, because the bank’s website was in Spanish and targeted to Venezuela residents, it provided “no basis for jurisdiction.”<sup>183</sup>

Even where the defendant makes its website available to forum residents, courts in the Fourth Circuit demand a strong showing of purposeful targeting before personal jurisdiction is proper. For example, in *Graduate Management Admission Council v. Raju*,<sup>184</sup> the defendant had non-Internet contacts in addition to operating a commercially interactive website with “specific emphasis on the United States,”<sup>185</sup> yet personal jurisdiction over the defendant was not supported under the Fourth Circuit’s modified *Zippo* test.<sup>186</sup> There, the Virginia corporation that produces the Graduate Management

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177. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714–15 (4th Cir. 2002).

178. *Id.* at 714.

179. *Graduate Mgmt. Admission Council v. Raju*, 241 F. Supp. 2d 589, 594 (E.D. Va. 2003).

180. 293 F. Supp. 2d 645 (E.D. Va. 2003).

181. *Id.* at 649–50.

182. *Id.* at 647–48.

183. *Id.* at 649.

184. 241 F. Supp. 2d 589.

185. *Id.* at 591.

186. *Id.* at 596. However, the defendant’s contacts with the United States were sufficient to exercise jurisdiction under Federal Rule of Civil Procedure 4(k)(2), discussed *infra* Part B.1.b.i. *Raju*, 241 F. Supp. 2d at 600.

Admission Test (“GMAT”) sued in Virginia an Indian defendant whose website sold test preparation materials in violation of the plaintiff’s copyright.<sup>187</sup> In addition to maintaining the website, the defendant shipped products to two customers in Virginia and had registered his website’s domain name with a Virginia company.<sup>188</sup>

The court concluded that “[t]hese contacts, evaluated in light of the three part [modified sliding scale] test, point ultimately to the absence of personal jurisdiction.”<sup>189</sup> Regarding the two shipments to Virginia customers, the court stated that “the question [of personal jurisdiction in the state] is close.”<sup>190</sup> However, the court concluded that the sales must be considered isolated and attenuated; otherwise, a plaintiff could sue an online retailer in any forum simply by ordering a product to be delivered to the desired forum.<sup>191</sup> Similarly, the court concluded that registering a domain name with a Virginia company is an insignificant contact, citing precedent for the proposition that such an act is merely fortuitous and random.<sup>192</sup> Therefore, despite an interactive website and some degree of “something more,” jurisdiction was not supported.

“Something more” can be supplied by the defendant’s Internet activities alone, provided those activities go beyond the mere maintenance of an interactive website. For example, in *Playboy Enterprises v. Asiafocus International, Inc.*,<sup>193</sup> personal jurisdiction was proper over Hong Kong defendants who actively attempted to

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187. *Raju*, 241 F. Supp. 2d at 590. Indeed, the defendant did not make a secret of using the plaintiff’s material. His site advertised “100% actual questions, which were never published in any GMAT books and material.” *Id.* at 591. Additionally, the website stated that 74% of recent test takers scoring over 700 on the GMAT were from India, China, Korea, Japan, and Taiwan, but only 22% of all test takers come from these countries. The court noted that “[t]he [defendant’s] website attributes this disproportionate success to the fact that ‘most of [these high scorers from these countries] have access to 100 percent of unpublished previous questions in these countries.’” *Id.*

188. *Id.* at 590–91.

189. *Id.* at 595.

190. *Id.*

191. *Id.* at 595 & n.13 (citing *Chung v. Nana Development Corp.*, 783 F.2d 1124 (4th Cir. 1986)). *Chung* held that, while a single forum contact could give rise to personal jurisdiction if it is “substantial and continuing,” like the 20-year contract in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 487 (1985), an “isolated” or “attenuated” single contact will not support personal jurisdiction. 783 F.2d at 1127–28.

192. *Graduate Mgmt. Admission Council*, 241 F. Supp. 2d at 595 (citing *Heathmount A.E. Co. v. Technodome.com*, 106 F. Supp. 2d 860 (E.D. Va. 2000); *America Online, Inc. v. Huang*, 106 F. Supp. 2d 848, 856–57 (E.D. Va. 2000)).

193. No. 97-734-A, 1998 U.S. Dist. LEXIS 10359 (E.D. Va. Feb. 2, 1998).

divert Internet users to their webpages.<sup>194</sup> This suit arose when Playboy Enterprises learned that the defendants were using Playboy's trademarked terms on their webpages.<sup>195</sup> The defendants' websites were interactive, selling subscriptions to view pictures,<sup>196</sup> and merchandise such as playing cards, key chains, calendars, and wrist watches.<sup>197</sup> However, the defendants did "something more" than just maintain interactive websites. They "purposefully employed deceptive tactics to attract consumers," such as embedding the plaintiff's trademarked terms "playboy" and "playmate" into the website's source code so that search engines would list their sites when consumers searched for those words.<sup>198</sup> The defendants also paid other website owners to advertise the defendants' websites, giving the advertising websites four cents for each hit on defendants' websites that was directed there by the advertising sites.<sup>199</sup> Even under the Fourth Circuit's modified test, the judge determined that the combination of these activities supported personal jurisdiction.<sup>200</sup>

Circuits that do not expressly require "something more" will still consider the defendant's activities in addition to maintaining a website. For example, in *Rio Properties, Inc. v. Rio International Interlink*,<sup>201</sup> the Ninth Circuit<sup>202</sup> considered whether the district court properly exercised personal jurisdiction over a Costa Rican company that operated an online gambling website.<sup>203</sup> The plaintiff, Rio

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194. *Id.* at \*10–14.

195. *Id.* at \*8.

196. *Id.* at \*6.

197. *Id.* at \*8.

198. *Id.*

199. *Id.* at \*9.

200. *Id.* at \*12.

201. 284 F.3d 1007 (9th Cir. 2002).

202. Although the Ninth Circuit repeatedly uses the term "something more" in its Internet personal jurisdiction analysis, it does so in reference to "something more" than maintaining a *passive* website. See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418–19 (9th Cir. 1997). This position is consistent with the *Zippo* sliding scale rather than a modification of it. However, some district courts have incorporated a "something more" requirement into the sliding scale itself. See, e.g., *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 921 (D. Or. 1999) ("[T]he middle interactive category of Internet contacts as described in *Zippo* needs further refinement to include the fundamental requirement of personal jurisdiction: 'deliberate action' within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state. This, in the court's view, is the 'something more' that the Ninth Circuit intended in *Cybersell* and *Panavision*." (citations omitted)).

203. *Rio Properties*, 284 F.3d at 1012, 1019.

Properties, alleged that the defendant, Rio International Interlink, infringed the plaintiff's trademark in the well-known Rio All-Suite Casino Resort located in Las Vegas.<sup>204</sup> In addition to maintaining an interactive website, the defendant ran radio and print advertisements in the forum.<sup>205</sup> The court considered all of these acts together in concluding that personal jurisdiction was proper.<sup>206</sup>

In sum, courts that require "something more" than an interactive website require the plaintiff to show that the defendant purposefully targeted the forum; mere interaction with the forum is not enough. However, the court will consider both Internet and non-Internet activities in its analysis.

