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BACK TO THE FUTURE: REVISITING *ZIPPO* IN LIGHT OF “MODERN CONCERNS”

DAVID SWETNAM–BURLAND & STACY O. STITHAM

“Beliefs lawyers hold about computers, and predictions they make about new technology, are highly likely to be false. This should make us hesitate to prescribe legal adaptations for cyberspace. The blind are not good trailblazers.”¹

“It is the distant future. . .the year 2000 . . . The world is quite different ever since the robotic uprising of the late ‘90s.”²

“I’ve seen the future and the future’s nothing new.”³

In his concurrence in *J. McIntyre Machinery, Ltd. v. Nicastro*, Justice Breyer expressed concern that courts were fashioning rules of broad applicability with respect to personal jurisdiction without full consideration of “modern–day consequences” and “modern concerns.”⁴ The roll of companies (past and present) that have lent their name to textbook personal jurisdiction cases is impressive, from *International Shoe Company*⁵ to *Burger King*⁶ to *World–Wide Volkswagen*.⁷ But when it comes to what would appear to be the paramount “modern concern” of the past two decades—jurisdiction over a person or entity based on Internet presence—only one name springs to mind: Zippo Manufacturing Company. Fifteen years ago—several eons in Internet time—a district court in the Western District of Pennsylvania issued a landmark decision regarding a WEBSITE

1. Frank H. Easterbook, “Cyberspace and the Law of the Horse,” 1996 U. CHI. LEGAL F. 207.

2. FLIGHT OF THE CONCORDS, ROBOTS (Sub Pop Records 2008).

3. THE ALTERNATE ROUTES, THE FUTURE’S NOTHING NEW (Vanguard Records 2009).

4. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793 (2011).

5. *Int’l Shoe Co v. State of Wash.*, Office of Unemployment Compensation and Placement, 326 U.S. 310 (1945).

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

7. *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

owner's amenability to suit in a distant forum.⁸ At a time when businesses and consumers were just discovering the World Wide Web, the district court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.* envisioned a sliding scale of web-based presence that depended on a defendant's WEBSITE level of "interactivity," ranging from a "passive" information-only WEBSITE to an "interactive" retail WEBSITE through which direct sales could be made.⁹ Adopted, adapted, and abused over the past decade and more, we revisit the *Zippo* test in light of "modern concerns." More specifically, we ask whether the sliding scale has collapsed as the Internet has become virtually synonymous with interactivity, and, if so, what the courts should do about it.

Part I explores generally how courts have factored Internet presence into the personal jurisdiction analysis, including the predecessors and progeny of *Zippo*. Part II uses the microcosm of patent litigation—in which venue is proper in any court with personal jurisdiction over the defendant—to highlight some flaws in an approach to personal jurisdiction that treats a website as a special invitation to suit in distant fora. Part III offers our recommendation to retire *Zippo* now that the Internet has become a universal medium for information and commerce rather than the novelty it was perceived to be fifteen years ago. While *Zippo*, the case, contained a significant insight into the role of the Internet in personal jurisdiction, *Zippo*, the test, has strayed from that insight, becoming an impediment rather than an aid to jurisdictional analysis.

I. ORIGINS

Like the King in *Alice's Adventures in Wonderland*, in exploring the question of Internet presence in the context of a jurisdictional analysis, we will "begin at the beginning" and go on until we come to the end. The beginning, for all practical purposes, is *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996), a ruling issued back in the days when the Internet was a sufficient novelty as to require explanation:

The Internet is a global communications network linked principally by modems which transmit electronic data over telephone lines. World-wide there are approximately 20 to 30 million users of the Internet. Domain addresses are similar to street addresses, in that it is through this domain address that Internet users find one another. A domain address consists of three parts: the first part identifies the part of the Internet desired such as world wide web (www), the second part is usually the name of the company or other identifying words, and the third part identifies the type of institution such as government (.gov) or commer-

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

9. *Id.*

cial (.com), etc.¹⁰

*Inset*¹¹ found personal jurisdiction based on, among other things, the determination that the defendant had “purposefully availed itself of the privilege of doing business within Connecticut” as it had “directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states.”¹²

The last clause, of course, is the sobering one—if presence in cyberspace was deemed sufficiently equivalent to physical presence in every state, the information superhighway threatened to derail jurisdictional analysis altogether by making any business with an online presence open for litigation in any forum in the country.¹³ A number of early cases so warned.¹⁴ See, e.g., *Naxos Res. (USA) Ltd. v. Southam Inc.*, 1996 WL 635387, *2 (C.D. Cal. June 3, 1996) (“The fact that Southam and SBICGI may also disseminate *Vancouver Sun* articles electronically via, *inter alia*, the Internet, LEXIS, and WESTLAW is not sufficient to confer general jurisdiction; if it were, publishers like Southam would be vulnerable to lawsuits in every state even for activities unrelated to the state”). “[A] finding of personal jurisdiction in New York based on an Internet WEBSITE would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet WEBSITE. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law nor acceptable to the Court as a matter of policy.” *Hearst Corp. v. Goldberger*, 1997 WL 97097, at *1 (S.D.N.Y. 1997) (brackets added).

Nonetheless, in the wild, wild west of the World Wide Web, other courts (both state and federal) followed *Inset’s* lead, including *State by*

10. *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 163 (D. Conn. 1996).

11. *Id.* *Inset* is hardly the only jurisdictional decision from its era to offer a now quaint-seeming description of the Internet. See also *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1330 (E.D. Mo. 1996) (noting “[t]he ‘internet’ is essentially a term that describes the interconnection of all of these computers to each other. It is also referred to as ‘the information superhighway.’ . . . There are at least 12,000 persons in Missouri who have internet access, although the number may be much higher. . . .”) (ellipses added; citations omitted); *EDIAS Software Inter’l, LLC v. BASIS Inter’l Ltd.*, 947 F. Supp. 413, 419 (D. Ariz. 1996) (stating, “[t]he Internet can be described by a number of different metaphors, all fitting for different features and services that it provides. For example, the Internet resembles a highway, consisting of many streets leading to places where a user can find information. The metaphor of the Internet as a shopping mall or supermarket, on the other hand, aptly describes the Internet as a place where the user can shop for goods, information, and services. Finally, the Internet also can be viewed as a telephone system for computers by which data bases of information can be downloaded to the user, as if all the information existed in the user’s computer’s disc drive.”).

12. *Id.* at 165.

13. *Id.*

14. *Naxos Res. Ltd. v. Southam, Inc.*, 1996 WL 635387, at *2 (C.D. Cal. June 3, 1996); *Hearst Corp. v. Goldberger*, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997).

