

# Personal Jurisdiction: Lost in Cyberspace?

by  
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## I. INTRODUCTION

Not so long, long ago or far, far away, personal jurisdiction was predicated upon readily identifiable and recognizable boundaries.<sup>1</sup> State lines provided nice bright lines. Although these lines were somewhat trampled by one particular *Shoe*<sup>2</sup> and its preoccupation with minimum contacts and fairness, the requirement of a physical, tangible, protracted activity continued to dictate the parameters of personal jurisdiction.<sup>3</sup>

In the days of *Pennoyer v. Neff*, parties could establish personal jurisdiction over those in the covered wagons that crossed state lines.<sup>4</sup> By the time of *International Shoe Co. v. Washington*, parties were required only to identify some contact with a specific territory.<sup>5</sup> In both cases, real space was the guiding force. For example, the Swiss Family Robinson may have been lost on an unknown tropical island, but at least they had identifiable coordinates much like their contemporary successors in the popular television show, *Lost in Space*.<sup>6</sup> Both Robinson families perceived space within the confines of real space, whether from an island on earth or a series of unidentified planets and stars throughout the universe.

With the advent of the Internet, however, the concept of “space” or the idea of a never-ending physical universe has captured a new connotation

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1. See *Pennoyer v. Neff*, 95 U.S. 714, 734-36 (1877) (requiring that the defendant be personally served within the forum state in order to acquire personal jurisdiction over him).
2. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) is the landmark case expanding the concept of personal jurisdiction to permit service on nonresident defendants.
3. See *id.* at 316 (recognizing that personal jurisdiction may be appropriate over a nonresident defendant who has certain minimum contacts with the forum state and maintenance of the lawsuit “does not offend ‘traditional notions of fair play and substantial justice’”) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).
4. See *Pennoyer*, 95 U.S. at 734-36.
5. See *Int'l Shoe Co.*, 326 U.S. at 316.
6. In the 1960s, the popular television show, *Lost in Space*, portrayed the space family Robinson, whose space ship traveled lost among unknown planets in outer space.

known as “cyberspace,”<sup>7</sup> whose inherent characteristics are manifested by its invisible, indefinite, amorphous nature. The covered wagons and the idea of a territorial contact can be transcended literally at the speed of light. Today, electronic mail (hereafter “e-mail”) can take a quantum leap in a matter of a second, thrusting a defendant into fifty states simultaneously and creating the potential for universal jurisdiction.

Despite the transformed nature of space, the traditional requirements of minimum contacts and fairness continue to exist in both real space and cyberspace. Many courts have failed to acknowledge the United States Supreme Court’s admonition that technology affects interstate commerce with a resultant need to conform jurisdictional analyses.<sup>8</sup> Consequently, some courts’ jurisdictional analyses tend to create irrational and contradictory results. Within this state of legal turmoil, some commentators advocate the creation of a new type of jurisdictional analysis for cyberspace activities, while others recognize that courts are beginning to develop necessary refinements in the law.<sup>9</sup>

Whether or not courts are currently willing to create new, functional solutions for analyzing cyberspace jurisdiction (hereafter “cyberjurisdiction”), now is the time for those who avail themselves of the Internet to take matters into their own hands. Relying on the confines of traditional jurisdiction, Internet users can structure their websites and e-mail communications to limit the jurisdictional reach of their Internet activities. This manipulation is essential to the interests of individual businesses and to the very growth of the global economy; it must be exercised to prevent the chilling effects of multiple exposure to potentially inconsistent regulation. In other words, the manipulation is required to curtail the threat of unlimited exposure to liability anywhere in the world.

To understand the need for Internet manipulation, parties must first develop an effective definition of “cyberspace.” Armed with this basic understanding, parties should examine first the traditional legal tests of personal

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7. See *infra* Part II and corresponding footnotes for an effective definition of “cyberspace.”
  8. See *Keelshield Inc. v. Megaware Keel-Guard, Inc.*, No. 00-1312, 2001 U.S. Dist. LEXIS 7012, at \*15 (C.D. Ill. May 11, 2001) (“As technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase”) (quoting *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958)). But see *Gorman v. Ameritrade Holding Corp.*, No. 01-7085, 2002 U.S. App. LEXIS 11674, at \*9-10 (D.C. Cir. June 14, 2002) (noting the differences between real space and cyberspace do not justify a change in the traditional jurisdiction analysis because cyberspace “is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar”).
  9. See *infra* note 11 for a list of law review articles in which the authors take varying positions with respect to the development of new law to analyze jurisdiction over cyberspace activities.

jurisdiction, which are based on minimum contacts and fairness within the territorial boundaries of real space, and then analyze how courts apply these tests to cyberspace activities.<sup>10</sup> In recent years, authors have provided plenty of cyberjurisdiction analyses regarding personal jurisdiction.<sup>11</sup> Consequently, the legal discussion in this article will step forward to concentrate on the 2001 and 2002 federal court cases in this burgeoning area of the law.<sup>12</sup>

Once parties analyze existing cyberjurisdiction law and determine how it affects conduct within the borderless context of cyberspace, they can begin to visualize the practical implications of their online activities and communications within, around and through the borderless context of cyberspace. This newfound understanding will assist them to develop strategies to manipulate or otherwise limit the jurisdictional reach of their cyberspace activities, whether via a website, e-mail, or a combination of online and real space activities.

Part II of this Article seeks to define “cyberspace.” Part III traces the history of cyberjurisdiction law up to the most recent federal decisions, while Part IV analyzes the 2001 and 2002 federal decisions in detail. Part V provides guidelines for those who desire to manipulate or limit the fora in which web-based business activities or electronic communication can invoke cyberjurisdiction. These practical pointers will enable Internet users to overcome the trepidation of being lost in cyberspace.

## II. AN EFFECTIVE DEFINITION OF “CYBERSPACE”

The term “cyberspace” was first coined by William Gibson in his science-fiction novel *Neuromancer*.<sup>13</sup> One author explained that, “Gibson used

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10. *Int'l Shoe Co.*, 326 U.S. at 316 (articulating the traditional test of jurisdiction, which is a two-step analysis requiring a finding that a nonresident defendant has “minimum contacts” with the forum state and maintenance of the lawsuit will “not offend ‘traditional notions of fair play and substantial justice’”) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).
  11. See Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2001); Terrence Berg, *www.wildwest.gov: The Impact of the Internet on State Power to Enforce the Law*, 2000 B.Y.U.L. REV. 1305 (2000); Susan Nauss Exon, *A New Shoe is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1 (2000); Kevin R. Lyn, *Personal Jurisdiction and the Internet: Is a Home Page Enough to Satisfy Minimum Contacts?*, 22 CAMPBELL L. REV. 341 (2000); Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385 (1998); David R. Johnson & David Post, *Law and Borders - The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996).
  12. See *infra* Part IV and corresponding footnotes.
  13. William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 198 n.5 (1995).

the term to describe a computer-generated condition that has the look and feel of the physical world, . . . this term is now commonly used to refer to on-line virtual communities as a whole.”<sup>14</sup> Although the first to use the word, Gibson is not the only person who has attempted to define “cyberspace.” Indeed, the process of developing a workable definition of “cyberspace” may seem like a daunting task because everyone has his or her own version of the term. The goal of arriving at a single, practical definition of “cyberspace” is further impeded by the vagueness and disparity that plagues the array of descriptions promulgated over the past two decades. The following is a small sampling of definitions as they appear on the Internet:

- “A consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts . . . . A graphic representation of data abstracted from the banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the non-space of the mind, clusters and constellations of data.”<sup>15</sup>
- “A metaphor for describing the non-physical terrain created by computer systems. Online systems, for example, create a cyberspace within which people can communicate with one another (via e-mail), do research, or simply window shop. Like physical space, cyberspace contains *objects* (files, mail messages, graphics, etc.) and different modes of transportation and delivery. Unlike real space, though, exploring cyberspace does not require any physical movement other than pressing keys on a keyboard or moving a mouse.”<sup>16</sup>
- “[T]he ‘place’ where a telephone conversation appears to occur. Not inside your actual phone, the plastic device on your desk. Not inside the other person’s phone, in some other city. The place between the phones. The indefinite place out there, where the two of you, human beings, actually meet and communicate.”<sup>17</sup>

From a legal perspective, the United States District Court for the Eastern District of Pennsylvania summarized “cyberspace” as the “decentralized,

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14. Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 343 n.12 (1996).

15. See <http://www.education.miami.edu/ep/michigan/tsld011.htm> (last visited Oct. 5, 2003) (quoting William Gibson’s definition of “cyberspace” from his novel, *Neuromancer*).

16. See <http://webopedia.lycos.com/TERM/c/cyberspace.html> (last visited Oct. 5, 2003) (emphasis in original) (quoting the Lycos Tech Glossary definition of “cyberspace”).

17. See Bruce Sterling, *The Principia Cybernetica Web*, available at <http://pespmc1.vub.ac.be/CYBSPACE.html> (last visited Oct. 5, 2003).

global medium of communications [via computers and computer networks comprising the Internet] . . . that links people, institutions, corporations, and governments around the world.”<sup>18</sup> The United States Supreme Court further explained the concept of “cyberspace” as a series of various communication methods that have “no particular geographical location but [are] available to anyone, anywhere in the world, with access to the Internet.”<sup>19</sup> These “information retrieval methods,” according to the Court, are in a constant state of flux and evolution and include “electronic mail (‘e-mail’), automatic mailing list services (‘mail exploders,’ sometimes referred to as ‘listservs’), ‘newsgroups,’ ‘chat rooms,’ and the ‘World Wide Web.’”<sup>20</sup>

The preceding definitions of “cyberspace” manifest a host of different concepts, probably because they were developed within varying contexts. To narrow the scope of meaning encompassed by these varying definitions, one can compare the laymen’s definitions with the legal definitions, seeking to discover their common elements and themes. The most obvious of these commonalities is the one theme that permeates each of the definitions—the concept that “cyberspace” is an amorphous space that does not occupy a set physical or geographic location. Another recurring theme is that cyberspace is accessed through computers that include Internet connections; these connections essentially are communication portals capable of networking with anyone around the world who maintains Internet access. Consequently, for purposes of this article, an effective definition of “cyberspace” may be stated as follows: a nonvisual, nonphysical endless maze of communication networks accessible by anyone around the world who maintains Internet access via a computer.

From a practical perspective, the concept of cyberspace cannot be seen or physically touched. Thus, Internet communicators really have no idea with whom they are communicating and where their communications actually occur within the confines of cyberspace. A jurisdictional maze, therefore, has begun to develop.

### III. HISTORICAL BACKDROP TO CURRENT CYBERJURISDICTION LAW

#### A. Development of Personal Jurisdiction in the Twentieth Century

Courts must have jurisdiction over the parties who appear before them. Parties can establish personal jurisdiction pursuant to a United States statute that authorizes nationwide service of process or pursuant to a particular jurisdiction’s long arm statute.<sup>21</sup> Once parties analyze the underlying statutory

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18. *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

19. *Reno v. ACLU*, 521 U.S. 844, 851 (1997).

20. *Id.*

21. *See Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002) (noting that in addition to establishing personal jurisdiction based on a state long-arm statute, jurisdiction also must comply with due process principles);

authority, they must determine whether Constitutional due process considerations are satisfied.<sup>22</sup>

The United States Supreme Court established the contemporary basis for evaluating personal jurisdiction in the landmark decision, *International Shoe Co. v. Washington*.<sup>23</sup> The *International Shoe* decision eliminated the requirement of presence within a specific forum in order for personal jurisdiction to attach.<sup>24</sup> The Court created an exception to the presence requirement of *Pennoyer v. Neff*,<sup>25</sup> by analyzing due process under a formula that requires a defendant to have "certain minimum contacts with . . . [a forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" <sup>26</sup> The due process analysis of *International Shoe* involves a two-step inquiry. First, a court must determine whether the defendant has minimum contacts with the forum state.<sup>27</sup> Second, it must analyze the reasonableness of allowing the lawsuit to be brought in a forum state.<sup>28</sup>

This due process analysis varies with the type of personal jurisdiction that a party asserts—either general or specific.<sup>29</sup> General jurisdiction exists when a defendant's activities in a forum state are continuous and systematic; the activities relate to some general presence within a forum state but not necessarily to the cause of action being asserted in the lawsuit.<sup>30</sup> Specific jurisdiction, however, is based on a defendant's conduct in the forum state that relates to, or arises out of, an underlying claim.<sup>31</sup> Courts analyze specific jurisdiction using a three-part test: (1) the defendant must purposefully avail itself of the privilege of conducting activities in the forum state or consummate some act or transaction with the forum state; (2) the defendant's forum-

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On-Line Techs. v. Perkin Elmer Corp., 141 F. Supp. 2d 246, 262 (D. Conn. 2001) (conducting both a long-arm statute analysis and a due process analysis to establish personal jurisdiction).

22. See *Rio Props.*, 284 F.3d at 1019; *On-Line Techs.*, 141 F. Supp. 2d at 262.

23. 326 U.S. 310 (1945).

24. *Id.* at 316.

25. 95 U.S. 714 (1877).

26. *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

27. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

28. *Id.* at 292 (quoting *Int'l Shoe Co.*, 326 U.S. at 316 (acknowledging that defendants are entitled to protection from unreasonable and unfair litigation within an inconvenient forum)).

29. See *infra* at Part IV.C. (providing a more detailed analysis of general and specific jurisdiction).

30. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 & n.9 (1984).

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

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related activities must relate to the claim; and (3) the exercise of jurisdiction must be reasonable.<sup>32</sup> Courts continue to rely on the due process analysis of *International Shoe* as they construe personal jurisdiction based on cyberspace activities.<sup>33</sup>

## B. The Leading Cyberjurisdiction Cases

As of December 31, 2000, seven circuits had addressed cyberjurisdiction issues within ten separate circuit court opinions.<sup>34</sup> Generally, the federal

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32. *Id.*

33. See *Hinsch v. Outrigger Hotels Haw.*, 153 F. Supp. 2d 209, 213-14 (E.D.N.Y. 2001) (“In the absence of a change in the law, the cases cited by the court remain the law to apply here.”). Consequently, cases from 1958 to 1990 are relevant to contemporary jurisdictional analyses.

34. See *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086-88 (9th Cir. 2000) (upholding personal jurisdiction under the “effects test” because the defendant’s letter to Network Solutions, Inc. was deemed to have an effect on the plaintiff in California despite very limited contacts with the forum state of California); *Intercon, Inc. v. Bell Atl. Internet Solutions, Inc.*, 205 F.3d 1244, 1247-48 (10th Cir. 2000) (upholding the district court’s assertion of personal jurisdiction over the defendant because once it had notice it was routing subscriber’s e-mails to the wrong domain name of a global service provider, its actions were deemed to be purposefully directed to the forum state); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000) (classifying the defendant’s website as interactive, but refusing to assert personal jurisdiction over the defendant based solely on allegations that forum state residents could access the defendant’s yellow pages websites); *Soma Med. Int’l v. Standard Chartered Bank*, 196 F.3d 1292, 1297 (10th Cir. 1999) (characterizing a bank’s website as passive because it offered information regarding its services and solicited business globally, yet refusing to assert jurisdiction even though a forum state resident could access the website); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999) (characterizing the defendant’s website as passive, and therefore, incapable of supporting personal jurisdiction because it posted product and service information; included a toll-free telephone number, mailing address and e-mail address; and provided a printable mail-in order form that could not be submitted via the Internet); *3D Sys., Inc. v. Aarotech Lab., Inc.*, 160 F.3d 1373, 1378-80 (Fed. Cir. 1998) (conferring jurisdiction where non-Internet activities with the forum state were combined with minimal Internet activities and acknowledging that a passive website alone is not sufficient to confer personal jurisdiction); *Panavision Int’l, LP v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (upholding jurisdiction based on the “effects test” because a cybersquatter registered domain names and then sought to extort money from companies holding the registered trademark for the names); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419-20 (9th Cir. 1997) (holding jurisdiction improper based on a passive website); *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25 (2d Cir. 1997) (holding jurisdiction improper based on a passive website); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996)

circuits have fairly consistent conclusions regarding a minimum contacts analysis of personal jurisdiction that is based on websites and online communications.<sup>35</sup> For example, the circuit courts consistently recognize that passive websites, standing alone, are not sufficient to confer personal jurisdiction.<sup>36</sup> All circuits scrutinize the evidence to determine whether it establishes some purposeful activity in which a defendant targeted a specific forum.<sup>37</sup> Despite this recent conformity at the appellate level, however, the early federal district court cases contain some confusing, erratic and divergent results.<sup>38</sup>

The emerging theme revolves around the characterization of websites. One of the leading cases, albeit a district court case, has set a standard that many courts have adopted.<sup>39</sup> In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, the United States District Court for the Western District of Pennsylvania adhered to the long-standing notion of *International Shoe*,<sup>40</sup> by looking at the nature and quality of activity to determine whether personal jurisdiction ex-

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(finding that the defendant purposefully availed himself of the privilege of doing business in the forum state where he actively transacted business via the Internet and otherwise corresponded with the plaintiff in the forum state via e-mails).

35. *See id.*

36. *See infra* note 42 and accompanying text for a definition of passive websites; *see also supra* note 34.

37. *See supra* note 34.

38. *See Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1999) (declining to adhere to general concepts of foreseeability with respect to the defendant's actions within the forum state, and instead focusing on the intrinsic characterization of the forum, including the defendant's anticipated, but not as yet established, target audience); *see also Roche v. Worldwide Media, Inc.*, 90 F. Supp. 2d 714, 718 (E.D. Va. 2000) (holding personal jurisdiction improper because a passive website cannot direct itself purposefully to the forum state of Virginia based simply on a pornographic website that solicited e-mail addresses and credit card information); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (upholding jurisdiction based on a passive website because such website continuously advertised and solicited over the Internet and "purposefully availed itself of the privilege of doing of business in [the forum state]").

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

40. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (establishing the principle that personal jurisdiction could be asserted over a nonresident defendant who had "minimum contacts" with the forum state and that such contacts did not "offend 'traditional notions of fair play and substantial justice'" (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).



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ists over a nonresident defendant.<sup>41</sup> In doing so, the *Zippo* court created a “sliding scale” analysis based on passive, active, and interactive websites. Generally, a passive website does not create contact with a forum state sufficient to confer personal jurisdiction over a nonresident defendant. It is deemed nothing more than an advertisement with no intent to target a specific forum.<sup>42</sup> Consequently, courts hold that “something more” is required.<sup>43</sup> Active websites, on the other hand, are highly interactive. Courts tend to find that these websites are sufficient to confer personal jurisdiction because they enable parties to enter into contracts that contemplate continued business with the forum state, and knowingly and repeatedly transmit files and communicate over the Internet.<sup>44</sup> Interactive websites make up the middle of the sliding scale; jurisdiction based on these websites depends on the nature and quality of commercial activity.<sup>45</sup> The divergence in jurisdictional analysis of interactive websites may stem from a particular court’s interpretation of the phrase, “nature and quality.” Some of the early opinions emphasize the quantity of contacts conducted via a website<sup>46</sup> while others, including more recent decisions, refer specifically to the nature and quality of the contacts.<sup>47</sup>

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41. *Zippo Mfg. Co.*, 952 F. Supp. at 1124 (holding that personal jurisdiction based on Internet contacts should relate to the “nature and quality of commercial activity that an entity conducts over the Internet”).
42. *See id.* (“A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.”).
43. *See Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25 (2d Cir. 1997) (holding that to target a specific forum for purposes of jurisdiction, something more is needed than simply creating a website).
44. *See Zippo Mfg. Co.*, 952 F. Supp. at 1124 (“If the defendant enters into contracts with residents of a foreign jurisdiction that involve knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.”). This conduct, according to the court, constitutes doing business in the forum. *Id.*
45. *Id.*
46. *See Butler v. Beer Across Am.*, 83 F. Supp. 2d 1261, 1267 (N.D. Ala. 2000) (recognizing the limited number of sales to forum residents); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (emphasizing the importance of quantity of contacts such as 131 hits to a website).
47. *See Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 891-92 (6th Cir. 2002) (holding that quantity and specifically a “‘percentage of business’ analysis” is not the proper test for personal jurisdiction; rather the proper test is “whether the absolute amount of business conducted . . . [in the forum state] represents something more than ‘random, fortuitous, or attenuated contacts’ with the state”) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996)

As seen in 2001 and 2002, most courts continued to adhere to the *Zippo* analysis, whether or not they designated a website as passive, active or interactive. Part IV will show that the discrepancies between these more recent decisions are not as significant as those in the earlier cases. Refinements in the law, therefore, have begun to develop with respect to personal jurisdiction over cyberspace activities, including a new principle known as the “web site plus” rule.<sup>48</sup>

#### IV. CYBERJURISDICTION REVISITED IN 2001 AND 2002

##### A. The Development of the “Web Site Plus” Rule

Despite *Zippo*’s quintessential characterization of each website, a “new” rule is emerging, which relies on the longstanding principle articulated in *International Shoe*—examination of the nature and quality of commercial activity. This new rule is known as the “web site plus” rule.<sup>49</sup> Under the “web site plus” rule, website characterization is not the paramount concern. Rather, facts must be presented to establish that a defendant could reasonably foresee “being haled into court” based on his intent to “dive into a particular forum.”<sup>50</sup> Personal jurisdiction, therefore, may not be appropriate under this new rule based on an otherwise active website that offers products for sale and contains a toll-free telephone for use in placing orders and managing customer service.<sup>51</sup>

*Digital Control Inc. v. Boretronics Inc.* first articulated the “web site plus” rule. There, the defendants manufactured a product and began a nationwide advertising campaign; they placed advertisements in two industry

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(determining the existence of purposeful availment based on the “quality” of contacts rather than their “status”); *Tech Heads, Inc. v. Desktop Serv. Ctr., Inc.*, 105 F. Supp. 2d 1142, 1150-51 (D. Or. 2000) (upholding personal jurisdiction based on a “highly interactive website” that resulted in only one transaction with the forum state because the court focused on the requirement of “quality” rather than “quantity” of contacts); *Zippo Mfg. Co.*, 952 F. Supp. at 1126-27 (recognizing that 3000 subscriptions, or two percent of total subscriptions was a sufficient basis for jurisdiction because the Supreme Court emphasizes the nature and quality of contacts with the forum rather than the quantity of contacts); *see also* *Rainy Day Books, Inc. v. Rainy Day Books & Café, LLC*, 186 F. Supp. 2d 1158, 1166 (D. Kan. 2002) (“the critical inquiry in determining whether there was a purposeful availment of the forum jurisdiction is the quality, not merely the quantity, of the contacts”).