*b. "Something more" in the context of  
general personal jurisdiction in international cases*

It should be unsurprising that most courts require more than merely maintaining an interactive website to support general personal jurisdiction.<sup>207</sup> Indeed, substantial case law exists where the defendant had both an interactive website and non-Internet contacts, yet the court refused to exercise general personal jurisdiction.<sup>208</sup> The Fourth Circuit stated the rule directly: "We are not prepared at this time to recognize that a State may obtain general jurisdiction over out-of-state persons who regularly and systematically transmit electronic signals into the State via the Internet based solely on those transmissions. Something more would have to be demonstrated."<sup>209</sup>

However, even where the defendant's activities supply "something more," general personal jurisdiction is rarely supported. For example, in *Berthold Types Ltd. v. European Mikrograf Corp.*,<sup>210</sup> the court considered the defendant's additional contacts of attending

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204. *Id.* at 1012.

205. *Id.* at 1020.

206. *Id.* at 1020–21.

207. See discussion *supra* Part B.1.c.

208. See, e.g., *Bird v. Parsons*, 2002 FED App. 0177P at 11 (6th Cir.) ("[T]he fact that [the defendant] maintains a website that is accessible to anyone over the Internet is insufficient to justify general jurisdiction."); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) (stating that the defendant's website and non-Internet contacts fell "well short of the 'continuous and systematic' contacts that . . . warrant general jurisdiction").

209. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 715 (4th Cir. 2002). The court did not, however, define what activities would satisfy "something more." *Id.*

210. 102 F. Supp. 2d 928 (N.D. Ill. 2000).

a tradeshow and sponsoring an upcoming seminar in the forum.<sup>211</sup> There, a maker of trademarked typefaces sued a German company for trademark violations.<sup>212</sup> Although the defendant's website was interactive,<sup>213</sup> the court concluded that, even in combination, these contacts could not be considered systematic and continuous.<sup>214</sup> Therefore, the case was dismissed.<sup>215</sup>

Due to the high standard of contacts required for general personal jurisdiction, it is rarely supported by Internet activities alone. This is true even under the traditional *Zippo* sliding scale analysis. In jurisdictions that require "something more," the standard for general personal jurisdiction is nearly impossible to satisfy. Therefore, the plaintiff must, where possible, assert a connection between the defendant's website and the cause of action in order to claim specific personal jurisdiction.

### 3. The Effects Test: How It Applies to the Internet and Why It Relates to the Sliding Scale

The effects test is another often used analysis for personal jurisdiction based on Internet activities. Unlike the sliding scale, the effects test was not created for the Internet. Rather, it was adopted by the Supreme Court in *Calder v. Jones*,<sup>216</sup> where the actress Shirley Jones sued two employees of the National Enquirer over an allegedly libelous story.<sup>217</sup> Under this test, personal jurisdiction is proper over a foreign defendant where (1) the defendant acts intentionally, (2) the act is expressly aimed at the forum and (3) it causes harm, the brunt of which is suffered—and which the defendant knows is likely to be

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211. *Id.* at 934.

212. *Id.* at 929.

213. *Id.* at 930.

214. *Id.* at 934.

215. *Id.*

216. 465 U.S. 783 (1984). The concept of personal jurisdiction created by the defendant's act causing and effect in the forum predated this case. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971). However, *Calder* made clear the requirement of express aiming. See *Calder*, 465 U.S. at 783–84.

217. *Calder*, 465 U.S. at 784–86.

suffered—in the forum.<sup>218</sup> Though adopted in a libel case, this test has been applied to Internet intentional tort and business tort cases.<sup>219</sup>

In the context of website activities, many courts apply the sliding scale and effects tests separately, and will often apply both to determine whether personal jurisdiction is supported. For example, in *Bible & Gospel Trust v. Wyman*,<sup>220</sup> the court applied the tests separately and found that jurisdiction was not supported by either test.<sup>221</sup> There, an association which included Minnesota residents<sup>222</sup> sued a Canadian defendant in U.S. district court in Minnesota for business interference.<sup>223</sup> The defendant maintained a website that defamed the plaintiff and published unauthorized copies of the plaintiff's copyrighted material.<sup>224</sup>

First, the court applied the sliding scale and determined that, although the website fell into the middle category, the level of commercial interactivity was not sufficient to support personal jurisdiction.<sup>225</sup> Next, the court considered the effects test.<sup>226</sup> The court also determined that the effects test could not support jurisdiction because the website was not specifically directed to Minnesota residents.<sup>227</sup> Therefore, under either test, jurisdiction was not supported.<sup>228</sup>

Other courts apply the effects test, but use the sliding scale to determine whether the defendant's website can satisfy the "expressly aimed at the forum" element. This approach was used in *Pebble Beach Co. v. Caddy*,<sup>229</sup> where the Pebble Beach Company, well-known for its golf courses, brought a trademark infringement suit

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218. *Rio Props. v. Rio Int'l Interlink*, 284 F.3d 1007, 1019–20 (9th Cir. 2002) (citing *Calder*, 465 U.S. at 788–89).

219. TiTi Nguyen, Note, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKELEY TECH. L.J. 519, 532 (2004).

220. 354 F. Supp. 2d 1025 (D. Minn. 2005).

221. *Id.* at 1031.

222. An unincorporated association is a citizen of every state where a member resides. *Hummel v. Townsend*, 883 F.2d 367, 369 (5th Cir. 1989) (citing *United Steelworkers of Am. v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965)).

223. *Bible*, 354 F. Supp. 2d at 1027.

224. *Id.*

225. *Id.* at 1029–30.

226. *Id.* at 1030–31.

227. *Id.* at 1031.

228. *Id.* at 1029–31.

229. 453 F.3d 1151 (9th Cir. 2006).

against the owner of a British bed-and-breakfast also named “Pebble Beach.”<sup>230</sup> The defendant maintained a minimally interactive website—it allowed visitors to fill out a form requesting more information, but visitors could not make reservations or pay online.<sup>231</sup>

The court analyzed the defendant’s actions under the effects test.<sup>232</sup> While parts of the test appeared to be satisfied, the critical inquiry became whether the defendant targeted the forum.<sup>233</sup> In considering whether the defendant’s website could satisfy this element, the court analyzed the website’s level of interactivity.<sup>234</sup> Ultimately, the court concluded that the website was not sufficiently interactive to support a finding that the defendant intentionally targeted the forum.<sup>235</sup>

Still other courts, by requiring “something more,”<sup>236</sup> have incorporated elements of the effects test into the sliding scale.<sup>237</sup> For example, the Third Circuit’s intentional interaction requirement is reminiscent of the effects test’s express-aiming requirement, as is the Fourth Circuit’s purposeful-targeting requirement.<sup>238</sup>

Whether the courts apply the effects test or the modified sliding scale, the plaintiff must prove the defendant targeted the forum. However, as with many aspects of traditional jurisdiction tests, it may be time to rethink the concept of “targeting” in the Internet age.<sup>239</sup>

#### 4. The Stream-of-Commerce Analysis as Applied to International Internet Cases

Courts will also consider the stream-of-commerce analysis in Internet cases. This analysis applies where a defendant does not directly deliver its products to the forum, but rather sells the products

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230. *Id.* at 1153.