Humphrey v. Granite Gate Resorts, Inc., 1996 WL 767431 (Minn. Dist. Court. Dec. 11, 1996), which succinctly (if problematically) concluded that:

In order to reasonably anticipate being hailed into court under the Doctrine of Minimum Contacts, there must be some acts by which the Defendant purposefully avails itself of the privileges of conducting activities within the forum State, thus involving the benefits and protections of its laws. . . In this case, the acts of WagerNet consisted of placing its ad on the Internet 24 hours, seven days a week, 365 days a year.¹⁵

Though Nevada-based, the Defendants found themselves in court in the North Star State because Minnesotans with Internet access could view their WEBSITES.¹⁶

As Internet WEBSITES began popping up all throughout the legal landscape as factors in jurisdictional analysis, courts struggled for a middle ground. One federal court mused that:

[s]ince it is not clear from the submissions that defendant could publish a page on its Web site in a way as to make it accessible to users in some jurisdictions but not others, arguably a defendant should not be subject to jurisdiction in New York simply because its home page could be viewed by users there.¹⁷

Arguably, indeed. Middle ground was sought and believed to be attained, as in *American Network*, where the court found significant in the jurisdictional analysis the fact that “six New York subscribers” signed up to the services advertised on its home page.¹⁸ Likewise, in *Superguide Corp. v. Kegan*, 987 F. Supp. 481 (W.D.N.C. 1997), the Court memorably opened with a description of ecommerce as follows: “Unlike traditional telephone solicitation, the commercial side of the Internet provides businesses with a unique opportunity to reach customers in a passive manner. Similar to a fisherman on the bank with his line in the water, a website is established, a product is offered, and the business waits for customers.”¹⁹ While finding jurisdiction, the Court did caution that:

While the number of hits to defendant’s website originating in North Carolina is not now before the court, a reasonable inference which arises is that such are numerous inasmuch as North Carolina is one of the populated states; however, should discovery reveal that the hits from North Carolinians are insubstantial, the jurisdictional issue may

15. *Minnesota ex rel Humphrey v. Granite Gate Resorts, Inc.*, 1996 WL 767431, at *11 (Minn. Dist. Dec. 11, 1996).

16. *Id.*

17. *Am. Network, Inc. v. Access Am./Connect Atlanta, Inc.*, 975 F. Supp. 494, 499-500 (S.D.N.Y. 1997).

18. *Id.* at 500.

19. *Superguide Corp. v. Kegan*, 987 F. Supp. 481, 486 (W.D.N.C. 1997).

be revisited.²⁰

What an “insubstantial” number of WEBSITE hits statewide would be must now forever remain a mystery.

Even as they struggled to wrestle with the application of traditional jurisdictional analysis to what seemed to be a revolutionary medium, some courts (rightly, in our view) kept their eye on the underlying question of *what* contacts tied the Internet to the forum, not *how* such contacts manifested. In *Digital Equipment Corp. v. AltaVista Technology, Inc.*, the Court said:

Ultimately, it does not matter for jurisdictional purposes whether these sales were made because a computer user clicked while accessing ATI’s Web-site, or by calling a toll-free telephone number, or by answering mail. The reality is that a Web-site is accessible by people in Massachusetts, they have accessed ATI’s Web-site, and ATI’s actions resulted in purchases being made by Massachusetts citizens.²¹

In short, substantial sales into the forum was the deciding jurisdictional factor, not the medium through which those sales were made.

ZIPPO

In 1997, a federal court in the Western District of Pennsylvania issued a decision that would essentially reboot the question of jurisdiction based on Internet presence. Before the court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, there was a claim alleging trademark violations arising under the Lanham Act and Pennsylvania state law by the famous manufacturer of Zippo cigarette lighters, a Pennsylvania corporation with its primary location in Bradford, Pennsylvania, against a computer news service using the domain names of *zippo.com*, *zippo.net* and *zipnews.com*.²² Zippo Dot Com was a California corporation based in Sunnyvale, California, which provided its news service worldwide.²³ Approximately two percent (3,000) of its 140,000 paid subscribers were Pennsylvania residents.²⁴ Additionally, Zippo Dot Com had contracts with seven Internet access providers in Pennsylvania to permit subscribers to access the news service.²⁵

On a motion by Zippo Dot Com to dismiss for lack of personal jurisdiction, the Court divided its background analysis by two subheadings: “The Traditional Framework” and “The Internet and Jurisdiction.”²⁶

20. *Id.* at 487.

21. *Digital Equip Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 465 n.18 (D.Mass 1997).

22. *Zippo*, 952 F. Supp. at 1119.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 1122.

Though the latter opened with comments on “traditional” jurisdictional decisions, such as *Hanson v. Denckla*, 357 U.S. 235 (1958) and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the Court moved quickly on to propose a “sliding scale” inquiry in which WEBSITES were to be assessed on a spectrum of “interactivity.”²⁷ At one end of the spectrum, the Court placed “situations where a defendant clearly does business over the Internet.”²⁸ Here, if “the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.”²⁹ Continuing down the spectrum, the “middle ground” is occupied by “interactive Web sites where a user can exchange information with the host computer.”³⁰ In these cases, “the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”³¹ Finally, the other end of the scale is occupied by “situations where a defendant has simply posted information on an Internet Web site, which is accessible to users in foreign jurisdictions.”³² These so-styled “passive” sites that do “little more than make information available to those who are interested in them are not grounds for the exercise personal jurisdiction.”³³

While the sliding-scale test is, as explored below, the legacy of *Zippo*, Judge McLaughlin’s actual analysis of Zippo Dot Com’s contacts with the forum would likely have proceeded similarly regardless of his now-infamous characterization of WEBSITE “interactivity.”³⁴ Analyzing the “nature and quality” of Zippo Dot Com’s contacts with the forum—including the scale of business conducted in Pennsylvania—under such traditional jurisdictional cases as *International Shoe Co. v. Washington*, 326 U.S. 310 (1945),³⁵ the court found jurisdiction despite defendant’s argument that only two percent of its subscribers were Pennsylvania residents.³⁶ Jurisdiction here may have been particularly proper given that a substantial amount of the injury from the alleged wrongdoing was likely to occur in Pennsylvania, due to Zippo’s base of operations there.³⁷

27. *Id.* at 1124.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

36. *See Zippo*, 952 F. Supp. at 1124.

