

**INTERNET-BASED PERSONAL JURISDICTION:
AN UNNECESSARY LEGAL DOCTRINE**

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Table of Contents

I.	Introduction.....	1
II.	Traditional Personal Jurisdiction Analysis	2
III.	Internet-Based Personal Jurisdiction.....	5
	A. The <i>Zippo</i> Sliding Scale	6
	1. Adoption of <i>Zippo</i>	8
	2. Rejection of <i>Zippo</i>	8
	B. <i>ALS Scan</i> Test.....	10
IV.	Arguments In Favor of Internet-Based Jurisdiction.....	12
	A. The Internet Lacks Physical Geographic Boundaries	12
	B. Technology-Based Arguments	14
V.	Problems with Internet-Based Personal Jurisdiction	15
	A. Cyberspace Does Not Exist Separate from the Real World.....	15
	B. Traditional Personal Jurisdiction Analysis is Flexible	17
	C. Inconsistent Internet-Based Personal Jurisdiction Tests	20
	D. The Law of the Horse Argument.....	20
	E. Lack of Predictability	21
VI.	Conclusion	22

I. Introduction

Imagine for a moment that you live a quiet life in Seattle, Washington. One day you decide to write on your blog about a company with which you had a negative experience. Several weeks later, you receive a notice that you are being sued by that company based on your blog comments. Most appalling, however, is that you have to defend yourself against this lawsuit in the U.S. District Court in Florida, because the company about which you complained has its principal place of business located in Orlando. Taking complex personal jurisdiction analysis out of the picture, does it seem fair to be hauled into court 3,000 miles away based on comments you made in a blog? Does this offend your concepts of “due process” and “justice?”

This is exactly what happened to Tabatha Marshall in November 2007 when she was sued by Internet Solutions Corporation (“ISC”) for allegedly defamatory postings she made on her website.¹ But the most shocking aspect of the case was that Marshall was forced to defend herself 3,000 miles away based on Internet activity that did not specifically target Florida residents.² The District Court dismissed the complaint for lack of personal jurisdiction, but ISC appealed to the Eleventh Circuit Court of Appeals.³ The appeal is currently pending.

Courts have been struggling with the issue of personal jurisdiction based on Internet activity since the mid-1990s. For some reason, courts were either reluctant or technologically ill-equipped to apply long-standing principles of personal jurisdiction to Internet-based causes of action. Courts initially deemed the Internet too unique and complex to fit squarely within the ambit of traditional personal jurisdiction analysis. Therefore, courts all over the United States

¹ *Internet Solutions Corp. v. Marshall*, 2008 U.S. Dist. LEXIS 28261, 2008 WL 958136 (M.D. Fla. 2008).

² Marshall also argued that jurisdiction was not proper because she (1) was a resident of Washington state and did not have sufficient contacts with Florida, (2) does not own or lease property in Florida, (3) does not operate a business of any kind in Florida, (4) only visited Florida on one occasion, (5) has never placed advertisements on the website, and (6) receives no compensation for the website. *Id.* at 3.

³ *Internet Solutions Corp. v. Marshall*, 557 F.3d 1293 (11th Cir. 2009) (*question certified*).

began crafting new tests of Internet-based personal jurisdiction from scratch. Seminal cases like *Zippo* and *ALS Scan* promulgated the first tests a court should use when deciding whether to exercise jurisdiction over a defendant based on activity over the Internet. The tests include a smattering of different factors, for example analyzing the type of website at issue (passive, semi-interactive, or interactive), whether the website is commercial in nature, and whether the defendant directed electronic activity into the state. But none of the various tests from around the country were comparable, and each test seemed to select a different element as the most essential.

Over time courts began to realize that creating a new legal doctrine was too difficult and possibly unnecessary. With no guidance to date from the U.S. Supreme Court, courts across the nation are using different tests for Internet-based jurisdiction, while other courts have altogether rejected the notion that the Internet necessitates its own legal analysis.

This paper argues that a separate legal doctrine for Internet-based personal jurisdiction is unnecessary. Traditional personal jurisdiction analysis is flexible enough to accommodate changes in technology and Internet-based activities can be analyzed under these existing requirements. Witnessing the courts spin their wheels while trying to come to a consensus on a new legal doctrine is proof that a specific test for Internet-based personal jurisdiction is inappropriate and gratuitous.

