Zippo-ing the Wrong Way: How the Internet Has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis

By Catherine Ross Dunham*

A classic is classic not because it conforms to certain structural rules, or fits certain definitions . . . It is classic because of a certain eternal and irrepressible freshness.

Edith Wharton

Introduction

IN 1997, THE UNITED STATES District Court for the Western District of Pennsylvania decided whether Internet-based contacts alone are sufficient to establish personal jurisdiction over a defendant. In this unlikely watershed case, Zippo Manufacturing Co. v. Zippo Dot Com, Inc., the district court wrangled with the new concept of purposeful availment through electronic contact with a forum state. The court viewed Zippo and its antecedents as a new body of personal jurisdiction law: Internet-based personal jurisdiction. In Zippo, the district court created a new test, the Zippo sliding scale, to evaluate the purposeful availment issue when a defendant’s contacts are based on Internet activity. Many courts then followed Zippo’s impulse to categorize Internet-based contacts differently than other contacts and applied the sliding scale to a variety of cases possessing the common thread of Internet activity.2

Zippo and its progeny question the extent the law should customize doctrine addressing the practical changes created by technological

---

* Catherine Ross Dunham is an Associate Professor of Law at Elon University School of Law. I would like to thank my research assistant, Heather Quinn, for her invaluable assistance researching this Article.

2. See infra note 86 and accompanying text (discussing cases applying the Zippo test to determine whether Internet-based contacts establish personal jurisdiction over the non-resident defendant).
advances. Courts are now in a similar position to courts at the turn of the twentieth century, when the country struggled with the realities of industrialization and cross-country travel. In *Pennoyer v. Neff*[^3] and later in *International Shoe Co. v. Washington*,[^4] courts mediated the tensions between national growth and the tradition of territoriality. Courts did this through tests based on a defendant’s contacts with the forum, rather than a defendant’s physical presence in the forum. Territoriality, or place, served as the foundation of twentieth-century personal jurisdiction jurisprudence and the use of a minimum contacts analysis formed the analytical framework.

Tensions exist between the role of contacts based on Internet activity and contacts based on physical location. The *Zippo* sliding scale was a federal district court’s response to the tension created by the perceived amelioration of place as a determinant of contacts and purposeful availment. The *Zippo* approach responded to a rising fear that if entities are able to contact citizens of the forum through the Internet alone, those contacts will fail the test of minimum contacts because Internet-based contacts can be disseminated so widely that purposeful availment with any particular forum is nonexistent.

This Article argues that the district court’s response in *Zippo* constituted a premature, non-functional, and destabilizing reaction to Internet-based contacts analysis. First, the *Zippo* sliding scale has destabilized the foundation of personal jurisdiction jurisprudence by directing courts to analyze the defendant’s contacts in reference to a linear scale. Second, this Article addresses how *Zippo*’s hasty construction creates a new need to define the established framework of contacts analysis based on the place theory directives of *Pennoyer* and *International Shoe*. Finally, this Article evaluates how place theory fits in the modern context through the hypothetical analysis of a case wherein a defendant’s only contacts with the forum are Internet based.

**I. Background**

**A. The Role of Place in Personal Jurisdiction Analysis**

This Article refers to the visual image of a house, offered as a metaphor for personal jurisdiction analysis. The house is not an elaborate mansion, but a small frame structure built on a subterranean stone foundation. It is a stable, functional, traditional house, common

[^3]: 95 U.S. 714 (1877).
[^4]: 326 U.S. 310 (1945).
to many American neighborhoods in the middle part of the twentieth century. And, as with any structure, construction of the house began with a foundation.

The foundation for modern personal jurisdiction analysis was laid before the Fourteenth Amendment applied the Due Process Clause to the states. It emerged in American jurisprudence after the application of the Fifth Amendment to the states through the adoption and ratification of the Fourteenth Amendment. Prior to the era of industrialization and the meshing of cross-country connections through a transcontinental railroad, American dispute resolution was local. In the latter part of the nineteenth century, courts began to adjust to the birth of a mobile American society. The Anglo-based procedures and customs were nurtured in American courts where civil disputes still relied on face-to-face resolution before a judge. Not until the nation stretched from east to west did courts face the challenge of determining proper procedural due process when one party did not reside within the forum state.

*Pennoyer* was the United States Supreme Court's first response to a more mobile society. In *Pennoyer*, the original landowner, Neff, moved from Oregon to California, leaving behind a parcel of land and a debt owed to his lawyer. Neff's lawyer filed suit against Neff for

---

5. See *Pennoyer*, 95 U.S. at 730–33 (examining cases decided before the enactment of the Fourteenth Amendment, including: *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855) (holding the tribunal must have jurisdiction over the defendant to render a valid judgment); *Mitchell's Adm'r v. Gray*, 18 Ind. 123 (1862) (same); *Darrance v. Preston*, 18 Iowa 396 (1865) (same); *Smith v. McCutchen*, 38 Mo. 415 (1866) (same); *Borden v. Fitch*, 15 Johns. 121 (N.Y. 1818) (holding notice must be given for a court to assert personal jurisdiction); and *Kilburn v. Woodworth*, 5 Johns. 37 (N.Y. 1809) (same)).

6. See generally Coleman v. Miller, 307 U.S. 433, 448–50 (1939) (describing the history of the Fourteenth Amendment, which was ratified on July 28, 1868).


8. See generally id. (discussing changes in American jurisprudence after the establishment of the intercontinental railroad).

9. Id.


11. Pennoyer v. Neff, 95 U.S. 714, 717 (1877). Marcus Neff hired attorney John H. Mitchell to help him prepare paperwork for a land grant. *Id.* Mitchell later sued Neff in Oregon state court for unpaid bills. *Id.* Neff was living in California at the time, however, and was unaware of the proceedings. *Id.* Mitchell therefore won the lawsuit by default judgment. *Id.* at 720. When Mitchell won the lawsuit in February 1866, Neff's land grant had not yet been conferred. *Id.* Mitchell, possibly waiting for the arrival of the grant, waited until July 1866 to get a writ of attachment on the property. *Id.* at 719. The court later ordered the land seized and sold in order to pay the judgment. *Id.* Mitchell bought the land at that very auction and later sold the land for approximately $15,000 and transferred
a $300 fee bill and sought a post-judgment seizure of Neff’s land in order to satisfy the judgment. Neff’s land was sold to Neff’s lawyer for $300 through a sheriff’s sale without notice to Neff. The land was later resold to Pennoyer. When Neff returned to Oregon, he filed suit to quiet title to his land, relying in part on a theory that he was deprived of procedural due process when the sale was made without notice to him.

Although this case is most cited for its definitional distinctions regarding in rem and in personam jurisdiction, a more interesting and less explored attribute of the case is its illustration of the changing tensions in American life. Neff left the state of Oregon, thus leaving his property. When his creditor filed suit on a debt owed, the very practical question of notice and jurisdiction arose. Since technology was not as advanced as today, the creditor’s best option was to seek in rem jurisdiction over Neff predicated on his real property. The Court made a bold statement when it failed to uphold the original judgment against Neff, based on the plaintiff’s failure to identify Neff’s property at the outset of the litigation. Of course, the error was more than just one of timing and, as the Court held, the failure to identify the property at the outset of the litigation deprived the defendant of pre-judgment notice, thus failing to provide a basis for the court’s exercise of jurisdiction over Neff, leading to an invalid judgment. Perhaps more boldly, the Court in Pennoyer laid the foundation for a territorial idea of personal jurisdiction.