48. *See* *Digital Control Inc. v. Boretronics Inc.*, 161 F. Supp. 2d 1183, 1186-87 (W.D. Wash. 2001) (describing the “something more” that is needed to establish jurisdiction was known as a “web site plus” rule where the plaintiff sought to obtain jurisdiction based on the defendant’s website).

49. *Id.* (articulating the “web site plus” rule).

50. *Id.* at 1185-87.

51. *Id.* at 1186.

journals and set up a website that offered the product for sale and included a toll-free telephone number to handle customer questions and orders.<sup>52</sup> After selling one product to a customer in Florida and being notified by the plaintiff of a possible patent infringement, the defendants ceased operations.<sup>53</sup> The court held that even though the advertising could reach residents of the forum state of Washington, it could not assert personal jurisdiction over defendants who had made no effort to “cultivate” a specific market in Washington.<sup>54</sup>

Other courts may rely on the rationale behind the “web site plus” rule without specifically referring to this new rule. For example, in *Alitalia-Linee Aeree Italiane S.p.A. v. casinoalitalia.com*, the court upheld personal jurisdiction without classifying the defendant’s on-line casino website as active or interactive.<sup>55</sup> The court stressed minimum contacts based on an on-line casino that interacted with the forum state of Virginia because it allowed residents to join and play games on its website.<sup>56</sup> Evidence showed that of the 750 on-line casino gamblers, five had billing addresses in Virginia, and that fact was sufficient to put the defendant on notice that it could be “haled” into a Virginia court.<sup>57</sup>

At first glance, the “web site plus” rule makes sense because it purports to apply the due process analysis of *International Shoe*.<sup>58</sup> After pondering the practical implications of this new rule, however, one might surmise that the “web site plus” rule appears to be nothing more than a new label for the *Zippo* sliding scale analysis.<sup>59</sup> A closer examination reveals that this supposition is only partially correct.

For purposes of a personal jurisdiction determination, the *Zippo* sliding scale analysis begins with the characterization of a website as passive, active or interactive; fundamental conclusions normally are made with respect to

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52. *Id.* at 1185.

53. *Id.*

54. *Id.*

55. 128 F. Supp. 2d 340, 350-51 (E.D. Va. 2001) (analogizing the defendant’s on-line casino to that involved in *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738 (W.D. Tex. 1998)). The *Thompson* court held that the on-line casino generated enough activity to support a finding of personal jurisdiction. *Id.* at 744.

56. *Alitalia-Linee Aeree Italiane S.p.A.*, 128 F. Supp. 2d at 350.

57. *Id.*

58. See *supra* notes 23-28 and accompanying text.

59. Compare *Digital Control Inc.*, 161 F. Supp. 2d at 1185-87 (emphasizing the need for a defendant to specifically target residents of a forum state in such a way that the defendant could reasonably foresee being haled into that court) with *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (recognizing that the “nature and quality of commercial activity . . . [conducted] over the Internet” serves as a basis for determining the appropriateness of personal jurisdiction).

passive and active websites.<sup>60</sup> Interactive websites involve a more complex analysis. Once a website is characterized as interactive in nature, courts then proceed to examine the “nature and quality of commercial activity” conducted over the website;<sup>61</sup> this is the crux of the sliding scale analysis. If the activities occurring on a defendant’s website lean more toward the passive side of the scale, the analysis will be more akin to that used for a passive website. If, however, the activity slides toward the active side of the scale, personal jurisdiction will likely be upheld.<sup>62</sup> The “web site plus” rule has a parallel result.

By its very nomenclature, the “web site plus” rule goes beyond the mere characterization of a website because the “plus” portion of the rule is used to examine the defendant’s conduct and how that conduct may reach out and touch the residents of a forum state.<sup>63</sup> In reality, therefore, the “web site plus” rule is analogous to the *Zippo* analysis regarding interactive websites. The core of each theory is a focus on the nature of the defendant’s interactivity with residents of a forum state.<sup>64</sup> Consequently, despite the propensity to use a particular name to describe a jurisdictional analysis, courts continue to implement the *International Shoe* standard of minimum contacts and fairness when determining jurisdiction in cyberspace.<sup>65</sup>

## B. *Zippo*’s Continued Prevalence

Notwithstanding the “web site plus” rule, most courts in 2001 and 2002 continued to analyze cyberjurisdiction pursuant to *Zippo* and its progeny. These courts continued to rely on the characterization of websites. Other courts first characterized a website and then analyzed whether the defendant’s web-based activities were purposely directed to residents of a forum state, a seemingly analogous application of the “web site plus” rule. Thus, despite the “web site plus” rule, *Zippo* continues to provide the prevailing rule for cyberjurisdiction analyses.

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60. See *supra* notes 42-44 and accompanying text.

61. *Zippo Mfg. Co.*, 952 F. Supp. at 1124.

62. See *id.*

63. See *Digital Control Inc.*, 161 F. Supp. 2d at 1186 (recognizing that a website that simply serves as a nationwide advertisement is not sufficient to confer jurisdiction and emphasizing that the “web site plus” rule constitutes the “something more” that is needed to confer personal jurisdiction).

64. See *supra* notes 60-62 and accompanying text.

65. See *Hinsch v. Outrigger Hotels Haw.*, 153 F. Supp. 2d 209, 214 (E.D.N.Y. 2001) (relying on cases from 1958 to 1990 as precedent for contemporary jurisdiction analyses).

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## 1. Passive Websites

Typically, courts classify websites as passive in nature because they are used primarily as informational sources. Recent court decisions continue to adhere to the general rule that these types of websites do not involve sufficient interactivity to give rise to personal jurisdiction.<sup>66</sup> This generalized rule, however, is fraught with perplexing consequences.

For example, in *Revell v. Lidov*, the United States District Court for the Northern District of Texas characterized a website as passive in nature and held that it did not give rise to personal jurisdiction where an individual posted an allegedly defamatory article to the Columbia University Journalism

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66. See *Medinah Mining, Inc. v. Amunategui*, 237 F. Supp. 2d 1132, 1135-36 (D. Nev. 2002) (holding that personal jurisdiction does not exist over a defendant that posted allegedly defamatory information on a passive website operated by another party); *Med-Tec Iowa, Inc. v. Computerized Imaging Reference Sys., Inc.*, 223 F. Supp. 2d 1034, 1038 (S.D. Iowa 2002) (characterizing defendant's website as passive because it posts product information, a description of products, and instructions on how to place orders and allows visitors to download a catalog; this activity is not sufficient to confer personal jurisdiction); *SCC Communications Corp. v. Anderson*, 195 F. Supp. 2d 1257, 1261 (D. Colo. 2002) (recognizing the ability to use e-mail hyperlinks from a website to communicate for informational purposes; however, refusing to assert personal jurisdiction because such website was classified as passive in nature); *Miami Breakers Soccer Club, Inc. v. Women's United Soccer Ass'n*, 140 F. Supp. 2d 1325, 1329 (S.D. Fla. 2001) (recognizing that personal jurisdiction cannot be based on a passive website that advertises a product line, yet allows purchases only by telephone order); *Enter. Rent-A-Car Co. v. Stowell*, 137 F. Supp. 2d 1151, 1158-59 (E.D. Mo. 2001) (holding that personal jurisdiction does not exist over a defendant whose website included photographs of classic cars, however, customers could not purchase the cars via the website or otherwise use the website to exchange information with defendant); *Fiber Network Solutions, Inc. v. Pac. Bell*, No. C2-02-176, 2002 U.S. Dist. LEXIS 23252, at \*11 (S.D. Ohio Oct. 25, 2002) (recognizing that personal jurisdiction cannot be asserted based on a passive website); *Rose v. Cont'l Aktiengesellschaft (AG)*, No. 99-3794, 2001 U.S. Dist. LEXIS 2354, at \*1-5 (E.D. Pa. Mar. 2, 2001) (recognizing that in a products liability case where a German-manufactured tire caused an injury in Germany, general personal jurisdiction will not be upheld in Pennsylvania based on a website that is maintained merely for informational purposes); *Amazon.com, Inc. v. Kalaydjian*, No. C00-1740R, 2001 U.S. Dist. LEXIS 4924, at \*16-17 (W.D. Wash. Feb. 20, 2001) (acknowledging that the AmazonTan.com website is a "text-book example of a passive site" because it provides information about tanning products and instructs customers how to purchase the products through the mail; the website does not allow customers to purchase products online or interact with the owner); *Metallic Ceramic Coatings, Inc. v. Precision Prods., Inc.*, No. 00-CV-4941, 2001 U.S. Dist. LEXIS 1224, at \*10 (E.D. Pa. Feb. 13, 2001) (holding that a passive website that advertises a product line and provides a toll-free telephone number is not sufficient to confer personal jurisdiction).

Review Internet bulletin board.<sup>67</sup> Viewers to the site could read the article and post their own comments to the bulletin board, but could not exchange information with the author of the article or otherwise interact with the site.<sup>68</sup> Interestingly, the Fifth Circuit reached the same result even though it characterized the website as interactive.<sup>69</sup> The practical implication of this case is that a party may cause injury to another simply by posting inflammatory information to a website. The injury may be based on claims of defamation, negligent or intentional infliction of emotional distress or some other tort. The accused, however, may escape liability in a particular forum by carefully crafting a website that curtails interactivity with visitors to the site. The anomaly of this holding is that a website owner or administrator may commit a tort that has a harmful effect, yet the aggrieved party will have no redress in his or her forum state because the website that contains the offending language is characterized as a passive website.

Some parties attempt to assert personal jurisdiction based on the language in which passive websites are written. They rationalize that language on a website indicates an intent to target a specific country. Even though a non-interactive website provides information in the English language, courts are unwilling to treat the website as one that is targeting the United States for jurisdictional purposes.<sup>70</sup>

Two Illinois courts stretched the limits of the passive website classification. In *Haggerty Enterprises, Inc. v. Lipan Industrial Co.*, the court held that a website was passive even though it provided a means for customers to contact the company only for informational purposes.<sup>71</sup> The website also exhibited a line of products. The court found the determinative factor to be the absence of corresponding prices because without listing the prices, the company could not attempt direct sales via the website.<sup>72</sup> Furthermore, the court noted that even if the website was classified as interactive, its very nature was informational, and therefore, was not sufficient to satisfy jurisdic-

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67. No. 3:00-CV-1268-R, 2001 U.S. Dist. LEXIS 3133, \*14 (N.D. Tex. Mar. 20, 2001).

68. *Id.*

69. *Revell v. Lidov*, 317 F.3d 467, 472 (5th Cir. 2002).

70. *See In re Magnetic Audiotape Antitrust Litig.*, 171 F. Supp. 2d 179, 189 (S.D.N.Y. 2001) (holding that the minimum contact analysis is not satisfied for personal jurisdiction based on a non-interactive website that is written in the English language and maintained on a server within a foreign country), *aff'd in part*, No. 99 Civ. 1580 (LMM), 2002 U.S. Dist. LEXIS 8362 (S.D.N.Y. May 9, 2002), *and rev'd in part*, *Tex. Int'l Magnetics, Inc. v. BASF Aktiengesellschaft*, No. 01-7307, 2002 U.S. App. LEXIS 3853 (2d Cir. Mar. 12, 2002).

71. No. 00 C 766, 2001 U.S. Dist. LEXIS 13012, at \*15-16 (N.D. Ill. Aug. 22, 2001).

72. *Id.* at \*15.

tional standards.<sup>73</sup> Finally, the court examined additional conduct in conjunction with the website, but remained unwilling to find that jurisdiction was proper.<sup>74</sup> In the second Illinois opinion, *Haemoscope Corp. v. Pentaparm AG*, the court refused to assert personal jurisdiction based on a passive website that provided product and service information without corresponding prices, provided users the ability to submit an online form requesting additional information, but precluded any sales activity over the website.<sup>75</sup>

*Haemoscope Corp.* also demonstrated that even if a website can be classified as interactive for purposes of a specific personal jurisdiction analysis, courts may choose to look beyond the general characterization of the website and focus on the interactivity with respect to the allegedly infringing product. In that case, a second defendant had an interactive website because it sold certain products via that website and even included a downloadable catalog.<sup>76</sup> Because none of the interactive features related to the allegedly infringing device, the court held that the website was passive as to that device.<sup>77</sup>

Courts also examine passive websites of third parties. Thus, an Internet service provider cannot be brought into court for the actions of its customers where it has no control over its customers' websites and simply provides "bandwidth service."<sup>78</sup> In *ALS Scan, Inc. v. Wilkins*, the plaintiff joined Digital, an Internet service provider, as a defendant along with the creator of a website who was accused of publishing the plaintiff's copyrighted photographs.<sup>79</sup> The court adhered to the *Zippo* sliding scale theory and classified Digital's website as passive.<sup>80</sup> Notwithstanding the commercial nature of Digital's website and the ability to send electronic signals to the forum state of Maryland, the court found no interaction by or between the website and Maryland residents.<sup>81</sup> The court noted that Digital's only direct contact with the forum state was "through the general publication of its website on the

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73. *Id.* at \*16.

74. *Id.* at \*16-17. The plaintiff contended that defendant attended trade shows in Boston, Los Angeles and New York. The defendant denied participation in the trade shows. The court held, however, that even if it resolved the conflict in favor of plaintiff, a foreign defendant's attendance at the trade shows did not amount to minimum contacts with the forum state of Illinois. *Id.* at \*17.

75. No. 02 C 4261, 2002 U.S. Dist. LEXIS 23387, at \*15 (N.D. Ill. Dec. 6, 2002).

76. *Id.* at \*22.

77. *Id.*

78. *ASL Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 709 (4th Cir. 2002).

79. *Id.*

80. *Id.* at 713.

81. *Id.* at 714-15 (recognizing that Digital merely served as an ISP provider, enabling Alternative Products to transmit information over its own website, and

Internet,” and that its own website was not related to the underlying claim of copyright infringement.<sup>82</sup> Therefore, the court held that Digital’s passive website was not sufficient to confer specific personal jurisdiction.<sup>83</sup>

These decisions demonstrate the continued prevalence of the holding in *Zippo*. As such, each court refused to confer personal jurisdiction based on a passive website, absent some other activity.

## 2. Active and Interactive Websites

The most intriguing decisions of 2001 and 2002 relate to websites that involved a variety of interactive features. Perhaps this is because these websites provided courts with the most flexibility to determine whether the Internet contacts with a particular forum constituted sufficient minimum contacts to establish personal jurisdiction.

### a. Websites that Constitute “Doing Business” Within a Forum State

Many courts were called upon to analyze whether an interactive website was “doing business” within a specific forum pursuant to a relevant state long-arm statute.<sup>84</sup> As shown below, the courts appear equally divided on this issue. Nonetheless, many of these courts emphasized the importance that a website plays as it enables a party to enter into even one contract with a forum state resident.

For example, *Media3 Technologies, LLC v. Mail Abuse Prevention System, LLC*, involved a California-based Internet service provider, MAPS, whose “stated purpose” was to “combat spam.”<sup>85</sup> To achieve that purpose, MAPS maintained a “Realtime Blackhole List”<sup>86</sup> on its website, which was a list of websites that sent or supported spam. MAPS prevented the transmission of such sites to its subscribers.<sup>87</sup> The court categorized MAPS’s website

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that Digital played no role in transmitting allegedly infringing material over the Internet).

82. *Id.* at 715.

83. *Id.*

84. *See, e.g.,* Deleo v. Swirsky, No. 00 C 6917, 2001 U.S. Dist. LEXIS 8465, at \*6-7, 12 (N.D. Ill. June 19, 2001) (conferring personal jurisdiction over defendant in a shareholder derivative suit because defendant’s website actively solicited shareholders from the forum state, and therefore, pursuant to the state’s long-arm statute qualified as transacting business within the state as well as doing business within the state).

85. No. 00-CV-12524-MEL, 2001 U.S. Dist. LEXIS 1310, at \*4 (D. Mass. Jan. 2, 2001). “Spam” is defined by the Internet industry as “unwanted e-mail that is often sent en masse to e-mail addresses for commercial purposes.” *Id.* at \*3.

86. *Id.* at \*4.

87. *Id.* at \*4-5.



as interactive because Internet users could access the site to conduct searches for specific Internet addresses and could download the entire blackhole list after entering into a contract and paying a fee.<sup>88</sup> MAPS argued that it did not specifically target Massachusetts. The court, however, liberally construed its long-arm statute to hold that jurisdiction existed, noting that three Massachusetts entities had downloaded the list.<sup>89</sup> A New Hampshire district court exhibited a similar liberal interpretation of its state's long-arm statute; contacts with a single New Hampshire customer may be sufficient to establish that the defendant used its website to conduct business within the state.<sup>90</sup>

In a trademark and trade dress action brought in the Northern District of Illinois, the court classified a website as highly interactive and upheld specific personal jurisdiction.<sup>91</sup> In *Ty, Inc. v. Baby Me, Inc.*, the plaintiff, Ty, manufactured and sold toys, including Beanie Babies beanbags. It sued defendant Baby Me, a Hawaiian corporation, for selling Baby Me Bears that were confusingly similar to the Beanie Babies toys.<sup>92</sup> The defendant claimed that it sold its Baby Me Bears as Hawaiian souvenirs so that its Internet website was really targeting visitors to Hawaii who returned home and wanted to buy another bear.<sup>93</sup> The court, however, focused its analysis on the features of the defendant's website, which included pictures of the Baby Me Bears, pricing information, an order form, and the ability to telephone or e-

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88. *Id.* at \*15.

89. *Id.* at \*11, 15 (noting that the jurisdictional grant of authority should be "construed broadly"). The relevant provision of the Massachusetts long-arm statute states: a "court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's: . . . (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth . . . ." *Id.* at \*8-9 (quoting MASS. GEN. LAWS ch. 233A, § 3(d) (2000)).

90. *See Remsburg v. Docusearch, Inc.*, No. 00-211-B, 2002 U.S. Dist. LEXIS 1940 (D.N.H. Jan. 31, 2002) (upholding personal jurisdiction based on the New Hampshire long-arm statute where the requirement of transacting any business within the state is coextensive with a constitutional due process analysis). In *Rensburg*, the defendant operated an Internet-based investigation and information service. *Id.* at \*2. A resident e-mailed several requests to the defendant and paid for services to locate a third party whom he later murdered. *Id.* at \*3-6. The court held that when the defendant accepted the requests and fulfilled them by providing the necessary information, it knew it was selling information to a New Hampshire resident, and therefore, had established a business relationship in New Hampshire. *Id.* at \*16.