II. Traditional Personal Jurisdiction Analysis

Personal jurisdiction, or jurisdiction *in personam*, is the power of a court to exercise authority over a particular individual.⁴ There are two types of personal jurisdiction: general and specific. “General jurisdiction exists when the lawsuit is not directly based on the defendant’s

⁴ Jurisdiction. *Black’s Law Dictionary* (8th ed. 2004).

contacts with the forum state, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state.”⁵ For example, an individual who resides in Georgia is subject to general jurisdiction in Georgia by virtue of his being a citizen of that state. In contrast, specific jurisdiction exists when the lawsuit “arises out of” or is “directly related to” defendant’s contacts with the state.⁶ For example, an individual who engages in tortious activity in Georgia is subject to specific jurisdiction in Georgia by virtue of having committed the tortious act in Georgia, regardless of where he may reside.

Personal jurisdiction was originally based on geographic boundaries. The U.S. Supreme Court first spoke on this issue in 1878 in *Pennoyer v. Neff*, saying the “authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed ... an illegitimate assumption of power.”⁷ In other words, a court could only exercise personal jurisdiction over an individual if s/he (i) were a resident of the state, (ii) owned property in the state, (iii) were served a summons while in that state, or (iv) appeared in court. The U.S. Supreme Court subsequently overruled *Pennoyer* nearly one hundred years later, instructing that the “standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*.”⁸

International Shoe was the 1945 landmark decision by the U.S. Supreme Court that set forth the test for personal jurisdiction still in use today. In that case, the Court stated that for a defendant to be subjected to personal jurisdiction in a given forum state, he must “have certain minimum contacts with it such that the maintenance of the suit does not offend traditional

⁵ *United Elec. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088 (1st Cir. 1992).

⁶ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

⁷ *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878).

⁸ *Shaffer v. Heitner*, 433 U.S. 186, 207, 211 (1977).

notions of fair play and substantial justice.”⁹ *International Shoe* has been cited in over 19,000 subsequent court opinions, and the “minimum contacts” test has been specifically mentioned in over 10,000 cases.¹⁰ However, the difficulty in determining what level of contact satisfies the “minimum contacts” test required further expansion of the personal jurisdiction analysis.

In *Calder v. Jones*, nearly forty years after *International Shoe*, the U.S. Supreme Court elaborated that when applying the “minimum contacts” test, courts should look at whether the defendant has expressly aimed or directed his conduct toward the forum state.¹¹ Under what became known as the “*Calder* effects test,” if a defendant has aimed his conduct towards the forum state, that defendant should “reasonably anticipate being hauled into court there.”¹² Several years later in *Asahi Metal Industry Co. v. Superior Court*, the Supreme Court specified that personal jurisdiction should be limited to cases in which the defendant “purposely avails” himself in the forum; that is, “whether the defendant *purposefully* established ‘minimum contacts’ in the forum State.”¹³

Thus, the final test in use today for the exercise of personal jurisdiction over an out-of-state defendant is that s/he must have (i) certain minimum contacts with the forum, (ii) those contacts must have been purposeful, and (iii) those contacts were directed or aimed at the forum. While it may seem obvious, some courts add a fourth prong requiring that the exercise of personal jurisdiction be reasonable.¹⁴

This history demonstrates one clear purpose for the traditional personal jurisdiction doctrine: to establish a “degree of predictability to the legal system that allows potential

⁹ *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

¹⁰ Data from LexisNexis Shepardize[®], accurate as of February 26, 2009.

¹¹ *Calder v. Jones*, 465 U.S. 783, 788 (1984).

¹² *Id.* at 790, quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

¹³ *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 109-12 (1987) (emphasis added).

¹⁴ *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (2002) (explaining that the potential cause of action must be “cognizable in the State’s courts.”).

defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”¹⁵ Enter the Internet.