231. *Id.* at 1153–54.

232. *Id.* at 1159–60.

233. *Id.* at 1158–59.

234. *Id.* at 1158.

235. *Id.* at 1160.

236. *See supra* Part B.2.

237. Nguyen, *supra* note 219, at 536 (“These ‘new’ additions to *Zippo* should look familiar; they are characteristics of the traditional test. Thus, even after creating and adopting a new, Internet-specific personal jurisdiction test, courts, either unwittingly or purposefully, returned to what is familiar and well-developed: the traditional personal jurisdiction test.”).

238. *See supra* Part B.2.

239. *See infra* Part B.5.

in the forum through a third party. Under the stream-of-commerce test, a court may “assert[] personal jurisdiction over a corporation that delivers its products into the stream-of-commerce with the expectation that they will be purchased by consumers in the forum State.”<sup>240</sup> However, the U.S. Supreme Court has never reached a majority opinion over whether the defendant must do something more than merely place the product into the stream-of-commerce before jurisdiction is proper.

*a. The disputed requirement of “more”  
in the stream-of-commerce test*

In *Asahi Metal Industry Co. v. Superior Court*,<sup>241</sup> the U.S. Supreme Court addressed, but did not answer, the question of whether a defendant could be subject to personal jurisdiction merely because it was aware that its products would reach the forum state through the stream-of-commerce.<sup>242</sup> There, a motorcyclist was injured in an accident and sued the Taiwanese manufacturer of the motorcycle’s tires in a California court.<sup>243</sup> The tire manufacturer then filed an indemnity claim against the Japanese company that manufactured the tire’s valve.<sup>244</sup> Although the Japanese manufacturer may have known that its valves were incorporated into tires sold in California, there was no indication that the company targeted that forum.<sup>245</sup>

Justice O’Connor, joined by three other Justices, concluded that “[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”<sup>246</sup> Therefore, personal jurisdiction is not supported under her analysis unless the defendant’s conduct, outside of merely placing a product in the stream-of-commerce, indicates an intent or purpose to serve the forum market.<sup>247</sup> Examples of such conduct given by O’Connor include designing the product for the forum,

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240. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980).

241. 480 U.S. 102 (1987).

242. *Id.* at 105.

243. *Id.* at 105–06.

244. *Id.* at 106.

245. *Id.* at 112–13.

246. *Id.* at 112.

247. *Id.*



advertising in the forum, establishing channels for providing regular advice to forum customers, or marketing through a sales agent in the forum.<sup>248</sup>

In his concurrence, Justice Brennan, joined by three other Justices, rejected this requirement of additional conduct.<sup>249</sup> Rather, he concluded that jurisdiction should be proper where the defendant is aware that its final product is being marketed in the forum.<sup>250</sup> In such a circumstance, a defendant should foresee being haled into court in the forum, since it receives an economic benefit in exchange for being subject to personal jurisdiction.<sup>251</sup>

Justice Stevens wrote a separate opinion, but that opinion is generally given less weight.<sup>252</sup> The case was ultimately disposed on the grounds that personal jurisdiction was not reasonable as applied to the facts, which left the question of targeting unanswered.<sup>253</sup>

*b. Sliding into the stream-of-commerce*

Courts will analyze whether the defendant's website can supply the "more" required by O'Connor's stream-of-commerce analysis. For example, in *Commissariat a l'Energie Atomique v. Chi Mei Optoelectronics Corp.*,<sup>254</sup> the court granted discovery to determine whether the defendant's website was a channel for providing regular advice to forum customers—one of the O'Connor factors.<sup>255</sup> There, a French government research agency sued a Taiwanese company in the District of Delaware for patent infringement.<sup>256</sup> Although the Taiwanese company did not directly transact business within the forum,<sup>257</sup> its products were incorporated into machines that were sold in the forum by others.<sup>258</sup>

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248. *Id.*

249. *Id.* at 117.

250. *Id.*

251. *Id.*

252. *Id.* at 121. "The plurality opinion of Justice O'Connor and the concurrence of Justice Brennan are far more commonly relied upon because Justice Stevens wrote only for himself on this specific issue." *Trueposition, Inc. v. Sunon, Inc.*, No. 05-3023, 2006 U.S. Dist. LEXIS 39681, at \*23 n.7 (E.D. Pa. June 14, 2006).

253. *Asahi*, 480 U.S. at 116.

254. 395 F.3d 1315 (Fed. Cir. 2005).

255. *Id.* at 1323–24.

256. *Id.* at 1316–17.

257. *Id.* at 1317.

258. *Id.* at 1321.

Since the forum had not determined whether to follow O'Connor or Brennan's stream-of-commerce analysis, the court analyzed personal jurisdiction under both theories.<sup>259</sup> Although the court felt the Brennan standard was satisfied because the defendant anticipated that its products would be sold in Delaware, whether the O'Connor standard was satisfied was less clear.<sup>260</sup> Therefore, the court granted discovery to determine whether the defendant targeted the forum.<sup>261</sup> In its holding, the court pointed to the defendant's website as one possible source of evidence that the defendant intended to serve the forum market.<sup>262</sup>

Where a defendant's website is interactive and directed to the forum, it will supply the "more" required by the O'Connor analysis. For example, in *TruePosition, Inc. v. Sunon, Inc.*,<sup>263</sup> the court determined that the O'Connor standard was satisfied because the defendant's website included hyperlinks to distributors in the forum.<sup>264</sup> In that case, the plaintiff was a Pennsylvania corporation that manufactured products which incorporated cooling fans manufactured by the Taiwanese defendant.<sup>265</sup> The plaintiff bought the fans from the defendant's Pennsylvania distributor, rather than directly from the defendant, making the stream-of-commerce test applicable.<sup>266</sup> When many of the fans later failed, the plaintiff sued in Pennsylvania district court.<sup>267</sup>

Noting that the Third Circuit has not determined which stream-of-commerce analysis it follows, the court concluded that personal jurisdiction was proper under either test.<sup>268</sup> In determining that the O'Connor test was satisfied, the court focused on the defendant's website.<sup>269</sup> Consistent with the sliding scale, the court analyzed the

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259. *Id.* at 1323–24.

260. *Id.* at 1321–22.

261. *Id.* at 1323.

262. *Id.* at 1323–24.