91. *Ty, Inc. v. Baby Me, Inc.*, No. 00 C 6016, 2001 U.S. Dist. LEXIS 5761, at \*14 (N.D. Ill. Apr. 20, 2001).

92. *Id.* at \*2.

93. *Id.* at \*13.

mail inquiries to purchase the bears for a retail business.<sup>94</sup> A decisive factor was information on the online order form, which included a disclaimer “that ‘prices below include shipping and delivery confirmation to U.S. destinations only.’”<sup>95</sup> Accordingly, the court held that the defendant intended to conduct business throughout the United States, including Illinois, despite the defendant’s contention that the three sales to an Illinois resident were in reality made to an agent of the plaintiff’s counsel.<sup>96</sup> The court recognized that a plaintiff may not “manufacture” jurisdiction; this argument failed because the defendant’s contentions were merely speculative and the defendant failed to produce any evidence on the issue.<sup>97</sup>

In 2001 and 2002, the New York courts were busy construing a number of websites to analyze whether defendants were transacting business in New York pursuant to its long-arm statute, C.P.L.R. 302(a)(1). The statute permits jurisdiction over a nonresident defendant who transacts business within the state as long as the cause of action relates to that transaction.<sup>98</sup> The New York courts construe the statute liberally because personal jurisdiction may be based on a single transaction as long as the defendant’s activities are purposeful and a substantial relationship exists between the transaction and the underlying cause of action.<sup>99</sup> The transaction need not involve a contract or the exchange of consideration;<sup>100</sup> however, when a website is in-

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94. *Id.* at \*12.

95. *Id.* (recognizing the defendant’s intent to sell products anywhere in the world because the order form included additional information that prices for international shipping would be made available upon request).

96. *Id.* at \*14.

97. *Id.* at \*14-15; *see also* Watchworks, Inc. v. Total Time, Inc., No. 01 C 5711, 2002 U.S. Dist. LEXIS 4491, at \*26 (N.D. Ill. Mar. 18, 2002) (holding that a plaintiff cannot create jurisdiction; therefore, personal jurisdiction was not sustained where the only verified sales made to residents of the forum state of Illinois were made to plaintiff’s investigator).

98. N.Y. C.P.L.R. § 302(a)(1) (McKinney 1990) (providing in pertinent part as follows: “[A] court may exercise personal jurisdiction over any non-domiciliary . . . who . . . (1) transacts any business within the state or contracts anywhere to supply goods or services in the state . . .”).

99. *See* Mattel, Inc. v. Adventure Apparel, No. 00 Civ. 4085 (RWS), 2001 U.S. Dist. LEXIS 3179, at \*7 (S.D.N.Y. Mar. 15, 2001).

100. *See* Obabueki v. IBM Corp., No. 99 Civ. 11262 (AGS), No. 99 Civ. 12486 (AGS), 2001 U.S. Dist. LEXIS 11810, at \*7-8 (S.D.N.Y. Aug. 14, 2001). *Obabueki* involved a discrimination suit in which the plaintiff sued IBM for withdrawing an employment offer and sued Choicepoint Services for providing improper information to IBM. *Id.* at \*1. The issue was whether the court had personal jurisdiction over Choicepoint based on its interactive website, which operated as a pre-employment screening service. *Id.* at \*11-12. A prospective customer could download an application form and then fax it to Choicepoint; however, the application form could not be sent over the Internet. *Id.* at \*12. A

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volved the website must serve as more than a passive conduit of information.<sup>101</sup>

For example, the consummation of one on-line transaction was sufficient to confer personal jurisdiction because the sales transaction was substantially related to the plaintiff's claims of trademark dilution and

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customer would then receive a special login ID and password to enable it to search the website for potential employees. *Id.* This screening could be done in New York and nationally. *Id.* Through the website, customers could e-mail questions to, and request information from, Choicepoint. The website also solicited business because it provided price estimates, sample reports, and information regarding turnaround time for requested services. *Id.* Based on this interactive website, the court found that jurisdiction was proper in New York because contacts with New York were "significant and clearly commercial in nature," *id.* at \*13, and for purposes of section 302(a)(1) the website contacts were sufficiently related to the underlying cause of action. *Id.* at \*16-17.

101. See *Phat Fashions, LLC v. Phat Game Athletic Apparel, Inc.*, No. 00 Civ. 0201 (JSM), 2001 U.S. Dist. LEXIS 13892, at \*15 (S.D.N.Y. Sept. 6, 2001) (refusing to assert jurisdiction based on the foreseeability that New York customers might visit the defendant's interactive website even though the site allowed customers to actually purchase goods online and exchange e-mail inquiries); *Trost v. Bauer*, No. 01 C 2038, 2001 U.S. Dist. LEXIS 10311, at \*37 (N.D. Ill. July 23, 2001) (holding personal jurisdiction improper based on a website that was nothing more than a national advertisement and did not allow customers to place orders); *V'Soske, Inc. v. V'soske.com*, No. 00 Civ. 6099 (DC), 2001 U.S. Dist. LEXIS 6675, at \*11 (S.D.N.Y. May 22, 2001) (noting the sale of a product to a company in a foreign country who ultimately took the product to the forum state is not sufficient contact with the forum; and holding personal jurisdiction improper based on a website that permitted customers to contact the defendant but not place orders through the website); see also *Sage Realty Corp. v. Barnhart Interests, Ltd.*, No. 02 Civ. 0725 (LAK), 2002 U.S. Dist. LEXIS 6691, at \*5 (S.D.N.Y. Apr. 18, 2002) (refusing to assert personal jurisdiction based on a passive website that simply posts business locations); *Chaldon Assocs., LLC v. Daedalus Capital, LLC*, No. 01 Civ. 2015 (JSR), 2001 U.S. Dist. LEXIS 15428, at \*7 (S.D.N.Y. Sept. 28, 2001) (acknowledging that business is not transacted in New York under section 302(a)(1) simply because a user of defendant's website may download information disclosing a marketing agreement between plaintiff, a New York firm, and a nonresident defendant). *But see Thomas Pub'g Co. v. Indus. Quick Search, Inc.*, 237 F. Supp. 2d 489, 491-92 (S.D.N.Y. 2002) (holding that personal jurisdiction was proper based on an interactive website that allows users to submit company listings, e-mail directly to defendant's sales department and track product areas; the use of the interactive website enabled users to do business in New York and the cause of action for infringement arose out of the transaction because it related to the use of the infringing domain name); *Marsalis v. Schachner*, No. 01 Civ. 10774 (DC), 2002 U.S. Dist. LEXIS 10157, at \*9 (S.D.N.Y. June 3, 2002) (holding that personal jurisdiction was proper because the website marketed and sold recordings, in spite of a lack of evidence showing that any sales actually took place in New York).

infringement and for unfair competition.<sup>102</sup> On the other hand, an Internet service provider could not foresee being haled into a New York court simply because it included contact information on a customer's restaurant website.<sup>103</sup> The court distinguished the facts of these two cases, claiming that a customer would not travel to a restaurant's website to purchase an ISP account.<sup>104</sup> The crucial difference between the two cases depends on whether the cause of action relates to the underlying transaction, a key requirement for jurisdiction based on section 302(a)(1).<sup>105</sup>

The concept of "doing business within a state is based strictly on statutory construction. Therefore, the controlling force of each decision depends on the particular facts and circumstances of each case analyzed in conjunction with a specific state long-arm statute.

***b. Websites That Cause Tortious Injury within a Forum State***

A few courts examined websites pursuant to long-arm statutes to ascertain whether the websites enabled defendants to commit tortious acts within a forum state. In *On-Line Technologies v. Perkin Elmer Corp.*, a Connecticut district court was unwilling to assert personal jurisdiction over an interactive website.<sup>106</sup> The site posted information about an allegedly infringing product and allowed inquiries from customers, but required such inquiries to be directed to a subsidiary, lacked pricing information, and did not permit on-line purchasing of products.<sup>107</sup> The court reasoned that because the website pri-

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102. *Mattel, Inc. v. Adventure Apparel*, 2001 U.S. Dist. LEXIS 3179, at \*10 (noting that the single sale to plaintiff's agent was "irrelevant" for the jurisdictional analysis). In *Adventure Apparel*, Mattel challenged defendant's registration of the domain names, "barbiesbeachwear.com" and "barbiesclothing.com." *Id.* at \*3. Mattel's investigator, Falsone, ordered some merchandise through defendant's website. *Id.* at \*4.

103. *Mattel, Inc. v. Securenet Info. Servs.*, No. 99 Civ. 11813 (JSM), 2001 U.S. Dist. LEXIS 6288, at \*6-7 (S.D.N.Y. May 15, 2001).

104. *Id.* at \*7.

105. *See id.* at \*4 (finding that section 302(a)(1) does not confer jurisdiction over a defendant who entered into a contract with the plaintiff's investigator to supply Internet access in New York because the causes of action in the complaint related to trademark infringement, trademark dilution and cybersquatting of another defendant's website domain name).

106. *On-Line Techs. v. Perkin Elmer Corp.*, 141 F. Supp. 2d 246, 266 (D. Conn. 2001). Connecticut's long-arm statute, CONN. GEN. STAT. § 33-929(f) (2003) provides as follows: "Every foreign corporation shall be subject to suit in this state . . . whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows . . . (4) out of tortious conduct in this state, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance."

107. *Id.* at 265-66.

marily involved the exchange of information, it could not serve as the basis for personal jurisdiction with respect to a tort claim of patent infringement.<sup>108</sup> Similarly, in *Pearson v. White Ski Co.*, a Virginia court was unwilling to confer personal jurisdiction over a nonresident ski resort that advertised over the Internet.<sup>109</sup> The court held that the website advertising did not relate to the plaintiff's claims of negligent operation of a ski lift, and therefore, could not satisfy the "causing tortious injury" prong of Virginia's long arm statute."<sup>110</sup>

On the other hand, New York construed its long-arm statute more liberally in *Starmedia Network, Inc. v. Star Media Inc.*<sup>111</sup> New York's long-arm statute, N.Y. C.P.L.R. § 302(a)(3), allows personal jurisdiction over a non-resident defendant who commits a tortious act outside of New York causing a plaintiff to suffer injury within New York, as long as the defendant can reasonably expect his actions to have consequences in New York and he derives substantial revenue from interstate commerce.<sup>112</sup> The injury, however, must cause more than an economic impact in New York.<sup>113</sup>

The *Starmedia* court rationalized that the defendant's website was interactive.<sup>114</sup> Customers could not purchase the defendant's product, computer software, over the site; however, they could register with the website and if they wanted to become a distributor of the defendant's software, they could

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108. *Id.* at 266.

109. *Pearson v. White Ski Co.*, 228 F. Supp. 2d 705, 709 (E.D. Va. 2002).

110. *Id.* The Virginia long-arm statute, VA. CODE ANN. § 8.01-328.1(A) (Michie 2000), states in pertinent part that: "A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action *arising from* the person's: . . . (3) Causing tortious injury by an act or omission in this Commonwealth; (4) Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth." (emphasis in original)

111. *Starmedia Network, Inc. v. Star Media Inc.*, No. 00 Civ. 4647 (DLC), 2001 U.S. Dist. LEXIS 4870, at \*6-7 (S.D.N.Y. April 23, 2001).

112. N.Y. C.P.L.R. § 302(a)(3) provides, in pertinent part as follows: "[A] court may exercise personal jurisdiction over any non-domiciliary . . . who . . . (3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he . . . (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . ."

113. *See Cselle v. Falls*, No. 02 Civ. 5385 (GEL), 2002 U.S. Dist. LEXIS 24509, at \*4-5 (S.D.N.Y. Dec. 20, 2002) (holding that jurisdiction under Section 302(a)(3) is not proper over a Virginia sheriff who failed to execute on a judgment within Virginia).

114. *Starmedia Network, Inc.*, 2001 U.S. Dist. LEXIS 4870, at \*2.

download a dealer application from the website. Customers who received a special password could access a specially protected area of the website to view product and pricing information.<sup>115</sup> Additionally, customers could communicate with the defendant via the website.<sup>116</sup> The defendant conceded that although it had not sold any of its products in New York, it derived substantial revenue from interstate commerce and used its website to target new customers nationwide, including New York.<sup>117</sup>

The court held that personal jurisdiction was proper under the long-arm statute because the defendant's website met all of the requirements of Section 302(a)(3).<sup>118</sup> First, the tort of patent infringement was deemed to have occurred in the state where the website was created and/or maintained, which in this case was the state of Washington.<sup>119</sup> Second, the injury must be suffered by a business conducting activities within New York. Such injury may take the form of lost sales or confusion as a result of marketing. However, the court did not require allegations of actual injury; all that was required was "the potential for confusion . . . 'within the state.'"<sup>120</sup> Third, the defendant conceded it derived substantial revenue from interstate commerce.<sup>121</sup>

Finally, the *Starmedia* court focused its attention on the issue of whether the defendant could reasonably have foreseen that its actions would have consequences in New York.<sup>122</sup> The court noted that a company does not submit itself to New York's jurisdiction by simply maintaining a website that New York residents could visit. Nevertheless, one may submit to the jurisdiction of the forum state based on sales to residents of that state made

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115. *Id.*

116. *Id.*

117. *Id.* at \*3.

118. *Id.* at \*7-8.

119. *Id.* at \*5-6 ("Where an Internet site displays allegedly infringing marks, the tort is deemed to be committed where the website is created and/or maintained.").

120. *Id.* at \*6.

121. *Id.* at \*3. *But see* *Mattel, Inc. v. Securenet Info. Servs.*, No. 99 Civ. 11813 (JSM), 2001 U.S. Dist. LEXIS 6288, at \*3 (S.D.N.Y. May 15, 2001) (finding that the requirement of "substantial revenue from interstate commerce" was not met where a Canadian restaurant, located near the New York border, did not advertise in New York or the United States, even though it accepted currency from the United States).

122. *Starmedia Network, Inc.*, 2001 U.S. Dist. LEXIS 4870, at \*6-7; *see also* *Thomas Publ'g Co. v. Indus. Quick Search, Inc.*, 237 F. Supp. 2d 489, 491-92 (S.D.N.Y. 2002) (finding personal jurisdiction proper under Section 302(a)(3)(ii) based on an interactive website that included advertisements by more than 75 New York companies and a reasonable expectation that the infringing domain name would have consequences in New York).

through the website.<sup>123</sup> The court held that although no sale had yet been made in New York, jurisdiction under Section 302(a)(3) was not defeated because the “defendant used its website to attract and service business across the nation, including in New York, and . . . received substantial revenue from those interstate sales.”<sup>124</sup>

**c. Jurisdictional Reach over Third Parties Based on Website Contacts**

Courts have addressed the viability of asserting personal jurisdiction over third parties who are associated with another’s website.<sup>125</sup> In a personal jurisdiction analysis, however, courts should consider the activities of a parent and subsidiary corporation separately.<sup>126</sup>

The first situation occurs when a plaintiff seeks to assert personal jurisdiction over a parent corporation based on its subsidiary’s website. In this type of case, courts focus on the relationship between the two associated parties rather than the characterization of the website. Thus, despite the highly interactive nature of a subsidiary’s website, personal jurisdiction will not be asserted over a parent corporation that has no responsibility for, or

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123. *Starmedia Network, Inc.*, 2001 U.S. Dist. LEXIS 4870, at \*7; *see also* *Bridgeport Music, Inc. v. Agarita Music, Inc.*, 182 F. Supp. 2d 653, 661 (M.D. Tenn. 2002) (holding that allegations of sales over an Internet website, without actual proof thereof, is not sufficient to confer personal jurisdiction).

124. *Starmedia Network, Inc.*, 2001 U.S. Dist. LEXIS 4870, at \*8. Once the *Starmedia* court found that New York’s long-arm statute applied, it addressed whether the defendant’s contacts with New York met due process standards of minimum contacts and reasonableness. The court examined the commercial nature and level of interactivity of the website. *Id.* at \*9. The court acknowledged that the website was commercial, and found that the level of interactivity was low because customers could not place orders online. Customers could, however, send comments to the defendant and could gain access to confidential information provided they first received a special password. Nevertheless, to bolster its holding, the court highlighted other contacts with New York, such as the defendant’s knowledge of the plaintiff’s domain name when he registered his domain name and the substantial income that the defendant derived from interstate commerce. *Id.* at \*11-12. Consequently, the court found that minimum contacts were met for due process purposes, and upheld specific personal jurisdiction. *Id.* at \*12. The court then discussed the second prong of the due process analysis and held that it would be reasonable for New York courts to assert jurisdiction over the defendant. *Id.* at \*12-13.

125. *See* *Phonetel Communications, Inc. v. U.S. Robotics Corp.*, No. 4:00-CV-1750-R, 2001 U.S. Dist. LEXIS 7233, at \*15 (N.D. Tex. June 1, 2001).

126. *Aero Prods. Int’l, Inc. v. Intex Corp.*, No. 02 C 2590, 2002 U.S. Dist. LEXIS 17948, at \*12 (N.D. Ill. Sept. 19, 2002).

control over, the website.<sup>127</sup> A court will not impute minimum contacts to a parent corporation based merely on the fact that it is a holding company and may derive revenue from its subsidiary.<sup>128</sup>

The second type of situation occurs when a plaintiff seeks to assert jurisdiction over a parent corporation that maintains its own website, which includes interactive features that belong to its subsidiaries. As in the first situation, courts will not assert personal jurisdiction over a parent corporation merely because a website is classified as interactive.<sup>129</sup> This situation is exemplified by a parent corporation that owns a domain name but has no control or involvement with the development of the website.<sup>130</sup> In *On-Line Technologies*, discussed above, the court rationalized that the website interactivity was the ability of viewers to use a pull-down menu to select a corporate subsidiary in a particular country;<sup>131</sup> visitors to the website could not purchase products through the website.<sup>132</sup> Parent and subsidiary corporations may, therefore, “coordinate and cooperate” with each other and even have a “close relationship” without the fear of imputing Internet contacts from the subsidiary to the parent corporation.<sup>133</sup>

#### *d. Websites Analyzed in Conjunction with Other Factors*

The 2001 and 2002 courts continued to construe websites in conjunction with other factors when determining whether personal jurisdiction was appropriate. Many of these courts were willing to uphold personal jurisdiction

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127. *Phonetel Communications, Inc.*, 2001 U.S. Dist. LEXIS 7233, at \*15 (recognizing that while the defendant was a holding company of the subsidiary that maintained the website that sold allegedly infringing products, but refusing to invoke personal jurisdiction over the defendant based on the derivation of revenue from the subsidiary or maintenance of overlapping directors or officers).

128. *Id.*; see also *Rose v. Cont'l Aktiengesellschaft (AG)*, No. 99-3794, 2001 U.S. Dist. LEXIS 2354, at \*6 (E.D. Pa. Mar. 2, 2001) (recognizing the general rule that personal jurisdiction will not be asserted over a foreign corporation who owns stock in a subsidiary corporation conducting business within the forum state).

129. *See On-Line Techs. v. Perkin Elmer Corp.*, 141 F. Supp. 2d 246, 265-66 (D. Conn. 2001) (acknowledging that a parent corporation's website was interactive because it permitted the exchange of information with customers, yet because the website did not allow on-line purchases and did not include pricing information for products the court did not recognize personal jurisdiction).

130. *See Aero Prods. Int'l, Inc.*, 2002 U.S. Dist. LEXIS 17948, at \*14 (refusing to uphold personal jurisdiction based on a parent corporation's domain name ownership since the corporation was never “involved with the creation, development, or maintenance of the website”).

131. *On-Line Techs.*, 141 F. Supp. 2d at 266.