III. Internet-Based Personal Jurisdiction

The Internet has created a new challenge when it comes to personal jurisdiction. Since the Internet is a global forum where information is instantaneously published and business transactions occur between different states, courts have struggled to apply traditional personal jurisdiction analysis to Internet activity. Outwardly, every website has some “minimum contact” with every computer that has access to the Internet. It is because of this instant, worldwide accessibility that courts continue to wrestle with Internet-based personal jurisdiction. Unfortunately, whatever the reason, courts have done nothing more than muddy the waters.

Many early district court decisions held that personal jurisdiction existed where a defendant used an interactive web site and did not purposely avoid the forum state.¹⁶ One of the broadest readings of minimum contacts over the Internet occurred in a 1996 opinion by the United States District Court for the District of Connecticut.¹⁷ In *Inset Systems*, the court exercised personal jurisdiction rationalizing that the Internet is “designed to communicate with people and their businesses in every state ... [and] once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user.” The *Inset* rationale has received negative treatment because it argues in favor of nationwide Internet-based jurisdiction without an explicit showing of a defendant’s activities in the forum state.

The U.S. District Court for the Western District of Pennsylvania promulgated the first specialized test for Internet-based personal jurisdiction in 1997, a test that was quickly adopted

¹⁵ *World-Wide Volkswagen* at 297.

¹⁶ *Search Force v. Dataforce Int’l*, 112 F. Supp. 2d. 771, 776 (S.D. Ind. 2000).

¹⁷ *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996).

by courts across the country.¹⁸ However, what became known as the “*Zippo* sliding scale” may not be the all-encompassing resolution to the issue it was first thought to be. Some courts have held that too rigid an adherence to the *Zippo* sliding scale may lead to erroneous results; for example, merely because a website falls into one category on a sliding scale does not necessarily mean that jurisdiction should be exercised.

A. The *Zippo* Sliding Scale

Zippo Manufacturing was a Pennsylvania corporation that manufactured “*Zippo*” lighters. *Zippo* Dot Com was a California corporation that owned the exclusive right to use the domain names “*zippo.com*,” “*zippo.net*,” and “*zippone.com*.” The basis of *Zippo* Manufacturing’s trademark claim was *Zippo* Dot Com’s use of the word “*Zippo*” in its domain names.¹⁹

In *Zippo*, the Pennsylvania-based court recognized that although the Internet had a worldwide presence, the development of Internet law with respect to personal jurisdiction was “in its infant stages” and that the “cases are scant.”²⁰ Having found that prior case law and legal resources lacked sufficient guidance,²¹ the *Zippo* court decided to create the first test for Internet-based jurisdiction. The court rationalized that the key element in this analysis was the “nature and quality of commercial activity that an entity conducts over the Internet.”²² To analyze commercial activity over the Internet, the *Zippo* court defined three types of websites classified on a sliding scale of commercial activity.

¹⁸ *Zippo Mfg. Co. v. Zippo DOT Com*, 952 F. Supp. 1119 (W.D. Pa. 1997).

¹⁹ The *zippo.com* domain is currently registered to *Zippo* Manufacturing Company.

²⁰ *Zippo* at 1123.

²¹ See, generally, Robert A. Bourque and Kerry L. Konrad, *Avoiding Jurisdiction Based on Internet Web Site*, New York Law Journal (Dec. 10, 1996); David Bender, *Emerging Personal Jurisdiction Issues on the Internet*, 453 PLI/Pat 7 (1996); Comment, Richard S. Zembek, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 Alb. L.J. Sci. & Tech. 339 (1996).

²² *Zippo* at 1123.

The first type of website, at one end of the scale, is one through which the defendant “clearly does business over the Internet.”²³ Examples of these types of websites are ones through which the defendant could enter into contracts or business transactions with residents of the foreign jurisdiction. These websites “involve the knowing and repeated transmission of computer files over the Internet [and in those cases] personal jurisdiction is proper.”²⁴

The second type of website, at the other end of the scale, is one through which the defendant “has simply posted information on an Internet website which is accessible to users in foreign jurisdictions.”²⁵ These “passive websites” do little more than make information available to interested parties and are “not grounds for the exercise of personal jurisdiction.”²⁶

The third type of website, in the middle of the scale, is one through which a user simply exchanges information with a host computer. In these middle-ground cases, “the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”²⁷ Unfortunately, the court failed to recognize that it is these middle-ground cases that are most often at issue in Internet jurisdiction disputes and this is where the law was in need of clarification. Through this failure, the court did little more than announce two obvious factors any competent court was likely to already have thought of when evaluating a website: the level of interactivity and commercial nature of its information.

