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IS *ZIPPO'S* SLIDING SCALE A SLIPPERY SLOPE OF UNCERTAINTY? A CASE FOR ABOLISHING WEB SITE INTERACTIVITY AS A CONCLUSIVE FACTOR IN ASSESSING MINIMUM CONTACTS IN CYBERSPACE

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A significant part of the distribution of goods and services in this country is going to move from conventional channels to some sort of Internet system—whether it's retail goods or services.[1]

INTRODUCTION

The advent of the Internet[2] has revolutionized the global marketplace.[3] Traditional producers of goods and services and

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1. Alan Greenspan, Address to Senate Budget Comm. (Jan. 28, 1999).

2. *See* Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 830 (E.D. Penn. 1996), *aff'd* 521 U.S. 844 (1997) (defining the Internet as a "giant network which interconnects innumerable smaller groups of linked computer networks"). Some networks are closed to other computer networks, but many are connected to other networks allowing each computer in the network to communicate with computers in other networks. *Id.* at 831. The world wide web (or the "web") is the most well-known and advanced method of locating and retrieving information on the Internet. *Id.* at 835-36. Any web document can include links, formally known as "hyperlinks," to other types of information or resources. *Id.* at 836. "Such hyperlinks allow information to be accessed and organized in very flexible ways, and allow people to locate and efficiently view related information even if the information is stored on numerous computers all around the world. *Id.*

3. *See* Thomas P. Vartanian, *Whose Internet is it Anyway? The Law of Jurisdiction in Cyberspace: Achieving Legal Order Among the World's Nation's, at* http://www.ffhsj.com/bancmail/jur_over.htm (last visited Jan. 29, 2001) (arguing that the need for legal certainty in Internet-related jurisdictional principles is a global issue). In fact, the defining feature of the Internet is its transcendence of geographic borders. AM. BAR ASS'N, GLOBAL CYBERSPACE JURISDICTION PROJECT 3 (2000). Consequently, the Internet's global proliferation has been astounding; each minute, over five million e-mail messages are being sent around the world. *Id.* at 3. In January 2001, there were nearly twenty-five million web sites accessible on the web; as late as 1993, there were fifty-five million. Mark Memmott, *A Different World Dawns for Bush*, U.S.A. TODAY, Jan. 19, 2001, at 4A.

new Internet-based companies are transforming their business processes into e-commerce[4] processes in an effort to lower costs, improve customer service and increase productivity.[5] New competitors are enabled by the Internet's low cost, convenience, and ubiquity, features which effectively eviscerate the traditionally substantial barriers to market entry.[6] Before the Internet, companies utilized three channels of communication for exchanging information: person to person, written, and telephone.[7] The Internet combines and expands the capabilities of all three channels.[8]

The virtues of electronic commerce are certainly not limited to the Fortune 500.[9] The Internet is the quintessential small and middle-market business tool, because it provides access to the global marketplace without having to go to the market.[10] Inversely, just as the entrepreneur reaches a global marketplace of consumers, the consumer may choose from a global reach of sellers.[11] The twenty-first century e-consumer maximizes his/her purchasing power, because such a consumer is armed with near-

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TODAY, Jan. 19, 2001, at 4A.

4. *See* OSCAR CHACON ET AL., THE FUTURE OF ELECTRONIC COMMERCE OVER THE INTERNET AND ITS EFFECT ON MARKET EFFICIENCY, SOCIO-ECONOMIC POLICY, RISK, CONTROL, AND AUDIT THEORY 2 (Montgomery Research, Se-Com Project No. 4.0, 1999) (defining e-commerce as "the sharing of information, using a variety of electronic technologies, between organizations and individuals for the purpose of doing business with one another"). There remains much debate over whether a definitive definition of e-commerce exists. *Id.* Alternatively, e-commerce refers to the combination of business and electronic infrastructures that enable online buying and selling of goods and services. *Id.*

5. *See* U.S. DEP'T OF COMMERCE, ELECTRONIC COMMERCE IN THE DIGITAL ECONOMY 1 (The Emerging Digital Economy 1, Chapter 1, 1999) (documenting the proliferation of e-commerce and the dynamic changes it has accorded in the global marketplace).

6. *See* BOOZ ALLEN & HAMILTON, INTERNET E-COMMERCE: DELIVERING ON THE REAL PROMISE 1 (Montgomery Research, Se-Com Project No. 1.0, 1999) (assessing the relevant factors involved in implementing a fiscally responsible e-commerce strategy).

7. *See* FORRESTER RESEARCH, INC., E-COMMERCE TAKES OFF 1 (Montgomery Research, Se-Com Project No. 4.1, 1999) (stating that the Internet, as a fundamentally new channel of communication, expands the capabilities of both buyers and sellers). The Internet removes the telephone's time constraints, exceeds the depth of written communication, and provides the individual attention of a direct sales force, all while unlocking previously unreachable markets. *Id.*

8. *Id.*

9. *See* DEAN ANDAL, A UNIFORM JURISDICTIONAL STANDARD: APPLYING SUBSTANTIAL PHYSICAL PRESENCE STANDARDS TO ELECTRONIC COMMERCE 10 (1999) (stating that the Internet has its greatest effect on small and middle-market businesses). Professor Andal theorizes that the more unique a product or service, the more the Internet facilitates finding of market. *Id.*

10. *Id.*

11. *See* CHACON ET AL., *supra* note 4, at 3.

perfect market information.[12]

This dynamic marketplace expansion triggered an imminent effect, as the last ten years ushered the most profound economic growth in United States' history.[13] Nevertheless, this astonishing growth imparts a sphere of legal uncertainty when legal certainty and stability are paramount to the future of e-commerce, because legal certainty and stability are necessary to facilitate e-commerce investment, development and entrepreneurship. Prospective entrepreneurs must know what laws apply in order to assess their development patterns, price their products, and fully understand their liabilities.[14] Central to this inquiry is the question of personal jurisdiction.[15]

This Comment explores the modern landscape for personal jurisdiction due process standards in Internet litigation. Part I traces personal jurisdiction from the ratification of the Due Process Clause of the Fourteenth Amendment through the present and develops the framework for personal jurisdiction in the modern economic context. Part II analyzes various courts' application of the minimum contacts standard in Internet litigation. Part III proposes that the courts refine their current majority approach, and adopt a "real space" analysis evaluating the outward manifest purpose of the defendant's conduct with particular regard afforded to the defendant's pecuniary expectancy interest in the forum state.

I. FROM *PENNOYER* TO *ASAHI*, DUE PROCESS STANDARDS FOR JURISDICTIONAL AMENABILITY

Section A examines the concept of personal jurisdiction and its correlative historical origins. Section B discusses the Supreme Court's "minimum contacts" analysis established in *International Shoe v. Washington*,[16] and studies the residual effects of both the

12. *Id.* Facilitating consumer comparisons of product alternatives and prices results in optimal purchasing decisions. *Id.* Economists refer to this as Efficient Markets Theory. *Id.* The inevitable result is a downstream power shift from producer to consumer. *Id.* This increased opportunity for both consumers and small and middle market businesses helps even the playing field between those who have capital and those who do not. *Id.*

13. Albert Gore, *Foreword* to TOWARDS DIGITAL EQUALITY 1, 1 (U.S. Gov't Working Group on Electronic Commerce, 2nd Annual Report, 1999) (crediting one third of real economic growth in the United States to the emergence of the Internet).

14. Vartanian, *supra* note 3, at 5.

15. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (stating that personal jurisdiction, through the Due Process Clause, "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit").

16. 326 U.S. 310, 316 (1945).

Due Process Clause and the "minimum contacts" analysis. Section C categorizes the general settings where a forum state may assert personal jurisdiction over a foreign defendant without an actual physical presence.

A. Pennoyer v. Neff *and the Territorial Personal Jurisdiction Framework*

Personal jurisdiction is defined as the power of a court over the person of a defendant.[17] Specifically, personal jurisdiction serves as a geographic or territorial limitation restricting where a defendant may be sued.[18] A court hearing a matter without the requisite personal jurisdiction over the defendant is said to speak "a nullity."[19] Essentially, without personal jurisdiction the final judgment of the court harbors no legal significance.[20] Thus, the establishment of personal jurisdiction over the defendant is fundamental to any cause of action.[21]

The traditional territorial notion of personal jurisdiction in American jurisprudence is based on the power and presence framework elucidated in *Pennoyer v. Neff*.[22] In *Pennoyer*, the United States Supreme Court first applied the newly ratified,[23]

17.*See* BLACK'S LAW DICTIONARY 856 (7th ed. 1999) (defining personal jurisdiction as "a court's power to bring a person into its adjudicative process"). This type of jurisdiction is generally referred to as "in personam jurisdiction." *Id.*

18. Russel D. Shurtz, *WWW.International_Shoe.Com: Analyzing* Weber v. Jolly Hotels' *Paradigm For Personal Jurisdiction In Cyberspace*, 1998 B.Y.U.L. REV. 1663, 1666 (1998) [hereinafter *WWW.International Shoe.Com*] (citing Kulko v. Superior Court, 436 U.S. 84, 91 (1978) and McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957)).