132. *Id.*

133. *See Rose*, 2001 U.S. Dist. LEXIS 2354, at \*7.



when analyzing the content of a website together with other forum contacts.<sup>134</sup> For example, in *Neogen Corp. v. Neo Gen Screening, Inc.*, the Sixth Circuit recognized that personal jurisdiction was a “close question” based on an interactive website.<sup>135</sup> The website at issue advertised its services (“diagnostic testing of blood samples”); provided contact information; posted test results that were accessible only by a password that was provided to customers who purchased the service; posted information that the defendant would perform genetic screening in any state; and even posted information regarding a breakdown of infant deaths by geographic area, including the forum state of Michigan.<sup>136</sup> The court acknowledged that despite the website’s “primarily” passive character, most of the attributes of the information evidenced defendant’s purposeful availment of the benefits and protections of Michigan law.<sup>137</sup> To bolster its finding that personal jurisdiction was proper, the court also examined the defendant’s other contacts with Michigan. For fourteen years, the defendant entered into contracts with Michigan residents and admitted that it expected to continue doing business in Michigan.<sup>138</sup> The defendant repeatedly used the mail to interact with, and accept payments from, Michigan customers.<sup>139</sup>

In *H.C. Smith Investments, LLC v. Outboard Marine Corp.*, a Michigan district court found sufficient minimum contacts to justify personal jurisdiction.<sup>140</sup> One factor in the court’s decision, albeit not determinative, was the defendant’s maintenance of an Internet website that solicited Michigan residents.<sup>141</sup> Specifically, the website provided links to defendant’s “‘authorized’ service centers” in the forum state.<sup>142</sup> The defendant’s other contacts with the forum state included: establishment of a contract to inspect an airplane owned by a Michigan-based company; knowledge that the airplane

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134. See *V’Soske, Inc. v. Vsoske.com*, No. 00 Civ. 6099 (DC), 2001 U.S. Dist. LEXIS 6675, at \*13 n.3 (S.D.N.Y. May 22, 2001) (“the majority of cases in [the Second] Circuit that have found personal jurisdiction based on defendant’s operation of a website have involved additional New York contacts”); see, e.g., *Mulcahy v. Cheetah Learning LLC*, No. 02-791 (PAM/JGL), 2002 U.S. Dist. LEXIS 8477, at \*9 (D. Minn. May 10, 2002) (holding that in a copyright infringement suit, personal jurisdiction was proper based on solicitations made through a website and by defendant’s act of traveling to the forum state to give a speech regarding her product).

135. 282 F.3d 883, 891 (6th Cir. 2002).

136. *Id.* at 886, 890-91.

137. *Id.* at 890.

138. *Id.* at 891.

139. *Id.* at 892.

140. No. 1:00-CV-128, 2001 U.S. Dist. LEXIS 8771, at \*13-15 (W.D. Mich. June 18, 2001).

141. *Id.*

142. *Id.*

would be stored, flown, and chartered in Michigan; and correspondence with the plaintiff in Michigan.<sup>143</sup>

Similarly, in *Divicino v. Polaris Industries*, the court found that the defendant's contacts with the forum state of Connecticut were sufficient to give rise to personal jurisdiction based in part on a website advertisement.<sup>144</sup> The court focused its purposeful availment analysis on a toll-free telephone number placed on the defendant's website, which said that the number was "[g]ood in NY State & all of New England."<sup>145</sup> The court held that various factors standing alone were not sufficient to establish purposeful availment; taken together, however, they were.<sup>146</sup> The court reasoned that the defendant intended to conduct business in Connecticut based on the telephone listing on the website; the plaintiff's use of the website to learn about the defendant's product; the defendant's advertising in a special newsletter and on a local radio station, both of which targeted New England residents; and the significant sales activity with Connecticut residents.<sup>147</sup>

Internet newsletters pose interesting analyses for jurisdictional purposes. In *Batzel v. Smith*, a California district court upheld personal jurisdiction over a nonresident defendant who was the sole operator of an Internet website that published newsletters about art and museum security issues.<sup>148</sup> The creator and sole owner of the newsletter maintained a subscriber list so he could e-mail the newsletters and invitations to view his website.<sup>149</sup> Although the website was maintained in the Netherlands, the newsletters were e-mailed all over the world, including California, where they were sent multiple times per week.<sup>150</sup> The court also examined additional contacts with the forum, such as a corporate sponsorship agreement entered into with a California company, a trip to a conference in California at which the defendant promoted his website and solicited subscribers for the newsletter, and the existence of numerous California subscribers.<sup>151</sup> Taken together with the online contacts, these physical contacts with California residents provided sufficient grounds to subject the defendant to personal jurisdiction in California.<sup>152</sup>

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143. *Id.* The court conceded that its opinion should not be construed in any way toward findings of general jurisdiction. *Id.* at \*11 n.2.

144. 129 F. Supp. 2d 425, 434 (D. Conn. 2001).

145. *Id.* at 433.

146. *Id.* at 433-34.

147. *Id.* at 432-34.

148. No. CV 00-9590 SVW (AJWx), 2001 U.S. Dist. LEXIS 8929, at \*2 (C.D. Cal. June 5, 2001).

149. *Id.*

150. *Id.* at \*5.

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

152. *Id.* at \*6-7.

The additional physical conduct that each court examined provided further evidence of a defendant's intent to target a forum state. As a result, each court had an easy task of upholding personal jurisdiction under the particular circumstances.

### C. Specific versus General Jurisdiction

As stated previously, courts classify personal jurisdiction over nonresident defendants as either specific or general.<sup>153</sup> Specific jurisdiction exists when the underlying claims arise out of, or are directly related to, a defendant's contacts with the forum state.<sup>154</sup> Courts weigh the "nature and quality" of a defendant's acts to determine if jurisdiction is proper.<sup>155</sup> When a defendant's conduct or activities do not relate to the cause of action, a plaintiff may seek to establish personal jurisdiction under the theory of general jurisdiction; in these situations courts examine whether the defendant has engaged in "substantial" or "continuous and systematic" contacts with a forum state.<sup>156</sup> Some courts are willing to apply the *Zippo* sliding scale analysis to both specific and general jurisdiction analyses,<sup>157</sup> although others are of the opinion that the sliding scale approach provides little guidance in a general jurisdiction context.<sup>158</sup>

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153. See *Bird v. Parsons*, 289 F.3d 865, 873 (6th Cir. 2002); see also *Yahoo! Inc. v. La Ligue Contre Le Racisme et, L'Antisemitisme*, 145 F. Supp. 2d 1168, 1173 (N.D. Cal. 2001).

154. See *Bird*, 289 F.3d at 874 (requiring plaintiffs to satisfy the three-part test of purposeful availment, conduct that arises from defendant's activities, and reasonableness); *Ty, Inc. v. Baby Me, Inc.*, No. 00 C 6016, 2001 U.S. Dist. LEXIS 5761, at \*8 (N.D. Ill. April 20, 2001).

155. *Yahoo! Inc.*, 145 F. Supp. 2d at 1173.

156. See *Bird*, 289 F.3d at 873 (noting that defendant's contacts with the forum state must be "continuous and systematic"); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 509-10 (D.C. Cir. 2002) (noting that general jurisdiction is permissible over nonresident defendants who have "continuous and systematic" business contacts with the forum state); *Yahoo! Inc.*, 145 F. Supp. 2d at 1173 (acknowledging that general jurisdiction is permissible over a nonresident defendant who has "substantial" or "continuous and systematic" contacts with the forum state).

157. See *Brown v. AST Sports Sci., Inc.*, No. 02-1682, 2002 U.S. Dist. LEXIS 12294, at \*19-20 (E.D. Pa. June 28, 2002) (noting that the sliding scale has been applied within the context of both general and specific jurisdiction, although it was developed for specific jurisdiction); see also *Revell v. Lidov*, 317 F.3d 467, 470-72 (5th Cir. 2002) (applying the *Zippo* sliding scale analysis within the context of both general and specific jurisdiction, but noting the difficulty when attempting to apply the sliding scale to a general jurisdiction query).

158. See *Smith v. Basin Park Hotel, Inc.*, 178 F. Supp. 2d 1225, 1233, 1235 (N.D. Okla. 2001) (analyzing personal jurisdiction in a slip and fall personal injury

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Most of the court opinions discussed in Part IV.B. of this article relate to issues of specific jurisdiction. For purposes of a general jurisdiction analysis, courts may treat a passive website as having “*some* contact with every state.”<sup>159</sup> A passive website may form a component of a general jurisdiction analysis. For example, general jurisdiction will not be found based on a passive website that simply advertises a product line and provides a toll-free telephone number.<sup>160</sup> Similarly, general jurisdiction will not be found based on a passive website that serves as an advertising medium, provides customer service, and solicits employees.<sup>161</sup> Nor will general jurisdiction be found because someone in the forum state can order products<sup>162</sup> or make a hotel reser-

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case and noting that a website may subject a defendant to general personal jurisdiction only when the site’s owner uses it to conduct commercial transactions on a “sustained basis with a substantial number of residents of the forum”).

159. *See* *Jeffers v. Wal-Mart Stores, Inc.*, 152 F. Supp. 2d 913, 922 (S.D. W. Va. 2001) (emphasis in original) (holding that while some contact with the forum state may be established by both a nationwide toll-free telephone number and a passive website that advertises a product line, shows a typical sales area, and provides contact information, these contacts by themselves do not amount to continuous or systematic contact).
160. *Metallic Ceramic Coatings, Inc. v. Precision Prods., Inc.*, No. 00-CV-4941, 2001 U.S. Dist. LEXIS 1224, at \*10 (E.D. Pa. Feb. 13, 2001).
161. *ALS Scan, Inc. v. Wilkins*, 142 F. Supp. 2d 703, 709 (D. Md. 2001), *aff’d*, *ALS Scan, Inc. v. Digital Serv. Consultants*, 293 F.3d 707 (4th Cir. 2002).
162. *See* *Robbins v. Yutopian Enters.*, 202 F. Supp. 2d 426, 430 (D. Md. 2002) (holding that forty-six sales transactions with forum state residents over a ten and one-half month period is not sufficient to confer general personal jurisdiction no matter what medium was used to consummate the sales, including an active website); *Computer City, Inc. v. Pro-C Ltd.*, No. 4:00-CV-0803-A, 2001 U.S. Dist. LEXIS 4845, at \*7 (N.D. Tex. April 17, 2001) (holding that general personal jurisdiction is not satisfied based on plaintiff’s allegation that a resident of Texas may order products over defendant’s website as plaintiff failed to refute defendant’s claims that its website was merely passive in nature); *see also*, *AST Sports Sci., Inc.*, 2002 U.S. Dist. LEXIS 12294, at \*20, 25-27 (holding that general personal jurisdiction was not proper over one defendant based on 958 sales made through its website in one year (3.7% of its total sales), because sales activity alone did not amount to continuous and systematic activity within the forum state); *Gator.com Corp. v. L.L.Bean, Inc.*, No. C 01-01126 MEJ, 2001 U.S. Dist. LEXIS 19737, at \*9-12 (N.D. Cal. Nov. 21, 2001) (acknowledging that defendant’s sales to forum state residents constituted approximately six percent of the total sales, and noting that for purposes of establishing general jurisdiction there is a difference between doing business with the forum – via website sales – rather than in the forum based on a geographic location). In *Gator.com Corp.*, the court dismissed the complaint for lack of personal jurisdiction. *Id.* at \*25. *But see* *Obermaier v. Kenneth Copeland Evangelistic Ass’n*, 208 F. Supp. 2d 1288, 1292 (M.D. Fla. 2002) (holding that minimum contacts are met by using websites, the mails and telephones to

vation<sup>163</sup> on a defendant's website. Finally, in *Bird v. Parsons*, the Sixth Circuit was unwilling to confer general jurisdiction over a nonresident defendant that maintained a website to register domain names.<sup>164</sup> In *Bird*, the court accepted the plaintiff's allegation that the defendant had registered approximately 4,666 domain names for Ohio residents.<sup>165</sup> Despite this allegation, the court held that those domain name registrations failed to establish that the defendant had continuous and systematic contact with the state of Ohio.<sup>166</sup> Furthermore, the court held that the assertion of general personal jurisdiction did not depend on the ability of people to register domain names via the website.<sup>167</sup> In each of these cases, the courts were unwilling to confer general personal jurisdiction based on passive websites.

Interactive websites also pose interesting legal scenarios with regard to general personal jurisdiction. In *Revell v. Lidov*, the Fifth Circuit refused to assert general jurisdiction based on a website that included an Internet bulletin board.<sup>168</sup> In *Gorman v. Ameritrade Holding Corp.*, the District of Columbia Circuit was confronted with an Internet brokerage website that enabled visitors to "engage in electronic transactions" with the defendant, Ameritrade.<sup>169</sup> Specifically, visitors could become customers of Ameritrade by opening brokerage accounts online; could transfer funds electronically to

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solicit donations from forum state residents even though defendant did not receive the money within the forum state).

163. See *Rodriguez v. Circus Circus Casinos, Inc.*, No. 00 Civ. 6559 (GEL), 2001 U.S. Dist. LEXIS 61, at \*5-6 (S.D.N.Y. Jan. 8, 2001) (equating an Internet-based hotel reservation to one made over the telephone – neither is sufficient to subject a defendant to general personal jurisdiction); accord *Hinsch v. Outrigger Hotels Haw.*, 153 F. Supp. 2d 209, 214 (E.D.N.Y. 2001) (acknowledging that the traditional jurisdiction cases dating back to 1958 apply to contemporary situations even if changes in technology affect the way people conduct business, such as using the Internet instead of a telephone); see also *Basin Park Hotel, Inc.*, 178 F. Supp. 2d at 1235 (refusing to assert general personal jurisdiction over a nonresident hotel in a slip and fall case where commercial transactions such as hotel reservations could not be made through the defendant's website).

164. 289 F.3d 865, 873-74 (6th Cir. 2002).

165. *Id.* at 872.

166. *Id.* at 874 (equating the domain name registrations with the purchases that were not sufficient to confer personal jurisdiction in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984)).

167. *Id.*

168. 317 F.3d at 470-71 (5th Cir. 2002) (acknowledging that a website, which allowed individuals to post articles and read articles by other authors, did establish a "continuous presence everywhere in the world," although it did not have a "substantial" connection to the forum state of Texas).

169. 293 F.3d 506, 512 (D.C. Cir. 2002).

their brokerage accounts; and could use electronic means to buy and sell securities, pay Ameritrade's commissions, and borrow funds on margin.<sup>170</sup> Additionally, Ameritrade used e-mail and web postings to communicate with its customers—confirm transactions, send monthly statements, and convey product information.<sup>171</sup> The court acknowledged that these extensive contacts with the District of Columbia could be sufficient to permit general jurisdiction, depending on the “frequency and volume” of Ameritrade's business.<sup>172</sup> However, the court refused to grant discovery on that issue because personal jurisdiction could not be upheld due to improper service of process.<sup>173</sup>

Other courts also were unwilling to assert general personal jurisdiction based on interactive websites. A key pronouncement, in *Snyder v. Dolphin Encounters Ltd.*, was whether the website was used to specifically target a forum state, and whether the business conducted over the website was “central to the defendant's business” in the forum state.<sup>174</sup> In *Phonetel Communications, Inc. v. U.S. Robotics Corp.*, the court refused to confer either general or specific jurisdiction over a parent corporation that had no responsibility for the website.<sup>175</sup>

Based on these authorities, plaintiffs have a difficult task in establishing general personal jurisdiction based on website activity, regardless of whether the website is characterized as passive, interactive, or active. *Snyder* provides the best guidance in this area because of its in-depth analysis of general personal jurisdiction based on real space contacts and its detailed application to Internet activities.<sup>176</sup>

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170. *Id.*

171. *Id.*

172. *Id.* at 513.

173. *Id.*

174. 235 F. Supp. 2d 433, 440-41 (E.D. Pa. 2002) (citing *Molnlycke Health Care AB v. Dumex Surgical Prods., Ltd.*, 64 F. Supp. 2d 448 (E.D. Pa. 1999)) (noting that despite the ability of customers to order souvenirs or book reservations on the website, the defendant's website served mainly as an informational source).

175. No. 4:00-CV-1750-R, 2001 U.S. Dist. LEXIS 7233, at \*13-17 (N.D. Tex. June 1, 2001) (acknowledging that to impute jurisdiction over a parent corporation, the plaintiff must show that the parent had control over the “internal business operations and affairs” of its subsidiary corporation).

176. *See Snyder*, 235 F. Supp. 2d at 440-41.

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#### D. The Effects Test

The “effects test” involves a three-pronged analysis used to establish purposeful availment when evaluating specific personal jurisdiction.<sup>177</sup> Under this test, the plaintiff must demonstrate the existence of “(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state.”<sup>178</sup> The Supreme Court first articulated the effects test in *Calder v. Jones*; it held that personal jurisdiction was proper over a nonresident writer and editor of a national tabloid newspaper because their libelous article had a harmful effect on a well-known entertainer in her forum state.<sup>179</sup>

Courts also apply the effects test to Internet activities.<sup>180</sup> It is a well-established rule, however, that parties do not expressly aim tortious conduct to any specific forum merely by posting information to a website that is accessible worldwide.<sup>181</sup> Likewise, the simple act of registering someone else’s tradename as a domain name and establishing a website to use that domain name is not sufficient to confer personal jurisdiction over a nonresident.<sup>182</sup> Under the effects test, “something more” is needed to specifically aim the misconduct at the forum state.<sup>183</sup> For example, in *Panavision International, LP v. Toeppen*, the court confronted allegations of trademark dilution against a “cyberpirate” who stole trademarks by registering domain names to sell back to trademark owners.<sup>184</sup> The court held that purposeful availment was established based on the effects test; the “something more” was the defendant’s scheme to extort money.<sup>185</sup> For purposes of the effects test, the concept of “something more” has been quantified as “express aiming.”<sup>186</sup>

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177. *Panavision Int’l, LP v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (citing *Calder v. Jones*, 465 U.S. 783, 788-89 (1984)).

178. *Id.* (citing *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)); *see also* *Amazon.com, Inc. v. Kalaydjian*, No. C00-1740R, 2001 U.S. Dist. LEXIS 4924, at \*7 (W.D. Wash. Feb. 20, 2001).

179. *Calder*, 465 U.S. at 788-89.

180. *See Panavision Int’l, LP*, 141 F.3d at 1318.

181. *See Remick v. Manfredy*, 238 F.3d 248, 259 (3d Cir. 2001) (holding that the effects test is not satisfied for purposes of specific personal jurisdiction over a claim of misappropriation of image and likeness simply because a photograph is posted to a website that is accessible worldwide).

182. *See Panavision Int’l, LP*, 141 F.3d at 1322.

183. *Id.*

184. *Id.* at 1321.

185. *Id.* at 1322.

186. *See Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (recognizing that “express aiming” occurs when a “defendant is al-

During 2001 and 2002, the courts continued to require “something more” under the effects test.<sup>187</sup> One court interpreted “something more” to mean “some form of entry into the state,” which it considered to be something more than economic damage in the forum state.<sup>188</sup> Thus, in *Keelshield Inc. v. Megaware Keel-Guard Inc.*, the plaintiff satisfied the requirements of the effects test based on allegations of trademark infringement and related torts. The plaintiff alleged that the corporate defendant committed a tortious act outside the forum because it registered a domain name and set up a website using that name, its actions caused economic injury within the forum state, and the defendant knew that the misconduct was aimed at the forum state because the plaintiff corporation was based in the forum state.<sup>189</sup> The court expressly distinguished its facts from those in *Cybersell, Inc. v. Cybersell, Inc.*,<sup>190</sup> where the registration of the infringing domain name was merely “happenstance.”<sup>191</sup>

The outcome may not be the same, however, when the plaintiff is an international company,<sup>192</sup> when the defendant’s website targets a specific

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leged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state”).

187. See *Keelshield Inc. v. Megaware Keel-Guard Inc.*, No. 00-1312, 2001 U.S. Dist. LEXIS 7012, at \*14 (C.D. Ill. May 11, 2001); *Amazon.com, Inc. v. Kalaydjian*, No. C00-1740R, 2001 U.S. Dist. LEXIS 4924, at \*8-9 (W.D. Wash. Feb. 20, 2001) (citing *Panavision Int’l, LP*, 141 F.3d 1316, 1322 (9th Cir. 1998)).

188. *Keelshield Inc.*, 2001 U.S. Dist. LEXIS 7012, at \*14; see *Donmar, Inc. v. Swanky Partners, Inc.*, No. 02 C 1482, 2002 U.S. Dist. LEXIS 15308, at \*7-8 (N.D. Ill. Aug. 19, 2002) (holding that “purely economic” injury felt by a plaintiff is not sufficient to confer personal jurisdiction over a nonresident defendant based on the effects test).