263. No. 05-3023, 2006 U.S. Dist. LEXIS 39681 (E.D. Pa. June 14, 2006).

264. *Id.* at \*25–26 (noting that "a mix of Internet and non-Internet contacts" could support a showing of purposeful availment before specifically focusing on the defendant's website).

265. *Id.* at \*3–5.

266. *Id.*

267. *See id.* at \*6.

268. *Id.* at \*23–28.

269. *Id.* at \*25–26; *see supra* text accompanying note 264.

level of interactivity of the website.<sup>270</sup> Based in part upon the website's hyperlinks to authorized distributors in the United States, including some in Pennsylvania, the court determined that the website was interactive and targeted the forum.<sup>271</sup> Therefore, the defendant's conduct indicated intent to transact business with the forum.<sup>272</sup>

It is clear that the sliding scale can be incorporated into the stream-of-commerce test, particularly to satisfy the O'Connor analysis. When doing so, courts again look for evidence that the defendant targeted the forum. However, courts should expand their definition of targeting in light of technological advances.

#### 5. Further Evolution?: Geolocation Software as a Proposed Additional Factor in the Personal Jurisdiction Analysis

Whether applying the modified sliding scale, the effects test, or O'Connor's stream-of-commerce test, courts will assert personal jurisdiction only where there is an indication that the defendant targeted the forum. However, available technology can block users from certain fora, and courts should consider this in their targeting analysis.

##### *a. Geolocation technology*

Geographic identification and blocking technology is available and not prohibitively expensive.<sup>273</sup> Although this technology is not yet commonplace, some companies already use it.<sup>274</sup> The most common form of geolocation technology is a database of IP addresses.<sup>275</sup> When a potential customer attempts to access a vendor's website, the vendor's server identifies the user's IP address

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270. *TruePosition*, 2006 U.S. Dist. LEXIS 39681, at \*25–26.

271. *Id.*

272. *Id.* at \*25–27.

273. Dan Jerker B. Svantesson, *The Legal Implications of Geo-identification* 1–2, 4 (July 2005) (Conference paper presented at Australasian Law Teachers Association Conference), <http://www.svantesson.org/computerlaw20050623web.doc>. This technology has not been well-known until recently. Indeed, as recently as 2002, the United States Supreme Court stated: “Web publishers currently lack the ability to limit access to their sites on a geographic basis. . . .” *Ashcroft v. ACLU*, 535 U.S. 564, 577 (2002).

274. Geist, *supra* note 17, at 15.

275. An IP address is “the numerical sequence that identifies an Internet server.” Dictionary.com, <http://dictionary.reference.com/browse/ip%20address> (last visited Apr. 14, 2007).

and sends it to the geolocation software provider.<sup>276</sup> The software provider then compares it against a database of known locations of IP addresses and sends back an educated guess as to the location of the potential customer.<sup>277</sup> All of this occurs after a user enters the website address into the browser, but before the webpage is displayed.<sup>278</sup> Therefore, a user from a prohibited area will never see the blocked webpages.<sup>279</sup>

This software is very accurate.<sup>280</sup> The claimed accuracy rate, though it cannot be independently verified, is 98 to 99.5% at the national level.<sup>281</sup> Although the accuracy rate is lower for divisions smaller than a country, users' locations can be narrowed down to the city with an accuracy of 85 to 90% inside the United States.<sup>282</sup> Therefore, online businesses could block specific U.S. states.

*b. A proposed personal jurisdiction analysis for the Internet*

A more appropriate personal jurisdiction analysis would merge the *Zippo* sliding scale with a sliding scale of efforts to limit contact with the relevant jurisdiction. Most importantly, this analysis would retain the modified sliding scale requirement of targeting, but expand the definition of targeting to account for developments in geolocation technology.

The first step of the analysis would be to determine the level of *commercial* interactivity of the website. An e-mail hyperlink or a downloadable user manual is not significant commercial interactivity, even though the user interacts with the website. Rather,

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276. Svantesson, *supra* note 273, at 3.

277. Info. Tech. Ass'n of Am., ECOMMERCE TAXATION AND THE LIMITATIONS OF GEOLOCATION TOOLS 3-4, available at <http://www.ita.org/taxfinance/docs/geolocationpaper.pdf>; Svantesson, *supra* note 273, at 3.

278. See Svantesson, *supra* note 273, at 3-4.

279. See *id.*

280. Readers can see an example of this software in use at IP2Location, <http://www.ip2location.com> (last visited April 14, 2007).

281. Info. Tech. Ass'n of Am., *supra* note 277, at 5.

282. *Id.* The accuracy rate falls for geographical divisions smaller than a country because of the way that IP addresses are assigned. *Id.* Because of a shortage of IP addresses, most IP addresses are not assigned to individual users, but rather to countries. *Id.* at 3. These addresses are recycled, called dynamic addressing, as individual users within that country sign on and off of the Internet. *Id.* In developed countries, rather than maintaining the IP addresses at the country level, they are assigned to cities. *Id.* Therefore, user locations can be accurately identified with much more specificity in developed countries than undeveloped. See *id.*

the court would look for evidence that the defendant intended to transact business from the website.

Where the website is commercially interactive, more analysis would be needed. This analysis, like *Zippo*, would place the websites along a sliding scale. At the low end of the scale would be websites that facilitate transactions where a user delivers his or her performance over the Internet, but where the product or service does not actually enter the user's forum. This would include, for example, a hotel website that allows a user to reserve and pay for rooms online, but the user still must travel to the hotel's location to use the service.

The middle of the commercial interactivity scale would consist of websites that allow a user to order and pay for products over the Internet, but where the websites' operators control delivery of their products or services. Many e-commerce businesses fall into this category. For example, a bookseller may allow users to place orders over the Internet, but may refuse to ship to certain locations.

The highest end of the sliding scale would consist of websites that allow an entire transaction, both the seller's and purchaser's performances, to be completed online. Examples include websites selling downloadable software or offering online gambling.

The second step of the inquiry would compare the level of commercial activity to a sliding scale of geographic blocking efforts. Operators of websites at the low end of the commercial interactivity scale would not be expected to utilize any access blocking technology. Any business generated from the outside the business's forum would be seen as random and fortuitous.

In the middle category of the commercial interactivity scale, where a vendor can control shipping, technologically simple means to block a forum would suffice. For example, a vendor could require registering for a free user account to access interactive features, and in the process, users would be told that the vendor would not interact with certain geographic locations.<sup>283</sup> If a user entered fraudulent information to obtain an account, the vendor could simply refuse to ship to that customer. Other common methods of identifying a

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283. See *Playboy Enters. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032, 1044-45 (S.D.N.Y. 1996).

customer's location, such as checking the zip code of a user's credit card billing address, could also be used.