19. *See* Vorhees v. Jackson, 35 U.S. 449, 467-68 (1836) (stating that "the Court is prohibited from rendering judgment until certain pre-requisites have been complied with, the judgment is not merely voidable, but a nullity, unless these pre-requisites. . . appear to be performed").

20. *See* May v. Anderson, 345 U.S. 528, 529 (1953) (holding that a decree issued in a state with no personal jurisdiction over the defendant will not be afforded full faith and credit in another sovereign).

21. *See* FED. R. CIV. P. 8(a) (requiring all claims for relief to set forth a statement of the grounds upon which the court's jurisdiction depends).

22. 95 U.S. 714, 722 (1877). The court opined that there are two well-established, mutually exclusive principles respecting the jurisdiction of an independent state over persons and property. *Id.* First, every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. *Id.* Second, no state can exercise jurisdiction and authority over persons or property exclusive of its territorial boundaries. *Id.* The states are of equal dignity and authority, thus the independence of one necessarily implies the exclusion of power from all others. *Id.*

23. *See generally* U.S. CONST. (providing, as ratified in 1789, for full faith and credit to judgments of all states, but not explicitly referring to personal jurisdiction). *Cf.* Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on* International Shoe *and Its Progeny*, 28 U.C. DAVIS L. REV. 965, 969 (1995) (concluding that the reason any

Due Process Clause of the Fourteenth Amendment[24] as a limitation on a state's exertion of personal jurisdiction.[25] As a general rule, according to the "power and presence" framework established in *Pennoyer*, a court's personal jurisdiction over a given defendant arises when the defendant is domiciled in the forum state.[26] This notion of territorial jurisdiction is generally intuitive to the average American: a citizen of Maine would never expect to defend a lawsuit in Hawaii without any prior connection to Hawaii.[27] However, since the age of *Pennoyer*, the Supreme Court has struggled to adapt the limitations of *Pennoyer* and the Due Process Clause to the increased mobility of society and the subsequent globalization of commerce.[28]

B. International Shoe v. Washington *and the Modern Economic Landscape*

By the mid-twentieth century, the proliferation of interstate travel and communication rendered the rigidity of the *Pennoyer* standard substantially impracticable.[29] The rule became laden

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reference to personal jurisdiction in the United States Constitution was omitted was that the rules of personal jurisdiction in the common law world appeared so clear, and so well accepted at the end of the eighteenth century, that harmonization at the federal level was deemed unnecessary).

24. *See* U.S. CONST. amend XIV. § 1 (providing in pertinent part, "[n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

25. *Pennoyer*, 95 U.S. at 733. *Pennoyer* involved a collateral attack by Neff, a resident of California, who was challenging the legitimacy of a sheriff's sale instituted to satisfy a default judgment issued by an Oregon court. *Id.* at 715-17. Neff asserted that the Oregon court lacked personal jurisdiction. *Id.* The District Court of Oregon invalidated the judgment on unrelated grounds, but the United States Supreme Court affirmed the holding that the Oregon court lacked personal jurisdiction over Neff. *Id.* In an epic opinion, Justice Field proffered an all-or-nothing standard by which a state has unquestionable jurisdictional authority over persons within its territory and no jurisdictional authority over persons exclusive of its territory. *Id.* at 733-36. *See generally* Wendy Collins Perdue, *Sin, Scandal and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH L. REV. 479 (1987) (providing a thorough examination of the facts, characters, and enduring effects of *Pennoyer*).

26. *See* Vlandis v. Kline, 412 U.S. 440, 453-54 (1973) (defining domicile as "an individual's true, fixed, and permanent home and place of habitation").

27. *See* Shurtz, *supra* note 18, at 1666 (stating that a citizen happily residing in one state justly would be disturbed to learn that he was being "haled" into a court in another state if he had no prior contact with the other state). This would be neither fair nor reasonable. *Id.*

28. *See generally* ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS 2.02 (2d ed. 1990); Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984).

29. *See Pennoyer*, 95 U.S. at 714 (holding that in-state service of process was a prerequisite to the assertion of personal jurisdiction over the defendant). *See also* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-23 (1957) (stating that

with illogical exceptions.[30] As a matter of consistency, it became exceedingly apparent that developing a new, pragmatic constitutional standard was both imperative and reasonable.[31]

Therefore, in 1945, the Supreme Court addressed the rigidity of the *Pennoyer* standard in the seminal case of *International Shoe v. Washington*.[32] The *International Shoe* analysis focused the jurisdictional inquiry on the contacts between the defendant, the forum, and the litigation.[33] The Court held that, in order to satisfy due process, a state could not exercise personal jurisdiction over a foreign defendant unless there are "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice."[34] While the Court did not expound what contacts would be deemed sufficient, it suggested that whether jurisdiction is permissible depends on the "quality and nature" of the contacts with the forum

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with the declining burdens imposed by interstate travel, and the expansion of national marketing and commercialization, the states were prevented from adequately protecting their respective interests).

30. *See, e.g.*, Adam v. Saenger, 303 U.S. 59, 67-68 (1938) (holding that an in personam judgment may be rendered in a cross-action against a plaintiff who has voluntarily submitted to the jurisdiction of the court by bringing the suit); Blackmer v. United States, 284 U.S. 421, 438-49 (1932) (holding that service of process on a United States citizen in a foreign country does not violate due process); Kane v. New Jersey, 242 U.S. 160, 167 (1916) (holding that nonresident motorist statutes that equate the use of a state's highways with a defendant's consent to appear are constitutional).

31. *See McGee*, 355 U.S. at 222-23 stating that:

> In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more states and may involve parties separated by the full continent. With this increasing nationalization of commerce has come an increase in the amount of business conducted by mail across state lines.

Id. At the same time modern transportation and communication have made it less burdensome for a party sued to defend itself in a state where it engages in economic activity"). *Id.*

32. Int'l Shoe v. Washington, 326 U.S. 310, 313 (1945). The International Shoe Company, incorporated in Delaware and headquartered in Missouri, employed between eleven and thirteen people in the State of Washington between 1937 and 1940, despite maintaining neither an office nor merchandise storage facilities in the state. *Id.* at 313-14. The State of Washington filed suit in its own courts asserting that International Shoe was in default on unpaid unemployment compensation funds. *Id.* at 313. The United States Supreme Court upheld the State of Washington's assertion of jurisdiction stating that due process is served after assessing the "quality and nature of the activity in relation to the fair and orderly administration of the laws" of the forum. *Id.* at 319. "[T]o the extent that a corporation exercises the privilege of conducting activities within a state . . . the privilege may give rise to obligations," which, for example, may require the corporation to defend against a suit. *Id.*

33. *Id.*

34. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

state.[35] The rationale of the *International Shoe* Court implies that a corporation (or individual) choosing to conduct activities within a state implicitly accepts a reciprocal duty to defend suits, arising out of those activities, in the local courts.[36] The defendant who deliberately chooses to take advantage of "the benefits and protections of the laws"[37] of a state should not be surprised when that state holds that defendant accountable in its court for those in-state acts.[38]

The fundamental obstacle in applying the minimum contacts standard is defining the "quality and nature" that makes a contact sufficient to support jurisdiction.[39] The Supreme Court's majority position is to apply the reasoning in *Hanson v. Denckla*.[40] In *Hanson*, the Supreme Court held that "an act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws," is always necessary.[41]

The reconciled residual effect of the holdings in *International Shoe* and *Hanson* is a variation in defining the due process requirements.[42] Now, "minimum contacts" is more logically equated with the *Hanson* requirement that the defendant purposefully avail himself/herself of the forum state's benefits.[43] *International Shoe's* "fair and orderly administration of the laws" is now said to

35. *Id.* at 319.

36. *See* JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS 4, (3rd ed. 1990) (stating that a defendant should understand that his or her activities within a state will have an inherent impact upon citizens and entities within that state). Professor Glannon observes that a state has a cognizable interest in enforcing an orderly conduct of affairs and adjudicating any disputes that may arise out of those activities. *Id.*

37. *Int'l Shoe*, 326 U.S. at 319.