The Court’s decision reflects the post-Civil War climate of Pennoyer and the new American tension around the idea of individual

12. Freer, supra note 11, at 50-51.
13. Id. at 51.
14. Id. at 52.
15. Id.
16. Id. at 58.
17. Id. at 50.
18. Pennoyer v. Neff, 95 U.S. 714, 714, 721-22 (1877); see also id. at 722 (“[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.”); Freer, supra note 11, at 55 (“[A] state has power over people and things inside its boundaries. Such power is demonstrated by the fact that the courts of the state can seize people and property found within the state. Thus, California has power over people and things inside California, and Oregon cannot exercise authority over such people or things.”).
19. Pennoyer, 95 U.S. at 725.
states and territoriality. Before Pennoyer, territoriality ruled the civil process. In Pennoyer, the Court wrestled with that tension and ultimately incorporated the traditions of territoriality into a modern era of Fourteenth Amendment Due Process. Pennoyer mediated the tension by upholding the value of territoriality. It did this by affirming quasi in rem jurisdiction as a proper jurisdictional predicate for a valid judgment, while requiring the plaintiff to notify the defendant at the outset of the litigation, that the land will serve as the jurisdictional basis of the suit.

The Court’s value of territoriality forms the foundation of modern personal jurisdiction jurisprudence. Despite the emerging tensions of growth, the Court required some contact with the territory as a basis for personal jurisdiction. Thus, Pennoyer set the stone foundation of the metaphorical house of personal jurisdiction. Despite growing mobility, the defendant’s “place” would be a factor in determining the Court’s authority over that person.

The structure of the metaphorical house of personal jurisdiction was built in the middle of the twentieth century, framed with the new “minimum contacts” test. In 1942, the Supreme Court analyzed personal jurisdiction involving the most mobile of the new Americans: the traveling salesman. In International Shoe, the Court evaluated the power that state courts in Washington held over a company that reached the forum state only through its salespeople. The Interna-

20. See generally Merkel, supra note 7 (noting that in the years after the Civil War, lawsuits were often removed from hostile state courts to more sympathetic federal courts, due in large part to the mobility offered by the transcontinental railroad).
21. Pennoyer, 95 U.S. at 723 (citing several cases that hold that a defendant is subject to the forum’s jurisdiction if the person is found within that jurisdiction, including: Penn v. Lord Baltimore, (1750) 1 Ves. Sen. 444; Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810); Watkins v. Holman, 41 U.S. (16 Pet.) 25 (1842); Corbett v. NUt. 77 U.S. (10 Wall.) 464 (1870)).
22. See Pennoyer, 95 U.S. at 721-22; see also Freer, supra note 11, at 54-55.
23. Pennoyer, 95 U.S. at 721-26; id. at 725-26 (“If there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding.” (quoting Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870))).
24. Id. at 721-22.
26. Id. at 310. The plaintiff, responsible for filing suit in Washington, established a “tax” on employers doing business therein, comprised of a mandatory contribution to the state’s Unemployment Compensation Fund. Id. at 311-12. The defendant, International Shoe, was a company incorporated in Delaware with its principal place of business in Missouri. Id. at 313. The corporation had maintained for some time a staff of eleven to thirteen salesmen in Washington who were residents of that state, and who occasionally rented
tional Shoe Company ("International Shoe") manufactured shoes in St. Louis, Missouri, but employed Washington residents as salespersons. Although International Shoe did not own any land in Washington, it occasionally rented rooms for the purpose of displaying shoes. Salespeople had no authority to accept purchase offers; rather, they forwarded the offers to buy shoes to St. Louis, where all decisions were made. Although the defendant company sold shoes in Washington through its salespeople—it had no real presence in the forum state. The State argued that International Shoe should be subject to personal jurisdiction within the forum state because it sold its product in the state and thus enjoyed the benefits and protections of Washington state law. The Court responded to this basic question of presence and personal jurisdiction by creating the "minimum contacts" test—the modern standard for personal jurisdiction analysis.

In its infancy, the test instructed that if a defendant had "minimum contacts" with the forum state such that he availed himself of the space to put up displays, as well as met with prospective customers in motels and hotels, thus having no permanent "situs" of business in the state. International Shoe did not pay the tax, so the state effected service of process on one of its salesmen with a notice of assessment. Washington also sent a letter by registered mail to International Shoe's place of business in Missouri. International Shoe made a special appearance in the trial court to dispute Washington's jurisdiction over it as a corporate "person." Because both the trial court and the Washington Supreme Court upheld personal jurisdiction, International Shoe appealed to the United States Supreme Court.

27. Id. at 313.

28. Id. at 313-14. International Shoe paid commission to its salesmen. Additionally, International Shoe permitted its salesmen to show only one shoe of a pair so that the company could later argue that its failure to ship an entire pair meant that it was not really doing business in Washington.

29. Id. at 314. International Shoe argued that by structuring its business in this manner, the company was not subject to jurisdiction in Washington. Additionally, the shoes were shipped from St. Louis "f.o.b.,” or "free on board,” which required the purchaser to pay the freight charges to get the shoes from St. Louis. International Shoe thus argued it did not ship anything into Washington and again reasoned that it should not be subject to jurisdiction there.

30. Id.

31. Id. at 320 ("[T]he activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities.").

efits and protections of the forum state's laws, he would be subject to personal jurisdiction in the forum state.\textsuperscript{33}

Through the years, the structure has been refined and updated with more detailed interpretations of the test, including the development of sub-tests for purposeful availment through contracting and placing products into the stream of commerce.\textsuperscript{34} Throughout these refinements, however, the Court has relied on the same basic concept held dear in \textit{Pennoyer}—territoriality.\textsuperscript{35} The very essence of the minimum contacts test is an evaluation of the defendant's physical contacts within the forum state. The analysis typically turns on the quality and nature of these contacts demonstrated through sale revenues from products sold in the state; points of destination for products shipped into the state; faxes, electronic mail, and telephone calls placed to individuals within the forum state; and other fact-based mechanisms for assessing the defendant's contact with the forum.\textsuperscript{36} Although modern life has afforded more opportunities for individuals to contact the forum state without physical presence in the state, the test still relies on the physical notion of contact. Thus, the minimum contacts analysis is rooted in the notion of "place," just as the court's analysis was in \textit{Pennoyer}. The metaphorical house of personal jurisdiction is framed upon a longstanding theory of territoriality, a place-based theory of personal jurisdiction.

\textbf{B. Tensions Created by Internet-Based Contacts}

An increasingly digital world has challenged the importance of place in civil procedure analysis. When national businesses began to

\textsuperscript{33} \textit{Int'l Shoe}, 326 U.S. at 315.

\textsuperscript{34} See, e.g., \textit{Asahi Metal}, 480 U.S. at 112 (holding that the petitioner's intentional act of placing its product into the stream of commerce, coupled with its awareness that some of the products would eventually reach the forum state, was insufficient to support jurisdiction); \textit{Burger King}, 471 U.S. at 478–79 (holding that an individual's contract with an out of state party alone cannot automatically establish minimum contacts with the forum, and that the parties' actual course of dealing must be evaluated to determine whether a defendant purposefully established minimum contacts); \textit{Keeton}, 465 U.S. at 774–75 (holding that the forum has jurisdiction if the defendant has "purposefully directed" his activities at residents of the forum); \textit{World-Wide Volkswagen}, 444 U.S. at 297–98 (holding that the forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that its products will be purchased by consumers in the forum state, and these products subsequently injure forum consumers).