Finally, operators of websites at the high end of the commercial interactivity scale, where both the purchaser and vendor complete performance over the Internet, would be required to use geolocation software or be subject to specific personal jurisdiction in any forum where it has customers. While it is true that a website operator may not be able to block 100% of users from certain forums, courts should view a defendant who took all available and reasonable steps to prevent a user from accessing the forum as not having purposefully availed itself of the forum. Conversely, operators of highly commercially interactive websites that do not make good faith efforts to block a forum should be seen as purposefully availing themselves of that forum. Moreover, by requiring this technology only for highly interactive websites, less sophisticated users who may not be aware of the software would not be impacted.

Under this proposed analysis, jurisdiction would have been proper in *Graduate Management Admission Council v. Raju*.<sup>284</sup> There, the defendant operated a website which sold and shipped test preparation materials.<sup>285</sup> The site contained special ordering instruction for customers in the United States, and the company had shipped products to at least two forum state residents.<sup>286</sup>

Under the proposed analysis, the first inquiry is whether the defendant's website was commercially interactive. In this case, the website would fall into the middle of the scale because the defendant accepted orders over the Internet, but also controlled shipping of his products.<sup>287</sup> The next inquiry would be whether the defendant made minimal efforts to exclude forum customers. Here, the defendant made no effort to block Virginia customers. Indeed, the defendant had shipped to Virginia customers on at least two occasions.<sup>288</sup> Moreover, the website contained special ordering instructions for U.S. customers.<sup>289</sup> Therefore, the defendant purposefully availed himself to the forum, and personal jurisdiction would be proper.

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284. 241 F. Supp. 2d 589 (E.D. Va. 2003); *see also supra* Part B.2.a.

285. *Raju*, 241 F. Supp. 2d at 591.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

C. *Consenting to Personal Jurisdiction: The Effect and Effectiveness of Forum Selection Clauses in International Transactions*

Personal jurisdiction is a waivable right, and parties can consent, either expressly or impliedly, to being sued in a particular forum.<sup>290</sup> This section analyzes the effect of forum selection clauses on litigation in U.S. federal courts by first describing how a choice of forum clause can be used to defeat the jurisdiction of U.S. courts, or alternatively, to designate a U.S. court as the required forum. This section will also examine the effect of international agreements on those agreements. Finally, this section examines the effectiveness of click-wrap and browse-wrap choice of forum contracts common to e-commerce transactions.

1. The Effect of Forum Selection Clauses

Forum selection clauses can be non-exclusive or exclusive.<sup>291</sup> Non-exclusive forum selection clauses, also called permissive forum selection clauses, permit, but do not require, a party to sue in the designated forum.<sup>292</sup> Therefore, a party *could* bring suit in another forum that has jurisdiction.<sup>293</sup> By contrast, exclusive forum selection clauses, also called mandatory forum selection clauses, *require* a party to bring suit in the designated forum.<sup>294</sup>

In the commercial setting, parties often agree by contract at the time of the transaction where future disputes will be litigated.<sup>295</sup> Where these choice of forum clauses are freely negotiated and not “unreasonable and unjust,” they are typically upheld.<sup>296</sup> Courts will even uphold forum selection clauses in adhesion contracts,<sup>297</sup> provided the contract is not contrary to public policy of the forum.<sup>298</sup>

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290. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (citing *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)).

291. *See Blanco v. Banco Indus. De Venez., S.A.*, 997 F.2d 974, 979 (2d Cir. 1993).

292. *See id.*

293. *See id.*

294. *See id.*

295. *Burger King*, 471 U.S. at 473 n.14.

296. *Id.*

297. A contract of adhesion is a standardized contract that is offered without an opportunity for the subscribing party to negotiate the terms. *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1281 (9th Cir. 2006) (citing *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853 (2001)).

298. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 601 (1991).

Where the courts have federal question jurisdiction, they prefer to enforce forum selection clauses based on the precedent established in *M/S Bremen v. Zapata Off-Shore Co.*<sup>299</sup> There the Supreme Court held that a choice of forum clause designating the London Court of Justice as the exclusive forum should be upheld unless a trial in England is “so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court.”<sup>300</sup> In that case, a U.S. corporation hired a German corporation to tow its off-shore drilling rig from Louisiana to Italy.<sup>301</sup> After the rig was damaged en route, the U.S. corporation sued in U.S. district court based on admiralty federal question jurisdiction.<sup>302</sup> Although forum selection clauses had been disfavored by U.S. courts, the Supreme Court stated: “The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”<sup>303</sup> Therefore, choice of forum clauses will be upheld under federal law unless the party seeking to break the contract can make a strong showing that the forum selection term should be set aside.<sup>304</sup>

However, some federal courts are less receptive to forum selection clauses when sitting in diversity. In such cases, the courts are split as to whether federal or state law controls forum selection clause enforcement.<sup>305</sup> The Ninth and Eleventh Circuits have held that federal law controls, whereas the Third Circuit has determined that state law controls.<sup>306</sup> Where state law controls, forum selection clauses are still usually upheld, as many states follow the *Bremen* precedent.<sup>307</sup> However, some states do not follow *Bremen*.<sup>308</sup> For

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299. 407 U.S. 1 (1972).

300. *Id.* at 18.

301. *Id.* at 2.

302. *Id.* at 3–4.

303. *Id.* at 9.

304. *See id.* at 10.

305. Nicholas S. Shantar, Note, *Forum Selection Clauses: Damages in Lieu of Dismissal?*, 82 B.U. L. REV. 1063, 1073 (2002).

306. *Id.*

307. Jason Webb Yackee, Note, *A Matter of Good Form: The (Downsized) Hague Judgments Convention and Conditions of Formal Validity for the Enforcement of Forum Selection Agreements*, 53 DUKE L.J. 1179, 1186–88 (2003).

308. *Id.*



example, Tennessee refuses to enforce forum selection clauses, and Illinois does not enforce forum selection clauses in form contracts.<sup>309</sup> Iowa and Montana generally do not enforce outbound forum selection clauses.<sup>310</sup>

Therefore, except where the court sits in diversity and applies state law that disfavors forum selection clauses, the selection clause will likely be enforced.

*a. CISG: The special case of  
business-to-business international sales of goods*

Where the transaction is an international sale of goods, the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) may apply. The CISG is a product of the United Nations Commission on International Trade Law (“UNCITRAL”).<sup>311</sup> UNCITRAL aims to harmonize and unify international trade law and reduce obstacles to international trade.<sup>312</sup> It has been called one of the most prominent sources of international contract law.<sup>313</sup>

As its name suggests, the CISG applies only to sales of goods,<sup>314</sup> and only where those goods are not for personal, family, or household use.<sup>315</sup> Moreover, it applies only where the parties to a transaction have their places of business in different countries which are parties to the Convention.<sup>316</sup> Where a party has more than one place of business, that party’s place of business with the closest relationship to the contract formation and performance is used for determining whether the CISG applies.<sup>317</sup>

The CISG does not directly address forum. However, Article 57, which requires payment to be made at the seller’s place of

309. *Id.* at 1187.

310. *Id.* at 1187–88.