38. GLANNON, *supra* note 36, at 4.

39. *Id.* at 8.

40. 357 U.S. 235, 265 (1958). In *Hanson*, the parties contested trust assets that were located in the State of Delaware. *Id.* at 238. A group of claimants brought an action in Florida state court seeking dispensation of the trust assets they claimed were passed under the residuary clause of a will. *Id.* The United States Supreme Court held that the fact that the owner was domiciled in Florida was an insufficient basis to establish jurisdiction over the Delaware trustee. *Id.* Because Florida was forbidden to enter a judgment binding a person over whom it had no jurisdiction, it had even less right to enter a judgment purporting to extinguish the interest of such a person in property over which it had no jurisdiction. *Id.* at 255-56.

41. *Id.* at 253. *See* AM. BAR ASS'N, *supra* note 3, at 41 (stating that "such an act may be a single occurrence, such as performing a single service in the state; it may be continuous presence of the defendant in the state as a citizen or domiciliary; it may be [and frequently is] something in between"). Any time a defendant is physically, intentionally present within the forum, the defendant has unequivocally benefited from the legal protections of that forum. *Id.*

42. AM. BAR ASS'N, *supra* note 3, at 41.

43. *Id.*

require that the assertion of jurisdiction be "reasonable."[44]

This hybrid analysis has led to universal application of a three-prong test to determine whether a nonresident has sufficient contacts with the forum state, such that the state's exercise of personal jurisdiction would comport with "traditional notions of fair play and substantial justice."[45] First, the court considers whether the defendant purposefully availed himself of the benefits of the forum state.[46] Second, the court resolves whether the claim asserted against the defendant arose out of the defendant's contacts with the forum state.[47] And third, the court determines whether the exercise of jurisdiction is reasonable.[48] This three-pronged test provides the current constitutional framework for "real space" jurisdictional analysis.

However, cases arising in the context of Internet commerce and communication do not generally fit within the most basic concepts of the paradigm established by *International Shoe* and its progeny.[49] In the Internet landscape, a defendant's "presence" may be manifested merely by a web site accessible in the forum.[50] In fact, the defendant may never be physically present in the forum state.

C. Personal Jurisdiction Without Physical Presence

The United States Supreme Court has held that personal jurisdiction, with no physical presence, is constitutionally permissible in three different settings.[51] First, jurisdiction can be constitu-

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44. *Id.* (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105 (1987)).

45. Darby v. Compagnie Nationale Air France, 769 F. Supp. 1255, 1262 (S.D.N.Y. 1991) (quoting Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945).

46. *Hanson*, 357 U.S. at 253. The critical inquiry is whether those activities are such that the defendant "should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

47. Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995).

48. *World-Wide Volkswagen Corp.*, 444 U.S. at 292. Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant will be considered in light of other factors. *Id. See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-23 (1957) (considering the forum state's interest in adjudicating the dispute); Kulko v. California Superior Court, 436 U.S. 84, 92 (1978) (considering plaintiff's interest in obtaining convenient and effective relief, especially when that interest is not adequately protected by plaintiff's choice of forum); Shaffer v. Heitner, 433 U.S. 186, 211, n. 37 (1977) (considering the interstate judicial system's interest in effectuating the most efficacious resolution of controversies); *see also Kulko*, 436 U.S. at 93 (considering the shared interests of the several states in advancing fundamental substantive social policies).

49. AM. BAR ASS'N, *supra* note 3, at 43.

50. *Id.*

51. *Id.* The American Bar Association argues that prior case law has dealt with variations of the same problem, a defendant not physically present in the

tionally permissible when the defendant, through a purposeful act or availment, receives some indirect economic benefit.[52] This doctrine is most commonly referred to as the "stream of commerce" doctrine. The doctrine originated in the Illinois Supreme Court in *Gray v. American Radiator & Standard Sanitary Corp.*[53] The court held that an Ohio manufacturer was subject to personal jurisdiction in Illinois.[54] The court opined, "to the extent that its business may be directly affected by transactions occurring here it enjoys benefits from the laws of this state."[55]

The *Gray* court acknowledged the substantial logistic developments of the modern economic world, eradicating the significance of state lines in both distribution and communication.[56] The impact of the *Gray* holding was momentous: a business whose product was "swept" into another state through the channels of commerce was subject to the jurisdiction of that state's courts.

In *World-Wide Volkswagen Corp. v. Woodson*, the United

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forum state. *Id.* This prior case law avails relevant precedent to guide the emerging jurisprudence. *Id.*

52. *Id.*

53. Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 763 (1961).

54. *Id.* at 444. The plaintiff brought a personal injury suit against several defendants alleging that a water heater exploded as a proximate result of a negligently constructed safety valve. *Id.* at 434. The defendant, Titan Valve Manufacturing Company, was a foreign corporation based in Cleveland, Ohio, with no physical presence in Illinois. *Id.* Titan Valve filed a motion to dismiss on the ground that it had not committed a tortious act in Illinois. *Id.* Its affidavit stated that it did no business in Illinois and that it sold the completed valves to a co-defendant outside Illinois. *Id.* The circuit court granted the defendant's motion to dismiss the complaint. *Id.* On appeal, the Illinois Supreme Court held that the defendant had sufficient contacts with the State of Illinois to establish jurisdiction because Titan elected to sell its product for ultimate use in Illinois. *Id.* at 444.

55. *Id.* at 442. Justice Klingbiel stated:

> With the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other [s]tates. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; [thus] it is not unreasonable . . . to say that the use of such products in the ordinary course of commerce is sufficient contact with this [s]tate to justify a requirement that he defend here. As a general proposition, if a corporation elects to sell its products for ultimate use in another [s]tate, it is not unjust to hold it answerable there for any damage caused by defects in those products.

Id.

56. *Gray*, 176 N.E.2d at 767. Justice Klingbiel acknowledged the changing nature of the modern market: "[a]dvanced means of distribution and other commercial activity have . . . largely effaced the economic significance of [s]tate lines. By the same token, today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other [s]tates." *Id.* at 442-43.

States Supreme Court validated the constitutionality of the "stream of commerce" doctrine,[57] but would not allow jurisdiction upon the specific facts of that case.[58] In that opinion, Justice White issued a calamitous warning against the expansive use of the doctrine opining that:

> it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states.[59]

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57. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980). In validating the "stream of commerce" argument, Justice White, citing *Gray*, stated:

> When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum [s]tate,' it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the [s]tate. Hence if the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other [s]tates, it is not unreasonable to subject it to suit in one of those [s]tates . . . The forum [s]tate does not exceed its powers under the Due Process Clause if it asserts 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 [s]tate.

Id. at 297-98 (quoting Hanson v. Denckla, 357 U.S. 235, 265 (1958)).

58. *Id.* at 299. A New York resident purchased a car from World-Wide Volkswagen in New York. *Id.* at 286. While driving through Oklahoma, the car was struck from the rear, igniting a fire that severely injured the purchaser. *Id.* The purchaser filed a products liability action in Oklahoma. *Id.* at 299. The defendants asserted that Oklahoma's exercise of jurisdiction would offend the Due Process Clause of the Fourteenth Amendment. *Id.* The trial court and the Oklahoma Supreme Court rejected the defendants' claim, but the United States Supreme Court reversed the decision, finding no specific factual basis establishing any "contacts, ties, or relations" with the State of Oklahoma. *Id.* at 298.

59. *Id.* at 294. Justice White warned:

> As technological progress has increased the flow of commerce between the [s]tates, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer*, to the flexible standard of *International Shoe*. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective [s]tates.

Id. (citing Pennoyer v. Neff, 95 U.S. 714, 722 (1877) and Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945)). *But see* Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03, n. 10, (1982) (stating that although

Cognizant of Justice White's concerns in *World Wide Volkswagen,* the Court has materially limited the breadth of jurisdiction possible through the "stream of commerce" doctrine.[60] In *Asahi Metal Industry Co. v. Superior Court of California*, the Court held that a defendant must engage in "something more" than just placing the product in the stream of commerce to render personal jurisdiction constitutionally permissible.[61] Thus, the "mere forseeability" that a product will be "swept" into the forum state is insufficient to sustain jurisdiction, unless the defendant acts with "purposeful intent . . . to serve the forum."[62]

Second, personal jurisdiction is permissible when the defendant intentionally causes damage in the forum state.[63] The seminal case employing this doctrine, which is commonly called the "effects test", is *Calder v. Jones*.[64] In *Calder*, the Supreme Court held

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this protection operates to restrict state power, it "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause" rather than as a function "of federalism concerns").

60. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 105 (1986). The defendant, Asahi Metal, a Japanese corporation, manufactured a valve that was sold to defendant Cheng Shin Rubber, a Taiwanese corporation, who used it in manufacturing a motorcycle tire. *Id.* at 106. The tire exploded in California, and the driver filed a products liability claim against Cheng Shin Rubber, who filed a cross-complaint for indemnity against Asahi Metal. *Id.* at 105-106. The trial court denied Asahi Metal's motion to quash service, the California Court of Appeals reversed, and the California Supreme Court reversed the decision of the appellate court. *Id.* at 107-108. The United States Supreme Court, in a plurality opinion, held that the mere fact that Asahi Metal knew that its parts would be used in products sold in the state did not provide the minimum contacts for the state to exercise personal jurisdiction over it, because Asahi did not avail itself of the privilege of conducting business in the state. *Id.* at 112-13. Justice O'Connor, wrote that "mere awareness" does not establish minimum contacts sufficient to render a state's exercise of personal jurisdiction consistent with fair play and substantial justice as required by the Due Process Clause. *Id.* at 113-14. The Court stated that:

> The substantial connection between the defendant and the forum necessary for a finding of minimum contacts must derive from an action purposely directed toward the forum state, and the mere placement of a product into the stream of commerce is not such an act, even if done with awareness that the stream will sweep the product into the forum state absent additional conduct indicating an intent to serve the forum.

Id. at 112.

61. *Id.* at 111.

62. *Id.*

63. AM. BAR ASS'N, *supra* note 3, at 48-49.

64. 465 U.S. 783, 785 (1983). Jones, a California resident, brought an action in California against a national magazine based in Florida alleging libel. *Id.* at 784. The defendants moved to quash service for lack of personal jurisdiction. *Id.* The trial court granted the defendant's motion, but the California appellate court reversed and was affirmed by the California Supreme Court. *Id.* at 785. The United States Supreme Court held that jurisdiction was proper, on the basis of the effects of the defendant's intentional conduct while in Florida. *Id.* at 789.

that actions intending to and causing damage in the forum state subjects the defendant to personal jurisdiction in that state.[65] The applicability of the "effects test" is fairly narrow; typically, courts only apply the doctrine to intellectual property and intentional tort claims.[66]

Third, jurisdiction is permissible when the defendant has intentionally affiliated himself/herself with some entity in the forum, where that affiliation is sufficient to satisfy the requirements evinced in *Hanson*.[67] The best example of such intentional affiliation is in *Burger King Corp. v. Rudzewicz*.[68] In *Burger King*, the Supreme Court held that when a foreign defendant intentionally affiliates himself/herself with an entity in the forum state, jurisdiction might constitutionally be asserted if the affiliation is of the "nature and quality" expounded in *Hanson*.[69] The Court specifically rejected any "talismanic jurisdictional formula," noting that its decision did not justify an assertion of personal jurisdiction over any party within contractual privity of a contract in the other party's home state.[70]

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65. *Id.* Justice Rehnquist held that "[t]he allegedly libelous story concerned the California activities of a California resident . . . the article was drawn from California sources, the brunt of the harm, in terms of both the plaintiff's emotional distress and the injury to her professional reputation, was suffered in California." *Id.* at 788-89. "California is the focal point both of the story and the harm suffered. *Id.* at 789. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of the Florida conduct in California." *Id.* (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980)).

66. AM. BAR ASS'N, *supra* note 3, at 49.

67. *See supra* text accompanying notes 40-41 and 46.

68. 471 U.S. 462, 464 (1962). Burger King, a Florida corporation with its principal offices located in Miami, filed a breach of contract action against two Michigan residents operating a franchise in Michigan. *Id.* at 462. The parties had previously executed a franchise agreement under which the defendant was licensed to use Burger King's trade and service marks in a leased standardized restaurant facility for a period of twenty years. *Id.* Subsequently, when the restaurant's patronage declined, the defendants fell behind in their monthly payments. *Id.* After extended negotiations among the parties proved unsuccessful in solving the problem, the Miami headquarters terminated the agreement, ordered the defendants to vacate the premises, and brought a breach of contract action. *Id.* The defendants filed a motion to dismiss claiming that, because they were Michigan residents and Burger King's claim did not "arise" within Florida, they were not subject to personal jurisdiction in Florida. *Id.* After numerous appeals, the United States Supreme Court determined that a party that avails itself of the benefits and protections of the law of a forum state is subject to personal jurisdiction in that state. *Id.* at 487. The Court found that the defendants had entered into a contract and established a substantial and continuing relationship with the plaintiff, a Florida resident. *Id.* at 479. Furthermore, the defendant had fair notice that he might be subject to suit in Florida. *Id.* at 487.

69. Id. at 474-75.

70. *Id.* at 485.

Essentially, the *Burger King* Court, like the *Calder* and *Asahi* Courts after it, centered the jurisdictional inquiry on the purposeful conduct of the defendant.[71] This inquiry invokes an element of fundamental fairness by allowing the defendant to structure his or her conduct to alleviate the burden of unexpected, distant litigation and provide minimum assurance of potential amenability.

Establishing the constitutional standards for personal jurisdiction in Internet litigation requires an exhaustive understanding of the due process framework. The preceding three situations serve as examples for exercising personal jurisdiction over defendants with no physical presence in the forum. In all three situations, the United States Supreme Court required that the defendant engage in conduct purposefully directed at the forum state.[72] This concurrent requirement provides a framework for the analysis of current Internet personal jurisdiction disputes.

II. THE CURRENT STATE OF CONSTITUTIONAL PERSONAL JURISDICTION IN INTERNET LITIGATION

Section A examines the initial application of due process standards to the Internet framework. Section B introduces the passive/interactive distinction and discusses the sliding scale analysis elucidated in *Zippo Manufacturing v. Zippo Dot Com.*[73] Section C surveys courts' current proclivity toward a more traditional application of the purposeful availment standard.

A. *Primitive Due Process in a Primitive Cyber World*

The first Internet-based jurisdiction cases presented a legal issue without precedent. Traditional notions of due process did not comport with the Internet paradigm, because a territorial-based doctrine is inherently irreconcilable in a medium that defies geographic boundaries.[74] Rather than defining a new jurisdictional framework, however, contemporary courts applied well-known tenets of personal jurisdiction to answer due process questions.[75]

The first major case to address the sufficiency of a web site in establishing minimum contacts was *Inset Systems, Inc. v. Instruc-*

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71. *Id.* at 462. *See also* text accompanying notes 60 and 65. The common thread indicative of the non-physical presence cases is the Court's focus on the purpose or intent of the defendant's conduct.

72. *See supra* text accompanying notes 57, 60, 65, and 68.

73. 952 F. Supp. 1119, 1122 (W.D. Pa. 1997).

74. Recent Case, *D.C. Circuit Rejects Sliding Scale Approach To Finding Personal Jurisdiction Based On Internet Contacts* - GTE New Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343 (D.C. Cir. 2000), 113 HARV. L. REV. 2128, 2128 (2000) [hereinafter *Circuit Rejects Sliding Scale Approach*] (asserting that courts have struggled to apply a territorial-based doctrine to a medium that defies geographic boundaries).

75. Edmund M. Amorosi, *Federal Courts Adapt Personal Jurisdiction Law For Disputes on Internet*, LEGAL BACKGROUNDER, Jan. 21, 2000, at 2.

tion Set, Inc.[76] In that case, Inset Systems, a Connecticut corporation, filed a trademark infringement action against Instruction Set, a Massachusetts corporation, in a Connecticut District Court.[77] Instruction Set filed a motion to dismiss the complaint citing a lack of personal jurisdiction.[78] The court denied the motion, holding the minimum contacts necessary to comport with due process were satisfied because the defendant had engaged a ubiquitously accessible web site, as well as a toll-free number to solicit business in the State of Connecticut.[79]

The court reasoned that the Internet, by its very nature, is designed to transmit information worldwide.[80] As such, Instruction Set had purposefully availed itself of the privilege of doing business in the State of Connecticut, and therefore, should reasonably anticipate the possibility of defending suit there.[81]

The precedential effect rendered by the *Inset Systems* holding is chilling.[82] Using the *Inset System* court's rationale, by establishing a web site, every host in the country renders himself amenable to jurisdiction in every state for claims arising out of his site.[83]

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76. 937 F. Supp. 161, 162 (D. Conn. 1996).