\textsuperscript{35} \textit{Pennoyer v. Neff}, 95 U.S. 714 (1877).

use the Internet as a basis for commerce in the 1990s, the house of personal jurisdiction began to feel crowded. With the minimum contacts frame bursting at the seams, courts began to plan—and ultimately build—an addition onto the metaphorical house to accommodate digital commerce. Unfortunately, the addition was built without adequate consideration of the underlying structure and integrity of the framing, leaving a functionless add-on that threatens the foundational integrity of the entire house.

The renovation planning began in 1996 when federal courts addressed the role of the Internet in three trademark infringement cases. In *Bensusan Restaurant Corp. v. King*, a New York restaurateur brought a trademark infringement suit against the operator of an Internet website which shared the restaurant’s famous name. The court granted the defendant’s motion to dismiss for lack of personal jurisdiction, noting the website operator did not use the Internet to reach out to the forum state, New York. Instead, the site derived revenue from substantially local sources, rather than sources from New York or other national sources. In addition to defining “site” and “Internet,” the court in *Bensusan* held that Internet activity can


39. *See id.* at 297, 300. The plaintiffs New York club and the defendant’s Internet site both had the name “The Blue Note.” *Id.* at 297. The defendant’s site advertised a nightclub in Columbia, Missouri, that serves Columbia residents almost exclusively, most of whom are University of Missouri students. *Id.* at 300. The Internet site included information about the club, an events calendar, and ticketing information, including the names and contact information of ticket outlets in Columbia and a charge-by-phone telephone number through which tickets could be ordered and picked up at the club. *Id.* at 297.

40. *Id.* at 301. In distinguishing this case from an almost simultaneous decision from the Sixth Circuit in *CompuServe*, the court found that the facts of *Bensusan* did not demonstrate that the had defendant “reached out” from Missouri to New York. *Id.* The court held that “[t]his action... contains no allegations that King in any way directed any contact to, or had any contact with, New York or intended to avail itself of any of New York’s benefits.” *Id.*

41. *See id.* at 300. The court noted that no goods were shipped from Missouri to New York, and that the defendant did not earn any revenues from New York residents. *Id.*

42. *Id.* at 297 n.1 (“A ‘site’ is an Internet address which permits users to exchange digital information with a particular host[,]... and the World Wide Web refers to the collection of sites available on the Internet.” (citing Shea v. Reno, 930 F. Supp. 916, 929 (S.D.N.Y. 1996)).

43. *Id.* (“The Internet is the world’s largest computer network (a network consisting of two or more computers linked together to share electronic mail and files). The Internet is actually a network of thousands of independent networks, containing several million ‘host’ computers that provide information services. An estimated 25 million individuals
have a passive or active character.44

The same year Bensusan was decided, the Sixth Circuit Court of Appeals addressed the question of minimum contacts through the Internet in CompuServe, Inc. v. Patterson.45 In CompuServe, plaintiff CompuServe filed a declaratory judgment action in the federal district court in Ohio against the defendant, a CompuServe subscriber, to settle defendant's allegations that CompuServe had infringed on defendant's software trademarks.46 The district court dismissed the action, finding that the defendant had not purposefully availed himself of the benefits and privileges of Ohio law.47 The plaintiff appealed, arguing, inter alia, that the defendant had purposefully availed himself of Ohio law when it entered into a contract with the plaintiff for the sale and marketing of "shareware" to CompuServe subscribers.48 The Sixth Circuit agreed with CompuServe, noting that Patterson purposefully contracted to market his product nationally, knowing CompuServe's Ohio operations would serve as his distribution center.49 The Sixth Circuit stated the case was a "novel question of first impression" regarding the sufficiency of electronic contacts under the Due Process Clause analysis of personal jurisdiction.50 However, the court performed a contact-

44. Id. at 300. The court used the existing tenet of foreseeability to delineate between the passive and active nature of Internet sites. Id. at 300 ("[M]ere foreseeability of an in-state consequence and a failure to avert that consequence is not sufficient to establish personal jurisdiction.").

45. CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).

46. Id. at 1261. CompuServe addressed the business relationship between defendant Patterson, a Texas domiciliary, and plaintiff CompuServe, an Ohio corporation that provided subscribers access to more than 1700 information services on the Internet. Id. at 1259-60. The defendant entered into an agreement with the plaintiff whereby the plaintiff would market and sell the defendant's electronic programs, referred to as "shareware," to other subscribers. Id. at 1260. The defendant claimed the plaintiff had stolen the design of his shareware products and marketed them under the CompuServe name. Id. at 1261. When the parties could not resolve the dispute, the plaintiff filed a declaratory judgment action. Id. The defendant then moved the court to dismiss the case for lack of personal jurisdiction in Ohio. Id. The district court dismissed the case and the plaintiff appealed. Id.

47. Id. at 1264. The district court held that the electronic links between defendant Patterson, who is a Texan, and Ohio, where CompuServe is headquartered, were "too tenuous to support the exercise of personal jurisdiction." Id. at 1260 (internal citation omitted). The district court also denied CompuServe's motion for reconsideration. Id.

48. Id. at 1263.

49. Id.

50. Id. at 1262. The court considered whether "CompuServe [made] a prima facie showing that Patterson's contacts with Ohio, which have been almost entirely electronic in nature, are sufficient, under the Due Process Clause, to support the district court's exercise of personal jurisdiction over him." Id.
based jurisdiction inquiry in its decision.\textsuperscript{51} Despite grand allusions to the Internet as "the latest and greatest manifestation of these historical, globe-shrinking trends,"\textsuperscript{52} the court relied on the imbedded concept of foreseeability, holding that the defendant was subject to personal jurisdiction in Ohio.\textsuperscript{53} Thus, despite the defendant's lack of any other contact with the forum state, the act of reaching out to Ohio electronically, satisfied due process requirements.\textsuperscript{54}

The third case in the trilogy of trademark infringement cases leading to the addition on the personal jurisdiction house, \textit{Maritz, Inc. v. Cybergold, Inc.},\textsuperscript{55} also held that the defendant was subject to the forum state's jurisdiction using traditional minimum contacts analysis.\textsuperscript{56} However, the district court in \textit{Maritz} identified the personal jurisdiction question as an issue of first impression.\textsuperscript{57} The court labeled the

\textsuperscript{51} \textit{Id.} at 1266. The \textit{CompuServe} court asserted that a defendant does not have to be physically present in the forum state to satisfy the requirements of purposeful availment. \textit{Id.} at 1264. The court stated that "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." \textit{Id.} at 1264 (quoting \textit{Burger King Corp. v. Rudzewicz}, 471 U.S. 462, 463 (1985)). The \textit{CompuServe} court further reasoned that the defendant

\textsuperscript{52} \textit{Id.} at 1262. ("The Internet represents perhaps the latest and greatest manifestation of these historical, globe-shrinking trends. It enables anyone with the right equipment and knowledge—that is, people like Patterson—to operate an international business cheaply, and from a desktop. That business operator, however, remains entitled to the protection of the Due Process Clause, which mandates that potential defendants be able 'to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit.' . . . Thus, this case presents a situation where we must reconsider the scope of our jurisdictional reach." (quoting \textit{World-Wide Volkswagen Corp. v. Woodson}, 444 U.S. 286, 297 (1980))).