311. UNITED NATIONS, THE UNCITRAL GUIDE: BASIC FACTS ABOUT THE UNITED NATION NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 12 (2006), available at <http://www.uncitral.org/pdf/english/texts/general/V0650941.pdf>.

312. *Id.* at 7.

313. Kenneth D. Crews, *ECommerce*, LEARNING CYBERLAW IN CYBERSPACE, <http://www.cyberspacelaw.org/crews> (last visited Apr. 14, 2007).

314. United Nations Convention on Contracts for the International Sale of Goods art. 1(1), Apr. 11, 1980, 19 I.L.M. 668, 671 [hereinafter CISG].

315. *Id.* art. 2(a).

316. *Id.* art. 1. The CISG preamble contains a list of countries that have ratified the Convention. *Id.* pmbl.

317. *Id.* art. 10(a).

business,<sup>318</sup> has been interpreted by courts as granting jurisdiction to the courts of the seller's place of business to settle payment disputes.<sup>319</sup> However, this jurisdiction can be avoided by an exclusive forum selection clause.<sup>320</sup>

For example, in *Tyco Valves & Controls Distribution GmbH v. Tippins, Inc.*,<sup>321</sup> a federal court refused to enforce a judgment rendered by a German court because it was contrary to the chosen forum specified in the contract.<sup>322</sup> The transaction implicated the CISG because it involved a contract for the sale of valves between a German seller and a U.S. purchaser.<sup>323</sup> When the purchaser failed to make the final payment on the order, the seller sued in Germany.<sup>324</sup> The seller relied on CISG Article 57 for jurisdiction, as Germany was the seller's place of business,<sup>325</sup> and the German court entered a default judgment against the purchaser.<sup>326</sup>

However, when the plaintiff sought to enforce the judgment in a U.S. district court, the defendant claimed that the German judgment was contrary to an exclusive choice of forum clause between the parties.<sup>327</sup> Indeed, the contract between the parties contained a clause requiring disputes to be decided by arbitration in Vienna.<sup>328</sup> Since the express choice of forum clause was accepted by the plaintiff,<sup>329</sup> the court dismissed the plaintiff's complaint seeking enforcement of the German judgment and granted summary judgment for the defendant.<sup>330</sup>

Although the CISG should be considered by parties to a transaction, it may not apply to many Internet sales. By excluding from its scope purchases for personal, home, or family use, the CISG

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318. *Id.* art. 57(a). Alternatively, payment is required at the place where the goods are handed over, if payment is to be made against the handing over. *Id.* art. 57(b).

319. Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299, 373-74 (2004).

320. *Id.* at 374-75.

321. No. 04-1626, 2006 U.S. Dist. LEXIS 77180 (W.D. Pa. Oct. 10, 2006).

322. *Id.* at \*20-21.

323. *Id.* at \*3.

324. *Id.* at \*9.

325. *Id.*

326. *Id.* at \*10.

327. *Id.* at \*1-2.

328. *Id.* at \*5-6.

329. *Id.* at \*17-18.

330. *Id.* at \*21.

excludes many e-commerce transactions.<sup>331</sup> However, business purchasers wishing to avoid personal jurisdiction in the seller's forum will want to contract around the CISG default rules.<sup>332</sup>

*b. The Hague Convention on Choice of Court Agreements:  
What the future may hold for business-to-business  
international sales of goods*

Recently, the Hague Conference on Private International Law, an intergovernmental organization that works to unify private international law by negotiating treaties,<sup>333</sup> set forth the Convention on Choice of Court Agreements ("Convention").<sup>334</sup> If signed by the United States, the Convention will affect both forum selection clauses and enforcement of judgments resulting from those clauses, though its scope is limited to international business-to-business transactions.<sup>335</sup> The Convention is not, however, intended to be a tool for litigation.<sup>336</sup> Rather, it seeks to facilitate international trade by upholding the agreements of the parties.<sup>337</sup>

Under the Convention, where an exclusive choice of forum clause is used, the chosen forum must hear the case.<sup>338</sup> The only exceptions to this rule are set forth in the Convention, such as where the agreement is void under the law of that forum.<sup>339</sup> Therefore, a chosen court could not dismiss the case on the grounds of forum non

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331. CISG, *supra* note 314, art. 2(a).

332. *Id.* art. 6.

333. The Hague Conference on Private International Law, Information on the Hague Conference on Private International Law, [http://www.hcch.net/index\\_en.php?act=text.display&tid=4](http://www.hcch.net/index_en.php?act=text.display&tid=4) (last visited Apr. 14, 2007).

334. Convention on Choice of Court Agreements, 20th Diplomatic Session, June 30, 2005, 44 I.L.M. 1294, available at [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=98](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98).

335. Ronald A. Brand, *The New Hague Convention on Choice of Court Agreements*, ASIL INSIGHT, July 26, 2005, <http://www.asil.org/insights/2005/07/insights050726.html>. The Convention was originally intended to cover consumer transactions, and it was not signed by the member states. *Id.* For a general explanation of the Convention's impact on forum selection in transnational disputes, see Emil Petrossian, *Developments, In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England*, 40 LOY. L.A. L. REV. 1257, 1326–29 (2007).

336. Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 547 (2005).

337. *Id.*

338. Convention on Choice of Court Agreements, *supra* note 334, arts. 5(1)–(2).

339. *See id.* arts. 5(1), 6, 19.

conveniens.<sup>340</sup> Moreover, a court not chosen by the exclusive forum selection clause must dismiss the case.<sup>341</sup>

The Convention also pertains to enforcing judgments of foreign courts. Indeed, the Convention originated with a request from the United States to create a convention targeted toward enforcing foreign judgments<sup>342</sup> because the United States had been willing to enforce the judgments of foreign courts, while foreign courts were less ready to enforce U.S. judgments.<sup>343</sup>

Under the Convention, a member country must enforce the judgment of a court chosen by an exclusive choice of forum clause.<sup>344</sup> Moreover, unless the judgment was rendered by default, the courts of the enforcing forum may not review the merits of the case.<sup>345</sup> Additionally, though not required, member countries may also enforce the judgments of foreign courts designated in non-exclusive forum selection clauses.<sup>346</sup> However, the Convention does not prohibit a country from enforcing the judgment of a court not chosen by the forum selection clause.<sup>347</sup> Thus, the Convention leaves open the possibility of parallel litigation, though the chosen court cannot defer to the parallel suit.<sup>348</sup>

Forum selection clauses can be effective in controlling the location of a suit. In cases where a judgment is given in a non-selected forum, these clauses can affect whether a judgment is later enforced. Therefore, in an international transaction, parties would be wise to limit their jurisdictional exposure.