77. *Id.* Inset filed and received registration as the owner of the federal trademark "INSET" in October 1986. *Id.* at 163. Thereafter, Instruction Set obtained "INSET.COM" as its Internet domain address. *Id.*

78. *Id.* at 162. The defendant also asserted that venue was improper. *Id.* at 165.

79. *Id.* at 164. The court reasoned that Instruction Set, through the use of the Internet and a toll-free number, had directed its advertising efforts towards the entire country. *Id.* at 165. In fact, the court reasoned, the mere readiness to initiate solicitation of Connecticut residents constitutes the purposeful availment of doing business in Connecticut. *Id.* (citing Whelen Eng'g Co., Inc. v. Tomar Elecs., 672 F. Supp. 659, 664 (D. Conn. 1993)).

80. *Id.* at 165. "Once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any [and every] Internet user." *Id.*

81. *Inset Systems*, 937 F. Supp. at 165. The court cited Connecticut's interest in adjudicating a dispute concerning state statutory and common law and the minimal distance between Connecticut and Massachusetts. *Id.*

82. Michael E. Allen, Note, *Analyzing Minimum Contacts Through the Internet: Should the World Wide Web Mean World Wide Jurisdiction*, 31 IND. L. REV. 385, 402 (1998).

83. *Id.* *See also* Maritz v. CyberGold Inc., 947 F. Supp. 1328, 1334 (E.D. Mo. 1996) (holding that a California corporation's web site, which provided information about the company's mailing list, was a conscious decision to transmit advertising information to all Internet users). The court found that the defendant's contacts were "of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence." *Id.* at 1333. The *Maritz* court contrasted the automatic exchange of information on CyberGold's web site with the discretionary response to customer's request for information through the mail. *Id.* The manifest implication of the court in both *Maritz* and *Inset Systems* is that "because material is accessible universally, jurisdiction might [be constitutionally permissible] almost anywhere." Corey Ackerman, Note, World-Wide Volkswagen, *Meet the World Wide Web: An Examination of Personal Jurisdiction Applied to a New World*, 71 ST. JOHN'S L. REV.

This reasoning assails the very essence of due process and fails to heed the calamitous warning of Justice White in *World-Wide Volkswagen*.[84] Thus, after *World-Wide Volkswagen*, courts have explicitly rejected the *Inset Systems* holding and rationale.[85]

In *CompuServe v. Patterson*, CompuServe, an Ohio-based Internet service provider, brought an action in an Ohio district court seeking declaratory judgment that it was not infringing on Patterson's trademarks.[86] Patterson had entered into a "Shareware Registration Agreement" with CompuServe in 1991, allowing him to place "shareware" on the CompuServe system for others to purchase.[87] From 1991 to 1994, Patterson, from his Texas home, transmitted thirty-two independent software files to CompuServe's Ohio system, where they were displayed and available to all CompuServe subscribers.[88] During that time period, CompuServe began to market an Internet navigation system similar to the defendant's.[89]

The district court granted Patterson's motion to dismiss for want of personal jurisdiction,[90] but the United States Court of Ap-

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403, 432 n.136 (1997).

84. Ackerman, *supra* note 83, at 432 n.137. *See also supra* text accompanying note 59 (quoting Justice White arguing that the Court's proclivity towards a more flexible constitutional standard should not signal the eventual demise of restrictions on the exertion of personal jurisdiction by state courts).

85. *See* Millennium Enter., Inc. v. Millennium Music, LP, 33 F. Supp. 2d. 907, 915 (D. Or. 1999) (concluding that courts have shifted away from finding jurisdiction based solely on the existence of web site advertising). The court referred to the *Inset Systems* holding as an "inauspicious beginning" to Internet minimum contacts questions. *Id.*

86. 89 F.3d 1257, 1259 (6th Cir. 1996). Defendant Richard Patterson, a Texas resident, subscribed to CompuServe for his Internet service. *Id.* at 1260.

87. *Id.* The "Shareware Registration Agreement" permitted Patterson to sell his shareware to any CompuServe subscriber. *Id.*

88. *Id.* at 1261. Patterson advertised and sold his software exclusively on CompuServe's system. *Id.* However, over this period of time, Patterson asserted that he sold less than $650 worth of software to twelve Ohio residents. *Id.*

89. *Id.* Patterson's software allowed Internet users to navigate the web. *Id.* Patterson notified CompuServe's marketing department that its product infringed his common law trademarks and demanded $100,000 to release CompuServe from any potential claims. *Id.* CompuServe filed a declaratory judgment action in the federal district court for the Southern District Court of Ohio. *Id.*

90. *CompuServe Inc.*, 89 F.3d at 1261. The district court held that the relationship was marked by a "minimal course of dealing" and looked to "cases involving interstate business negotiations and relationships." *Id.* at 1264. *See also* Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110, 1119 (6th Cir. 1992) (holding that the contacts between an England-based association and an Ohio plaintiff were "superficial" where the parties had engaged in mail and telephone communications, but had engaged in no prior negotiations and had no expectation of future consequences).

peals for the Sixth Circuit reversed, concluding that Patterson "knowingly made an effort-and in fact, purposefully contracted-to market a product in other states, with Ohio-based CompuServe operating, in effect, as his distribution center."[91]

The impact of the *CompuServe* decision is principally in what the court did not decide. The court refused to rule on whether Patterson would be subject to suit in any state where his software was used.[92] Thus, the *CompuServe* court impliedly rejected the reasoning of *Inset Systems*, by suggesting that Patterson might not be subject to jurisdiction in *every* state where his software was sold or used.[93] This was a significant departure from the reasoning of *Inset Systems*, and fashioned the need for a new standard for analysis.[94]

B. The Passive/Interactive Distinction and the Sliding Scale

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91. *CompuServe Inc.*, 89 F.3d at 1263. The court found that Patterson clearly engaged in purposeful conduct creating a substantial connection with the State of Ohio:

> [When] Patterson chose to transmit his software from Texas to CompuServe's system in Ohio, myriad others gained access to Patterson's software via that system, and Patterson advertised and sold his product through that system . . . . Moreover, this was a relationship intended to be on going in nature; it was not a 'one-shot affair' . . . we believe that ample contacts exist.

Id. at 1264-65.

92. *Id.* at 1268. The court explicitly stated:

> We need not and do not hold that Patterson would be subject to suit in any state where his software was purchased or used; that is not the issue before us. We also do not have before us an attempt by another party from a third state to sue Patterson in Ohio for, say, a "computer virus" caused by his software, and thus we need not address whether personal jurisdiction could be found on those facts. Finally, we need not and do not hold that CompuServe may, as the district court posited, sue any regular subscriber to its service for nonpayment in Ohio, even if the subscriber to its service is a native Alaskan who has never left home.

Id.

93. *Compare Inset Systems*, 937 F. Supp. at 162 (implying that a web host would be subject to personal jurisdiction in every state), *with CompuServe Inc.*, 89 F.3d at 1259 (refusing to extend their holding beyond the facts of that case). Applying the rationale of the *Inset Systems* court to *CompuServe, Inc.* would clearly render Patterson subject to the personal jurisdiction of every state where his software was sold or used.

94. While the residual effect of the *Inset Systems* holding was chilling, it unquestionably provided both legal stability and certainty. Essentially, every web host was subject to the jurisdiction of every state. The *CompuServe, Inc.* court opened the door of uncertainty. Thus, to avoid any "talismanic jurisdictional formula," a new standard was necessary. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86 (1962) (stating that the facts of each case must always be weighed to determine whether jurisdiction would comport with fair play and substantial justice). Any jurisdictional determination that prevents the defendant from a reasonable anticipation of being brought before a court does not comport with these notions. *Id.* at 486.

Standard of Zippo

Several courts have elucidated a dispositive distinction between passive and interactive web sites.[95] The distinction is firmly rooted in Justice O'Connor's "stream of commerce" analysis.[96] The implication is that hosting a web site is substantially similar to placing a product in the stream of commerce.[97] In both circumstances, the defendant chose a course of action in which the effect in the forum state is reasonably foreseeable.[98] However, without requiring "something more," the defendant would essentially be subject to nationwide jurisdiction.[99] A contrary due process standard would effectively eviscerate any rational limits on state sovereignty.[100]

In *Benusan Restaurant Corp. v. King*,[101] the plaintiff corporation, owner of a famous New York jazz club known as "The Blue Note," brought a trademark infringement action against the defendant, the owner of a jazz club in Missouri operating under the same name.[102] In April 1996, King created a general access web site promoting his club[103] and containing a logo substantially similar to the logo utilized by the plaintiff.[104] The defendant filed a mo-

95. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (concluding that a review of prior cases revealed that the likelihood that personal jurisdiction can be constitutionally exercised if directly proportionate to the nature and quality of commercial interactivity available over the web site).

96. Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987)).
See also Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1362-65 (W.D. Ark. 1997) (finding the "stream of commerce" doctrine analogous to web site advertising).

97. *Id.* Both creating a web site and placing a product in the stream of commerce have nationwide effects, however without something more, these acts are not purposefully directed at the forum state. *Id.*

98. *Compare Benusan*, 937 F. Supp. at 300 (concluding that the defendant could have foreseen that his web site was available to forum residents) *with Asahi*, 480 U.S. at 112 (assuming that Asahi was aware that its valves would be incorporated into tires sold in the forum state).

99. *Compare Asahi Metal Indus. Co.*, 480 U.S. at 102 (introducing the "something more" standard), *with Inset Systems,* 937 F. Supp. at 165 (finding limitless jurisdictional boundaries).

100. *See Inset Systems,* 937 F. Supp. at 165 (holding that merely hosting a web site with a commercial advertisement is a purposeful availment of doing business in every state).

101. 937 F. Supp. at 295, 295 (S.D.N.Y. 1996).

102. *Id.* at 297.

103. *Id.* The web site contained general information about the club, including a calendar of events and the name, address, and local phone number for a ticket outlet in Columbia, Missouri. *Id.*

104. *Id.* In addition, the defendant's web site contained the following disclaimer: "The Blue Note's Cyberspot should not be confused with one of the world's finest jazz club[s] [the] Blue Note located in the heart of New York's Greenwich Village." *Id.* at 297-98. The site also contained a hyperlink to the

tion to dismiss citing a lack of personal jurisdiction.[105]

The court dismissed the case holding that the defendant was not amenable to suit under either the New York long-arm statute or the Due Process Clause.[106] King had done nothing to purposefully avail himself of New York;[107] he was neither seeking to encourage New Yorkers to access his site nor visit his club.[108] In fact, the court opined, his actions were analogous to merely placing a product into the stream of commerce.[109] Thus by analogy, merely creating a web site, without something more, is an insufficient basis to establish jurisdiction. This analysis comports with the rationale of *Asahi* and maintains the court's focus on the defendant's purposeful conduct.

Shifting this reasoning to the Internet context, the "something more" requirement of Justice O'Connor's "stream of commerce" opinion appears to be inherently possible through the medium itself.[110] The critical inquiry would be the level of commercial interactivity available directly through the site.[111] In *Benusan*, the court noted that Internet users could not order tickets directly from the defendant's web site.[112] The manifest implication is that if the site allows New Yorkers to buy tickets while accessing the web site, the defendant purposefully avails himself/herself of the benefits of conducting business in New York. Thus, the defendant satisfied the "something more" requirement in Justice O'Connor's analysis.[113]

However, the next step in this emerging jurisprudence illogically obfuscated the court's focus on the defendant's conduct. In

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plaintiff's web site, which could be accessed by double-clicking on the hyperlink. *Id.* at 298.

105. *Id.*

106. *Benusan,* 937 F. Supp. at 300. The court's constitutional inquiry was unnecessary, and as such, is actually dicta. The Due Process Clause functions as a limit to a state's sovereignty over a non-resident defendant when that defendant is subject to a forum state's jurisdiction under the state's long-arm statute. *Id.* However, the *Bensusan* court determined that King was not subject to New York's jurisdiction under the state long-arm statute. *Id.*

107. *Id.* at 301.

108. *Id.*

109. *Id.* "Creating a [web] site, like a placing a product into the stream of commerce, may be felt nationwide, or even worldwide, but, without more, it is not an act purposefully directed toward the forum state." *Id. See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1986) (holding that merely placing a product into the stream of commerce, without something more is not an act sufficient to support jurisdiction).

110. *See* Allen, *supra* note 82, at 403 (arguing that the "stream of commerce" analysis is fundamentally different in the Internet context). In the Internet context, the "something more" requirement could be established by some characteristic of the web site itself. *Id.*

111. *Id.*

112. *Id.* at 402 (citing *Bensusan,* 937 F. Supp at 299).

113. *Id.*

Zippo Manufacturing v. Zippo Dot Com, the court further defined the passive/interactive distinction and created a sliding scale of interactivity to analyze cases where the defendant's web site is not definitively passive or interactive.[114] In that case, the plaintiff, Zippo Manufacturing, filed a trademark dilution and infringement action in Pennsylvania district court against Zippo Dot Com, a California Internet news service.[115] The defendant's only contacts with Pennsylvania residents occurred over the Internet, and approximately two percent of the defendant's 140,000 worldwide subscribers were Pennsylvania residents.[116] In addition. Dot Com had entered into agreements with seven Pennsylvania-based Internet service providers.[117]

The defendant filed a motion to dismiss for lack of personal jurisdiction, but the court denied the motion holding that Dot Com's Pennsylvania contacts were sufficient to establish jurisdiction.[118] The court specifically rejected Dot Com's contention[119] that its contacts with Pennsylvania residents were "fortuitous" within the meaning of *World Wide Volkswagen*.[120]

Instead, the court adopted a sliding scale of interactivity to analyze the likelihood that personal jurisdiction can be constitutionally exercised.[121] In the sliding scale analysis, an interactive, substantially commercial web site, with repeated file transmissions will likely establish constitutionally permissible jurisdiction.[122] Conversely, an informational, passive web site is not

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

115. *Id.* at 1121. Zippo Dot Com's web site contained information about the company and a subscription application. *Id.* The user provided vital information and proffered payment either by credit card directly through the web site or over the telephone. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 1127. The court noted that Zippo Dot Com had "done more" than just create an interactive web site. *Id.* at 1125. It contracted with 3,000 residents and seven Internet service providers in Pennsylvania. *Id.* at 1126.

119. *Zippo*, 952 F. Supp. at 1126. "Dot Com repeatedly and consciously chose to process Pennsylvania resident's applications and to assign them passwords." *Id.* "When a defendant makes a conscious choice to conduct business with the residents of a forum state, 'it has clear notice that it is subject to suit there.'" *Id.* (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1979)). "Dot Com was under no obligation to sell its services to Pennsylvania residents. It freely chose to do so, presumably in order to profit from those transactions." *Id.* "If Dot Com had not wanted to be amenable to jurisdiction in Pennsylvania, the solution would have been simple, it could have chosen not to sell its services to Pennsylvania residents." *Id.* at 1126-27.

120. *See World-Wide Volkswagen Corp.*, 444 U.S. at 297 (stating that jurisdiction can not be based upon one, isolated occurrence which was merely foreseeable to the defendant).

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

122. *Id.* at 1124. The court opined:

grounds for exercising personal jurisdiction.[123] The middle ground is occupied by interactive web sites where a user can exchange information with the host site.[124] In these cases the material inquiry is the level of interactivity and the commercial nature of that activity.[125]

However, this analysis, much like Justice O'Connor's "stream of commerce" analysis, offers wide discretion to the court. Undeniably, a majority of web sites are neither entirely passive in nature, nor substantially commercial in nature.[126] Thus, the sliding scale analysis, on its face, fails its essential purpose.[127] An entrepreneur has very little guidance in structuring his/her conduct, or

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> [T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well-developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.

Id. at 1124. *E.g.* CompuServe Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).

123. *Zippo*, 952 F. Supp. at 1124. The court proffered:

> At the opposite end are situations where a defendant has simply posted information on an Internet web site that is accessible to users in foreign jurisdictions. A passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.

Id. E.g. Bensusan, 937 F. Supp. at 295, 295 (S.D.N.Y. 1996).

124. *E.g.* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1333 (holding that a California corporation's web site, which provided information about the company's mailing list, was a conscious decision to transmit advertising information to all Internet users) (E.D. Mo. 1996); Ty. Inc. v. Clark, No. 99C5532, 2000 U.S. Dist. LEXIS 383 at *9 (N.D. Ill. Jan. 14, 2000) (finding that the defendant's web site received e-mail and issued ordering information fell in the "middle ground"); Origin Instruments Corp. v. Adaptive Computer Sys., Inc., No. 3:97-CV-2595-L, 1999 U.S. Dist. LEXIS 1451, at *8 (N.D. Tex. Feb. 4, 1999) (holding that the defendant's site, which provided product information and a hyperlink to another web site that sold the products was in the "middle ground" according to *Zippo*).

125. *See* cases cited *supra* note 124 (finding that the level of interactivity and the "quality and nature" of that activity is the determinative factor in evaluating the defendant's contacts).