189. *Keelshield Inc.*, 2001 U.S. Dist. LEXIS 7012, at \*19-20. The *Keelshield Inc.* court also held that personal jurisdiction was proper over an individual defendant because he knew the plaintiff was a competitor at the time of the domain name registration and the “something more” was the defendant’s use of the plaintiff’s trademark as megatags to link viewers to his company’s website. *Id.* at \*22-23. See also *N.W. Healthcare Alliance Inc. v. Healthgrades.com*, No. 01-35648, 2002 U.S. App. LEXIS 21131 (9th Cir. Oct. 7, 2002) (finding that personal jurisdiction existed under the effects test where the defendant’s website rated home health care providers in the forum state of Washington and the brunt of the harm caused by these ratings was suffered by the plaintiff, a Washington corporation).

190. 130 F.3d 414 (9th Cir. 1997).

191. *Keelshield Inc.*, 2001 U.S. Dist. LEXIS 7012, at \*22.

192. See *Oasis Corp. v. Judd*, 132 F. Supp. 2d 612, 624 (S.D. Ohio 2001). The defendant created a “gripe site” at <http://www.boycott-em.com> to complain about the plaintiff’s product as well as some of its officers and employees. *Id.* at 614. The plaintiff, an Ohio corporation with its principal place of business in



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market area that does not include the forum state,<sup>193</sup> or when an online publication contains defamatory information.<sup>194</sup> In each situation, the courts denied personal jurisdiction under the effects test, finding that the defendants did not specifically target their online conduct toward forum residents.<sup>195</sup>

Likewise, courts have continued to follow the general rule that the effects test cannot be used to create personal jurisdiction in situations where a defendant merely sets up a website with a registered domain name that in-

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Ohio, sued the defendant for defamation, trademark infringement, and related causes of action. *Id.* However, the court was unwilling to confer personal jurisdiction under the effects test because the defendant suffered injury in Oklahoma rather than in the forum state of Ohio, the plaintiff was an international corporation whose reputation was not limited to Ohio, and the defendant's website did not specifically target Ohio residents. *Id.* at 624. "The fact that [the defendants] could foresee that [their statements would be viewed] and have an effect in Ohio is not, in itself, enough to create personal jurisdiction." *Id.* (quoting *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir. 1994)).

193. See *Watchworks, Inc. v. Total Time, Inc.*, No. 01 C 5711, 2002 U.S. Dist. LEXIS 4491, at \*25 (N.D. Ill. Mar. 18, 2002) (finding that a plaintiff's use of an investigator in Illinois to purchase products from the defendant was an attempt to manufacture jurisdiction because the California defendant never before sold any products to residents of Illinois); see also *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907 (D. Or. 1999).

194. See *Revell v. Lidov*, 317 F.3d 467, 476-77 (5th Cir. 2002) (noting that even when a plaintiff had an international reputation as Associate Deputy Director of the FBI, the defendants could not have known that their online publication of defamatory information would be felt specifically in the state where the plaintiff lived). The courts look "to the geographic focus of the article, not the bite of the defamation, the blackness of the calumny, or who provoked the fight." *Id.* at 477.

195. See *Oasis Corp.*, 132 F. Supp. 2d at 624; *Revell*, 317 F.3d at 476-77; see also *Young v. New Haven Advocate*, 315 F.3d 256, 264 (4th Cir. 2002). In *Young*, the Fourth Circuit held that two Connecticut newspapers' allegedly defamatory articles, each from different Connecticut newspapers, criticizing a prisoner transfer policy whereby prisoners were moved to a Virginia prison, were not sufficient to subject the newspapers to specific personal jurisdiction in Virginia under the effects test. First, the court focused its analysis on the content of the newspapers' websites, noting that they were specifically designed for the Connecticut market and links contained therein were to Connecticut businesses. *Id.* at 263. Second, the court examined the allegedly defamatory newspaper articles and held that the emphasis of the articles was on fostering public debate regarding the prisoner transfer policy; knowledge that a Virginia resident was mentioned in the articles was not sufficient to establish the defendants' intent to target the plaintiff within the forum state of Virginia. *Id.* at 264.

fringes on someone else's registered trademark.<sup>196</sup> Thus, in *Amazon.com, Inc. v. Kalaydjian*, the United States District Court for the Western District of Washington held that the plaintiff could not rely on the effects test to establish purposeful availment simply because the defendant was aware of the popular Amazon.com website at the time he registered the allegedly infringing domain name and established his own website.<sup>197</sup> The court distinguished the case from *Panavision* because the "something more" required by the *Panavision* court was the defendant's act of extortion rather than his knowledge of the plaintiff's website.<sup>198</sup> The court also distinguished the facts of *Amazon.com, Inc.* from *Bancroft & Masters, Inc. v. Augusta National Inc.*<sup>199</sup>

In *Bancroft & Masters, Inc.*, the defendant sent a letter to the plaintiff, a California corporation, demanding that it cease and desist its use of an allegedly infringing domain name.<sup>200</sup> The defendant also sent a letter to Network Solutions, Inc. ("NSI"), the domain name registrar, forcing the plaintiff to take action in accordance with NSI's dispute resolution policy by either relinquishing the domain name or obtaining a declaratory judgment establishing the right to it.<sup>201</sup> The court held that the defendant's actions amounted to "express aiming" because the defendant knew that the letter sent to NSI would force the California plaintiff to respond.<sup>202</sup> In contrast, the defendant in *Amazon.com* sent a cease and desist letter directly to Amazon.com's legal department without notifying NSI. As a result, the defendant's actions did not force Amazon.com into court, as was the situation in *Bancroft & Masters, Inc.*<sup>203</sup>

This subtle distinction regarding the impact of a cease and desist letter did not ring true in *Yahoo! Inc. v. La Ligue Contre Le Racisme et, L'Antisemitisme*.<sup>204</sup> *Yahoo! Inc.* involved a dispute between French citizens and the Internet service provider, Yahoo!, which has its principal place of

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196. *Amazon.com, Inc. v. Kalaydjian*, No. C00-1740R, 2001 U.S. Dist. LEXIS 4924, at \*8-9 (W.D. Wash. Feb. 20, 2001) (citing *Panavision Int'l, LP v. Toepen*, 141 F.3d 1316, 1322 (9th Cir. 1998)).

197. *Id.* at \*10-13.

198. *Id.* at \*10-11.

199. *Id.* at \*11-13.

200. *Bancroft & Masters, Inc. v. August Nat'l, Inc.*, 223 F.3d 1082, 1085 (9th Cir. 2000).

201. *Id.*

202. *Id.* at 1088.

203. *Amazon.com, Inc.*, 2001 U.S. Dist. LEXIS 4924, at \*13-14.

204. 145 F. Supp. 2d 1168 (N.D. Cal. 2001) (acknowledging that the defendants intentionally aimed their conduct to the forum state of California by sending a cease and desist letter to Yahoo! at its corporate headquarters located in California).

business in California.<sup>205</sup> The French citizens sent a cease and desist letter directly to Yahoo! in California, demanding that it prevent access by French citizens to online auctions for Nazi memorabilia.<sup>206</sup> When Yahoo! failed to heed the warning, the French citizens filed suit against Yahoo! in France for violation of the Nazi Symbols Act, a French law that bars the public display of Nazi-related memorabilia, and obtained an order against Yahoo!.<sup>207</sup>

In response, Yahoo! filed suit in California, seeking a declaration that the French order was unenforceable.<sup>208</sup> The French citizens, now defendants in the California suit, filed a motion to dismiss for lack of personal jurisdiction, but the California court denied the motion and upheld jurisdiction based on the effects test.<sup>209</sup> Astoundingly, the court went so far as to state that the effects test is not limited to tortious conduct; rather, a defendant's conduct may be either "wrongful or tortious," so long as it is expressly aimed at a forum resident.<sup>210</sup> According to the court, the French defendants' conduct was "wrongful" because "its primary purpose or intended effect. . .[was] to deprive a United States resident of its constitutional rights."<sup>211</sup> The court held that the French defendants intentionally targeted Yahoo!'s California headquarters with the intent to cause consequences to be felt in California based on such intentional acts as: (1) sending the cease and desist letter to Yahoo! in California; (2) requesting the French court to order Yahoo! to re-engineer its California-based servers to recognize the French Internet protocol; and (3) using the United States Marshals to serve Yahoo! in California.<sup>212</sup>

These 2001 and 2002 cases demonstrate that the courts have used and will continue to apply the effects test as part of a cyberjurisdiction analysis. The courts required strict adherence to the requirements of this test, and few courts were persuaded that jurisdiction could be conferred based on the effects test. A Virginia district court carved out a limited exception to this general rule in a case involving spam e-mail; the court held that those engaged in such activities are aware of the effects of their activities and commit the tort of trespass to chattels, thus subjecting themselves to specific personal

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205. *Id.* at 1171.

206. *Id.* at 1172.

207. *Id.*

208. *Id.* at 1171.

209. *Id.* at 1174 (referencing *Bancroft & Masters, Inc. v. August Nat'l, Inc.*, 223 F.3d 1082, 1089 (9th Cir. 2000)).

210. *Yahoo! Inc.*, 145 F. Supp. 2d at 1175. The court acknowledged that the effects test typically applied only to tortious conduct but noted that the effects test had been applied in declaratory relief actions, although those cases involved "underlying allegations sound[ing] in tort." *Id.* at n.3.

211. *Id.* at 1175.

212. *Id.* at 1174.

jurisdiction in the fora of those they harm.<sup>213</sup> The holding in *Yahoo! Inc.* appears to create another exception with respect to the scope of a defendant's conduct. Under a broadened approach, a defendant's conduct is not limited to that of an intentional tort; a defendant's conduct may satisfy the effects test if it is either wrongful or tortious.<sup>214</sup> Time will tell whether other courts will follow this broader approach.

## E. Distinctions Based on Subject Matter

### 1. Trademark Infringement

The Lanham Act does not authorize nationwide service of process.<sup>215</sup> Consequently, a plaintiff who brings a trademark infringement action must rely on the forum state's laws to assert personal jurisdiction over a defendant.<sup>216</sup>

Trademark infringement is considered a tort.<sup>217</sup> Both the Third and Sixth Circuits recognize that the "cause of action for trademark infringement arises where the passing off occurs."<sup>218</sup> In determining jurisdiction, the dispositive fact is where a plaintiff suffers the injury,<sup>219</sup> as evidenced by consumers' confusion regarding the source or sponsorship of the allegedly infringing trademarks.<sup>220</sup> If a trademark infringement action is based on a

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213. *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 617-18 (E.D. Va. 2002).

214. As of late 2002, the Ninth Circuit continues to require a tort to trigger an analysis under the effects test and makes no mention of a wrongful act. *See N.W. Healthcare Alliance Inc. v. Healthgrades.com*, No. 01-35648, 2002 U.S. App. LEXIS 21131, at \*6 (9th Cir. Oct. 7, 2002). Similarly, the Northern District of Illinois requires an intentionally tortious act to be aimed into the forum state and makes no mention of a wrongful act. *Donmar, Inc. v. Swanky Partners, Inc.*, No. 02 C 1482, 2002 U.S. Dist. LEXIS 15308, at \*7 (N.D. Ill. Aug. 19, 2002).

215. *Haggerty Enters., Inc. v. Lipan Indus. Co.*, No. 00 C 766, 2001 U.S. Dist. LEXIS 13012, at \*4 (N.D. Ill. Aug. 22, 2001).

216. *Id.*

217. *Alitalia-Linee Aeree Italiane S.p.A. v. casinoalitalia.com*, 128 F. Supp. 2d 340, 348 (E.D. Va. 2001); *see Bird v. Parsons*, 289 F.3d 865, 876 (6th Cir. 2002) (noting that trademark infringement is analogous to a tort).

218. *See Oasis Corp. v. Judd*, 132 F. Supp. 2d 612, 620 (S.D. Ohio 2001) (noting that the Third Circuit looks to the place where the "passing off occurs" to establish where a trademark infringement cause of action arises); *see also Bird*, 289 F.3d at 876 (noting that a trademark infringement injury occurs "both in places where the plaintiff does business and in the state where its primary office is located").

219. *Keelshield Inc. v. Megaware Keel-ground, Inc.*, No. 00-1312, 2001 U.S. Dist. LEXIS 7012, at \*13 (C.D. Ill. May 11, 2001).

220. *Oasis Corp.*, 132 F. Supp. 2d at 621.

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noncommercial website, however, personal jurisdiction will not be sustained because consumers in the forum state are not deceived with regard to the source or ownership of a product or service.<sup>221</sup>

Trademark infringement allegations relating to domain names pose special problems because a domain name can be used for two purposes: (1) a “non-trademark technical purpose” when the domain name is used to designate an Internet address; and (2) a trademark purpose when the domain name is used to identify a party who offers goods or services over the Internet.<sup>222</sup> When a trademark infringement action relates to an Internet domain name, the “tortious act is the use of the domain name.”<sup>223</sup> Although the tort is committed where the infringer operates its website, the injury may occur elsewhere based on confusion, mistake and deception based on dilution.<sup>224</sup> The simple act of registering an infringing domain name and establishing a website under that name may not be sufficient to confer personal jurisdiction under either the traditional minimum contacts analysis<sup>225</sup> or the effects test.<sup>226</sup> Courts are especially unwilling to assert personal jurisdiction based on in-

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221. *Id.* at 620-21.

222. *Bird*, 289 F.3d at 878 (citing *Lockheed Martin Corp. v. Network Solutions, Inc.*, 985 F. Supp. 949, 956 (C.D. Cal. 1997)).

223. *Alitalia-Linee*, 128 F. Supp. 2d at 348.

224. *See id.*

225. *See Accuweather, Inc. v. Total Weather, Inc.*, 223 F. Supp. 2d 612, 617 (M.D. Pa. 2002) (finding that personal jurisdiction did not exist in a trademark infringement suit based on an interactive website that only provided information and other advertised services because no commercial activity transpired); *Donmar, Inc. v. Swanky Partners, Inc.*, No. 02 C 1482, 2002 U.S. Dist. LEXIS 15308, at \*10-11 (N.D. Ill. Aug. 19, 2002) (holding that the defendant’s interactive website was not sufficient to confer personal jurisdiction in Illinois because the website posted information about the defendant’s business establishment in Atlanta, Georgia, provided directions from within Atlanta, and allowed customers to sign up for a mailing list, but instantly removed all out-of-state residents).

226. *See Amazon.com, Inc. v. Kalydjian*, No. C00-1740R, 2001 U.S. Dist. LEXIS 4924, at \*8-9 (W.D. Wash. Feb. 20, 2001) (establishing that the purposeful availment requirement of the effects test requires “something more” than merely registering an infringing domain name and using that name on a website) (quoting *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997)); *see also Donmar, Inc.*, 2002 U.S. Dist. LEXIS 15308, at \*8-9 (refusing to assert personal jurisdiction under the effects test because the defendant’s informational website did not target or otherwise have an effect in the forum state as the website specifically targeted local residents while removing all out-of-state residents from its mailing list).

fringing domain names when they are associated with passive websites.<sup>227</sup> The Sixth Circuit, however, did affirm an Ohio district court's assertion of specific personal jurisdiction over an Internet domain name registrar and an Internet auction site that offered allegedly infringing domain names for sale.<sup>228</sup>

Even interactive websites pose problems;<sup>229</sup> a determinative factor may be the lack of evidence that any forum state resident has contacted or otherwise interacted with the defendant.<sup>230</sup> The mere ability to interact on-line

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227. *See* Miami Breakers Soccer Club, Inc. v. Women's United Soccer Ass'n, 140 F. Supp. 2d 1325, 1329 (S.D. Fla. 2001) (recognizing a passive website whereby customers may purchase goods only by placing a telephone order).

228. *Bird v. Parsons*, 289 F.3d 865, 874-76 (6th Cir. 2002). The court examined specific personal jurisdiction based on a three-part test. First, the court noted that the Internet domain name registrar maintained a website, which allowed Ohio residents to register domain names. The court accepted plaintiff's allegations as true, in that the registrar accepted business from approximately 4,666 Ohio residents, thus, satisfying the first requirement of purposeful availment. *Id.* at 874. Next, the court held that plaintiff's claims of trademark infringement may arise out of the defendant's contacts with the forum state as long as there is a "substantial connection with the defendant's in-state activities." *Id.* at 875. Finally, the court noted that it would not be unreasonable to hale the defendant into Ohio as the forum state had an interest in protecting business interests of its residents, the residents had an interest in obtaining relief, and these interests overrode any interest that the state of Washington might have. *Id.* However, the Sixth Circuit dismissed the trademark infringement claims against both parties on substantive grounds, rationalizing that neither the registrar, nor the auctioneer, infringed on a trademark because they did not use the allegedly infringing domain name, but merely assigned it to an applicant. *Id.* at 878-79.

229. *Compare* *Mattel, Inc. v. Adventure Apparel*, No. 00 Civ. 4085 (RWS), 2001 U.S. Dist. LEXIS 3179, at \*9 (S.D.N.Y. Mar. 15, 2001) (noting that one sales transaction of infringing merchandise met the requirements of New York's long-arm statute as the sale related to the underlying cause of action) *with* *Mattel, Inc. v. Securenet Info. Servs.*, No. 99 Civ. 11813 (JSM), 2001 U.S. Dist. LEXIS 6288, at \*7 (S.D.N.Y. May 15, 2001) (noting that the sale of Internet services obtained via a telephone listing on a restaurant's allegedly infringing website was not sufficient to meet the requirements of New York's long-arm statute because the sale did not relate to the underlying cause of action).

230. *See* *Am. Info. Corp. v. Am. Infometrics, Inc.*, 139 F. Supp. 2d 696, 698-700 (D. Md. 2001) (noting that forum state residents cannot interact with defendant's website which is only used for advertising purposes, included links to search engines and price lists for prospective customers, and provided information for existing customers); *see also* *Phat Fashions, LLC v. Phat Game Athletic Apparel, Inc.*, No. 00 Civ. 0201 (JSM), 2001 U.S. Dist. LEXIS 13892, at \*15-16 (S.D.N.Y. Sept. 2001) (acknowledging a website's commercial nature, but holding it insufficient to confer jurisdiction because its interactivity was deemed low, the defendant only responded to a "handful of email inquiries,"

with the residents of a forum state, therefore, may not be sufficient to confer personal jurisdiction.<sup>231</sup> Taking this scenario one step further, one court refused to assert personal jurisdiction over a defendant in a trademark infringement suit that was based on the single tort of selling an infringing product via a website.<sup>232</sup>

Several cases, however, present a striking contrast. In *Rainy Day Books, Inc. v. Rainy Day Books & Café, LLC*, a Kansas court held that the determinative factor was the defendant's maintenance of an active website with knowledge that the domain name infringed on the plaintiff's trademark, rather than the number of book orders placed by forum state residents.<sup>233</sup> Two other courts upheld personal jurisdiction based on an allegedly infringing website without acknowledging any sales or actual contact with forum state residents.<sup>234</sup> In *Starmedia Network, Inc.*, discussed above, the court up-

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and no actual sales or other contact with New York was shown). *But see* Audi AG v. Izumi, 204 F. Supp. 2d 1014, 1020-21 (E.D. Mich. 2002) (holding that purposeful availment is met based on a website that allows customers to purchase items by clicking on links to place orders, and thus recognizing that the website solicits business from forum state residents, despite the lack of evidence that any actual sales were made to forum residents).

231. *See* Amazon Tours, Inc. v. Wet-A-Line Tours, LLC, No. 3-01-CV-1433-R, 2002 U.S. Dist. LEXIS 1649, at \*9 (N.D. Tex. Jan. 31, 2002) (providing an e-mail address or link that enables customers to contact a company is insufficient to confer personal jurisdiction as some evidence must exist that the defendant entered into a contract to sell products or services—taking credit card information or responding to requests for information does not sustain the contract theory); *Am. Info. Corp.*, 139 F. Supp. 2d at 700 (noting that non-customers could respond to defendant's website by posting their contact information, inquiring about available services, and inquiring about jobs); *cf.* *Rainy Day Books, Inc. v. Rainy Day Books & Café, LLC*, 186 F. Supp. 2d 1158, 1166 (D. Kan. 2002) (recognizing that quality, rather than quantity of contact is critical for a purposeful availment analysis).
232. *See* *Origins Natural Res., Inc. v. Kotler*, 133 F. Supp. 2d 1232 (D.N.M. 2001) (recognizing that one sale of an infringing product to the plaintiff's representative may constitute a tortious act within the forum state under the New Mexico long-arm statute, even though that one sale did not establish the defendant's purposeful availment for purposes of a due process analysis).
233. 186 F. Supp. 2d at 1165 (characterizing the defendant's website as active based on *Zippo Mfg. Co.* because the website provided information regarding the defendant's bookstore, and customers had the ability to purchase gift certificates and subscribe to a mailing list). The court also noted that customers could purchase books on the website by clicking on a hyperlink to a third-party provider of online ordering services. *Id.* at 1164.
234. *First Tenn. Nat'l Corp. v. Horizon Nat'l Bank*, 225 F. Supp. 2d 816, 821 (W.D. Tenn. 2002); Audi AG v. Izumi, 204 F. Supp. 2d 1014, 1020-21 (E.D. Mich. 2002) (accepting as true plaintiff's allegations that customers could purchase items over defendant's website, even though defendant contended that the only

held jurisdiction pursuant to New York's tortious act long-arm statute even though the defendant's interactive website had virtually no contact with the forum state.<sup>235</sup> The court emphasized the defendant's knowledge of the plaintiff's trade name at the time of registration, coupled with the defendant's admission that he derived substantial revenue from interstate commerce albeit no income was derived from the forum state.<sup>236</sup> Unfortunately, the decisions in these trademark infringement cases appear to be outcome determinative and at odds with one another.