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

A SLIDING SCALE WORLD

Zippo ignited the jurisdictional analysis, and for fifteen years its “sliding scale” has been debated, discussed, and derided, but not yet discarded. Before diving into the details, we briefly note that, in the decade and a half since *Zippo*’s issuance, the Internet has grown exponentially. The twenty to thirty million users noted by *Inset* has burgeoned to more than two billion—slightly less than a *third* of the world’s population.³⁸ And e-commerce—the industry most affected by *Zippo*’s focus on “interactivity”—has skyrocketed as well. By way of example, in 1997, Dell was the first company to record a million dollars in online sales.³⁹ In 2010, according to *Internet Retailer’s Top 500 Guide*, Dell did a brisk \$4.8 billion in sales—and only came in fourth for the year.⁴⁰ It is through the lens of this unprecedented growth that we address *Zippo*’s application—and the extent to which a “sliding scale” approach to Internet contacts, or indeed, any separate inquiry at all, makes sense.

We begin by conceding that *Zippo* has enjoyed its fair share of success, the analysis adopted or mimicked in whole or in part by a number of circuits.⁴¹ But *Zippo* has not had a universally rosy reception. In short, the additional gloss provided by *Zippo*—the three-pronged (and now outdated) shorthand to determine the likelihood of jurisdiction over an Internet operator—might, in the end, be nothing more than a confusing distraction from the jurisdictional analysis. At the outset, courts have questioned whether “interactivity” has any proper place in such a determination:

First, it is not clear why a website’s level of interactivity should be determinative on the issue of personal jurisdiction. As even courts adopting the *Zippo* test have recognized, a court cannot determine whether personal jurisdiction is appropriate simply by deciding whether a website is “passive” or “interactive” (assuming that websites can be readily classified into one category or the other). Even a “passive” website may support a finding of jurisdiction if the defendant used its website intentionally to harm the plaintiff in the forum state. . . . Similarly, an “interactive” or commercial website may not be sufficient to support

38. *World Internet Usage and Population Statistics*, INTERNET WORLD STATS (Mar. 28, 2012), <http://www.internetusageworld.com/stats.htm>.

39. *History of Ecommerce*, COMMERCE-LAND (2004), http://www.ecommerce-land.com/history_ecommerce.html.

40. *Top 500 Guide 2010*, INTERNET RETAILER (May 27, 2010), <http://www.internetretailer.com/2010/05/27/top-500-guide?p=2>

41. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239 (2d Cir. 2007); *Toys ‘R’ Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 713 (4th Cir. 2002); *Soma Medical Int’l v. Standard Chartered Bank*, 196 F.3d 1292, 1297 (10th Cir. 1999); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997); *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883 (6th Cir. 2002).

jurisdiction if it is not aimed at residents in the forum state. . . Moreover, regardless how interactive a website is, it cannot form the basis for personal jurisdiction unless a nexus exists between the website and the cause of action or unless the contacts through the website are so substantial that they may be considered “systematic and continuous” for the purpose of general jurisdiction. Thus, a rigid adherence to the *Zippo* test is likely to lead to erroneous results.⁴²

Indeed, an overt focus on “interactivity”—in an era which virtually *every* WEBSITE is interactive—is at best superfluous and at worst counterproductive.

Already, a number of courts have questioned or limited the applicability of *Zippo* to the issue of general jurisdiction.⁴³ Others have bypassed *Zippo* even in instances of specific jurisdiction, when “electronic contacts” over the Internet are at issue.⁴⁴

We note however that, whatever role “interactivity” may play in the jurisdictional analysis—and (as noted) it is questionable whether it should have any⁴⁵—it has rarely if ever been held to be a litmus test. Rather, courts have considered it sufficient to confer jurisdiction if some residents of the forum made use of that “interactivity” to place orders or otherwise engage in business with the WEBSITE host.⁴⁶ In other words, existence of an interactive WEBSITE may not be enough to confer jurisdiction—but sales into the forum, by way of that WEBSITE, may be. It’s the result, not the means, which matters.

42. *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004). *Compare* *Northbrook Ditigal, LLC v. Vendio Serv., Inc.*, 625 F. Supp. 2d 728, 750 (D. Minn. 2008) (noting that *Zippo* is sometimes criticized for focusing too much on the Internet operations of the defendant, without examining the relationship between those operations and the forum state).

43. *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002) (noting that the *Zippo* sliding scale “is not well adapted to the general jurisdiction inquiry”); *Henning v. Suarez Corp. Indus.*, 713 F. Supp. 2d 459 (E.D. Pa. 2010) (noting that *Zippo* was a specific jurisdiction case, and that advancements in technology have affected courts’ application of the “sliding scale;” finding no general jurisdiction through retail website that did not specifically target forum).

44. *Tamburo v. Dworkin*, 601 F.3d 693, 703 (7th Cir. 2010); *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1219 n.26 (11th Cir. 2009).

45. *See Hy Cite Corp.*, 297 F. Supp. 2d at 1160.

46. *ISI Brands, Inc. v. KCC Int’l, Inc.*, 458 F. Supp. 2d 81, 87-88 (E.D.N.Y. 2006) (stating, “[e]ven the existence of an interactive ‘patently commercial’ website that can be accessed by New York residents is not sufficient to justify the exercise of personal jurisdiction unless some degree of commercial activity occurred in New York”) (emphasis in original); *Darius Int’l Inc. v. Young*, 2006 WL 1071655 at *20 (E.D. Pa. Apr. 20, 2006) (stating, “[w]hether or not the website itself justifies jurisdiction, the defendants, through contacts established on the website, proceeded to e-mail extensively with and sell and ship their products to consumers in Pennsylvania, including but not necessarily limited to [the plaintiffs]”) (brackets in original).

Indeed, rather than provide an added “Internet gloss” to the jurisdictional analysis or, worse, an inappropriate shortcut, the sliding-scale test is best confined to the dustbin of jurisprudence as “irrelevant.”⁴⁷ That a corporate defendant may be reachable on its WEBSITE from afar, just as in previous years it was reachable at a 1–800 number, is irrelevant.⁴⁸ It is the quality of the contacts with the forum—which admittedly may include the volume of sales there—that is significant, as a number of courts have recognized.⁴⁹ “In reality, an interactive WEBSITE is similar to telephone or mail communications. A passive WEBSITE is much the same as advertising on the radio or in a magazine. An ad on the Internet is no different than an ad in any other medium that provides a telephone number or other means to contact a potential defendant. It is mere advertisement or solicitation of business.”⁵⁰

II

As support for this conclusion, we turn to the mischief *Zippo* has made (and can make) in the specific context of patent litigation. The corpus of personal jurisdiction decisions in patent infringement actions is appropriate for such an investigation for several reasons. *First*, an accused patent infringer may be sued in any court that has personal jurisdiction over that defendant. Under the patent laws, the venue and personal jurisdiction analyses are identical.⁵¹

47. *Howard v. Mo. Bone & Joint Center, Inc.*, 869 N.E.2d 207, 212 (Ill. App. 2007) (stating, “[I]n *Zippo*, the court did not explain under what authority it was adopting a specialized test for the internet or even why such a test was necessary”).