\textsuperscript{53} \textit{Id.} at 1265 ("Patterson deliberately set in motion an ongoing marketing relationship with CompuServe, and he should have reasonably foreseen that doing so would have consequences in Ohio.").

\textsuperscript{54} \textit{See id.} at 1266.

\textsuperscript{55} \textit{947 F. Supp. 1328} (E.D. Mo. 1996).

\textsuperscript{56} \textit{Id.} at 1332–34.

\textsuperscript{57} \textit{Id.} at 1332. The court framed the issue as
Internet as an entirely new means of information exchange and found analogies to cases involving mail and telephone contacts inapposite based on the ability of electronic mail to efficiently reach a global audience. The subtext of the district court’s opinion is a reticence to accept the advent of electronic communication and an unspoken fear of this new medium of commercial communication. Despite this reticence, the court set out and followed the Eighth Circuit’s five-prong test for measuring minimum contacts, focusing its analysis on the nature and quality of the defendant’s contacts with the forum state.

Two points follow from the district court’s decision in Maritz. First, the court concluded that the nature and quality of contacts provided by the maintenance of a website on the Internet are of a different nature and quality than other means of contact with the forum state. This conclusion follows from the court’s limited understanding of electronic mail and Internet use, rather than from the actual facts of the case and the actions of the defendant. The court viewed the website’s ability to respond to each and every person who accessed the site as evidence of the defendant’s intent to reach all Internet users. The court held this established purposeful availment and sufficient contacts to subject the defendant to the forum’s jurisdiction.

Second, the case introduces the concept of a passive website but rea-

[whether maintaining a website, such as the one maintained by CyberGold, which can be accessed by any Internet user, and which appears to be maintained for the purpose of, and in anticipation of, being accessed and used by any and all Internet users, including those residing in Missouri, amounts to promotional activities or active solicitations such as to provide the minimum contacts necessary for exercising personal jurisdiction over a non-resident corporation, presents an issue of first impression to this Court.

Id. The Maritz court highlights the new and mysterious character of the Internet and electronic communication and suggests the Internet raises new questions of due process.

58. Id. at 1332–33 (noting that electronic mail differs from posted mail in its efficiency and reach, and that electronic mail places advertisers in immediate contact with potential clients, whereas 1-800 numbers require advertisers to market the number and wait for interested persons to call); see also Inset Systems, Inc. v. Instruction Set Inc., 937 F. Supp. 161, 165 (D. Conn. 1996).

59. Maritz, 947 F. Supp. at 1330. The court defines the terms “Internet” and “information superhighway,” using CyberGold’s web service as an example of the Internet’s ability to interconnect computers to each other. Id.

60. Id. at 1332. The Eighth Circuit’s five-part test balances (1) the nature of the contacts with the forum state; (2) the quality of the contacts; (3) the relationship between the contacts and the cause of action; (4) the interest of the forum state; and (5) the convenience of the parties. Id.

61. Id. at 1333.

62. Id.
sons that this distinction is irrelevant because any website on the Internet demonstrates an intent to reach all Internet users.\textsuperscript{63}

C. The District Court’s Remedy in \textit{Zippo}

The infant jurisprudence birthed in 1996 cried out for more space in the house of personal jurisdiction. In January 1997, the District Court for the Western District of Pennsylvania renovated the house of personal jurisdiction when it decided \textit{Zippo}. In \textit{Zippo}, the court added a new sliding scale to be used in evaluating minimum contacts based on Internet activity.\textsuperscript{64}

\textit{Zippo} arose from a trademark infringement action brought under the Lanham Act\textsuperscript{65} by Zippo Manufacturing Company ("Zippo Manufacturing"), the Pennsylvania manufacturer of Zippo tobacco lighters.\textsuperscript{66} Zippo Manufacturing complained that Zippo Dot Com, a California-based Internet news service, infringed on the Zippo trademark by use of domain names, including the name "Zippo."\textsuperscript{67} Defendant Zippo Dot Com moved to dismiss for lack of personal jurisdiction in Pennsylvania.\textsuperscript{68} Zippo Manufacturing countered that because Zippo Dot Com’s website was accessible to Pennsylvania residents, and since Pennsylvania residents were subscribers of Zippo Dot Com’s news service through the Internet site,\textsuperscript{69} Zippo Dot Com

\begin{itemize}
  \item \textsuperscript{63} \textit{Id.} CyberGold introduced the concept of passive websites by characterizing its website as passive. The \textit{Maritz} court disagreed with CyberGold’s reasoning:
    
    CyberGold’s posting of information about its new, up-coming [sic] service through a website seeks to develop a mailing list of [I]nternet users, as such users are essential to the success of its service. Clearly, CyberGold has obtained the website for the purpose of, and in anticipation that, [I]nternet users, searching the Internet for websites, will access CyberGold’s website and eventually sign up on CyberGold’s mailing list. Although CyberGold characterizes its activity as merely maintaining a “passive website,” its intent is to reach all [I]nternet users, regardless of geographic location.
  
  \textit{Id.}
  \item \textsuperscript{65} \textit{See id. at 1121}; \textit{see also Federal Trademark Act, 15 U.S.C. § 1051–127 (2000)}.
  \item \textsuperscript{66} \textit{Zippo}, 952 F. Supp. at 1119; \textit{see also, e.g.}, \textit{Zippo Mfg. Co. v. Rogers Imports, Inc.}, 216 F. Supp. 670 (S.D.N.Y. 1963).
  \item \textsuperscript{67} \textit{Zippo}, 952 F. Supp. at 1121–22. Zippo Dot Com obtained the exclusive right to use the domain names “zippo.com,” “zippo.net,” and “zipponews.com.” \textit{Id.} at 1121. Zippo Dot Com operated a website that contained information about the company, advertisements, and an application to become a subscriber to the news service. \textit{Id.} Through the use of the word “Zippo” in the domain name, activity on the site generates the use of the word “Zippo” in numerous locations on the company’s website and in many downloads and messages sent from and posted on the website. \textit{Id.} at 1121–22.
  \item \textsuperscript{68} \textit{Id.} at 1121.
  \item \textsuperscript{69} \textit{Id.} All of Zippo Dot Com’s contacts with Pennsylvania occurred over the Internet, through a website that was nationally accessible. \textit{Id.} Zippo Dot Com had approximately
\end{itemize}
had sufficient minimum contacts with Pennsylvania to allow the district court to exercise specific personal jurisdiction over Zippo Dot Com.\textsuperscript{70}

The \textit{Zippo} court's analysis began at the "Constitutional touchstone" of minimum contacts, recognizing the role of foreseeability and "reaching out" in the determination of purposeful availment.\textsuperscript{71} Then, relying specifically on the 1996 trilogy of trademark infringement cases,\textsuperscript{72} the court devised a sliding scale to evaluate the nature and quality of commercial activity that an entity conducts over the Internet.\textsuperscript{73}

\textbf{Figure 1.}\textsuperscript{74}

\begin{tabular}{|c|c|c|}
\hline
No Personal Jurisdiction & Possible Personal Jurisdiction & Proper Personal Jurisdiction \\
\hline
\textbullet{Defendant has simply posted information on an Internet website which is accessible to users in foreign jurisdictions. A passive website with the goal to make information available to those interested is not grounds for the exercise of personal jurisdiction. \textit{(Bessman Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996)).} } & \textbullet{Defendant participates in an interactive website where a user can exchange information with the host computer. Here, the exercise of jurisdiction is determined by examining the level of interactivity and the commercial nature of the exchange of information that occurs on the website. \textit{(Martins, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D.Mo. 1996)).} } & \textbullet{Defendant clearly does business over the Internet involving knowing and repeated transmission of computer files over the Internet; personal jurisdiction is proper. \textit{(Compuware Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)).} } \\
\hline
\end{tabular}

\textbf{Zippo Mfg. Co. v. Zippo Dot Com Sliding Scale}

140,000 subscribers worldwide, and approximately two percent of the subscribers (or 3,000 people) were Pennsylvania residents. \textit{Id.} In addition, Zippo Dot Com had entered into seven agreements with Internet service providers in Pennsylvania. \textit{Id.}

\textsuperscript{70} \textit{Id.} at 1122–27. The court held that Zippo Dot Com would not be subject to general jurisdiction in Pennsylvania, thus narrowing its inquiry to whether the defendant had sufficient minimum contacts with the forum, whether the claim asserted arose out of the defendant's contacts, and whether the exercise of personal jurisdiction over the defendant was reasonable. \textit{Id.} at 1125–27.