The *Zippo* court exercised personal jurisdiction in that case based on (i) Plaintiff being a resident corporation of Pennsylvania, (ii) giving weight to Plaintiff’s choice to seek relief in Pennsylvania, and (iii) the cause of action arising out of Zippo Dot Com’s forum-related

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 1124.

²⁷ *Id.*

conduct, including Zippo Dot Com's contracts with Pennsylvania residents, alleged trademark dilution occurring in Pennsylvania, and Zippo Dot Com's choice to conduct business and pursue profits in Pennsylvania. Ironically, none of the court's bases of personal jurisdiction were Internet related.

Twelve years having passed since *Zippo*, some courts are realizing that the *Zippo* sliding scale may no longer be the ideal way to determine Internet jurisdiction. More importantly, before the courts become exhausted by attempting to keep pace with technology, it must be determined whether the Internet necessitates a separate test for personal jurisdiction at all.

1. Adoption of *Zippo*

Following *Inset Systems* and *Zippo*, all but four Circuit Courts of Appeal have addressed Internet activity as a basis for asserting personal jurisdiction. Of those courts, the Second and District of Columbia Circuits addressed the issue only within the confines of state long-arm statutes,²⁸ and the Sixth Circuit case was decided prior to *Zippo* but it employed a similar analysis.²⁹ Only the Fourth, Fifth, and Tenth Circuits have relied upon the *Zippo* sliding scale to determine the propriety of exercising jurisdiction based on Internet activity.³⁰

2. Rejection of *Zippo*

Several courts have explicitly rejected the rationale in *Zippo*, and raised the larger issue of whether a specific test for Internet-based jurisdiction is even necessary. The United States District Court for the Eastern District of Virginia compared *Zippo* to *Inset Systems* and chose to follow the interpretation present in *Inset Systems*; specifically, that a continuous website

²⁸ See *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 29 (2d Cir. 1997); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000).

²⁹ *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996) (finding personal jurisdiction where the defendant not only engaged in the nationwide marketing of his software through a server located in the forum state, but also because the defendant had entered into a contract with that server which was governed by the forum's law).

³⁰ See *ALS Scan* at 711; *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 337 (5th Cir. 1999); *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244, 1248 (10th Cir. 2000).

constituted the purposeful conducting of business in the state.³¹ In *Telco Communs. v. An Apple a Day, et al.*, Defendants’ advertisements on the Internet were accessible to Virginia residents twenty-four hours a day, and if a resident “saw their press release and called the Defendants, Defendants would not have refused the call.” Therefore, the court held that “posting a Web site advertisement or solicitation constitutes a persistent course of conduct, and [advertisements] rise to the level of regularly doing or soliciting business.”³²

The Court of Appeals for the Seventh Circuit had not decided an Internet-based personal jurisdiction case until 2004. In *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, the court recognized that several district courts in that circuit had already chosen to follow *Zippo*. However, this court decided to change the circuit’s direction:

First, it is not clear why a website’s level of interactivity should be determinative on the issue of personal jurisdiction. As even courts adopting the *Zippo* test have recognized, a court cannot determine whether personal jurisdiction is appropriate simply by deciding whether a website is “passive” or “interactive” (assuming that websites can be readily classified into one category or the other) . . . Thus, a rigid adherence to the *Zippo* test is likely to lead to erroneous results. Second, in *Zippo*, the court did not explain under what authority it was adopting a specialized test for the internet or even why such a test was necessary.³³

Recently, the Illinois Court of Appeals agreed with the Seventh Circuit saying that the level of interactivity of a website is irrelevant to a jurisdictional analysis. The court explained that “[a]n ad on the Internet is no different than an ad in any other medium . . . It is mere advertisement or solicitation of business. Illinois courts have long held that a mere advertisement or solicitation is not enough to sustain personal jurisdiction in Illinois.”³⁴

The Maryland Court of Appeals explained that “[i]rrespective of the sliding scale delineated in *Zippo*, the question of general jurisdiction is not difficult to resolve. Though the

³¹ 977 F. Supp. 404, 406 (E.D. Va. 1997).