48. *Id.*

49. *Id.*

50. *See Howard*, 869 N.E.2d at 212; *see also* *Caiazza v. Am. Royal Arts Corp.*, 2011 WL 2135585, at *6 (Fla. Dist. App. June 1, 2011); *see also* *Shamsuddin v. Vitamin Research Products*, 346 F. Supp. 2d 804, 813 (D. Md. 2004) (“In the jurisdictional context, there is no critical difference between operating a toll-free, nationwide telephone number capable of accepting purchase orders, on the one hand, and operating a website capable of accepting purchase orders.”).

51. *Trintec Indus., Inc. v. Pedre Promotional Products, Inc.*, 395 F.3d 1275, 1280 (Fed. Cir. 2005) (explaining “[v]enue in a patent action against a corporate defendant exists wherever there is personal jurisdiction.”); *N. Am. Philips Corp. v. Am. Vending Sales, Inc.*, 35 F.3d 1576, 1577 n.1 (Fed. Cir. 1994) (“The venue issue is therefore subsumed in the personal jurisdiction issue.”); Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 1, 1–37 (2010) (stating, “[t]he venue issue is therefore subsumed in the personal jurisdiction issue.”). Accordingly, patent infringement defendants have a strong incentive to litigate personal jurisdiction—and the *Zippo* question specifically—because it directly affects where they can be sued. If the ability of customers to order products online from their homes provides some or all of the necessary contacts to establish personal jurisdiction, then any company that sells online can be sued in any federal court in the country. While not the sole cause, one can infer that the ease of obtaining personal jurisdiction over patent defendants explains in part the concentration of so much patent litigation in so few judicial districts.

Second, the Federal Circuit has neither adopted nor rejected the *Zippo* sliding scale test in patent cases.⁵² Because the Federal Circuit has determined that the issue of personal jurisdiction is “intimately involved with the substance of the patent laws,” the Federal Circuit applying its own law, not regional circuit law, decides the question in all patent cases.⁵³ The Federal Circuit has adopted a three-part test of personal jurisdiction with familiar prongs: whether (1) the defendant purposely directed its activities at residents of the forum; (2) the claim arises out of or relates to the defendant’s activities in the forum; and (3) assertion of personal jurisdiction is reasonable and fair.⁵⁴ As noted, however, the Federal Circuit has punted on the application of the *Zippo* test for Internet contacts, neither adopting nor rejecting it.⁵⁵ Thus, not only do patent defendants have an incentive to litigate the issue of personal jurisdiction, they have a specific incentive to litigate the question of whether and how Internet-based “contacts” count in the personal jurisdiction analysis because the appellate court has left that legal question open.

Third, given the exponential growth in the number of business method and software patents issued by the United States Patent and Trademark Office since *State Street Bank & Trust Co. v. Signature Fin. Group, Inc.*,⁵⁶ patent litigants are not only litigating the *Zippo* question, they are doing so in the context of litigation in which their websites (or some feature or element of them) are the accused instrumentalities, *i.e.*,

52. See *Trintec*, 395 F.3d at 1281.

53. By contrast, the Federal Circuit considers the question whether to transfer a case from one district court to another “[f]or the convenience of the parties and witnesses, in the interest of justice,” 28 U.S.C. § 1404(a), to be a procedural issue to be decided under regional circuit law. See, e.g., *In re Link_A_Media Devices Corp.*, 662 F.3d 1221, 1222–23 (Fed. Cir. 2011). That is, because the personal jurisdiction and venue analyses are identical, substantive Federal Circuit law decides where a case may be filed, while regional circuit law determines whether and where it may be transferred. This dichotomy creates a wedge for the forum-shopping plaintiff to seek to file in a venue where personal jurisdiction may be secured under Federal Circuit law, but transfer may be more difficult to secure under the regional law governing transfers. Given the concentration of the bulk of patent cases in a handful of preferred jurisdictions, it is little wonder that the Federal Circuit has been required repeatedly to apply regional law to rule on a series of *mandamus* petitions seeking transfer out of those favored fora. See, e.g., *id.*; *In re Microsoft Corp.*, 630 F.3d 1361 (Fed. Cir. 2011); *In re VTEch Comm’n, Inc.*, 2010 WL 46332 (Fed. Cir. Jan 6, 2010); *In re Hoffman–LaRoche, Inc.*, 587 F.3d 1333 (Fed. Cir. 2009); *In re Volkswagen of Am., Inc.*, 566 F.3d 1349 (Fed. Cir. 2009); *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009). See also *Autogenomic, Inc. v. Oxford Tech. Ltd.*, 566 F.3d 1012, 1016 (Fed. Cir. 2009).

54. *Silent Drive, Inc. v. Strong Indus., Inc.*, 326 F.3d 1194, 1201–02 (Fed. Cir. 2003).

55. See *Trintec*, 395 F.3d at 1281.

56. *State Street Bank & Trust Co. v. Signature Fin. Grp., Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999).

the very subject matter of the underlying litigation.⁵⁷ For that reason, the litigation of software patents asserted against WEBSITES may foreground the importance of the difference between specific and general jurisdiction in the Internet era, that is, the difference between infringing Internet conduct that might ground a finding of specific personal jurisdiction and generic Internet presence that could only support a finding of general personal jurisdiction.

MODERN CONCERNS ABOUT *ZIPPO*

At the time of writing, the business world is abuzz over Facebook's initial public offering, and more broadly the prospects of social media to revolutionize e-commerce in the braver, newer world of the twenty-first century Internet. The discussion has advanced, because Internet commerce is now taken for granted as the platform on which social media will build new models for commercial success. The concept of a "passive," information-only WEBSITE seems quaint, and relegated to the desk-drawer of nostalgia alongside our Sony Discman and Sega Genesis. Even so, while the demise of the passive WEBSITE may be here (or nearing), *Zippo* remains a jurisprudential touchstone courts feel obligated to consider even today, especially in the context of litigation over software applications that rely on or enable web-based commerce.