Since the enactment of the Anticybersquatting Consumer Protection Act ("ACPA"), parties now have an additional source of protection against infringing domain names. The ACPA permits a plaintiff to assert personal jurisdiction over a defendant in domain name infringement cases.<sup>237</sup> Unlike traditional claims of trademark infringement and unfair competition, however, jurisdiction is proper in the forum where the trademark holder bears the brunt of the injury.<sup>238</sup> This jurisdictional analysis is based on the intent of the ACPA, which is to protect "trademark holders against extortion by domain name cybersquatters," not to protect against consumer confusion.<sup>239</sup> In the event that personal jurisdiction is not possible, *in rem* jurisdiction may be obtained over the domain name itself.<sup>240</sup>

A question that arose with respect to jurisdiction under the ACPA was whether a plaintiff could pursue personal jurisdiction concurrently with *in*

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way to purchase items was to click on links to other websites that enabled the purchases). The *Audi* court also recognized that the website solicited business from forum state residents, the defendant maintained his headquarters in the forum state, and the defendant offered to sell the rights to the website name to the plaintiffs. *Id.* at 1021. The court, in *First Tenn. Nat'l Corp.*, also upheld personal jurisdiction despite fewer contacts with the forum state. 225 F. Supp. 2d at 821. There, the defendant hosted an interactive website with an allegedly infringing domain name. The court acknowledged that neither party presented evidence to establish or deny contacts made by forum state residents via the website. *Id.* The court held, however, that the interactive website solicited customers and that fact was sufficient to show that the defendant purposefully availed itself of the forum state. *Id.*

235. *Starmedia Network, Inc. v. Star Media, Inc.*, No. 00 Civ. 4647 (DLC), 2001 U.S. Dist. LEXIS 4870, at \*11-12 (S.D.N.Y. April 23, 2001). See *supra* note 112 for the text of the New York tortious act long-arm statute.

236. *Id.*

237. See 15 U.S.C. § 1125(d) (2001).

238. *Ford Motor Co. v. Great Domains.com, Inc.*, 177 F. Supp. 2d 628, 634 (E.D. Mich. 2001).

239. *Id.*

240. "The owner of a mark may file an *in rem* civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located . . . ." § 1125(d)(2)(A).



*rem* jurisdiction.<sup>241</sup> The court resolved this issue in *Alitalia-Linee Aeree Italiane S.p.A. v. casinoalitalia.com* by holding that the two types of jurisdiction are mutually exclusive.<sup>242</sup> The court reasoned that the remedies afforded to personal jurisdiction are broader than the *in rem* remedies, and in fact, include all remedies otherwise available under *in rem* jurisdiction.<sup>243</sup>

## 2. Patent Infringement

Like all causes of action against a nonresident defendant, claims of patent infringement must comply with an applicable state long-arm statute as well as a due process analysis.<sup>244</sup> For purposes of state long-arm jurisdiction, personal jurisdiction will attach to the tort of patent infringement as long as the tort takes place in the forum state.<sup>245</sup> Although long-arm statutes and their interpretations vary from state to state, the act of selling an infringing product in a forum state will generally suffice to establish personal jurisdiction,<sup>246</sup> as will the production of coupons on a website that allegedly violates a patent.<sup>247</sup> However, jurisdiction will not satisfy a long-arm statute's requirement that a tort be committed within the forum state based on an interactive website that provides product information (without pricing information), directs all contact information to a corporate subsidiary, and does not allow sales contracts to be consummated through the website.<sup>248</sup> The same interactive website will not meet a "solicitation of business" re-

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241. See *Alitalia-Linee Aeree Italiane S.p.A. v. casinoalitalia.com*, 128 F. Supp. 2d 340, 348 (E.D. Va. 2001).

242. *Id.* In this case, plaintiff Alitalia-Linee Aeree Italiane S.p.A. ("Alitalia"), Italy's national airline, sued defendant for registering an infringing domain name and operating an on-line casino. *Id.* at 341-42.

243. *Id.* at 344-46.

244. See *On-Line Techs. v. Perkins Elmer Corp.*, 141 F. Supp. 2d 246, 262 (D. Conn. 2001) (requiring an analysis of both the forum's long-arm statute and due process); *Phonetel Communications, Inc. v. U.S. Robotics Corp.*, No. 4:00-CV-1750-R, 2001 U.S. Dist. LEXIS 7233, at \*4-5 (N.D. Tex. 2001) (requiring an analysis first of a forum state's long-arm statute and then of due process).

245. *On-Line Techs.*, 141 F. Supp. 2d at 264.

246. See *id.* at 264-65.

247. See *Response Reward Sys., LC v. Meijer, Inc.*, 189 F. Supp. 2d 1332, 1337 (M.D. Fla. 2002) (adhering to Eleventh Circuit precedent that interpreted the tortious act prong of Florida's long-arm statute to require the commission of a tortious act outside Florida that causes injury within the state). Florida's long-arm statute provides that: "(1) Any person . . . submits . . . to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts: . . . (b) Committing a tortious act within this state . . . ." FLA. STAT. § 48.193 (2002).

248. *On-Line Techs.*, 141 F. Supp. 2d at 266.

quirement contained in a long-arm statute because parties cannot enter into binding sales contracts through the website.<sup>249</sup>

With respect to the due process analysis of personal jurisdiction in patent infringement cases, courts look to the law of the Federal Circuit, rather than the law of regional circuits.<sup>250</sup> Personal jurisdiction will not be upheld based on a passive website that exhibits product information and descriptions, instructions to place orders, and catalogs to download, but does not allow customers to place orders over the website.<sup>251</sup> Even when a website exhibits a sufficient level of commercial interactivity, personal jurisdiction will not be upheld if the plaintiffs fail to allege facts to infer that any contacts were made with forum state residents<sup>252</sup> and otherwise fail to establish that the defendant specifically intended to target the forum state with its advertisements.<sup>253</sup> Additionally, the purposeful availment prong of a due process

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249. *Id.* at 268-69.

250. *Med-Tec Iowa, Inc. v. Computerized Imaging Reference Sys., Inc.*, 223 F. Supp. 2d 1034, 1038 (S.D. Iowa 2002); *Phonetel, Communications, Inc.*, 2001 U.S. Dist. LEXIS 7233, at \*5 n.1; *Trost v. Bauer*, No. 01 C 2038, 2001 U.S. Dist. LEXIS 10311, at \*31 (N.D. Ill. 2001) (noting that when interpreting state long-arm statutes, however, the Federal Circuit will defer to the relevant state or federal determination).

251. *Med-Tec Iowa, Inc.*, 223 F. Supp. 2d at 1038.

252. *See iAccess, Inc. v. WEBcard Tech., Inc.*, 182 F. Supp. 2d 1183, 1188-89 (D. Utah 2002) (holding that the plaintiff must prove a nexus between defendant's website and forum state residents such as a sufficient number of "hits" to the website or other Internet activity in which the defendant sought to target the forum state) (citing *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997)). *iAccess* involved an interactive website. Although evidence existed that one \$20 sale had been consummated with a Utah resident, no evidence was presented that the sale was connected in any way to the defendant's website. *Id.* Apparently that sale was not sufficient to establish jurisdiction in this declaratory judgment action seeking to invalid a patent. *See also Trost*, 2001 U.S. Dist. LEXIS 10311, at \*39-40. In *Trost*, the plaintiffs filed an action, seeking a declaration that they were not infringing on the defendants' patents. The plaintiffs sought to obtain personal jurisdiction over the defendant corporation based on its maintenance of a website. *Id.* at \*1. The website described products and services in detail, including advertising and toll-free telephone numbers. Although customers could not place orders over the Internet website, they could contact the corporation via e-mail. *Id.* at \*37, 39.

253. *See Response Reward Sys., LC*, 189 F. Supp. 2d at 1338 (holding that the defendant did not have sufficient minimum contacts with the state of Florida by producing coupons on its website for use in its stores located in five other states and otherwise did not intend that the coupons could be used in Florida); *Trost*, 2001 U.S. Dist. LEXIS 10311, at \*40. *But see Haggerty Enters., Inc. v. Lipan Indus. Co.*, No. 00 C 766, 2001 U.S. Dist. LEXIS 13012, at \*15-16 (N.D. Ill. Aug. 22, 2001), where the court was confronted with facts that were almost identical to those in *Trost*, however, the court classified the website as passive

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analysis will not be satisfied where the defendant's allegedly infringing products are sold over a website that is maintained and controlled by a subsidiary corporation; some evidence must exist other than the defendant's status as a parent corporation.<sup>254</sup>

In these patent infringement cases, the courts had a difficult time asserting personal jurisdiction over specified defendants, even when highly interactive websites were involved. The determinative factor seemed to be a lack of evidence that a website targeted a specific forum state.<sup>255</sup> For at least three courts, the determinative factor was the involvement of a parent corporation which had no control or maintenance over a website.<sup>256</sup>

### 3. Product Liability

Two courts analyzed product liability claims in which they were asked to assert personal jurisdiction over nonresident defendants based on Internet-

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in nature because it posted a product line without corresponding prices and provided a means for customers to contact the company for information purposes only.

254. See *Phonetel Communications, Inc.*, 2001 U.S. Dist. LEXIS 7233, at \*11. In *Phonetel Communications, Inc.*, the plaintiff sued several defendants, including Verizon Communications, Inc. (VCI) for patent infringement. VCI's only connection to the other defendants was as a parent corporation; it acted as a holding company in a number of companies that used the name "Verizon," along with a geographic indicator. *Id.* at \*9. The plaintiff attempted to assert personal jurisdiction over VCI based on the Verizon website, which advertised some of the allegedly infringing products, allowed customers to order products and services through the website, and provided a toll-free and local telephone number. *Id.* at \*10. The court held, however, that neither general nor specific personal jurisdiction existed over VCI because it had no control over, and was not responsible for, the website. *Id.* at \*11; see also *Aero Prods. Int'l, Inc. v. Intex Corp.*, No. 02 C 2590, 2002 U.S. Dist. LEXIS 17948, at \*12 (N.D. Ill. Sept. 19, 2002). *Aero Products International* involved a situation where a parent corporation owned the domain name for the website at issue, had ultimate control over the website, but played no part in the creation or maintenance of the website. *Id.* at \*14. The court held that personal jurisdiction could not be asserted against the parent corporation based on an interactive website, which provided information regarding an allegedly infringing product, but did not allow visitors to purchase the product without using links to other websites. *Id.* at \*18-19. As a result, the website did nothing more than place the product into the stream of commerce; courts have consistently held that this is not sufficient to confer personal jurisdiction. *Id.* at \*13.

255. See e.g., *Response Reward Sys., LC*, 189 F. Supp. 2d at 1338-39; *iAccess, Inc.*, 182 F. Supp. 2d at 1188.

256. See *On-Line Techs. v. Perkin Elmer Corp.*, 141 F. Supp. 2d 246, 266 (D. Conn. 2001); *Aero Prods. Int'l, Inc.*, 2002 U.S. Dist. LEXIS 17948, at \*14; *Phonetel Communications, Inc.*, 2001 U.S. Dist. LEXIS 7233, at \*11-15.

related contacts. These two cases demonstrate that the interactive nature of a website is important.

In *Rose v. Continental Aktiengesellschaft (AG)*, the plaintiffs were injured when a tire tread separated while they were driving an automobile in Germany.<sup>257</sup> They sued the German tire manufacturer in a Pennsylvania federal district court. The court, however, was unwilling to confer personal jurisdiction over the tire manufacturer based on its passive website or on websites that were maintained solely by corporate subsidiaries.<sup>258</sup> In contrast, the court in *Divicino v. Polaris Industries*, did assert personal jurisdiction over the defendant.<sup>259</sup> In *Divicino*, the defendant maintained an interactive website, upon which the plaintiff claimed he relied when deciding to purchase the defective product.<sup>260</sup> The outcome in this case, however, was largely determined by the plaintiff's reliance on many other non-Internet contacts combined with the website.<sup>261</sup>

#### 4. Defamation

In 2001 and 2002, few courts addressed issues of personal jurisdiction with respect to defamation claims. In all cases, online defamation was an insufficient basis to confer personal jurisdiction. First, it is important to remember that the tort of defamation requires a defendant to communicate defamatory remarks to a third person who receives the communication in the forum state.<sup>262</sup> A website that contains allegedly defamatory remarks regarding a federal agent who had gained national and international reputation, cannot have had an effect on, or otherwise target, the forum state where the plaintiff resides.<sup>263</sup> Personal jurisdiction will not be conferred based on a newspaper's allegedly defamatory article that is posted on a website that fo-

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257. No. 99-3794, 2001 U.S. Dist. LEXIS 2354, \*7 (E.D. Pa. Mar. 2, 2001).

258. *Id.* at \*4-8.

259. 129 F. Supp. 2d 425 (D. Conn. 2001).

260. *Id.* at 431-32.

261. *Id.* at 431-34. In *Divicino*, the court discussed various forms of contact with the forum state of Connecticut and acknowledged that each form, standing alone, would probably not be sufficient to establish purposeful availment. *Id.* at 433. These contacts included radio and newspaper advertisements, actual sales to Connecticut residents, and common knowledge that Vermont is a vacation destination for Connecticut residents. *Id.* at 431. All of these contacts, taken in conjunction with the interactive website, were sufficient to confer personal jurisdiction over the defendant, a Vermont resident. *Id.* at 433-35.

262. *Oasis Corp. v. Judd*, 132 F. Supp. 2d 612, 621 (S.D. Ohio 2001).

263. *Revell v. Lidov*, 317 F.3d 467, 475-76 (N.D. Tex. 2001) (applying the effects test analysis to illustrate that the defendants had no knowledge where the plaintiff resided, and therefore, could not use an Internet bulletin board to intentionally direct any activity toward the plaintiff in the forum state).

cuses on a specific audience in a state other than the forum state.<sup>264</sup> In both situations, the courts used the effects test to examine the “geographic focus” of the defamatory articles rather than look to the plaintiff’s physical location.<sup>265</sup> Furthermore, courts will not assert personal jurisdiction over a defendant who simply posts allegedly defamatory information on a noncommercial website<sup>266</sup> or on a website that is operated by another who simply allows the posting of messages.<sup>267</sup>

#### F. The Impact of E-Mail Transmissions on Internet Activity

E-mail is a “method of communicating” using the Internet; the communication looks like a letter that can be sent to numerous individuals simultaneously and is stored electronically until the recipient opens it.<sup>268</sup> A party must have access to an Internet Service Provider (“ISP”), through which she accesses the Internet and sends and receives e-mail.<sup>269</sup> Because an e-mail address generally does not contain any indication of its user’s geographic location, personal jurisdiction can be a complicated issue in actions based on e-mail communication.<sup>270</sup> During 2001 and 2002, federal courts dealt with e-mail transmissions in a number of contexts. These recent decisions demon-

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264. *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002).

265. *See Revell*, 317 F.3d at 476; *Young*, 315 F.3d at 264. *But see* N.W. Healthcare Alliance, Inc. v. Healthgrades.com, No. 01-35648, 2002 U.S. App. LEXIS 21131, at \*5-6 (9th Cir. July 12, 2002) (using the effects test to find that personal jurisdiction did exist based on a website that rated home health care providers, including the plaintiff).

266. *Oasis Corp.*, 132 F. Supp. 2d at 622 (noting that the *Zippo* sliding scale does not apply to a noncommercial website because no purposeful availment exists).

267. *Kovacs v. Jim*, No. 02 C 7020, 2002 U.S. Dist. LEXIS 21787, at \*6 (N.D. Ill. Nov. 8, 2002) (stating that personal jurisdiction does not exist over a defendant who does little more than make information available to interested parties); *Medinah Mining, Inc. v. Amunategui*, 237 F. Supp. 2d 1132, 1136-37 (D. Nev. 2002) (holding that personal jurisdiction does not exist over a defendant that posts allegedly defamatory information on a passive website).

268. *See Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 606 (E.D. Va. 2002).

269. *Id.* at 605 (noting that an Internet Service Provider (ISP) holds a proprietary network to operate its computer communication service and provides its subscribers with access to the Internet).

270. *Id.* (recognizing that subscribers identify themselves by “us[ing] the ISP’s domain name, *e.g.*, ‘verizon.net,’ together with their own personal identifier to form a distinctive e-mail mailing address, *e.g.*, ‘tmarshall@verizon.net’”); *see Hydro Eng’g, Inc. v. Landa, Inc.*, 231 F. Supp. 1130, 1136 (D. Utah. 2002) (recognizing that an e-mail address such as nielson.cameron@ut.ngb.army.mil, includes a geographic indicator for the state of Utah but does not identify the state where the e-mail was actually received, opened, or published).

strate that despite e-mail's lack of geographical presence, it may sufficiently satisfy a minimum contacts analysis to establish personal jurisdiction.<sup>271</sup>

### 1. Service of Process Effected by E-Mail Transmission

*Rio Properties, Inc. v. Rio International Interlink* represents the first circuit opinion to approve service of process by e-mail. In this groundbreaking decision, the Ninth Circuit upheld the trial court's discretion to order e-mail service of process pursuant to Federal Rule of Civil Procedure 4(f)(3).<sup>272</sup> This rule authorizes service upon individuals in a foreign country by means not otherwise prohibited by an international agreement as long as a court ordered the service.<sup>273</sup> The court noted that Rule 4(f) authorizes three methods to effect service. Because the three methods were separated by the conjunction "or," the court's discretion to authorize e-mail service of process carried the same weight as the other two methods and was not to be considered a "last resort" used only after exhausting all other methods.<sup>274</sup>

The *Rio* court held that despite the trial court's discretion to authorize special service pursuant to Rule 4, the service also must comport with notions of due process.<sup>275</sup> The service must be "'reasonably calculated,' under the circumstances," to provide notice of a pending action and the opportunity to be heard.<sup>276</sup> The court observed that the defendant, a resident of Costa Rica, had done everything possible to avoid being served because its attorney refused to accept service on the defendant's behalf, the only address denoted on the website belonged to an international courier who was not an authorized agent for service of process, and the website listed an e-mail address as its only other point of contact and the "preferred" method of communication.<sup>277</sup> Quite simply, the court recognized that the defendant "had neither an office nor a door; it had only a computer terminal."<sup>278</sup> Based on these facts, the e-mail service met due process requirements because it was the "method of service most likely to reach [the defendant]."<sup>279</sup>

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271. See *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773, 779 (S.D. Miss. 2001) (applying the due process analysis to e-mail communications).

272. 284 F.3d 1007 (9th Cir. 2002).

273. *Id.* at 1014-16. Rule 4(f) provides three methods of service over an individual who is not within any judicial district of the United States, with the third option specifically authorizing service "by other means not prohibited by international agreement as may be directed by the court." FED. R. CIV. P. 4(f)(3).

274. *Rio Props., Inc.*, 284 F.3d at 1015-16.

275. *Id.* at 1016.

276. *Id.* (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

277. *Id.* at 1013, 1018.

278. *Id.* at 1018.

279. *Id.* at 1017.