³² *Id.*

³³ *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004).

³⁴ *Howard v. Mo. Bone & Joint Ctr., Inc.*, 373 Ill. App. 3d. 738 (2007).

maintenance of a website is, conceivably, a continuous presence everywhere, the existence of a website alone is not sufficient to establish general jurisdiction in Maryland ...” The court held that in addition to presenting evidence merely of defendant’s website, a plaintiff must also prove “substantial, continuous, systematic contacts with Maryland.”³⁵

The Ninth Circuit had previously chosen to follow *Zippo*, but in 2008 that circuit chose to create a new three part test for establishing minimum contacts, requiring (1) purposeful direction of activities toward the forum, (2) a claim arising out of or related to defendant’s forum related activities, and (3) reasonableness, fair-play, and substantial justice.³⁶

The Indiana Court of Appeals joined the debate in 2009, noting that courts “appear to be applying a modified *Zippo* analysis, aimed not at determining the interactivity or passivity of the ... internet site itself, but instead seeking to distinguish between the purposeful activity and the impressions created by the activity and representations of the individual user ...”³⁷

B. *ALS Scan* Test

The Fourth Circuit took a different approach in *ALS Scan v. Digital Serv. Consultants* by modifying the *Zippo* test to create a new test of its own:

[A] State may ... 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.³⁸

The court in *ALS Scan* affirmed the district court’s order dismissing the complaint for lack of personal jurisdiction, explaining that even though the defendant maintained a website on the

³⁵ *Beyond Sys. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 25 (Md. 2005).

³⁶ *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. Cal. 2008).

³⁷ *Attaway v. Omega*, 903 N.E.2d 73, 78 (Ind. Ct. App. 2009).

³⁸ *ALS Scan* at 714.

Internet, it had “engaged in no activity in Maryland, and its only contacts with the State occur when persons in Maryland access [defendant]’s website.”³⁹

In *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, the Fourth Circuit applied the *ALS Scan* principles.⁴⁰ The court chose not to exercise personal jurisdiction over the defendant reasoning that the website at issue was “semi-interactive” and was non-commercial in nature.⁴¹ Moreover, the court emphasized that the injury ultimately must be accompanied by a defendant’s own purposeful actions having more than a minimum impact in order for jurisdiction to be asserted.

Thus, it is the level of Internet activity and whether that activity is commercial in nature, not where a website falls on a sliding scale, which will have a decided impact on whether the Internet activity in question could be the basis for personal jurisdiction.⁴²

The Maryland Court of Appeals determined that the *Zippo* sliding scale is “not particularly well-suited for use in the personal jurisdiction inquiry because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction.”⁴³ The U.S. Court for the District of Rhode Island agreed, because “even if the ... Defendants maintain websites which sell products in every state, an exercise of general jurisdiction based solely on an interactive website would subject many companies and individuals to suit in essentially any court, which is untenable.”⁴⁴ These courts routinely hold that “something more” is needed in addition to the Internet activity, for the exercise of personal jurisdiction to comport with the Due

³⁹ *Id.* at 715.

⁴⁰ *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390 (4th Cir. 2003).

⁴¹ *Id.* at 400.

⁴² *Mkt. Am. v. Optihealth Prods.*, 2008 U.S. Dist. LEXIS 95337, 11-15 (M.D.N.C. Nov. 21, 2008).

⁴³ *Beyond Sys.* at 25 (2005) (*quoting Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002)).

⁴⁴ *Sostre v. Leslie*, 2008 U.S. Dist. LEXIS 10015 (D.R.I. Jan. 4, 2008) (*quoting Mullally v. Jones*, 2007 U.S. Dist. LEXIS 15982 (D. Nev. February 28, 2007)).