In *Grant Street Group, Inc. v. D&T Ventures, LLC*, 2012 WL 13694 (W.D. Pa. Jan. 4, 2012), for example, the plaintiff accused the defendant of infringing a patent to a process an apparatus for conducting auctions over electronic networks by allegedly selling and offering for sale products and services for conducting online tax lien certificate auctions.⁵⁸ In opposing a defendant's motion to dismiss for lack of personal jurisdiction, Grant Street went straight to *Zippo*, arguing that the court had personal jurisdiction over that defendant because it provided "highly interactive websites to its tax collector clients that have been accused in Pennsylvania."⁵⁹ The court then applied the *Zippo* text (acknowledging that it had not been adopted by the Federal Circuit) to the WEBSITES associated with the defendant.⁶⁰ The first, an informational WEBSITE hosted in Tampa, Florida, the court deemed inadequate because it was a passive conduit of information.⁶¹ The second set of WEBSITES, county tax auction

57. JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS AND LAWYERS PUT INNOVATORS AT RISK 8-9, 22 (2008) (estimating that the Patent Office had issued 200,000 software patents, approximately 11,000 of which covered some aspect of the Internet).

58. *Grant Street Grp., Inc., v. D&T Ventures, LLC*, 2012 WL 13694 (W.D. Pa. Jan. 4, 2012).

59. *Id.* at *5.

60. *Id.*

61. *Id.*

WEBSITES, were highly interactive, but not the defendant's.⁶² Rather, those WEBSITES were owned and operated by the counties that used them to conduct tax auctions.⁶³ The court noted that no tax sales or auctions were ever conducted on the defendant's servers; rather, all activity was performed on the counties' servers, and D&T had no control over the operation of those sites.⁶⁴ "The mere fact that [the defendant] may have provided a 'highly interactive' WEBSITE to its clients to use to conduct tax certificate auctions does not automatically confer personal jurisdiction."⁶⁵ The court concluded,

In short, the courts have made it clear that the advent of the Internet has not vitiated traditional concepts of minimum contacts and the requirement that the defendant have sufficient contacts with the forum jurisdiction that they could reasonably anticipate being sued there. . . I agree with [the defendant] that the exercise of personal jurisdiction over [the defendant] in this case would render local businesses that license software and/or provide related web support services to local customers amenable to suit in any jurisdiction in which an Internet user could access its customer's website.⁶⁶

The "modern concern" expressed in *Grant Street Group* is not that a contacts-based jurisprudence cannot adequately deal with Internet-based contacts, but rather that a *Zippo*-based jurisprudence will swallow the doctrine of personal jurisdiction whole. If every business with a virtual presence can be sued anywhere, and virtually every business is online, then virtually every business can be sued virtually anywhere.

The patent arena demonstrates the willingness of some courts to embrace the rule that interactive WEBSITES establish personal jurisdiction.⁶⁷ Some courts have characterized their endorsement of this rule on fairness grounds, as a choice between the lesser of two evils. They have concluded that it is fairer to impose the burdens of personal jurisdiction on out-of-state businesses that have WEBSITES allowing them to make sales into the forum because that reflects a "choice" those businesses have made to enter the national market; they view this result as fairer than forcing plaintiffs to travel to the defendant's home state to file suit.⁶⁸

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Washington v. www.dirtcheapcg.com, Inc.*, 260 F. Supp. 2d 1048, 1052 (W.D. Wash. 2003) (referring to the "well settled rule that a non-resident's maintenance of an interactive website through which consumers may purchase goods or services is sufficient" for purposeful availment of the forum).

68. *Coolsavings.com, Inc. v. IQ Commerce Corp.*, 53 F. Supp. 2d 1000, 1003 (N.D. Ill. 1999) (quoting, "[i]t may seem unfair to subject IQ to personal jurisdiction almost any-

But does the proliferation of retail WEBSITES really present such a Hobson's choice between universal web-based jurisdiction on the one hand, and jurisdiction only in the defendant's home forum on the other? Isn't a contacts-based law of personal jurisdiction designed precisely to avoid this kind of all-or-nothing dilemma? We believe that these cases underscore how the *Zippo* sliding scale has focused judicial attention on the wrong question: how interactive the WEBSITE is.

SLIDING SCALE OR SLIPPERY SLOPE

We start by accepting the premise of the district court in *Grant Street Group* that the advent of the Internet has not vitiated the traditional minimum contacts analysis for personal jurisdiction.⁶⁹ If so, then one must ask how (and which) Internet "contacts" fit in the mix.⁷⁰

The sliding scale approach proposed in *Zippo* asks courts to consider what kind of WEBSITE the defendant has: passive (information only), hybrid, or interactive (retail sales). The adoption and application of the *Zippo* test has had the incidental effect of creating a cottage industry of jurisdictional disputes over how interactive the defendant's WEBSITE is, often without regard to the subject matter of the underlying dispute. Because today virtually all businesses have WEBSITES, virtually all plaintiffs can muster a *Zippo* response—"Look at the defendant's interactive website"—to a motion to dismiss for lack of personal jurisdiction. It costs the plaintiff virtually nothing to point to the defendant's WEBSITE, while it costs the defendant (and ultimately the court) time and effort to determine whether and to what extent the WEBSITE makes a difference.⁷¹

where in the country, but to us it seems even more unfair to allow IQ to introduce its program to the entire country while remaining subject to personal jurisdiction only in its home state and thus requiring patentees from all over the country to go to California in order to litigate their infringement claims."); *Lexmark Int'l v. Laser Land Inc.*, 304 F. Supp. 2d 913, 917–18 (E.D. Ky. Jan. 15, 2004) (stating, "Laserland had a choice as to whether it could be subjected to jurisdiction in Kentucky. By choosing to sell its products to Kentucky residents, Laserland purposefully availed itself of the privileges of doing business in Kentucky."); *Somfy SAS v. Rollease, Inc.*, 2004 WL 4963446, at *1 (N.D. Ill. July 30, 2004) (stating, "[a] court may exercise personal jurisdiction over a defendant who operates an interactive website for the purpose of entering into contracts for sale with residents of the forum state.").

69. *Shamsuddin v. Vitamin Research Products*, 346 F. Supp. 2d 804, 813 (D. Md. 2004); *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 543 (E.D. Pa. 1999) (stating "[t]he construction of the information superhighway does not warrant a departure from the well-worn path of traditional personal jurisdiction analysis.").

70. *ArrivalStar S.A. v. Axis Global Logistics*, No. 11–80585–CIV–MARRA, slip op. at 7 (S.D. Fla. Feb 13, 2012) (explaining that "[t]he operative question is thus whether [the defendant's] contacts are 'substantial'").

71. *Id.* at 2 (describing plaintiff's submission of three unauthenticated print-outs from websites offered in support of argument in favor of personal jurisdiction over the defendant).

In the patent infringement context, a sampling of cases in which the *Zippo* analysis was performed yield mixed results; and the mixture suggests that considerations other than the “sliding scale” are driving the courts, whether or not they pay lip-service to the *Zippo* formula.