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340. Teitz, *supra* note 336, at 550–51. Forum non conveniens is the principle that a court may refuse to hear a case even when jurisdiction is authorized if the forum is extremely inconvenient for the defendant. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

341. Convention on Choice of Court Agreements, *supra* note 334, art. 6.

342. Brand, *supra* note 335.

343. Teitz, *supra* note 336, at 548.

344. Convention on Choice of Court Agreements, *supra* note 334, art. 8(1).

345. *Id.* art. 8(2).

346. *Id.* art. 22.

347. Teitz, *supra* note 336, at 554.

348. *Id.*

## 2. The Effectiveness of Forum Selection Clauses in Click-Wrap and Browse-Wrap Contracts

In e-commerce transactions, choice of forum clauses are often contained in the website's click-wrap or browse-wrap.<sup>349</sup> Indeed, virtually every business operating online has a forum selection clause,<sup>350</sup> except in the European Union, where choice of forum clauses are ineffective for online transactions.<sup>351</sup> Click-wrap typically appears in a pop-up window and requires the purchaser to manifest assent by clicking a button labeled "accept" before the transaction may proceed.<sup>352</sup> In contrast, browse-wrap contract terms are typically located on a separate webpage accessible from the transactional webpage by a hyperlink marked "Legal" or "Terms."<sup>353</sup> With browse-wrap, the purchaser is deemed to assent to the terms merely by visiting the website.<sup>354</sup> Accordingly, the purchaser may not even be aware of the existence of the terms on the webpage when completing the transaction.<sup>355</sup>

### *a. Enforcing click-wrap and browse-wrap terms*

Click-wrap contracts are typically upheld.<sup>356</sup> Since the purchaser must click to accept the terms, the purchaser has manifested assent to those terms.<sup>357</sup> Despite the argument that purchasers rarely familiarize themselves with the terms before mechanically clicking

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349. The terms "click-wrap" and "browse-wrap" are derived from the term "shrink-wrap," which was the term for contracts (typically for software) placed inside the plastic wrapping around the product's box. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 22 n.4 (2d Cir. 2002); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

350. Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 AM. BUS. L.J. 531, 566 (2002).

351. *Id.* at 567. Forum selection clauses are ineffective for all consumer transactions in the European Union. *Id.*

352. *Specht*, 306 F.3d at 22 n.4.

353. Jane K. Winn, *Contracting Spyware by Contract*, 20 BERKELEY TECH. L.J. 1345, 1351 (2005).

354. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004) ("[A] browse wrap license is part of the web site and the user assents to the contract when the user visits the web site." (citing *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000))).

355. *Pollstar*, 170 F. Supp. 2d at 980-81.

356. *Specht*, 150 F. Supp. 2d at 594 ("The few courts that have had occasion to consider click-wrap contracts have held them to be valid and enforceable."); *In re RealNetworks, Inc. Privacy Litig.*, No. 00 C 1366, 2000 U.S. Dist. LEXIS 6584, at \*2, \*20-21 (N.D. Ill. May 11, 2000) (upholding contract terms appearing in a pop-up window).

357. Winn, *supra* note 353, at 1351.

the box, contract law contains a duty to read.<sup>358</sup> Therefore, like other choice of forum contracts, choice of forum contracts contained within click-wrap are upheld unless they are unreasonable, unconscionable, or contrary to the public policy of the forum.<sup>359</sup> Additionally, courts will uphold choice of forum contracts although they designate a forum distant to some potential litigants.<sup>360</sup>

For example, in *In re RealNetworks, Inc. Privacy Litig.*,<sup>361</sup> the court upheld a choice of forum clause selecting arbitration in Washington.<sup>362</sup> There, the plaintiffs claimed that the defendant's software secretly allowed the defendant to access information on users' computers.<sup>363</sup> However, in order to download the software, the plaintiffs had to agree to the defendant's click-wrap contract, which included the forum selection clause.<sup>364</sup> The court concluded that the contract was not procedurally unconscionable, despite the fact that the terms appeared in a pop-up window that was hard to read, because a user could scroll through the pop-up window at length or copy the text into a word processing program and print it.<sup>365</sup> Moreover, the court concluded that the clause's selection of Washington as a forum was not substantively unconscionable because "[t]he designation of any state as a forum is bound to be distant to some potential litigants."<sup>366</sup> Accordingly, the court upheld the agreement.<sup>367</sup>

On the other hand, courts are less willing to enforce browse-wrap terms.<sup>368</sup> Although little case law on browse-wrap currently exists, courts typically strike down browse-wrap agreements, citing

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358. *Pimpinello v. Swift & Co., Inc.*, 170 N.E. 530, 531 (N.Y. 1930).

359. *See, e.g., Koch v. Am. Online, Inc.*, 139 F. Supp. 2d 690, 694-96 (D. Md. 2000) (upholding a forum selection clause as mandatory and finding that its enforcement was not unreasonable); *Caspi v. Microsoft Network LLC*, 732 A.2d 528, 529-32 (N.J. Super. Ct. App. Div. 1999) (enforcing an exclusive Washington choice of forum clause in a click-wrap agreement because it did not violate the public policy of New Jersey).

360. *In re RealNetworks*, 2000 U.S. Dist. LEXIS 6584, at \*18.

361. *Id.* at \*1.

362. *Id.* at \*2-3, \*21.

363. *Id.* at \*1.

364. *Id.* at \*2-3.

365. *Id.* at \*16-17.

366. *Id.* at \*18.

367. *Id.* at \*21.

368. *See, e.g., Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585, 596 (S.D.N.Y. 2001) (refusing to enforce the browse-wrap contract because the user did not assent to its terms).

concerns regarding lack of notice of terms and lack of assent.<sup>369</sup> One court has indicated, in dicta, that browse-wrap agreements “may be arguably valid and enforceable,”<sup>370</sup> but this is the minority position.

For example, in *Specht v. Netscape Communications Corp.*,<sup>371</sup> the court refused to enforce a browse-wrap choice of forum term that required arbitration in California.<sup>372</sup> There, the plaintiffs downloaded software from the defendant’s website.<sup>373</sup> Users could download the software without manifesting assent to the terms.<sup>374</sup> Indeed, the sole reference to a contract was available only if the user scrolled down the webpage to a section not initially visible.<sup>375</sup> If the user did scroll down the webpage, it stated that users had to agree to the licensing agreement before downloading the product, but the terms were contained on yet another webpage, accessible via a hyperlink.<sup>376</sup> In rejecting the defendant’s argument that downloading the product manifested assent to the contract, the court stated that the primary purpose of downloading software is to obtain the software, not to manifest assent.<sup>377</sup> Because mutual assent was lacking, the court refused to enforce the contract.<sup>378</sup>

*b. UCITA and the special case of software sales*

In some states, transactions for software are governed by the Uniform Computer Information Transactions Act (“UCITA”).<sup>379</sup> UCITA resulted from a rift between the two groups responsible for the Uniform Commercial Code (“UCC”).<sup>380</sup>

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369. See, e.g., *Defontes v. Dell Computers Corp.*, C.A., No. PC-03-2636, 2004 R.I. Super. LEXIS 32, at \*17 (Super. Ct. Jan. 29, 2004) (stating that the browse-wrap agreement “was not sufficient to put Plaintiffs on notice of the terms and conditions of the sale of the computer. As a result, the browsewrap agreement found on Dell’s webpage cannot bind the parties to the arbitration agreement.”).