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## 2. E-mail Transmissions as a Source of Minimum Contacts

Most of the cyberjurisdiction cases are based on contacts made by or through a website, and the general trend is to adhere to the *Zippo* sliding scale approach of classifying websites. This sliding scale approach, however, does not apply to e-mail communications.<sup>280</sup>

*Internet Doorway, Inc. v. Parks*, is one of the few personal jurisdiction cases involving e-mail communications rather than a website.<sup>281</sup> In *Parks*, the defendant advertised its pornographic website by sending unsolicited e-mails to people all over the world, including Mississippi. Recipients inferred that the e-mails were sent from the plaintiff Internet Doorway's account.<sup>282</sup> The plaintiff sued the defendant for violating the Lanham Act and for a state law claim of trespass to chattels.<sup>283</sup> For purposes of personal jurisdiction, the court held that the defendant's e-mails met two different prongs of Mississippi's long-arm statute.<sup>284</sup> First, the act of sending e-mails to Mississippi's residents qualified as "doing business" in the state because the defendant attempted to solicit people to enter its website.<sup>285</sup> Second, the court held that a tort was committed in Mississippi because the tort was completed when the Mississippi recipients opened the e-mail.<sup>286</sup> Next, the court discussed the minimum contact requirements of due process and held that specific personal jurisdiction was proper. As previously noted, specific jurisdiction may be based on a single contact, as long as the cause of action arises out of or is related to that contact. It was not unreasonable to hale the defendant into a Mississippi court since the defendant manipulated the e-mails to appear as though the plaintiff, a Mississippi ISP, had sent them.<sup>287</sup> Furthermore, the defendant could have reasonably expected the e-mails to be opened in many different jurisdictions, including Mississippi.<sup>288</sup>

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280. See *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773, 779 n.4 (S.D. Miss. 2001) (recognizing that the Fifth Circuit has adopted the sliding scale approach of *Zippo*, but refusing to apply that approach to e-mails that the defendant actively sent to residents of the forum state).

281. *Id.*

282. *Id.* at 774.

283. *Id.*

284. *Id.* at 775. The Mississippi long-arm statute permits a court to exercise personal jurisdiction over a defendant: "who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state." MISS. CODE ANN. § 13-3-57 (2000).

285. *Internet Doorway, Inc.*, 138 F. Supp. 2d at 776.

286. *Id.*

287. *Id.* at 778-79.

288. *Id.* at 779-80.

Several other states also have addressed the issue of personal jurisdiction based on e-mail communications. Virginia relied on the effects test to hold that personal jurisdiction was appropriate over defendants who sent spam e-mail to millions of Verizon's subscribers.<sup>289</sup> The defendants used Verizon as their ISP and knew that Verizon maintained its computers and servers in the forum state of Virginia.<sup>290</sup> Of particular importance was the court's reference to new Virginia legislation, which amended the state's long-arm statute to provide that "using a computer or computer network located in the Commonwealth shall constitute an act in the Commonwealth."<sup>291</sup> Without such a long-arm statute, the effects test may not be as helpful to establish personal jurisdiction. For example, one case involved three Utah e-mail addresses out of a mass e-mail list of approximately 400 addresses;<sup>292</sup> this mass e-mail did not serve as a sufficient basis to establish that the defendants expressly aimed their activity at the forum state of Utah.<sup>293</sup>

Massachusetts has recognized that e-mail communications, like telephone communications, may confer jurisdiction even though the defendant has no physical presence in the state.<sup>294</sup> One Massachusetts court analogized an e-mail to a telex, recognizing that a single telex into the forum could establish personal jurisdiction.<sup>295</sup> Texas, on the other hand, was not willing to assert personal jurisdiction based on an unspecified number of e-mail and telephone communications that occurred during the formation of a con-

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289. *See Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 606 (E.D. Va. 2002) (defining spam e-mail as unsolicited bulk e-mail (UBE) and analogizing it to unsolicited mass mailings to multiple recipients).

290. *Id.* at 617-19 (acknowledging that "[t]he sending of spam to and through an ISP's e-mail servers constitutes the tort of trespass to chattel in the state of Virginia," and therefore, qualifies as an intentional tort for purposes of the effects test).

291. *Id.* at 610 (citing VA. CODE ANN. § 8.01-328.1(B) (Michie 2000)).

292. *See Hydro Eng'g, Inc. v. Landa, Inc.*, 231 F. Supp. 2d 1130, 1136 (D. Utah 2002).

293. *Id.* (refusing to assert personal jurisdiction in a trade libel or defamation case because no evidence existed that a mass e-mail message was opened by those e-mail accounts within the forum state of Utah, even though three e-mails included the Utah designation in their e-mail addresses).

294. *Media3 Techs., LLC v. Mail Abuse Prevention Sys. LLC*, No. 00-CV-12524-MEL, 2001 U.S. Dist. LEXIS 1310, at \*11 (D. Mass. Jan. 2, 2001) (recognizing that at least six e-mail and telephone communications occurred between the defendant and the plaintiff's personnel within the forum state, therefore finding personal jurisdiction).

295. *Id.* (noting that jurisdiction will be upheld based on the sending of at least one telex to an individual in the forum state).



tract.<sup>296</sup> Furthermore, even though an e-mail address may include a specific geographic locator, that fact alone is not sufficient to establish that an allegedly libelous e-mail message was actually opened in a particular geographical area.<sup>297</sup> The transient nature of e-mail is a perfect example of being lost in cyberspace and not knowing who is receiving Internet communications or where.

**V. MANIPULATION OF CYBERSPACE ACTIVITIES AS A MEANS TO  
ESTABLISH AND LIMIT PERSONAL JURISDICTION:  
THE GUIDELINES**

The preceding legal authorities establish general trends with respect to cyberjurisdiction. Parties may have concerns that they are lost in cyberspace, in other words, that they may be subject to personal jurisdiction in multiple jurisdictions with differing and inconsistent results. Consequently, parties can structure their online activities to manipulate or limit the forum in which they may be sued for acts arising out of their cyberspace contacts. The threshold consideration is the level of interactivity of their websites. Parties can manipulate the jurisdictional reach of their activities by limiting the content of their websites. Even if websites are deemed active in nature, parties also can restrict sales to customers within certain fora because any sales activity within a forum will be analyzed in favor of jurisdiction, especially under the “web site plus” rule.<sup>298</sup>

This author previously has written to suggest that new jurisdictional rules be established for cyberspace activities.<sup>299</sup> Courts, however, continue to rely on the traditional requirements of minimum contacts and fairness to determine personal jurisdiction over cyberspace activities.<sup>300</sup> The following

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296. See *Canyoncreek Communications Corp. v. Communication Cable Co.*, No. 3:01-CV-1523-BF, 2002 U.S. Dist. LEXIS 4168, at \*12-14 (N.D. Tex. Mar. 12, 2002) (holding that the defendant had not met the minimum contacts required for a due process analysis simply by making one telephone call to the forum state in response to the plaintiff’s Internet advertisement and engaging in a few e-mail communications with the plaintiff located in the forum state).

297. See *Hydro Eng’g, Inc.*, 231 F. Supp. 2d at 1136 (refusing to uphold personal jurisdiction without some evidence that an alleged libelous e-mail was published in the forum state).

298. See *supra* notes 49-54 and accompanying text. In *Digital Control, Inc. v. Boretronics, Inc.*, 161 F. Supp. 2d 1183, 1187 (N.D. Wash. 2001), the court noted that “indiscriminate, nationwide forms of advertising” show no deliberate action taken toward forum state residents such that the defendants could anticipate being haled into court there.

299. See Susan Nauss Exon, *A New Shoe is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1 (2000).

300. See *Hinsch v. Outrigger Hotels Haw.*, 153 F. Supp. 2d 209, 214 (E.D.N.Y. 2001) (recognizing that the personal jurisdiction analyses of cases from 1958 to 1990 apply to contemporary jurisdiction issues); see also *supra* Part IV.B.

guidelines are offered to help Internet users decide whether and how to structure their online presence to minimize or manipulate the potential reach of personal jurisdiction.

#### A. Limit Content of Website

##### 1. Advertising by Professionals

To date, at least one court has analyzed the interactivity of a law firm website to determine whether personal jurisdiction exists.<sup>301</sup> In *Hearst Corp. v. Goldberger*, the court classified the defendant's website as passive because it offered future networking services to attorneys, but had not yet sold any services to forum state residents.<sup>302</sup> As a result, the court was not willing to assert personal jurisdiction over the defendant lawyer.<sup>303</sup> Another court examined a law firm website, but refused to make any conclusions regarding its effect on jurisdiction because no evidence was presented to establish that the website existed at the time of injury.<sup>304</sup>

Attorneys, therefore, should be careful how they construct their websites. They may be able to avoid personal jurisdiction based on website activity if a website is set up to provide helpful information, does not permit the establishment of an attorney-client relationship, and does not include any dates to indicate when a website was created or modified. This same advice applies to other professionals such as physicians, certified public accountants, and others.

Moreover, professionals should use limiting language on their websites. This means that professionals should specify the jurisdiction(s) in which they are qualified to practice. For example, if an attorney advertises her services

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through Part IV.F. for a detailed discussion of the 2001 and 2002 cyberjurisdiction cases.

301. See *We're Talkin' Mardi Gras, LLC v. Davis*, 192 F. Supp. 2d 635, 640 (E.D. La. 2002) (referring to the defendant law firm's website and noting that it contained a section entitled "Ask Us," which allowed visitors to request information; however, the website was not used to establish an attorney-client relationship or otherwise accept instructions from clients). Despite the court's description of the law firm's website, the court did not appear to place any weight on the website in its analysis of specific personal jurisdiction. *Id.* at 640-41.

302. No. 96 Civ. 3620 (PKL) (AJP), 1997 U.S. Dist. LEXIS 2065, at \*31-37 (S.D.N.Y. Feb. 26, 1997).

303. *Hearst Corp.*, 1997 U.S. Dist. LEXIS 2065, at \*37.

304. See *Kim v. Keenan*, 71 F. Supp. 2d 1228, 1234 (M.D. Fla. 1999) (acknowledging that jurisdiction may be based on websites that actively solicit business and noting that the law firm website at issue included a toll-free telephone number, solicited new clients, and stated that the law firm had served clients in over forty states, but the website contained no indication as to the time it was established).

on the Internet, she should indicate in which state(s) she is licensed to practice law. If she includes that type of language or simply states that her practice is limited to a specific geographic area, courts should construe such language as limiting the attorney's foreseeability of being haled into court in a foreign state. Similarly, if the attorney includes such limiting language on her website or in her online advertisements, it will help her to avoid accusations of the unauthorized practice of law.<sup>305</sup> Attorneys also should be cautioned against participating in chat groups if any of the communication that they convey could be construed as professional advice or otherwise be deemed the practice of law. This same analysis also can be applied to other licensed professionals, such as physicians, CPAs, etc.

## 2. Telephone Listings on Website

A telephone listing on a website may demonstrate intent to target a specific forum. A nationwide toll-free number does not target a specific forum whereas a local number may.<sup>306</sup> For example, a toll-free telephone number that is good for a certain geographic region, such as New England, is evidence of intent to target states in that region.<sup>307</sup> If parties want to limit the jurisdictional reach to the forum in which they reside, they can establish intent by using local telephone numbers on websites. Some caution is still advised, however. Even if parties advertise nationwide toll-free telephone

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305. Many states define the "unauthorized practice of law" in statutes. In California, for example, the unauthorized practice of law is a misdemeanor and applies to "[a]ny person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar . . . ." CAL. BUS. & PROF. CODE § 6126(a) (West 2002). Pennsylvania also considers the unauthorized practice of law a misdemeanor and provides the following general rule: "Except as provided in subsection (b), any person, including, but not limited to, a paralegal or legal assistant, who within this Commonwealth shall practice law, or who shall hold himself out to the public as being entitled to practice law, or use or advertise the title of lawyer, attorney at law, attorney and counselor at law, counselor, or the equivalent in any language, in such a manner as to convey the impression that he is a practitioner of the law of any jurisdiction, without being an attorney at law or a corporation complying with 15 Pa.C.S. Ch. 29 (relating to professional corporations), commits a misdemeanor of the third degree upon a first violation. A second or subsequent violation of this subsection constitutes a misdemeanor of the first degree." 42 PA. CONS. STAT. § 2524 (2002).

306. See *Divicino v. Polaris Indus.*, 129 F. Supp. 2d 425, 432-33 (D. Conn. 2001) (recognizing that a toll-free telephone number that targets a certain geographic region establishes intent to target that particular region); *Brown v. AST Sports Sci., Inc.*, No. 02-1682, 2002 U.S. Dist. LEXIS 12294, at \*27 (E.D. Pa. June 28, 2002) (noting that a toll-free telephone number does not target a specific forum, at least for purposes of general personal jurisdiction).

307. See *Divicino*, 129 F. Supp. 2d at 432-33.

numbers on their websites, that conduct could be combined with other more forum-specific activity to establish personal jurisdiction in another forum.<sup>308</sup>

### 3. Product/Service Listing With Corresponding Pricing Information

Some courts have examined the nature of a product or service list as a guide to determine proper jurisdiction. One court, in two different cases, scrutinized websites by holding that jurisdiction was not proper where the websites listed products without corresponding prices.<sup>309</sup> Even though a consumer could contact the defendant company through the website, apparently it was for informational purposes only; “[a] website set up as a resource for telling customers more about a company is a passive website.”<sup>310</sup> Inclusion of price lists on websites, therefore, may not be indicative of jurisdiction. For example, some courts have held that the inclusion of price lists on a website does not deem the website commercial enough to assert personal jurisdiction; each court noted that customers could not place orders through the website in question.<sup>311</sup>

An easy way to limit direct sales activity and discourage a finding of personal jurisdiction is to avoid listing pricing information on a website.

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308. See *supra* Part IV.B.2.d.

309. See *Haggerty Enters., Inc. v. Lipan Indus. Co.*, No. 00 C 766, 2001 U.S. Dist. LEXIS 13012 (N.D. Ill. Aug. 22, 2001). The *Haggerty Enters., Inc.* court classified the defendant’s website as passive in nature because it listed products, but did not include corresponding pricing. *Id.* at \*15-16. Without such pricing, the court concluded that the defendant made no attempt to conduct direct sales to consumers anywhere in the world. Consequently, the court held that jurisdiction could not be asserted over the defendant based on its website. *Id.* In a subsequent case, the same court followed *Haggerty Enters., Inc.* and held that personal jurisdiction was not proper based on a passive website posting information about products and services without including pricing despite customers’ ability to submit online forms to request additional information. *Haemoscope Corp. v. Pentapharm AG*, No. 02 C 4261, 2002 U.S. Dist. LEXIS 23387, at \*15 (N.D. Ill. Dec. 6, 2002).

310. *Haggerty Enters., Inc.*, 2001 U.S. Dist. LEXIS 13012, at \*16.

311. See *Jeffers v. Wal-Mart Stores, Inc.*, 152 F. Supp. 2d 913, 923 (S.D. W. Va. 2001) (recognizing that the defendant’s website was passive because it advertised a product line, included the typical sales area, and provided contact information); *Trost v. Bauer*, No. 01 C 2038, 2001 U.S. Dist. LEXIS 10311, at \*36-42 (N.D. Ill. July 23, 2001) (holding that the defendant’s website did not specifically target Illinois by including detailed descriptions of products, services, sales information, price lists, telephone numbers, and the ability to e-mail questions to the defendant); *V’Soske, Inc. v. V’soske.com*, No. 00 Civ. 6099 (DC), 2001 U.S. Dist. LEXIS 6675, at \*13 (S.D.N.Y. May 22, 2001) (holding personal jurisdiction improper based on a website that posted product information, allowed customers to pose inquiries via e-mail, yet did not permit customers to place orders directly through the website).

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Courts have rationalized that if a website does not include prices that correspond with the listed products or services, then the website host must not have the necessary intent to actively sell products or services through the website.<sup>312</sup>

#### **4. Designation of Shipping Costs**

Courts may consider information regarding costs of shipping goods to certain destinations as intent to target specific jurisdictions.<sup>313</sup> It is important to scrutinize the specific wording used on a website. For example, in *Ty Inc. v. Baby Me, Inc.*,<sup>314</sup> the court looked at specific language on an order form that was part of the defendant's website. The order form included a disclaimer that "prices below include shipping and delivery confirmation to U.S. destinations only."<sup>315</sup> The form also stated that customers could request pricing information for international shipping. The court held that personal jurisdiction was appropriate in the forum state because such language evidenced intent to target customers everywhere in the world.<sup>316</sup> Obviously, such a consequence should be avoided if at all possible.

#### **5. Ability to Purchase Products/Services or Otherwise Transact Business via Website**

Courts routinely cite two cases when analyzing forum residents' ability to purchase products or services or to otherwise transact business through the defendant's website: *Mink v. AAAA Dev. LLC*<sup>317</sup> and *CompuServe, Inc. v. Patterson*.<sup>318</sup> These cases demonstrate that two factors are paramount to determinations of personal jurisdiction. First, courts scrutinize forum residents' ability to purchase products and services via the websites.<sup>319</sup> Bear in mind that jurisdiction may be upheld in situations where a domain name allegedly

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312. See *On-Line Techs. v. Perkins Elmer Corp.*, 141 F. Supp. 2d 246, 266 (D. Conn. 2001) (noting that one reason for refusing to assert personal jurisdiction was the lack of pricing information on the website); *Haggerty Enters., Inc.*, 2001 U.S. Dist. LEXIS 13012, at \*15 (noting that the exclusion of prices on a website was deemed intent not to conduct sales via the website); *VP Intellectual Props., LLC, v. Imtec Corp.*, No. 99-3136, 1999 U.S. Dist. LEXIS 19700, at \*15-16 (D.N.J. Dec. 8, 1999) (acknowledging that a website does not "offer to sell" when it does not include pricing information).

313. See *Ty, Inc. v. Baby Me, Inc.*, No. 00 C 6016, 2001 U.S. Dist. LEXIS 5761, at \*12-14 (N.D. Ill. April 20, 2001).

314. *Id.* at \*12.

315. *Id.*

316. *Id.* at \*13 n.2.

317. 190 F.3d 333 (5th Cir. 1999).

318. 89 F.3d 1257 (6th Cir. 1996).

319. See *supra* Part V.A.3. of this article.

infringes on a trademark, despite the absence of any sales activity.<sup>320</sup> Second, courts analyze whether visitors to websites may actively communicate with a website host for purposes of entering into contracts or otherwise in furtherance of existing contracts.<sup>321</sup> This second factor depends greatly on the level of interactivity between the parties; courts are reluctant to assert personal jurisdiction based solely on one-way communications from a visitor or customer to a website host without the ability to receive online services.<sup>322</sup>

*Mink* involved a website that posted information about the defendant's products and services including a toll-free telephone number, a mailing address, and an e-mail address.<sup>323</sup> It also provided users with a printable mail-in order form.<sup>324</sup> The determinative fact was the customer's inability to place orders on the website. A customer had to print the order form, complete it, and then mail it back to the company. The court classified this website as a passive advertisement and refused to assert personal jurisdiction based on it.<sup>325</sup>

*CompuServe, Inc.* is the classic "doing business" case.<sup>326</sup> In that case, the defendant was an attorney in Texas who subscribed to CompuServe and entered into a "shareware" agreement and a service agreement with CompuServe so that he could provide CompuServe customers access to software

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320. See *supra* notes 233-236 and accompanying text.

321. See *Mink*, 190 F.3d 333; *CompuServe, Inc.*, 89 F.3d 1257. See *supra* Part IV.A. for a comparison of the "web site plus" rule and the *Zippo* sliding scale. Under either analysis, however, personal jurisdiction will be upheld based on facts that show some intent to reach out and conduct business in or with a forum state.

322. See *Am. Info. Corp. v. Am. Infometrics, Inc.*, 139 F. Supp. 2d 696, 698-700 (D. Md. 2001). In *Am. Info. Corp.*, the defendant established a website for advertising purposes and included links to search engines, price lists for prospective customers, and some helpful information for existing customers. Non-customers were permitted only to submit contact information and inquire about available services and job information. The court was unwilling to confer personal jurisdiction based on these website contacts. *Id.* at 700; see also *Haggerty Enters., Inc. v. Lipan Indus. Co.*, No. 00 C 766, 2001 U.S. Dist. LEXIS 13012, at \*15 (N.D. Ill. Aug. 22, 2001) (finding no personal jurisdiction over the defendant based on a website that did not post a product price list because the court characterized the website as passive).

323. *Mink*, 190 F.3d at 336-37.

324. *Id.* at 337.