Process Clause. This “something more” is typically described as “evidence ... that the website was systematically and continuously aimed at the forum,”⁴⁵ which is an element already steeped in traditional personal jurisdiction analysis. The Fourth Circuit used a newspaper’s website to illustrate an example:

Thus, the fact that a newspaper’s websites could be accessed anywhere, does not by itself demonstrate that the newspaper is intentionally directing its website content to a particular state’s audience. Something more than posting and accessibility is needed to indicate that the newspaper purposefully directed its activity in a substantial way to the forum state. The newspaper must, through the Internet postings, manifest an intent to target and focus on a particular state’s readers.⁴⁶

Clearly, as the courts have attempted to move on from *Zippo*, they have done little more than create inconsistency across the nation and maintain the personal jurisdiction doctrine as void of any predictability.

IV. Arguments In Favor of Internet-Based Jurisdiction

The complex nature of Internet has led to a reevaluation of the long established traditional personal jurisdiction analysis. Two ubiquitous arguments in support of the establishment of a separate analysis for Internet-based activities are that (i) unlike the traditional analysis, the Internet lacks physical geographic boundaries on which to base jurisdiction, and (ii) traditional analysis cannot accommodate the complex technological issues surrounding the Internet.

A. The Internet Lacks Physical Geographic Boundaries

“Law, defined as a thoughtful group conversation about core values, will persist. But it will not, could not, and should not be the same law as that applicable to physical, geographically-

⁴⁵ *Id.*

⁴⁶ *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. Va. 2002).

defined territories.”⁴⁷ The primary argument for the creation of Internet-based jurisdiction is that the system in which our nation’s laws exist is largely based on geographically defined physical borders, and that such a legal system cannot be applied to a borderless, electronic territory lacking any physical geographic boundaries. Jurisdiction has been based on physical geographic boundaries for hundreds of years; when a person crosses the border of one territory and enters another, that person becomes aware that they are subject to the laws of that second territory. The argument continues that the Internet “is indifferent to the physical location of those [computers], and there is no necessary connection between an Internet address and a physical jurisdiction.”⁴⁸

Some argue that the attempt to exercise jurisdiction over Internet activities based on geographically defined physical borders is futile, because events on the Internet occur in multiple jurisdictions in the same moment. Therefore, no jurisdiction has any more compelling claim than any other to subject those events exclusively to its laws.⁴⁹ “The rise of an electronic medium that disregards geographical boundaries throws the law into disarray by creating entirely new phenomena that need to become the subject of clear legal rules but that cannot be governed, satisfactorily, by any current territorially based sovereign.”⁵⁰

In 2007, the Court of Appeals of California (1st Dist.) had to determine whether to exercise jurisdiction over a defendant based on criminal activity over the Internet. While the court was “[m]indful of the dynamic relationship between law and technology, some maintain that the modern development of the Internet represents just the type of technological change that

⁴⁷ Johnson, Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1402 (1996).

⁴⁸ *Id.* at 1371.

⁴⁹ *Id.* at 1376.

⁵⁰ *Id.* at 1375.

calls for the doctrinal modification ... of constitutional interpretation in general and the law of personal jurisdiction in particular.”⁵¹

The *Hageseth* court decided that it was “jurisdictionally immaterial that Petitioner committed the charged offense in cyberspace.”⁵² The court recognized the “extent to which [the Internet] undermines the role of territorial boundaries ... [and] in providing notice that the crossing of a physical boundary may subject one to new rules ...”⁵³ The California Court of Appeal was also aware that “governmental efforts to map local regulation and physical boundaries into Cyberspace [were] sure to prove quixotic and the Internet must be therefore left alone to develop its own effective legal institutions.”⁵⁴

B. Technology-Based Arguments

Harvard Professor Lawrence Lessig distinguished an Internet customer experience from a real world customer experience. When a consumer enters a brick and mortar store they can, for the most part, remain anonymous; even if an item is purchased, at most the store would know the customer’s name and credit card number. In contrast, Lessig writes:

“when you enter a store in cyberspace, the store can record who you are; click monitors ...track where you browse, how long you view a particular page; an ‘employee’ can follow you around, and when you make a purchase, it can record who you are and from where you came. Data is collected, but without your knowledge.”⁵⁵

The theory is that the Internet is so technologically unique that existing personal jurisdiction analysis cannot accommodate each nuance. Under this theory, courts should use a separate

⁵¹ *Hageseth v. Superior Court*, 150 Cal. App. 4th 1399, 1420-1421 (Cal. App. 1st Dist. 2007) (quoting Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 *Jurimetrics J.* 575-77 (1998)).