126. *See* cases cited and text accompanying *supra* note 124 (showing that the majority of web sites will fall into this pervasive "middle ground").

127. *See* Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 939 (1998) (concluding that the current "hodgepodge" of cases which fall in this middle ground is "inconsistent, irrational, and irreconcilable"). This is in direct conflict with an essential element of Due Process Clause protection because it fails to give a degree of predictability to a legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them amenable to suit. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1979).

web site, in a way that adequately assesses his/her potential amenability to suit in a foreign state.

With this in mind, the United States Court of Appeals for the District of Columbia recently rejected this sliding scale analysis for the very reasons cited above.[128] This decision seems to indicate greater reliance on traditional "real space" analysis in evaluating Internet contacts.

C. *A Traditional Application of the Purposeful Availment Standard*

Recently, several courts have indicated a proclivity to take a more traditional "real-space" view of the purposeful availment requirement.[129] In *GTE New Media Services Inc. v. BellSouth Corp.*, GTE filed an action against five regional Bell operating companies alleging antitrust violations and tortious interference with a contract.[130] GTE asserted that the alleged conspiracy was designed to cause Internet users to use only defendants' links, which, as a result of the increased number of hits to each site, increased advertising revenue.[131] The defendants moved the district court to dismiss the action for lack of personal jurisdiction, but were denied.[132] The district court applied the sliding scale test established in *Zippo* to categorize the defendants' Internet contacts.[133]

The D.C. Circuit held that the district court erred in concluding there was sufficient evidence to sustain personal jurisdiction.[134]

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128. GTE Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343, 1346 (D.C. Cir. 2000).

129. *See* GTE New Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343, 1346 (D.C. Cir. 2000) (concentrating the court's inquiry on the purposeful acts specifically directed at the forum); Millennium Enters., Inc. v. Millennium Music, Inc., 33 F. Supp. 2d 907, 921 (D. Or. 1999) (finding that reliance on the sliding scale of web site interactivity is insufficient for a conclusive finding of jurisdiction).

130. *GTE New Media Servs.*, 199 F.3d at 1346. GTE had a non-exclusive contract with Netscape, pursuant to which Netscape offered several Internet business directories on its site, including GTE's SuperPages. *Id.* GTE alleged that the five regional Bell companies conspired to monopolize the Internet business directories market, offering a joint, mutually exclusive map whereby each company provided exclusive service for its region. *Id.*

131. *Id.* at 1345. Large search engines and other large general use web sites generate revenue from the advertising placed on their sites. *Id.* The rate of compensation is calculated much like a television or radio commercial. Instead of Nielsen ratings to gauge the attractiveness to the advertiser, web hosts compute the number of people who visit the site or "hits". Therefore, even a web site that is free to the user, with no "commercial interactivity," can generate substantial revenue for the host. *Id.*

132. *Id.* at 1346. The district court held that the defendants had engaged in "a persistent course of conduct" under the D.C. long-arm statute. *Id.* at 1349.

133. *Id.* The web sites were deemed to be "highly interactive" with district users and highly commercial in both quality and nature. *Id.*

134. *GTE New Media Servs.*, 199 F.3d at 1349.

As such, the court rejected the reasoning of *Zippo*. The court concluded that the passive/interactive distinction fails, because the fundamental purpose of personal jurisdiction due process is to allow the defendant an opportunity to effectively structure his or her conduct and control where the defendant might be amenable to legal action.[135] The court found that the district court failed to justify why interactivity should serve as a proxy for minimum contacts or why maintaining a highly interactive web site should independently give rise to jurisdiction.[136] The district court's analysis, applying the *Zippo* standard, did not serve as an effective means for evaluating the nature of the defendants' contacts.[137]

Another recent case applied a similar line of reasoning, and rejected the *Zippo* analysis. In *Millennium Enterprises, Inc. v. Millennium Music, LP*, the United States District Court for the District of Oregon held that the middle interactive category of *Zippo* needed further refinement to include the fundamental requirement of personal jurisdiction: "deliberate action."[138] Thus, the court held, the "something more" requirement of Justice O'Connor's analysis would not be satisfied through an interactive web site alone. [139]In order to establish "minimum contacts," there must be either transactions of a pecuniary nature between the defendant and residents of the forum state, or conduct of the defendant purposefully directed at residents in the forum.[140] This stan-

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135. *See supra* text accompanying note 15 (explaining the Due Process Clause's fundamental purpose).

136. *D.C. Circuit Rejects Sliding Scale Approach To Finding Personal Jurisdiction Based On Internet Contacts*, *supra* note 73, at 2132. The defendant's web site was highly interactive and generated substantial revenue, however, the solitary source of the revenue was advertising ventures.

137. *Id.*

138. Millennium Enters., Inc. v. Millennium Music, Inc., 33 F. Supp. 2d 907, 921 (D. Or. 1999) (holding that the interactivity of the defendant's web site was not sufficient, in and of itself, to satisfy minimum contacts). The defendant, Millennium Music, operated retail music stores located in South Carolina. *Id.* at 908. The defendant sold products through their retail outlets and their Internet web site. *Id.* at 908. The plaintiff, Millennium Enterprises filed a trademark infringement suit in the State of Oregon, alleging that the defendant's use of the name "Millennium Music" violated plaintiff's state and common law trademark rights. *Id.* at 909. The plaintiff asserted that defendant's interactive web site, where customers can purchase compact discs, request information, and join a discount club, was a sufficient contact with Oregon residents to permit jurisdiction over the defendant. *Id.* at 913. However, the court dismissed the claim, finding the defendant's contacts with Oregon were insufficient to render personal jurisdiction constitutionally permissible. *Id.* at 924.

139. *Id.* at 922.

140. *Id.* at 921. This was a significant holding, because it validated the *Bensusan* court's application of *Asahi* in creating the passive/interactive distinction. *See supra* text accompanying note 109 (comparing the "stream of commerce" with creating an Internet web site). However, the court implied, the sliding scale analysis created in *Zippo* was not the "something more" require-

dard ignores the medium of communication and concentrates on the intent of the defendant.

The court characterized the defendant's web site as interactive, within the meaning of *Zippo*.[141] However, the court refused to exercise personal jurisdiction, because the defendant did not act "creating 'a substantial connection' with Oregon, or deliberately engage in 'significant activities' within Oregon."[142]

The fact that someone who accessed the defendant's web site could purchase a compact disc did *not* render the defendant's actions purposefully directed at the forum.[143] It is the conduct of a defendant, not the medium utilized by them, to which parameters of personal jurisdiction apply.[144] A web site is not automatically projected to a user's computer without invitation; the user must take affirmative steps to turn on the computer, access the Internet, and browse the web for a particular site.[145] Thus, the court held that the level of interactivity contained on the web site is not a dispositive factor in characterizing intent of the defendant's conduct.[146]

The Conclusion of this Comment critiques the insufficiency of the passive/interactive distinction as applied in *Zippo*, and proposes that courts should refine this approach by adopting a "real space" analysis evaluating the outward manifest purpose of the defendant's conduct with particular regard afforded to the defendant's pecuniary expectancy interest in the forum state.

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ment in Justice O'Connor's *Asahi* analysis. The court instead incorporated the other two examples of constitutionally permissible personal jurisdiction without a physical presence. *Millennium Enters., Inc.*, 33 F. Supp. 2d at 921. The "something more" requirement is satisfied by either intentional transactions with residents in the forum state, or conduct purposefully directed at forum residents. *See supra* text accompanying notes 64, 65 and 68 (introducing "effects test" of *Calder* and intentional transactions requirement of *Burger King*).

141. *Millennium Enters., Inc.*, 33 F. Supp. 2d at 920.

142. *Id.* at 921.

143. *Id.* Absent actual exchanges or transactions with forum residents, or evidence that forum residents were targeted, defendants cannot reasonably anticipate that they will be brought before an Oregon court. *Id.* at 923. It is therefore "presumptively unreasonable to require them to submit to the burdens of litigation" in the forum. *Id.* (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1962)).

144. *Id.* at 921 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

145. *Id.* at 922. Information published on the web site is not indiscriminately thrust on the user. *Id.*

146. *Id.* at 922-23. The court stated that "the better approach is that taken by the courts which refused to assert jurisdiction on the sole basis of an interactive web site. . .and agrees with the reasoning of those courts which have asserted jurisdiction on the basis that the defendant's Internet conduct was intended to reach forum residents." *Id.* (citing e-Data Corp. v. Micropatent Corp., 989 F. Supp. 173, 177 (D. Conn. 1997) and Panavision Int'l v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998).