325. *Id.*; see *On-Line Techs. v. Perkin Elmer Corp.*, 141 F. Supp. 2d 246, 265-66 (D. Conn. 2001) (holding that the defendant's website was interactive because customers could exchange information with the host, but unwilling to assert personal jurisdiction over the defendant because customers could not purchase products directly via the website especially since pricing information was not included on the site).

326. 89 F.3d at 1260.

that he created.<sup>327</sup> All of the parties' communications were through e-mail, and the agreements included choice of law provisions stating that Ohio law would govern any conflicts.<sup>328</sup> The defendant continually transmitted his software files electronically to CompuServe to be included in its system located in Ohio.<sup>329</sup> The court upheld jurisdiction in Ohio, holding that Patterson knowingly, and in fact "purposely," contracted with an Ohio company and maintained an ongoing relationship with that company.<sup>330</sup> Patterson, therefore, could have reasonably expected to be sued in Ohio, where CompuServe was located.<sup>331</sup> In some cases, contact with just one forum state resident may be sufficient to establish that a defendant is conducting business within the forum state.<sup>332</sup>

## 6. Customer Service Information

Courts will not confer personal jurisdiction based solely on customer service information that appears on a website.<sup>333</sup> Apparently, this is because courts deem customer service information as an attribute of a passive website.<sup>334</sup> Consequently, parties should not worry that jurisdiction can be established if they provide customer service information on their websites.

## 7. Links to Other Websites

Parties should be careful to limit links to other websites, which could be used to establish contacts in a forum state. Several courts relied on these types of links to uphold a finding of personal jurisdiction. For example, one district court emphasized the active nature of a website because viewers could subscribe to a mailing list, obtain information about gift certificates, but most importantly could purchase books by clicking on a link to a third party's website that provided on-line ordering services.<sup>335</sup> Another court scrutinized two factors in its personal jurisdiction analysis: (1) the defen-

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327. *Id.*

328. *Id.*

329. *Id.* at 1264.

330. *Id.* at 1264-66.

331. *Id.* at 1268.

332. *See* *Remsburg v. Docusearch, Inc.*, No. 00-211-B, 2002 U.S. Dist. LEXIS 1940, at \*16 (D.N.H. Jan. 31, 2002) (holding that an Internet-based investigation and information service was doing business in New Hampshire when it contracted for, and provided information to, a New Hampshire resident).

333. *See* *ALS Scan, Inc. v. Wilkins*, 142 F. Supp. 2d 703, 709 (D. Md. 2001) (recognizing that customer service information was part of a passive website), *aff'd*, *ALS Scan, Inc. v. Digital Serv. Consultants*, 293 F.3d 707 (4th Cir. 2002).

334. *See id.*

335. *See* *Rainy Day Books, Inc. v. Rainy Day Books & Café, LLC*, 186 F. Supp. 2d 1158, 1164 (D. Kan. 2002).

dant's ability to use its website to solicit customers; and (2) the links from the website to the sites of other companies that maintained service centers in the forum state of Michigan.<sup>336</sup> A third court, however, declined to assert personal jurisdiction because the defendant's website catered to a local audience outside the forum state and included links to other businesses within the same non-forum state.<sup>337</sup> These cases suggest that website hosts can avoid the jurisdictional reach of website links by only posting links to other businesses and entities within the same state or perhaps even by including a disclaimer that the host of the website is not responsible for any activity conducted by or through links on its site.<sup>338</sup>

## **B. Monitoring Ability to Communicate via Electronic Mail**

Courts recognize a general rule with regard to the ability to exchange information electronically: if a user or visitor may exchange information or otherwise submit questions to the website host without engaging in a direct purchase, his communication does not rise to the level of commercial activity necessary to assert personal jurisdiction.<sup>339</sup> Responding to a few e-mail inquiries from a forum state may not amount to purposeful activity, especially when the e-mails are not involved in tortious conduct.<sup>340</sup> On the other hand, a

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336. See *H.C. Smith Invs., LLC v. Outboard Marine Corp.*, No. 1:00-CV-128, 2001 U.S. Dist. LEXIS 8771, at \*15 (W.D. Mich. June 18, 2001).

337. See *Young v. New Haven Advocate*, 315 F.3d 256, 263-64 (4th Cir. 2002) (holding that the assertion of personal jurisdiction was not proper in a defamation action brought in the state of Virginia based on two Connecticut newspapers' websites that focused on Connecticut news and weather and otherwise included links to Connecticut businesses).

338. To date, no court has addressed the issue of website disclaimers with respect to a personal jurisdiction analysis.

339. See *Haggerty Enters., Inc. v. Lipan Indus. Co.*, No. 00 C 766, 2001 U.S. Dist. LEXIS 13012, at \*15-16 (N.D. Ill. Aug. 22, 2001) (holding that a website, which includes product information without a corresponding price list did not attempt to conduct sales via the site); *Keelshield Inc. v. Megaware Keel-Guard Inc.*, No. 00-1312, 2001 U.S. Dist. LEXIS 7012, at \*18-19 (C.D. Ill. May 11, 2001); see also *Amazon Tours, Inc. v. Wet-A-Line Tours, LLC*, No. 3-01-CV-1433-R, 2002 U.S. Dist. LEXIS 1649, at \*9 (N.D. Tex. Jan. 31, 2002) (holding that personal jurisdiction will not be asserted over a nonresident defendant based on the mere maintenance of an e-mail address and/or link that allows viewers to contact it without some evidence that the defendant conducted business with forum residents).

340. See *Phat Fashions, LLC v. Phat Game Athletic Apparel, Inc.*, No. 00 Civ. 0201 (JSM), 2001 U.S. Dist. LEXIS 13892, at \*15-16 (S.D.N.Y. Sept. 6, 2001) (holding that personal jurisdiction did not exist pursuant to the New York long-arm statute's "transacting business within the state" prong where a defendant responded to e-mails, but did not consummate any sales with New York residents).



court may uphold personal jurisdiction based on a tortious act that occurs by sending a single e-mail to a forum state<sup>341</sup> or by simply analogizing an e-mail to a telex.<sup>342</sup> Spam e-mail also may support personal jurisdiction.<sup>343</sup>

It is important, therefore, to consider carefully both the content of an e-mail and where it will be received because sending e-mail that results or is involved in the commission of a tort could subject one to personal jurisdiction in the forum where the e-mail is received. As a final option, one could seek to avoid personal jurisdiction in another state by forcing the recipient to prove that the tortious e-mail was actually opened within the forum state. This proof may be difficult to accomplish even if the e-mail contains a geographic locator within the e-mail address.<sup>344</sup>

### C. Monitoring Website Newsletters

As discussed in Part IV of this article, several courts have addressed cyberjurisdiction based on contacts posed by Internet newsletters.<sup>345</sup> Briefly recapitulating *Batzel v. Smith*, discussed earlier, a California district court examined contacts based on an Internet website that published newsletters regarding art and museum security issues.<sup>346</sup> The court held that the defendant, who was the creator and operator of the website, had purposefully availed himself of the benefits and privileges of conducting business in the forum state of California because: (1) he used the Internet to transmit his newsletter to California several times each week; (2) he entered into a corporate sponsorship agreement with a company located in California; (3) several

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341. See *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773, 776-79 (S.D. Miss. 2001) (holding that a tort was committed where the recipient opened the e-mail, and therefore, specific jurisdiction could be based on a single contact).

342. See *Media3 Techs., LLC v. Mail Abuse Prevention Sys. LLC*, No. 00-CV-12524-MEL, 2001 U.S. Dist. LEXIS 1310, at \*11 (D. Mass. Jan. 2, 2001) (equating e-mail to telephone communications).

343. See *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 617-19 (E.D. Va. 2002) (recognizing that the use of an ISP's e-mail servers to send spam constituted the tort of trespass to chattel and supported a finding of personal jurisdiction).

344. See *Hydro Eng'g, Inc. v. Landa, Inc.*, No. 2:02CV-0625DAK, 2002 U.S. Dist. LEXIS 22875, at \*13-14 (D. Utah Nov. 18, 2002) (holding that personal jurisdiction was not proper in a trade libel or defamation case because even though three e-mails included the Utah designation in their e-mail addresses, no evidence existed that a mass e-mail message was opened by those e-mail accounts within the forum state of Utah).

345. See *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Batzel v. Smith*, No. CV 00-9590 SVW (AJWx), 2001 U.S. Dist. LEXIS 8929 (C.D. Cal. June 5, 2001).

346. No. CV 00-9590 SVW (AJWx), 2001 U.S. Dist. LEXIS 8929, at \*3-4 (C.D. Cal. June 5, 2001).

California residents were subscribers to the Internet newsletter; and (4) he traveled to California to promote his website and solicit subscribers to his newsletter.<sup>347</sup>

In *Blumenthal v. Drudge*, the court examined the Drudge Report, an electronic gossip publication that capitalized on gossip from Hollywood and Washington, D.C.<sup>348</sup> Although the publication was created and disseminated from the defendant's home base in California, the publication was available at no cost to anyone who accessed the defendant's website.<sup>349</sup> By 1995, the defendant had 1,000 e-mail subscribers, who received weekly editions of the Drudge Report.<sup>350</sup> The plaintiff alleged that by 1997, the defendant had 85,000 subscribers.<sup>351</sup> Additionally, the defendant entered into licensing agreements, which allowed the Drudge Report to be circulated by other Internet providers, including AOL, for a royalty payment.<sup>352</sup> The court held that personal jurisdiction was proper since the Drudge Report was accessible over the Internet twenty-four hours a day, the defendant received financial support from approximately fifteen residents of the District of Columbia, the defendant made two trips to the District of Columbia to promote his publication, and he received gossip tips from District of Columbia residents.<sup>353</sup> Furthermore, the court classified the defendant's website as interactive because visitors could e-mail gossip to the defendant and request an e-mail subscription to the publication, and the defendant e-mailed the Drudge Report to e-mail subscribers on a weekly basis.<sup>354</sup>

These two cases point out specific facts that begin to frame relevant issues for courts to use when questioning the propriety of cyberjurisdiction based on an Internet newsletter. For example, is the newsletter e-mailed to individuals or companies within a specific jurisdiction? Is the newsletter free of charge or is a subscription fee involved? The latter increases the level of commercial activity. Does the newsletter focus on a particular area, such as the Drudge Report's focus on gossip from Hollywood and Washington, D.C.? In this line of cases, courts also will examine additional contacts such as trips to the forum state for trade shows, conferences, and solicitation for sponsors of the newsletter.<sup>355</sup>

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

348. 992 F. Supp. 44 (D.D.C. 1998).

349. *Id.* at 47.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 57.

354. *Id.* at 54.

355. *See id.* at 57 (D.D.C. 1998); *Batzel v. Smith*, No. CV 00-9590 SVW, 2001 U.S. Dist. LEXIS 8929, at \*5-6 (C.D. Cal. June 5, 2001).

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**D. Create a Parent/Subsidiary Corporation to Avoid Liability**

Parent and subsidiary corporations may interact in a number of ways without the fear of subjecting the parent to personal jurisdiction in a particular forum. The parent and subsidiary corporations may maintain a close relationship and even “coordinate and cooperate” with each other without the fear of imputing forum contacts.<sup>356</sup> For example, courts will not assert personal jurisdiction over a parent corporation that includes information on its website regarding its subsidiaries<sup>357</sup> or that posts product information on its website and allows customer interactivity with its subsidiaries.<sup>358</sup> With regard to a subsidiary corporation’s highly interactive website, a parent corporation will not be subject to personal jurisdiction as long as the parent corporation does not have responsibility for, or control over, the website. The key question, therefore, revolves around control.<sup>359</sup> Courts will not impute minimum contacts of a subsidiary to its parent corporation simply because a parent corporation may derive revenue from its subsidiary or have overlapping directors or officers with a subsidiary.<sup>360</sup> A parent corporation may be subject to jurisdiction, however, if it simply serves as the alter ego of a subsidiary corporation.<sup>361</sup>

Corporate entities should be careful when analyzing their parent/subsidiary relationships, especially with respect to their online activities. Providing

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356. See *Rose v. Cont’l Aktiengesellschaft (AG)*, No. 99-3794, 2001 U.S. Dist. LEXIS 2354, at \*3-4 (E.D. Pa. Mar. 2, 2001) (holding that personal jurisdiction did not exist over a parent corporation based on the acts of its subsidiary corporation).

357. *Id.* at \*4.

358. See *On-Line Techs. v. Perkin Elmer Corp.*, 141 F. Supp. 2d 246, 266 (D. Conn. 2001) (holding that a parent corporation is not subject to personal jurisdiction based on a website that allows interactivity between customers and subsidiary corporations). In *On-Line Techs.*, the interactivity was based on the ability of customers to select certain subsidiary corporations from a pull-down menu on the website. *Id.*

359. See *Aero Prods. Int’l, Inc. v. Intex Corp.*, No. 02 C 2590, 2002 U.S. Dist. LEXIS 17948, at \*14-19 (N.D. Ill. Sept. 19, 2002) (refusing to assert personal jurisdiction over a parent corporation that owned the domain name, but did not create or maintain the website at issue, which included interactive links to subsidiaries for purposes of purchasing the allegedly infringing product); *Phonetel Communications, Inc. v. U.S. Robotics Corp.*, No. 4:00-CV-1750-R, 2001 U.S. Dist. LEXIS 7233, at \*9-11 (N.D. Tex. June 1, 2001) (refusing to assert personal jurisdiction over Verizon Communications, Inc. (“VCI”) despite the Verizon brand name being used on products marketed and sold via the Internet and through other promotional media because VCI acted only as a holding company and had no control over the subsidiaries’ websites that advertised the Verizon products).

360. *Phonetel Communications, Inc.*, 2001 U.S. Dist. LEXIS 7233, at \*14-15.

361. See *Rose*, 2001 U.S. Dist. LEXIS 2354, at \*3.

links to each other's website may be deemed intent to target a specific forum, as discussed previously in Part V.A.7. of this article, although some courts have held otherwise.<sup>362</sup>

#### E. Be Wary of Conduct Under the "Effects Test"

The effects test<sup>363</sup> creates a series of questions that parties must ask themselves when creating a website or engaging in mass e-mail solicitations. First, is the primary purpose for a website or e-mail considered tortious or wrongful?<sup>364</sup> Typically, personal jurisdiction will not be conferred based on the defendant's registration of an allegedly infringing domain name and creation of a website using that name.<sup>365</sup> A factual analysis becomes important to determine the real intent behind the acquisition and use of an allegedly infringing domain name, such as trademark infringement or the use of a link to the defendant's website whenever a search is conducted using the competitor's name.<sup>366</sup> An attempt to extort money from the plaintiff for use of the infringing domain name or a purposeful intent to negatively affect a competitor also will satisfy the first prong of the effects test.<sup>367</sup>

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362. See *supra* notes 335-338 and accompanying text.

363. See *supra* Part IV.D. for a complete discussion of the effects test.

364. Prong one of the three-part effects test requires "intentional actions." *Panavision Int'l, LP v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998). A new twist is developing whereby the Ninth Circuit has expanded this part of the effects test to include wrongful acts. *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (recognizing that "wrongful conduct" may suffice under the effects test); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et, L'Antisemitisme*, 145 F. Supp. 2d 1168, 1175 (N.D. Cal. 2001) (recognizing that for purposes of the effects test, the defendant's conduct may be either "wrongful or tortious").

365. See *Panavision Int'l, LP*, 141 F.3d at 1322 (requiring something more than the registration of an infringing domain name and the establishment of a website to confer personal jurisdiction).

366. See *Keelshield Inc. v. Megaware Keel-Guard Inc.*, No. 00-1312, 2001 U.S. Dist. LEXIS 7012 (C.D. Ill. May 11, 2001). The court analyzed personal jurisdiction regarding an individual defendant who had registered the domain name "keelshield." That domain name registration was the defendant's only contact with the plaintiff Keelshield in Illinois. *Id.* at \*21-22. The court held, however, that the defendant knew of his competitor when he reserved the domain name. *Id.* at \*22-23. Additionally, the requirement of "something more" was satisfied because the defendant also used infringing megatags, which attracted users to the corporate defendant's site. This latter fact, according to the court, was sufficient to establish the defendant's intent to "affect negatively his company's competitor." *Id.* at \*23. Therefore, the court was willing to find jurisdiction over the defendant. *Id.*

367. See *id.*; *Panavision Int'l, LP*, 141 F.3d at 1322.

Second, does the conduct, establishing a website or engaging in the exchange of e-mail, expressly aim toward a specific forum?<sup>368</sup> A passive website will not satisfy this part of the analysis.<sup>369</sup> The second question also is critical when a party attempts to question another's conduct. For example, some courts have held that this requirement is met by the single act of sending a cease and desist letter regarding another party's allegedly infringing domain name.<sup>370</sup> When challenging a potentially infringing domain name, be careful to consider to whom the letter is sent. A distinction exists whether the letter is sent to the domain name registrar or merely to the party itself because the former may trigger personal jurisdiction whereas the latter may not.<sup>371</sup>

Third, was the plaintiff harmed, and did the defendant know that the plaintiff would likely be harmed, in a particular forum state?<sup>372</sup> Under this requirement, it may be important to ascertain whether the defendant knew where the plaintiff resided or conducted business.<sup>373</sup>

The same three questions apply to allegations of defamation based on Internet-based publications, such as newsletters, bulletin boards and newspaper articles. Courts may focus on the interactivity of a website and whether a website is classified as passive or interactive, although the more prevalent trend is to focus on the geographic location of the person to whom the de-

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368. The second requirement of the effects test is that the conduct is expressly aimed toward a forum state. *Panavision Int'l, LP*, 141 F.3d at 1321.

369. See *id.* at 1322 (requiring "something more" than a passive website to demonstrate an intent to expressly aim conduct toward a specific forum).

370. See *Bancroft & Masters, Inc.*, 223 F.3d at 1087 (holding that "express aiming" occurred when the defendant sent a letter to NSI inquiring about an allegedly infringing domain name and the NSI policies required that the other party take some action). But see *Amazon.com, Inc. v. Kalaydjian*, No. C00-1740R, 2001 U.S. Dist. LEXIS 4924, at \*13-14 (W.D. Wash. Feb. 20, 2001) (holding that the express aiming requirement was not met because the cease and desist letter was sent to Amazon.com's legal department and the letter did not force Amazon.com to go to court).

371. See *supra* note 370; see also *Yahoo! Inc. v. La Ligue Contre Le Racisme Et, L'Antisemitisme*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001). In *Yahoo!*, the court was not so concerned with the destination of the initial cease and desist letter. The letter was sent directly to Yahoo! *Id.* at 324.

372. See *Panavision Int'l, LP*, 141 F.3d at 1321 (holding that the third part of the effects test is the act of "causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state").

373. See *Bancroft & Masters, Inc.*, 223 F.3d at 1087 (acknowledging the importance of defendant's knowledge that the plaintiff was a resident of a particular state). But see *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (holding that knowledge of the plaintiff's residence was not important to establish personal jurisdiction in a defamation case; rather the court focused on the content of an article and its geographic "focal point.").

famatory article applies when determining personal jurisdiction under the effects test.<sup>374</sup> A good rule of thumb, therefore, is to monitor the content of an Internet publication to limit the interactivity of the website where the publication is posted.

The potential consequences of the effects test should not be overlooked when conducting activities over the Internet. Thus, if parties desire to limit the jurisdictional reach of their activities, they should look beyond the mere characterization of their website and conduct a factual analysis regarding the three requirements of the effects test.

## VI. CONCLUSION

Activity in cyberspace can create the illusion of being lost in space, especially with regard to personal jurisdiction. The lack of boundaries in cyberspace creates a jurisdictional quandary inasmuch as the cyberjurisdiction analysis remains the same as the traditional basis of personal jurisdiction. Although the early cyberjurisdiction cases create some inconsistent results, recent cases seem to generate more concrete standards. Nonetheless, inconsistent analyses persist. As a result, guidelines are needed to assist people as they maneuver their activities in, around, and through the amorphous space known as cyberspace. The guidelines presented in Part V of this article are designed to alleviate the effects of this inconsistency by offering advice to manipulate the reach of cyberspace activities. These guidelines are designed to help overcome the fear of being lost in cyberspace.

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374. See *Revell v. Lidov*, 317 F.3d 467, 472 (5th Cir. 2002) (holding that personal jurisdiction was not proper based on an allegedly defamatory article posted to a university's Internet bulletin board because it permitted visitors to post comments but not otherwise exchange information with the article's author); *Young*, 315 F.3d at 263 (emphasizing the "focal point" of the defamatory article).