\textsuperscript{71} \textit{Id.} at 1123 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)).


\textsuperscript{73} \textit{Zippo}, 952 F. Supp. 1119, 1123–24. The court used a sliding scale to differentiate between activity on websites. \textit{Id.}

\textsuperscript{74} This graphic is a visual interpretation of the court's textual description of the scale.
The sliding scale demonstrates the spectrum of a defendant's business activity on the Internet. On one end of the scale, the court described situations where businesses clearly conduct business on the Internet such as contracting with foreign residents and using the Internet for repeated and knowing transmission of computer files. The court held that defendants falling at this end of the scale are subject to personal jurisdiction. At the opposite end of the scale, the court described passive websites that provide information only to Internet users and are not sufficient to subject the defendant to personal jurisdiction. The court then discussed the "middle ground" of Internet activity, a space occupied by interactive sites wherein the user and host computer can exchange information. This type of website requires the court to examine the nature of activity on the individual site to determine whether the exercise of personal jurisdiction is proper.

The sliding scale confirms the outcome of minimum contacts analysis on Internet-based activity that is either predominantly passive or overwhelmingly active/interactive. As in prior cases of mail or telephone communication between remote parties, the level and nature of the activity controls the jurisdictional analysis. If a defendant uses the Internet to attract foreign customers, and continues to deal with the out-of-state entity (through the Internet or otherwise), the traditional basis for personal jurisdiction is formed. Likewise, if the defendant does nothing more than make information available to the general public—through the Internet or through traditional advertising—the test for personal jurisdiction is likely not met because the activity does not demonstrate purposeful availment. The passive and active ends of the Zippo sliding scale contribute nothing to the established understanding of minimum contacts and purposeful availment. It is the vast midsection of the scale, the websites which are neither completely active, nor completely passive, that present difficult questions.

75. Id. at 1124.
76. The term "foreign" in a court's personal jurisdiction analysis typically refers broadly to persons or entities residing outside of the jurisdiction. BLACK'S LAW DICTIONARY 675 (8th ed. 2004).
77. Zippo, 952 F. Supp. at 1124 (citing CompuServe, Inc. v. Patterson, 89 F. Supp. 1257 (6th Cir. 1996)).
78. Id.
79. Id. (citing Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996)).
81. See CompuServe, 89 F. Supp. at 1263, 1265 (using the level and nature of the activity as consideration in an Internet-based activity case).
II. Post-Zippo Destabilization

The Zippo court reasoned that its scale was a new approach to personal jurisdiction analysis developed to intercept the "global revolution looming on the horizon," thus staging its own opinion as the next step in a progression of personal jurisdiction law. However, the Zippo court's creation and application of the scale fails to offer any new approach to personal jurisdiction analysis. In fact, the scale itself has led to more confusion as courts try to comprehensively wedge Internet-based contacts questions into the inadequate and poorly structured scale, essentially overbuilding and overcrowding the addition to the house of personal jurisdiction.

A. The Structural Stress of Zippo's Progeny

The renovated house of personal jurisdiction has become an attractive gathering place for courts and litigants wrestling with motions to dismiss predicated on Internet-based contacts. Despite the fact that the Zippo sliding scale is the creation of a federal district court, other courts have used the test to determine whether a website subjected a defendant to personal jurisdiction in the forum state. Although reference to the scale has continued through the present, some circuits have been reluctant to affirmatively adopt the scale.

82. Zippo, 952 F. Supp. at 1123 ("'[A]s 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, 205–51 (1958))); see also Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (finding that physical presence in the forum is not required for the exercise of personal jurisdiction).


84. See, e.g., Roberts, 2007 WL 3203969, at *5. The court evaluated the question of personal jurisdiction regarding a California company that advertised its product through a website accessible to Michigan residents, but that did not use Michigan vendors. Id. at *1–5.

85. See Toys R Us, Inc. v. Step Two, S.A., 318 F.3d 446, 454 (3d Cir. 2003) (requiring the plaintiff to prove that the defendant knowingly transacted business with the forum state by "directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficiently other related contacts"); Noegen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002) (holding that the presence of a website that is "interactive to a degree that reveals specifically intended interaction with residents of the state" is sufficient to show purposeful availment); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321–22 (9th Cir. 1998) (requiring "something more" than a passive website with advertising and contact information to indicate the defendant purposefully directed activity at the forum state, and holding that satisfaction of the effects test is sufficient); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir.
Other circuits have been less reticent.\textsuperscript{86} The Fourth Circuit recognized that the Internet-based contacts question invoked an existing dichotomy between the traditional minimum contacts analysis and the \textit{Calder v. Jones}\textsuperscript{87} effects test when applied in intentional tort cases.\textsuperscript{88} When a plaintiff alleges an intentional tort via use of a website, the two tests coalesce around the nexus of the Internet activity. For example, in \textit{ALS Scan Inc. v. Digital Service Consultants},\textsuperscript{89} the plaintiffs alleged that a Georgia-based Internet service provider who enabled a website owner to publish photographs on the Internet subjected itself to personal jurisdiction in Maryland.\textsuperscript{90} The plaintiffs argued that this move allowed arguments from the traditional contacts perspective and the effects test perspective.\textsuperscript{91} Given that the contact arguments centered on Internet activity, the circuit court adopted the \textit{Zippo} sliding scale, while creating a new test which essentially imports the \textit{Zippo} scale into a \textit{Calder}-like effects test.\textsuperscript{92} The new test allows a court to exercise personal jurisdiction over a person outside of the forum when that person: (1) directs electronic activity into the state; (2) with the manifested intent of engag-

\textsuperscript{86}See Best Van Lines, Inc. v. Walker, 490 F.3d 239, 252 (2d Cir. 2007) (using the \textit{Zippo} scale not as a separate analytical framework, but as a tool to decide whether a defendant has transacted business in the forum); ALS Scan, Inc. v. Digital Service Consultants, 293 F.3d 707, 714 (4th Cir. 2002) (adopting the \textit{Zippo} scale, but creating a test for personal jurisdiction that combines the \textit{Zippo} scale and the test used in \textit{Calder v. Jones}, 465 U.S. 783 (1984)). Under the test created in \textit{ALS Scan}, a court may find personal jurisdiction when the defendant directs electronic activity into the state with the manifested intent of engaging in business or other interactions within the state. \textit{Id.} The activity must additionally create a potential cause of action in the state. \textit{Id.; see also Lakin v. Prudential Sec., Inc., 348 F.3d 704, 711 (8th Cir. 2003) (noting that the \textit{Zippo} scale is properly used in cases where specific jurisdiction is alleged, but that the scale alone is insufficient when general jurisdiction is alleged); Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999) ("We find that the reasoning of \textit{Zippo} is persuasive and adopt it in this Circuit.").