Question: Does the existence of a web-based coupon site create personal jurisdiction?

Answer: Yes.⁷²

Question: Do web-based sales of Internet telephone software create personal jurisdiction?

Answer: Yes.⁷³

Question: Does the existence of a WEBSITE that allows for the exchange of information with the defendant, but not sales, create personal jurisdiction?

Answer: No.⁷⁴

Question: Does an interactive WEBSITE that allows New York residents to purchase amusement park passes, but not passes to the California amusement park with the allegedly infringing amusement park cars in it, create sufficient contacts to establish personal jurisdiction?

Answer: No.⁷⁵

Question: Does a WEBSITE that allows for the exchange of information to initiate a membership and otherwise solicits commercial relationships with the defendant create personal jurisdiction?

Answer: No.⁷⁶

Question: Do sales into the forum through a distributor and offers for sale via an interactive website create personal jurisdiction?

Answer: Yes.⁷⁷

Question: Does the defendant’s “interactive WEBSITE” that allows users to provide the defendant “with every piece of information necessary to complete a sale except a credit card number” create personal jurisdiction?

Answer: Yes.⁷⁸

72. See *CoolSavings.com*, 53 F. Supp. 2d at 1003.

73. *Multi-Tech Sys., Inc. v. VocalTec Commc'ns, Inc.*, 122 F. Supp. 2d 1046 (D. Minn. 2000) (in conjunction with in-state store sales).

74. *On-Line Techs v. Perkin Elmer Corp.*, 161 F. Supp. 2d 246, 265-66 (D. Conn. 2001).

75. *Meteoro Amusement Corp. v. Six Flags, Inc.*, 267 F. Supp. 2d 263 (S.D.N.Y. 2003).

76. *InfoSys Inc. v. Billingnetwork.com, Inc.*, 2003 WL 22012687, at *4 (N.D. Ill. Aug. 27, 2003) (although a “close call”).

77. *Walter Kiddie Portable Equip., Inc. v. Universal Sec. Instruments, Inc.*, 304 F. Supp. 2d 769 (M.D.N.C. 2004).

78. *Litmer v. PDQUSA.com*, 326 F. Supp. 2d 952, 958 (N.D. Ind. 2004).

Question: Does a WEBSITE that provides a telephone number that customers can use to order one of its products, but does not advertise the patented product in dispute in the lawsuit, create sufficient contacts to establish personal jurisdiction?

Answer: No.⁷⁹

Question: Does a WEBSITE through which a user may download a proposal form and equipment installation form but not place direct orders or receive price quotes create personal jurisdiction?

Answer: No.⁸⁰

Question: Does commercial interactive website making sales into the forum create personal jurisdiction?

Answer: Yes.⁸¹

Based on a review of these decisions, the application of the sliding-scale test does not appear to lead to predictable results, both in the classification of WEBSITES along the sliding scale and in the jurisdictional significance of those classifications.

As is evident from these examples, the *outcomes* are more reliably predicted by looking not at the nature of the WEBSITE, *i.e.*, where the WEBSITE falls on the sliding scale, but rather by looking at whether the court could find any *other* contacts in addition to the WEBSITE. By and large, courts faced with WEBSITE-only allegations as a basis for personal jurisdiction found such jurisdiction lacking.⁸² A number of the cases rely on the existence of an interactive WEBSITE *and* other relevant factors.⁸³ The

79. *Slocum Enters., Inc. v. New Generation Devices*, 2004 WL 1879886 (D. Or. Aug. 23, 2004).

80. *Majestec 125, LLC v. Sealift, Inc.*, 2006 WL 2039984 (W.D. Mich. July 19, 2006).

81. *WebZero, LLC. v. ClicVU, Inc.*, 2008 WL 1734702 (C.D. Cal. Apr. 4, 2008) (in conjunction with contract between defendant and forum-based company that related to the subject matter of the action).

82. *On-Line Techs v. Perkin Elmer Corp.*, 161 F.Supp. 2d 246, 265-66 (D. Conn. 2001); *see InfoSys Inc. v. Billingnetwork.com, Inc.*, 2003 WL 22012687, at *4 (N.D. Ill. Aug. 27, 2003); *see Majestec*, 2006 WL 2039984; *see Slocum Enters*, 2004 WL 1879886; *see Litmer*, 326 F. Supp. 2d at 958.

83. *Coolsavings.com, Inc. v. IQ Commerce Corp.*, 53 F. Supp. 2d 1000, 1003 (N.D. Ill. 1999) (use of forum-based marketing firm); *Multi-Tech Sys., Inc. v. VocalTec Commc'ns, Inc.*, 122 F. Supp. 2d 1046 (D. Minn. 2000) (in-state store sales); *Walter Kiddie Portable Equip., Inc. v. Universal Sec. Instruments, Inc.*, 304 F. Supp. 2d 769 (M.D.N.C. 2004) (sales into forum through distributor); *see WebZero* 2008 WL 1734702, at *7 (stating “[a]ny misgivings the Court may have about the application of the ‘sliding scale’ test to this scenario, however, are resolved upon consideration of the 2002 Spamcon contract.”); *Meteoro Amusement Corp. v. Six Flags, Inc.*, 267 F. Supp. 2d 263, 269 (S.D.N.Y. 2003) (stating, “nonetheless courts in this circuit have repeatedly found that ownership and operation of a website within the district, without more, is not enough to satisfy the ‘solicitation plus’ standard for doing business pursuant to C.P.L.R. section 301. This is so whether the website is ‘passive,’ (used only as a means of advertisement), or as here, ‘interactive.’”) (citations omitted). .

de facto rule that appears to best explain the results described above is the “solicitation plus” or “web site plus” rule, which factors Internet contacts into the analysis, but does not rest on them alone.⁸⁴ Further, the patent case law strongly suggests that the *Zippo* test does not reliably determine whether general personal jurisdiction can be exercised over a defendant. If maintaining a WEBSITE that advertised its services and allowed users to purchase goods online, “standing alone, were enough to satisfy *International Shoe’s* ‘minimum contacts’ standard, then due process would impose little restraint on the Court’s ability to exercise jurisdiction over every e-commerce entrepreneur who offers goods or services for sale online.”⁸⁵ “Without some evidence of the nature and quality of interaction between Defendant and this forum via the website, the fact that users can exchange information with Defendant is insufficient to establish general jurisdiction.”⁸⁶

That leaves the question of specific personal jurisdiction, which requires tying the defendant’s contacts with the subject matter of the underlying litigation. In the patent context, this analysis requires looking at the allegedly infringing product or instrumentality to determine whether it has any connection to the accused infringer’s WEBSITE. That determination is sufficiently concrete as to lead to relatively more predictable results. Thus, evidence of thousands of downloads of allegedly infringing software into the forum strongly suggests that the exercise of personal jurisdiction is proper.⁸⁷ On the other hand, evidence that WEBSITE contacts were not sufficient or sufficiently related to the accused product or instrumentality suggests that personal jurisdiction should not be exercised.⁸⁸

84. See *Meteoro Amusement Corp.*, 267 F. Supp. 2d at 269 (“solicitation plus”); *Digital Control Inc. v. Boretronics Inc.*, 161 F. Supp. 2d 1183, 1186–87 (W.D. Wash. 2001) (“web-site plus”).