III. RETURNING WEB SITE INTERACTIVITY TO ITS PROPER CONSTITUTIONAL PLACE

The advent of the Internet will inevitably make the most significant impact on human interaction since the printing press. Its effect on economic development in the United States and throughout the world is paramount.[147] The Internet allows the small entrepreneur to overcome the inherent obstacles created by a capitalistic economic system.[148] With the Internet, a computer-savvy entrepreneur can enter a worldwide market economy, previously accessible only to those with the capital available to reach specific geographic markets.[149] Furthermore, the Internet will facilitate a shift in market power to consumers, because they will be armed with near perfect market information.[150]

Thus, the United States clearly has a compelling interest in facilitating Internet development.[151] Conceiving a notion of "fair play and substantial justice" that reconciles with the pragmatic realities of the cyber world is absolutely vital. There is precedent for this. [152]As a post-World War II economy eviscerated meaningful geographic barriers, the Supreme Court adjusted its definition of due process to abrogate a purely "power and presence" framework.[153] Now, public policy and pragmatic necessity advocate reexamining our notion of "fair play and substantial justice," because Internet contacts do not fall within the territorial based paradigm.[154] However, in developing an applicable standard, the sliding scale analysis has strayed too far from traditional due process principles.

The current application of the sliding scale analysis fails in its

147. *See supra* text accompanying note 13.

148. Gore, *supra* note 13, at 5.

149. *See supra* text accompanying note 6.

150. *See supra* text accompanying note 12.

151. Gore, *supra* note 13, at 2. The U.S. Government created the Electronic Commerce Working Group to facilitate growth of e-commerce and information technology. *Id.* The Clinton/Gore administration outlined numerous policy initiatives to assure this growth. *Id.* Included among these principles are: requirements for meaningful consumer protection, a long term extension of the research and development tax credit to stimulate private sector research, a dramatic increase in federal funding for the information technology sector, a moratorium on all tariffs for e-commerce, and adjusting our domestic and international legal regimes to the reality that the cyber-world is not consistent with "territorial based" systems. *Id.*

152. *See supra* text accompanying notes 29 and 31 (concluding that the changing economic world made the rigidity of the *Pennoyer* standard impractical, and thus, the Court adjusted its notion of "fair play and substantial justice").

153. Shurtz, *supra* note 18, at 1666.

154. *See supra* text accompanying note 49 (concluding that Internet contacts are unique to the paradigm established by *Int'l Shoe* and *Hanson*).

essential purpose.[155] Only those with an entirely passive or entirely commercial web site can effectively assess their potential amenability.[156] A web host whose site falls in the pervasive middle ground would have difficulty knowing whether a court would define his site as "interactive."[157] This assails the essence of due process protection because the potential defendant cannot structure his primary conduct in light of his potential amenability.

The sliding scale's failure to avail minimum assurance is economically inefficient. A prospective entrepreneur is forced to account for her broadest possible liabilities, thus her cost of production is far in excess of its true cost. The entrepreneur might forego this efficient and accessible avenue of commerce if faced with the "litigious nightmare of being subjected to suit" in every jurisdiction in the country.[158] Those who do choose to utilize the Internet will ultimately pass this cost onto the consumer, eradicating any economic advantage the consumer receives in a global marketplace.

The *Benusan* court's reliance on Justice O'Connor's "something more" standard is well placed.[159] The Internet is sufficiently analogous to placing a product in the stream of commerce.[160] However, defining the "something more" requirement solely in terms of web site interactivity is illogical, inefficient, and unavailing. The "purposeful availment" of the forum state has been achieved through the transaction or the intended effect, not the communication.[161] Thus, the level of interactivity of the web site is not conclusive, because interactivity is a characteristic of the web site itself, not evidence of conduct directed at any particular forum.

Courts should apply the reasoning of *GTE New Media Services* and *Millennium Enterprises*, which assess the defendant's behavior towards the forum state. Evidence of conduct that has an intended effect on the forum state, or results in economic transactions with forum residents provides the minimum contacts for exercising personal jurisdiction. This would be the "something more" requirement evinced in *Benusan*.

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155. *See supra* text accompanying note 127 (observing that the current application of the sliding scale analysis fails to give a reasonable level of predictability to a legal system that allows defendants to plan their conduct with reasonable assurances of where they will be required to defend suit).

156. *Id.* While Justice O'Connor's "stream of commerce" analysis is plagued by a similar problem, the "stream of commerce" analysis provides a degree of fundamental fairness by focusing the inquiry on the defendant's conduct, not the characteristic capacity of his communication medium.

157. *Circuit Rejects Sliding Scale Approach*, *supra* note 74, at 2132.

158. Millennium Enters., Inc. v. Millennium Music, Inc., 33 F. Supp. 2d 907, 923 (D. Or. 1999) (quoting Donnie L Kidd, Jr., *Casting the Net: Another Confusing Analysis of Personal Jurisdiction and Internet Contacts in* Telco Communications v. An Apple a Day, 32 U. RICH. L. REV. 505, 541 (1998)).

159. *See supra* text accompanying note 140.

160. *Benusan*, 937 F. Supp. at 301.

161. *Id.*

A web presence actually evinces less about the defendant's "purposeful availment" of the forum state than telephone calls, mail, and other forms of communication. These forms of communication require less affirmative conduct by the consumer to reach a given forum.[162] Thus, by analogy, an interactive web site is insufficient to establish any jurisdictionally significant actions.[163] However, the "nature and quality" of the defendant's purposeful availment of the forum is significant.

A defendant who advertises his web site pervasively in the cyber world, providing hyperlinks that create easy accessibility for any user in any forum, is manifestly targeting a national base. In contrast, a small business whose site is generally unadvertised, with its accessibility generally dependent upon the affirmative acts of consumers, is clearly not directing its web site at any specific forum, despite the web site's ubiquitous nature. In either case, the level of interactivity should not be the material factor in determining the validity of an exercise of personal jurisdiction.

While an entirely commercial web site, with substantial sales in all fifty states clearly renders the host amenable in all fifty states, this is the exception rather than the norm. A pervasive majority of web sites will fall in the "middle area" as defined in *Zippo*.[164] Thus, in order to remain consistent with prior "real space" precedent, assure a reasonable level of predictability for the web host, and facilitate efficient means of communication, courts should focus their inquiry on the express target of the defendant's conduct. Web site interactivity is related to this inquiry, but the nature of the defendant's web site promotion, the general likelihood it will be accessed by forum residents, and the nature of the contacts with forum residents are more relevant factors in assessing a defendant's "purposeful availment of the forum."

Thus, this Comment proposes that courts refine this approach by adopting a "real space" analysis evaluating the outward manifest purpose of a defendant's conduct. This standard will give a

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162. *See Millennium Enters., Inc.*, 33 F. Supp. 2d at 922 (stating that a web site is not automatically projected to a user's computer without invitation; the user must take affirmative steps to turn on the computer, access the Internet, and browse the web for a particular web site). By contrast, telephone calls to the user and mail sent to his house are unquestionably directed at the resident and, thus, the forum state.

163. *See id.* at 921 (stating that the "something more" requirement of Justice O'Connor's analysis would not be satisfied through an interactive web site alone). In order to establish "minimum contacts," there must be either transactions of a pecuniary nature between the defendant and residents of the forum state, or conduct of the defendant purposefully directed at residents in the forum. *Id.*

164. *See supra* text accompanying notes 124 and 127 (concluding that a majority of web sites will fall into the pervasive "middle ground" as defined by *Zippo*).

greater degree of predictability, because it will not focus the court's jurisdictional inquiry on a characteristic of the web site itself, but will focus on the purposeful target of the defendant's conduct.

CONCLUSION

In *Zippo Manufacturing v. Zippo Dot Com*, the Federal District Court for the Western District of Pennsylvania created the sliding scale of interactivity to analyze cases where the defendant's web site is not definitively passive or interactive. In this pervasive "middle ground" the dispositive inquiry is the level of interactivity and the commercial nature of that activity. However, this test fails to properly apply Justice O'Connor's "something more" requirement as defined in *Asahi Metal Industry Co. v. Superior Court of California*.

The Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurances as to where that conduct will and will not render them amenable to suit. To comport with these assurances, courts should focus their inquiry on the defendant's conduct towards the forum. Web site interactivity is related to this inquiry, but the nature of the defendant's web site promotion, the general likelihood it will be accessed by forum residents, and the nature of the contacts with forum residents are also relevant factors in evaluating the defendant's "purposeful availment" of the forum.