\textsuperscript{87} \textit{Calder}, 465 U.S. at 789.

\textsuperscript{88} See \textit{ALS Scan}, 293 F.3d 707.

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} \textit{Id.} at 709.

\textsuperscript{91} \textit{Id.} at 712.

\textsuperscript{92} \textit{Id.} at 714.
ing in business or other interactions within the forum; and (3) that activity creates, in a person within the forum, a potential cause of action cognizable under the laws of the forum. The test devised by the Fourth Circuit substitutes an intent analysis for the Zippo scale's determination of website activity which is neither completely active nor completely passive. As applied, the test places websites used to intentionally direct electronic commercial activity into the forum into the interactive arm of the scale.

Arguably, however, the Fourth Circuit's professed adoption of the Zippo scale adds nothing to the middle portion of the scale since activity and intent measure the same element of the defendant's conduct: purposefully engaging itself in the forum.

By crafting the Zippo sliding scale into a test relying on commercial traffic, the Fifth Circuit also crowded into the new room in the house of personal jurisdiction. In Mink v. AAAA Development, LLC, the defendant company did not take purchase orders through their website, and thus no interactive commercial activity could be con-

93. Id. ("Thus, adopting and adapting the Zippo model, we conclude that a State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State."); see also Calder, 465 U.S. at 789-90. Under Calder, personal jurisdiction can be based on (1) intentional actions, (2) expressly aimed at the forum state, and (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state. Id. at 789-90.

94. See ALS Scan, 293 F.3d at 714-15.

95. See id. at 714; see also Motley Rice, LLC v. Baldwin & Baldwin, LLP, 518 F. Supp. 2d 688, 695 n.6 (D. S.C. 2007). In Motley Rice, a South Carolina law firm sued a Texas law firm alleging breach of co-counsel and fee sharing agreements and seeking to clarify, reform, or rescind such agreements. Id. at 689. Following the case's removal on diversity grounds, the Texas law firm moved to dismiss for lack of personal jurisdiction, or in the alternative, to transfer the case to United States District Court for the Eastern District of Texas. Id. at 691. The court noted: "ALS Scan provides some support to Plaintiffs' argument that the court has personal jurisdiction over Defendant. Plaintiffs and Defendant communicated with each other during their nineteen year relationship in which they served as co-counsel, and Plaintiffs now have a potential cause of action against Defendant for breach of contract." Id. at 695.

96. See Mink v. AAAA Dev., LLC, 190 F.3d 333, 336 (5th Cir. 1999) ("We find the reasoning of Zippo is persuasive and adopt it in this Circuit.").

97. Id.
ducted through the site. The website at issue was essentially a bulletin board that posted information about the defendant's products. By employing the scale to resolve the personal jurisdiction question, the Fifth Circuit created its own version of Zippo, holding that if the website in question allows visitors to purchase products and services online, the court will exercise personal jurisdiction over the defendant. However, the court's analysis did not require the use of the scale. A simple factual analysis of purposeful availment would have rendered the same result.

Implementation of the Zippo sliding scale has led to a confusing array of decisions, demonstrating the scale's faults. In addition, courts and litigants seem to overlook contacts analysis when confronted with an Internet-based business or communication between the parties through electronic mail. Courts have used the Zippo scale in cases where the issue of personal jurisdiction centers on product sales be-

98. Id. at 336–37. Mink was a Texas resident and furniture salesman. Id. at 334. He claimed that in January 1997, he began to develop a computer program designed to track information on sales made and opportunities missed on sales not made. Id. On May 13, 1997, Mink applied for a patent. Id. Mink claimed that he was approached by Stark, a Colorado resident, in June 1997, and that he eventually shared information with Stark about his computer program. Id. at 335. Between June 1997 and October 1997, Stark allegedly shared all of Mink's ideas and information about the program with Middlebrook, a Vermont resident. Id. “According to Mink's complaint, Middlebrook and two companies, AAAA Development and Profitsystems, conspired to copy Mink's copyrighted and patent-pending [program] and create an identical system of their own for financial gain.” Id. AAAA Development was a Vermont corporation with its principal place of business in Vermont. Id. “Neither AAAA Development nor Middlebrook own[ed] property in Texas.” Id. AAAA Development had advertised in a national furniture trade journal and through a website on the Internet. Id.

99. Id. at 336–37.

100. Id. at 337 (“AAAA's website does not allow consumers to order or purchase products and services online.”); see also Roberts v. Paulin, No. 07-CV-13207, 2007 WL 3203969, at *4 (E.D. Mich. Oct. 31, 2007) (noting that the defendant sold less than $500 worth of products in the forum); Tamburo v. Dworkin, No. 04 C 3317, 2007 WL 3046216, at *3 (N.D. Ill. Oct. 9, 2007) (holding that a website that allows visitors to access information about canine pedigrees is not interactive because it does not offer communication about products and services).


102. See Dearwater v. Bond Mfg. Co., No. 1:06-CV-154, 2007 WL 2745321 (D. Vt. Sept. 19, 2007). Plaintiff Dearwater brought a wrongful termination lawsuit against defendant employer Bond Manufacturing. Id. at *1. The plaintiff acquired the job through e-mails in response to advertisements on Craigslist and CareerBuilder.com. Id. Defendant Bond had no connection to the forum state, and the plaintiff's only basis for asserting personal jurisdiction was the defendant's advertisements on national websites. Id. The plaintiff argued that the Zippo scale should apply, using the job search sites (which are at the most active end of the Zippo scale) as a basis to assert personal jurisdiction over the defendant. Id. at *7.
tween states. Courts have also invoked Zippo when the company had a website which either advertised or sold products, despite other evidence of contact between the defendant and the forum state.\(^{103}\) In the product cases, courts rely on the amount of revenue from product sales to determine the issue of presence in the forum.\(^{104}\) A product site which fails to generate substantial revenue is not deemed an interactive site when set upon the sliding scale.\(^{105}\) Furthermore, litigants typically request for the scale's application when the defendant's site is not commercial in nature.\(^{106}\) After a court applies the Zippo scale, a website lacking commercial Internet activity is typically held to be a passive website without consideration of the defendant's purposeful availment of the forum state.\(^{107}\)

**B. The House Destabilized**

Rather than enhance the house of personal jurisdiction, the scale directs courts and parties to an area of the house unsupported by the original place-based structure. Thus, the Zippo renovations have destabilized the house of personal jurisdiction. Courts relied on the new-

---


105. See, e.g., Mink v. AAAA Development, LLC, 190 F.3d 333, 336–37 (5th Cir. 1999) (explaining that a website that essentially only advertises and provides order forms is considered a "passive" or non-interactive site on the Zippo scale).

106. See Vax-D Medical Tech., LLC v. Allied Health Mgmt., LTD, No. 8:04-CV-1617-T-26TGW, 2006 WL 4847740, at *2 (M.D. Fla. Mar. 14, 2006). The defendant's website in Vax-D purported to advertise chiropractors using the VAX-D technique. In reality, those chiropractors used a different technique. Id. at *2; see also Chi. Architecture Found. v. Domain Magic, LLC, No. 07 C 764, 2007 WL 3046124, at *1 (N.D. Ill. Oct. 12, 2007). In Chicago Architecture, the defendant created a website portal designed to pirate the plaintiff's website hits. Id. at *5. The court placed the defendant's website on the Zippo scale despite the absence of any commercial traffic between the plaintiff and defendant. Id.