370. *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000).

371. 150 F. Supp. 2d 585.

372. *Id.* at 589.

373. *Id.* at 587.

374. *Id.* at 588.

375. *Id.*

376. *Id.*

377. *Id.* at 595.

378. *Id.* at 596.

379. See, e.g., MD. CODE ANN., COM. LAW §§ 22-101 to -816 (West 2007).

380. Brian D. McDonald, *The Uniform Computer Information Transactions Act*, 16 BERKELEY TECH. L.J. 461, 462 (2001).

The UCC is a joint project of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and the American Law Institute (“ALI”).<sup>381</sup> Although the UCC is a model code with no authority of its own, it has been very influential on state statutes. Indeed, it “has given parties in traditional sales of goods a well-understood legal framework to establish contract formation, terms, and enforcement rights.”<sup>382</sup>

Believing that it was time to “adapt [the UCC] framework to the digital era” and the realities of global e-commerce,<sup>383</sup> the NCCUSL drafted the proposed Article 2B, which was aimed at software contracts and contracts for licenses to electronically access information.<sup>384</sup> However, the ALI would not agree to the changes, and the proposed Article 2B never became part of the UCC.<sup>385</sup> In response, the NCCUSL used their revisions to establish a separate model code, the UCITA.<sup>386</sup>

Under UCITA, both click-wrap contracts<sup>387</sup> and choice of forum clauses are enforceable.<sup>388</sup> In holding forum selection clauses enforceable, UCITA states that it is simply following the common law of U.S. courts.<sup>389</sup> Moreover, UCITA enforces choice of law clauses even where the law has no relationship to the transaction, stating:

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381. See Maureen A. O'Rourke, *An Essay on the Challenges of Drafting a Uniform Law of Software Contracting*, 10 LEWIS & CLARK L. REV. 925, 930 (2006).

382. U.C.C. Article 2B, *Preface* (Draft for Discussion Only 1998), available at <http://www.law.upenn.edu/blil/ulc/ucc2b/2b898.pdf> [hereinafter U.C.C. Article 2B Draft]. Goods are “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.” U.C.C. § 2-105(1) (amended 2003).

383. U.C.C. Article 2B Draft, *supra* note 382, at *Preface*.

384. U.C.C. Article 2B Draft, *supra* note 382, at § 2B-103. The NCCUSL felt that the distinction between information and goods was no longer meaningful. See *id.* intro. pt. 1.

385. McDonald, *supra* note 380, at 462.

386. American Association of Law Libraries Washington Affairs, A Quick Look at the Uniform Computer Information Transactions Act (UCITA), <http://www.aallnet.org/aallwash/UCITA2.html> (last visited Apr. 14, 2007).

387. U.C.I.T.A. §§ 112, 202(a), 206(b) available at <http://www.law.upenn.edu/blil/ulc/ucita/2002final.pdf>.

388. *Id.* § 110 cmt. 2 (“Choice of forum agreements are generally enforceable.”). The UCC takes no position on click-wrap or browse-wrap contracts. See U.C.C. § 2-207 cmt. 5 (amended 2003).

389. See U.C.I.T.A. § 208 cmt. 2, available at <http://www.law.upenn.edu/blil/ulc/ucita/002final.pdf>.



In a global information economy, limitations of that type are inappropriate, especially in cyberspace where physical locations are often irrelevant or not knowable. Parties may appropriately wish to select a neutral forum because neither is familiar with the law of the other's jurisdiction. In such a case, the chosen state's law may have no relationship at all to the transaction.<sup>390</sup>

However, UCITA has met controversy. Many claim that its terms favor software licensors over end-users, for example, by allowing terms to be disclosed after payment.<sup>391</sup> Largely for these reasons, only Maryland and Virginia have enacted UCITA.<sup>392</sup> Additionally, some states that have not adopted UCITA fear that a vendor could put a choice of forum clause into a contract and transfer the litigation to a state that has enacted UCITA. To prevent this, these states have enacted UCITA "bomb shelter" legislation, which voids any choice of forum or law clause that would result in the application of UCITA.<sup>393</sup> Because of UCITA's low approval rate among the states, NCCUSL announced in 2003 that it was no longer going to promote UCITA.<sup>394</sup>

In sum, click-wrap contracts are effective where they are formed by the mutual assent of both the website operator and the purchaser. Therefore, a click-wrap forum selection clause can control the forum where a dispute is heard. On the other hand, early cases on browse-wrap contracts indicate that most courts will not uphold them, because such contracts do not provide adequate notice to the purchaser, and therefore do not secure the purchaser's assent.

#### *D. Conclusion*

E-commerce and the increasing rate of purchases from foreign vendors have presented new concerns in assessing personal jurisdiction over foreign defendants. A court analyzing personal jurisdiction over a foreign defendant based on that defendant's

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390. *Id.* § 109 cmt. 2(a).

391. McDonald, *supra* note 380, at 463–68.

392. *Id.* at 461.

393. *See, e.g.*, IOWA CODE § 554D.125 (2001); N.C. GEN. STAT. § 66-329 (2005); W. VA. CODE ANN. § 55-8-15 (2006).

394. Press Release, National Conference of Commissioners on Uniform State Laws, UCITA Standby Committee is Discharged (Aug. 1, 2003), available at <http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=56>.

website is far more likely to assert specific personal jurisdiction than general personal jurisdiction. Therefore, a plaintiff must allege any and all connections between the website and the cause of action.

Additionally, courts will find jurisdiction only if the website is sufficiently interactive. Some courts also require the defendant to do “something more” than merely maintain a website, even a commercially interactive one, to indicate that the defendant purposefully targeted the jurisdiction. In that case, the court will consider the defendant’s Internet and non-Internet activities. Notably, courts have not yet incorporated geolocation technology into their targeting analysis, though geolocation technology allows foreign vendors to effectively block users from any or all of the United States from accessing their websites.

Due to fear of being sued in a foreign jurisdiction, many e-commerce vendors now limit their jurisdictional exposure through forum selection clauses. These terms are typically incorporated into a website’s click-wrap or browse-wrap. Where these terms are present, courts are far more likely to enforce click-wrap agreements than browse-wrap agreements, as assent is present in the former, but lacking in the latter. When these forum selection clauses are exclusive, the court will refuse to hear the case unless the plaintiff can make a showing that he or she will essentially be deprived of his or her day in court.

Foreign defendants should consider adjusting the visibility and acceptance requirements of the forum selection clauses in their user agreements to effectively limit their jurisdictional exposure. Finally, courts should consider the impact of technological advances, like geolocation technology, that would effectively limit a party’s jurisdictional exposure.