85. *Quality Improvement Consultants v. Williams*, 2003 WL 543393, at *6, (D. Minn. Feb. 24, 2003).

86. *Nationwide Contractor Audit Serv., Inc. v. Nat’l Compliance Mgmt. Servs., Inc.*, 622 F. Supp. 2d 276 (W.D. Pa. 2008) (quoting *Capitol Fed. Sav. Bank v. E. Bank Corp.*, 493 F. Supp. 2d 1150, 1162 (D. Kan. 2007)); *Molnlycke Health Care AB v. Dumex Med. Surgical Prods. Ltd.*, 64 F. Supp. 448, 452 (E.D. Pa. 1999) “The court, however, disagrees with plaintiff’s more fundamental premise and holds that the establishment of a website through which customers can order products does not, on its own, suffice to establish general jurisdiction. To hold that the possibility of ordering products from a website establishes general jurisdiction would effectively hold that any corporation with such a website is subject to general jurisdiction in every state.”

87. *Northbrook Digital, LLC v. Vendio Serv., Inc.* 625 F. Supp. 2d 728, 752 (D. Minn. 2008); *Lexmark Int’l, Inc. v. Laserland, Inc.*, 304 F. Supp. 2d 913, 917–18 (E.D. Ky. Jan 15, 2004) (commercial website plus sales into the forum).

88. *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 113–15 (D. Conn. 1998) (no personal jurisdiction in patent action under bacterial detection system patent; website did not allow online purchases); *Instabook Corp. v. Instantpublisher.com*, 469 F. Supp. 2d 1120 (M.D.

In addition to the concerns just discussed, challenging personal jurisdiction also raises the specter of jurisdictional discovery, a further (and perhaps unnecessary) expense in time and money to litigants, lawyers, and judges. In the usual course of litigation, a defendant seeking to challenge the court's jurisdiction over its person avails itself of Fed. R. Civ. P. 12(b)(2), and files a motion to dismiss for lack of personal jurisdiction early in the case, generally before discovery has begun in earnest. A plaintiff can defeat a Rule 12(b)(2) motion to dismiss by making a *prima facie* showing of jurisdiction.⁸⁹ If the existing record cannot establish jurisdiction, but the plaintiff makes a showing that it could establish jurisdiction by developing additional facts, a court may order jurisdictional discovery. "Jurisdictional discovery is appropriate where the existing record is 'inadequate' to support personal jurisdiction and 'a party demonstrates that it can supplement its jurisdictional allegations through discovery.'"⁹⁰

At least some case law suggests that the "presence" of a WEBSITE within a jurisdiction—*i.e.*, its availability to forum residents—may support a request for jurisdictional discovery. In *C-cation Technologies, LLC v. Comcast Corp.*, Comcast sought dismissal for lack of personal jurisdiction on the ground that the accused instrumentality—allegedly infringing cable systems and services—were provided by subsidiaries, including named co-defendants, but not Comcast Corporation ("Comcast").⁹¹ C-cation countered by arguing that Comcast's WEBSITE advertised allegedly infringing cable systems, offered such systems for sale, and sold them to Texas consumers, thereby holding itself out as a provider of such services.⁹² Rather than decide the question based on C-cation's *prima facie* showing, the court denied the motion to dismiss without prejudice, and authorized sixty days of jurisdictional discovery.⁹³ In this instance,

Fla. 2006) (no personal jurisdiction in patent action under electronic bookstore vending machine patent; interactive website plus two sales into forum); *Tadayon v. Saucon Techs., Inc.*, 2011 WL 1770172, at *2 (D. Md. May 9, 2011) (no personal jurisdiction in patent action under patent for safe method for mobile or wireless computing or communication devices; defendant's contract was with bus company, not passengers of bus company traveling through forum); *Roblur Mktg. Group, Inc. v. GPS Indus., Inc.*, 645 F. Supp. 2d 1130, 1143 (S.D. Fla. 2009) (no personal jurisdiction under portable golf computer patent; website did not allow sale of allegedly infringing software); *Digital Control, Inc v. Boretronics Inc.*, 161 F. Supp. 2d 1183, 1186–87 (W.D. Wash. 2001) (no personal jurisdiction under underground drilling patent; no sales into or inquiries about sales into forum).

89. *Trintec Indus., Inc. v. Pedre Promotional Products, Inc.*, 395 F.3d 1275, 1280 (Fed. Cir. 2005).

90. *Id.* (quoting *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351–52 (D.C. Cir. 2000)).

91. *C-cation Techs., LLC v. Comcast Corp.*, No. 2:2011-CV-00030-TJW (E.D. Tex. Jan. 12, 2011).

92. *Id.* at *4.

93. *Id.* at *4-5.

then, the plaintiff was able to obtain jurisdictional discovery primarily by pointing to promotional statements and press releases on Comcast's website.

THE MEDIUM IS NOT THE MESSAGE

The criticism that emerges strongly from the line of post-*Zippo* patent cases is that *Zippo's* sliding scale between passive and interactive WEBSITES is measuring and focusing attention on the wrong thing. In other words, the *Zippo* test focuses attention on a medium (the defendant's WEBSITE), not the defendant's actual conduct (sales and/or operations in the forum).⁹⁴ As one district court put the point, "Even a passive WEBSITE may support a finding of jurisdiction if the defendant used the WEBSITE intentionally to harm the plaintiff in the forum state. Similarly, an interactive or commercial WEBSITE may not be sufficient to support jurisdiction if it is not aimed at residents in the forum state."⁹⁵ "The fact that someone who accesses defendants' Web site can purchase a compact disc does not render defendants' actions 'purposefully directed' at this forum. It is the conduct of the defendants, rather than the medium utilized by them, to which the parameters of specific jurisdiction apply."⁹⁶ "[T]he ultimate question remains the same, that is, whether the defendant's contacts with the state are of such a quality and nature that it could reasonably expect to be haled into the courts of the forum state."⁹⁷ "[W]ebsite interactivity may have some bearing on the jurisdictional analysis, but it does not control the outcome."⁹⁸

III

As so often happens, the future looks different in hindsight. Just as the late 1990s did not witness the robotic uprising predicted (retrospectively) by *The Flight of the Conchords*, the explosive growth of the In-

94. See *Northbrook Digital, LLC v. Vendio Servs., Inc.*, 625 F. Supp. 2d 728, 750 (D. Minn. 2008).

95. *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004) (quotations and citations omitted).