107. See Zombeck Co. v. Amada, No. 06-953, 2007 WL 4105231 (W.D. Pa. Nov. 15, 2007). In a products liability case against a foreign component part manufacturer, the plaintiff combined a stream of commerce analysis with a Zippo analysis. Id. at *3–5. The plaintiff argued that the defendant's website alone, which allowed electronic mail content, even in the absence of additional contact with the forum state, subjected the defendant to personal jurisdiction in the forum state. Id. at *4–5.
ness of Internet activity in formulating the original scale.\textsuperscript{108} The Internet was described in terms of its ephemeral existence online. Devices now as commonplace as electronic mail were differentiated from posted mail and telephone calls because of electronic mail's remoteness and inability to place persons in live contact with another.\textsuperscript{109} Thus, the \textit{Zippo} scale was predicated on the concept of non-contact rather than on the longstanding concepts of minimum contacts and purposeful availment. The early decisions identified the issue of Internet-based contacts as matters of first impression, distinct from the traditional personal jurisdiction case.\textsuperscript{110} By doing so, courts have turned away from traditional place-based analysis and attempted to create a new arm of personal jurisdiction jurisprudence for Internet-based contacts.

This new analysis is not based on the traditional tenets of territoriality and contacts. Given the historical importance of territory and contact, a new, individual analysis for Internet-based contacts is inadequate. The new approach's lack of architectural support is demonstrated through the post-\textit{Zippo} decisions.\textsuperscript{111} A court may at times invoke the scale as a means to describe the Internet basis for the jurisdictional argument.\textsuperscript{112} The decisions often revert to more traditional contacts analysis, relying on the secure ground of revenues, contracts, and communication, despite sometimes lengthy discussions of the passivity or interactivity of the website.\textsuperscript{113}

\section*{III. Applying the Place Theory Framework in Internet-Based Contacts Analysis}

Place theory is the theory of personal jurisdiction enhanced by \textit{Pennoyer} and \textit{International Shoe}.\textsuperscript{114} The core of place theory is the un-

\begin{itemize}
\item 109. For a discussion of the differences between electronic mail, telephone advertisements, and traditional mail, see the sources cited \textit{supra} note 58 and accompanying text.
\item 110. For a discussion of these early cases, see the sources cited \textit{supra} notes 57–58, and the text accompanying notes 50, 52, and 58.
\item 114. For a discussion of a court's jurisdiction based on the defendant's physical location or "place," see discussion \textit{supra} notes 18 and 51 and accompanying text.
\end{itemize}
derstanding that for a defendant to be subject to personal jurisdiction within the forum, the defendant must have some contact with the territory of the forum. \[115\] Traditionally, contacts were viewed as variations of physical contact, such as actual physical presence through travel, sales, corporate operations, or telephone/facsimile/mail correspondence. The core value in a contacts analysis is "reaching out" from the defendant's forum to the plaintiff's forum. \[116\] Because jurisdic-tional analysis is largely a fact-based analysis, tying contact analysis to place provides courts a framework under which the defendant's activity can be evaluated and weighed against other factors in the overall jurisdictional analysis. When electronic contacts through websites are considered untethered to a physical place, courts are deprived of the traditional framework for evaluating the defendant's purposeful availment.

A. Attributes of Place Theory

The place theory of personal jurisdiction is marked by certain attributes that combine the historical roots of territorial jurisdiction with the appropriate flexibility necessary for the modern commercial context. First, place theory is rooted in the traditional contacts theory jurisprudence of personal jurisdiction. \[117\] Second, place theory applies flexibly to almost all situations where personal jurisdiction is raised in commercial and non-commercial interactions. Third, because it relies on an established framework for jurisdictional analysis, place theory is able to uniquely respond to the new realities of interaction between remote parties through the Internet.

The first attribute of place theory is its basis in established jurisprudence. \[118\] The theory recognizes that the entire concept of in personam jurisdiction rests on the concept of territorialism: the idea that a forum has a duty to protect its citizens from harm and thus a forum's reach extends to its borders. \[119\] This core concept has evolved into a test based on contacts with the forum. \[120\] A forum's reach has extended with the development of the contacts test. \[121\] As courts expanded contacts to include more remote interaction, courts shifted the focus to whether the defendant purposefully availed itself of the

\[115\] For a discussion of place theory, see supra notes 18–23 and accompanying text.
\[116\] For a discussion of contacts analysis, see supra Part I.A.
\[117\] For a discussion of place theory, see supra notes 18–23 and accompanying text.
\[118\] Pennoyer v. Neff, 95 U.S. 714, 720 (1877).
\[119\] See id. at 730.
benefits and protections of the forum. Thus, courts created the place theory framework for personal jurisdiction analysis around the coalescing concepts of presence, contacts, and purposeful availment.

The second attribute of place theory is the necessary flexibility it provides. The issue of purposeful availment has been measured in the modern context of remote communications, such as facsimile transmissions, telephone calls, mail order business, and other devices of commercial communication that allow parties to develop contacts without travel to the forum. When the framework relies on purposeful contacts to assess jurisdiction, it is able to adapt with technology.

The Internet is the most significant communication change in the late twentieth and early twenty-first centuries. Just as the fax replaced mail, and mail order replaced traveling salespersons, electronic mail now makes all other forms of communication dated. Internet commerce offers conveniences other sales approaches cannot offer. However, the underlying act between the parties in an electronic communication and an Internet sale is the same. Thus, the third attribute of place theory is its ability to respond to remote parties. In all types of communication, one party reaches out to the other. Reaching out is the measure of purposeful availment. If a defendant’s telephone contacts to the forum state can demonstrate purposeful availment, so can his electronic mail. If a defendant company purposefully avails itself to the forum when it mails a catalog and order form, then a defendant company purposefully avails itself of the forum when it makes Internet sales to customers within the forum. The devices for sales and communications have become more complicated but the behavioral analysis remains the same. Whether a court finds itself analyzing telephone calls or electronic mail transmissions, it should analyze the defendant’s pattern of commercial behavior to determine if the defendant purposefully engages in commerce within the forum.

The Zippo scale’s fallacy is its attempt to recast the place theory framework in the context of the Internet. The sliding scale has been erroneously adopted as a new framework for analyzing situations


where the parties deal through the Internet. At most, the scale has defined a way to measure purposeful availment through websites by determining whether the site in question is passive or interactive. An interactive site occupies the most purposeful end of the scale, creating a presumption that interactive websites subject the site operators to personal jurisdiction in any forum the site accesses. However, a place-based analysis of Internet activity without consideration of the sliding scale yields the same result. The quantity and quality of the contacts demonstrates purposeful availment. Likewise, the passive end of the scale is equally superfluous because passive websites indicate low contact and little effort to reach out to a forum. In cases where the level of commercial activity falls somewhere between passive and active, the decision of using either place theory analysis or the \textit{Zippo} sliding scale is determined by jurisdiction. To the extent that the scale is used to identify cases which fall into this more complex area, it can be helpful. After the type of case has been determined, however, the scale itself offers no framework for resolving the jurisdictional questions generated by activity falling in the middle portion of the scale.

\section*{B. Place Theory Exemplified in the Modern Context}

The \textit{Zippo} scale's absence of an analytical framework causes courts to struggle with the scale's application. Consider the following hypothetical involving conduct through a website.

MedicOne,\textsuperscript{124} a Tennessee corporation, markets and distributes automated external defibrillators ("AEDs"). MedicOne offers programs and support services to AED purchasers and users through a website. MedicOne manages its online support services with a patent-pending "three-prong readiness" web-based interface system developed by MedicOne called the "AED Manager." The AED Manager checks the status of participating AEDs and sends automated "action item" e-mails to customers suggesting customers have their AED units tested for readiness. MedicOne operates a website that lists general information about the company, including contact information and a description of its services. The MedicOne website contains an access point to the AED Manager, which users may access only after entering a correct login name and password.

\textsuperscript{124} The hypothetical case summarized here is based on Premedics \textit{v. Zoll}, No. 3:06-0716, 2007 WL 5012968 (M.D. Tenn. Oct. 9, 2007). Premedics involved allegations against a rival company based on the unauthorized use of the plaintiff's intellectual property. Id. at *1–2. The district court rejected the defendant's \textit{Zippo}-based argument that it was not subject to personal jurisdiction. Id. at *5.
In July 2002, MedicOne and CALL Medical Corporation ("CALL"), a Massachusetts-based company that manufactures and markets AEDs, entered into a contract where MedicOne agreed to provide certain CALL customers with support services, including the AED Manager. In 2004, CALL took steps to reverse engineer and copy the AED Manager, ultimately creating and advertising its own web-based interactive database application. According to MedicOne, CALL engaged ProM Management ("ProM") to reproduce the MedicOne web-based support system.

ProM accessed MedicOne's website and navigated onto the AED Manager portion of the website. ProM created an unauthorized test account for the AED Manager, an account that is only distributed to MedicOne's own web developers. As a result of establishing a test account, CALL and ProM were able to receive the automated "action item" e-mails from the MedicOne system, which is a proprietary component of MedicOne's system. MedicOne contends that by improperly logging into the AED Manager using an unauthorized test account and receiving the automated e-mails, ProM and CALL were able to determine the functionality of the AED Manager for the purpose of reproducing it. On September 8, 2004, ProM's website published a statement that it had developed an interactive database application on behalf of CALL, called "CALL MD." CALL made a similar publication on its website in October 2004, advertising its CALL MD program.

MedicOne filed a suit in a Tennessee court, alleging numerous claims against ProM and CALL, including conspiracy, misappropriation of trade secrets, violation of the Uniform Trade Secrets Act, conversion, violation of the Electronic Communications Privacy Act, and violation of the Computer Fraud and Abuse Act.

CALL argues that the Tennessee court lacks personal jurisdiction over it because CALL lacks present connection with the State of Tennessee. CALL has no offices, agents, or contacts in Tennessee and has never conducted or solicited business in Tennessee. CALL further argues that the alleged activities were all conducted by ProM in Louisiana. MedicOne argues that CALL's website is accessible in Tennessee and has been accessed by Tennessee residents, thus supporting the Court's exercise of personal jurisdiction over CALL.

Courts are tempted to apply the Zippo sliding scale in determining a defendant's purposeful availment to the forum when a defendant's website is the basis for the forum's personal jurisdiction over a
defendant. However, the sliding scale provides misdirection in cases where the Internet activity involves purposeful behavior. For example, if the court utilizes the sliding scale analysis and looks to the number of hits on CALL's website from Tennessee residents and the amount of revenue received from sales in Tennessee, the court may completely overlook the fact that CALL intentionally accessed MedicOne's website for the purpose of reverse engineering MedicOne's web-based product.

The facts of the hypothetical case parallel a pre-Internet scenario where one vendor travels to another state to buy a competitor's product, then takes the product back to its own shop for use as a model to create a rival product. In the pre-Internet scenario, the acts of traveling to another state and purchasing a product for an improper purpose would be sufficient to demonstrate purposeful avialment. The fact that modern actors use the Internet as a means for the same end should not alter the analysis.

If the court places CALL's website on the Zippo sliding scale, the case result may be highly illogical. It is possible that when placed on the sliding scale, the CALL website would fail to meet the necessary level of interactivity to establish personal jurisdiction over CALL in Tennessee. A misdirected focus on the defendant's website can overtake the heart of the plaintiff's allegations, the defendant's purposeful act. When the same facts are analyzed through the place theory framework, the court would first determine the defendant's

---

125. See id. at *4 ("Undoubtedly, the determination of purposeful avialment becomes more challenging when applied to situations involving the use of the [Internet]. The prevalence and scope of the [Internet] allows individuals to communicate, conduct business, or casually browse across state lines and international borders without leaving their desk. Information once part and parcel to transactions, such as knowledge of another party's physical location, is no longer a prerequisite to communication. Federal courts have applied a specific analysis in determining whether a defendant's [Internet] activity constitutes purposeful avialment, commonly referred to as the 'Zippo sliding scale.'" (quoting Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997))).

126. See id. ("[T]he sliding scale approach is not applicable in every case merely because facts touch on [Internet] activity. Rather, the [Zippo] analysis is appropriately applied in personal jurisdiction inquiries where the facts center on the defendant's activities conducted through its own website.").

127. See id. ("Defendants' activities on their own website are irrelevant for purposes of determining personal jurisdiction. Instead, the issue at hand focuses on the unauthorized actions taken by the Defendants against Plaintiff's website. In short, this is a case involving computer hacking, and therefore, personal jurisdiction turns on the tortious injury that Defendants allegedly inflicted upon Premedics.").

128. In fact, it is possible that if the defendant is aware of the sliding scale prior to designing the website, he can design a website that meets the description of a passive website on the sliding scale.
contacts with the forum state, then determine whether those contacts demonstrate purposeful availment. In this hypothetical, the contacts include CALL's entry into a contract with MedicOne, a Tennessee company, CALL's access of MedicOne's website, CALL's receipt of e-mails from MedicOne's site, and any and all other interactions with MedicOne. These contacts demonstrate purposeful availment since CALL's contact with the MedicOne website, on its own and through its agent ProM, were undertaken for the purpose of reverse engineering the MedicOne technology. Under the place theory framework, CALL's actions should be analyzed as the electronic version of a product purchase for the same improper motive. The place theory framework supports the logical conclusion that CALL would be subject to personal jurisdiction in Tennessee; however, the sliding scale analysis may reach the opposite result by focusing on CALL's website rather than its actions.

Conclusion

All things new do not require new things. The Zippo sliding scale offers the most compelling example of why functional doctrine should not be supplanted to address the societal changes brought forth through technology. The scale is a naïve device because it categorizes Internet sites on a linear continuum to assess whether the attributes of a website constitute conduct directed at the forum. Despite invocation of the scale by courts and litigants as a device for analyzing the forum's constitutional reach, the scale itself offers no framework for evaluating purposeful activity within the forum. In contrast, place theory allows courts and litigants to analyze an Internet-based contacts case through the vertical Constitutional framework defined and refined through over one hundred years of precedent.

The Zippo sliding scale's addition to the house of personal jurisdiction is dated. The house suffers under the structural stress of the scale. Courts should abandon the Zippo sliding scale and return to the place theory analytical framework. This will prepare litigants with the inevitable technological changes on the global horizon.

129. See Premedics, 2007 WL 3012968, at *4–6. The Premedics court applied the effects test, focusing on the tortious injury the defendant allegedly inflicted on the plaintiff. Id. The court denied the defendants' motions to dismiss for lack of personal jurisdiction. Id.