96. *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 921 (D. Or. 1999) (citations omitted); see also *Roblor Mktg. Group, Inc. v. GPS Indus., Inc.*, 645 F. Supp. 2d 1130, 1141-42 (S.D. Fla. 2009) (stating "[w]e share in the criticism of over-reliance on the sliding scale of interactivity analysis. The sliding scale offers little guidance in the case of a defendant running a website that falls in the middle ground. Moreover, this test is likely to be too rigid with regards to the passive and active categories of websites. Passive websites could very well target a specific forum state and give rise to personal jurisdiction. Similarly, an active website, which does not target a forum state, should perhaps not give rise to personal jurisdiction by itself.").

97. See *Hy Cite* 297 F. Supp. 2d at 1154; see also *Shamsuddin v. Vitamin Research Prods.*, 346 F. Supp. 2d 804, 812-13 (D. Md. 2004).

98. See *Shamsuddin*, 346 F. Supp. 2d at 811.

ternet during that same time period did not shake the fundamentals of commerce or (more parochially) the American law of personal jurisdiction. Instead, as the Alternate Routes could have predicted, the future of personal jurisdiction is nothing new. The core insight of *Zippo*—that the Internet would allow for an exponential expansion of the ability of people and businesses to interact—was sound, and remains sound in the new age of social media. The error made by those who adopted the *Zippo* sliding scale as a *novel* test of Internet-based personal jurisdiction was to mistake a difference of degree (the Internet greatly expands our ability to interact with people and businesses in remote locations) for a difference in kind (the Internet allows us to do something radically new for which new rules are required). It is not at all clear that Judge McLaughlin, the author of the *Zippo* ruling, made this mistake himself.⁹⁹

An effective WEBSITE may allow a regional retailer to become a national retailer by making it easier to make direct sales. The retailer may start to make sales to customers in states where it has never previously done so. The retailer may have to buy or rent a location for the web servers and other equipment that power its WEBSITE, and may choose to do so in a forum distant from its headquarters. Those changes may affect where the retailer can be sued. The sale of a defective product to San Diego may land a retailer from Portland, Maine in a California courtroom under that court's specific personal jurisdiction. The presence of a Miami retailer's web servers in Seattle may land that retailer in a Washington courtroom under that court's general personal jurisdiction. But the reason in each case is that the company's web presence allowed it to make certain contacts with the forum state, not that the company's web presence *was* in and of itself a contact with that forum state.

The chief lesson of *Zippo* is that the Internet—like the telephone and the catalog before it—makes certain kinds of contacts possible; it is not that the Internet creates new kinds of contact. We are not arguing here either in favor of or against the American legal tradition of contacts-based personal jurisdiction. We are arguing, however, that so long as federal court personal jurisdiction is predicated on contacts with the forum, the relevant questions will be what (if anything) did the defendant do in the forum state that would bring it within the general or specific personal jurisdiction of that court. The existence and level of interactivity of a WEBSITE does not of itself do anything to answer that question.

99. See *Roblor Mktg. Group, Inc. v. GPS Indus., Inc.*, 645 F. Supp. 2d 1130, 1142 (S.D. Fla. 2009) (stating “[i]t is worth noting that the *Zippo* court, while establishing the sliding scale analysis, ultimately did not rely on it. Many courts may have given more weight to the sliding scale analysis than the *Zippo* court itself intended to do.”) (citations omitted).

In the words of the Supreme Court, a defendant's purposeful availment of a forum depends in each case on the "*defendant's conduct* and the economic realities of the market the defendant seeks to serve."¹⁰⁰ As the world knows, companies can do all kinds of things on or over the Internet. What matters for jurisdictional purposes, however, is *what* a defendant does, not *whether* the defendant uses the Internet to do it. In this regard, then, the Internet is the medium through which certain acts can be performed. With regard to the law of personal jurisdiction, that medium is no more a "modern concern" than the telephone or television before it, other media through which businesses can establish new contacts with far-flung fora.

We would draw the following lessons from the case law on patents and personal jurisdiction. *First*, what you do, not how you do it, is what matters in the jurisdictional analysis. A strong commercial website can generate retail sales; but it is the nature and quantity of those sales, not the ability of the WEBSITE to generate them, that matters for the jurisdictional analysis. *Second*, a company's presence on the Internet, regardless of how interactive it may be, should not be a factor in determining *general* personal jurisdiction. "Virtual" presence is a metaphor. No WEBSITE, even one that is "clearly and deliberately structured to operate as a sophisticated virtual store" in any forum, *creates* contacts with a forum by its very existence.¹⁰¹ *Third*, simply pointing to a defendant's "interactive" WEBSITE is not sufficient to make a *prima facie* case for *specific* personal jurisdiction. A plaintiff opposing a motion to dismiss for lack of personal jurisdiction should be required to present evidence of sufficient contacts between the defendant and the forum to warrant the exercise of specific personal jurisdiction. A commercial WEBSITE may be the medium through which contact was made—the sales channel through which the exploding widget was purchased—but it should be the plaintiff's burden to show that the web-based contacts were sufficient in number and sufficiently germane to the underlying dispute.¹⁰²

100. J. McIntyre Mach., Ltd., v. Nicastro, 131 S. Ct. 2780, 2790 (2011) (emphasis added).

101. Gator.com Corp. v. L. L. Bean, Inc., 341 F.3d 1072, 1078 (9th Cir. 2003), *reh'g en banc granted*, 366 F.3d 789 (9th Cir. 2004), *dismissed*, 398 F.3d 1125 (9th Cir. 2005).

102. See Digital Control Inc. v. Boretronics Inc., 161 F. Supp. 2d 1183, 1186–87 (W.D. Wash. 2001) "The medium, by its very nature, provides immediate and virtually uncontrollable worldwide exposure. While the advertiser may in fact be willing to engage in commerce with anyone anywhere in the world, it may simply be seeking customers in a very localized area commensurate with its distribution or service facilities. Until the advertiser is actually faced with and makes the choice to dive into a particular forum, the mere existence of a worldwide web site, regardless of whether the site is active or passive, is an insufficient basis on which to find that the advertiser has purposely directed its activities at residents of the forum state."