⁵² *Hageseth* at 1421.

⁵³ *Id.*

⁵⁴ *Id.* (quoting Johnson & Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 *Stan. L.Rev.* 1367, 1372 (1996)).

⁵⁵ Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 *Harv. L. Rev.* 501, 505 (1999).

analysis to determine whether to exercise personal jurisdiction over Internet-based causes of action. The Second Circuit analogized that “attempting to apply established trademark law in the fast-developing world of the Internet is somewhat like trying to board a moving bus.”⁵⁶

V. Problems with Internet-Based Personal Jurisdiction

The arguments against the use of Internet-based personal jurisdiction are growing as the courts scramble to catch up with technology. Some argue that existing personal jurisdiction analysis was intentionally drafted to be flexible enough to accommodate changes in technology. One of the most popular arguments, a philosophical one, is that cyberspace will always be rooted by computers in a physical location operated by individual users in a physical location.

A. Cyberspace Does Not Exist Separate from the Real World

“Imagine a school without books, pens, pencils or paper. Imagine that school with children that can read and write, but with teachers who cannot, and you have a metaphor of the information age in which we live.”⁵⁷ A metaphor is a figure of speech in which a word or phrase is used in place of another to suggest an analogy between two objects.⁵⁸ Because the Internet is a relatively new concept, it has been the subject of myriad metaphors; metaphors help us explain abstract and unfamiliar concepts by using familiar ones. The Internet is most commonly referred to as “the web” (representing the “web” of interconnected computers), but it is also referred to as an ocean (*e.g.*, ‘surfing the web’), as a road (*e.g.*, ‘Internet traffic’), as a library (*e.g.*, ‘browsing a website’), as a physical location (*e.g.*, ‘visiting a site’), and as a book (*e.g.*, a ‘webpage’).⁵⁹ The

⁵⁶ *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 (1997).

⁵⁷ Cochrane, Peter. In “*IT Literate or Retired?*” Retrieved April 29, 2009 from Sample Titles & Abstracts: <http://www.cochrane.org.uk/samples-titles-and-abstracts.php>

⁵⁸ metaphor. (2009). In *Merriam-Webster Online Dictionary*. Retrieved April 29, 2009, from <http://www.merriam-webster.com/dictionary/metaphor>.

⁵⁹ Saffer, Daniel. “*The Role of Metaphor in Interaction Design*,” Carnegie Mellon University Thesis, May 2005, available at: http://www.odannyboy.com/portfolio/thesis/saffer_thesis_paper.pdf.

term “cyberspace” was coined by William Gibson in his 1984 novel “Neuromancer,” in which he describes a series of interconnected computers.⁶⁰ In 1992, former Vice President Al Gore, Jr. was the first to refer to the Internet as the “information superhighway.”⁶¹

The dilemma with such rampant use of these metaphors for the Internet is that people may easily lose sight of what the Internet really is: a series of interconnected computer networks located in various physical points around the globe. These points do not exist along a theoretical superhighway or in an abstract world like cyberspace; rather, they exist on real property within physical geographic boundaries, are accessed and operated by real human users, and “thus they affect real things. Cyberspace is not its own place; it does not yet independently exist separate from the natural world.”⁶²

In 1999, the U.S. District Court for the Eastern District of Pennsylvania weighed in on the issue of personal jurisdiction based on Internet activity, while also fueling the metaphorical fire:

“... the construction of the information superhighway does not warrant a departure from the well-worn path of traditional personal jurisdiction analysis trod by the Supreme Court and innumerable other federal courts ... [A] web site alone does not minimum contacts make.”⁶³

While these metaphors assist us in communicating about the Internet, they are “not only unhelpful but can often be quite harmful.”⁶⁴ If we continue to use symbolic speech to represent the Internet, we will create a numbing effect where people will no longer see the Internet as separate from the real world. This effect is already rippling through the federal and state court

⁶⁰ Cyberspace. (2009). In *Encyclopedia Britannica*. Retrieved April 20, 2009, from Encyclopedia Britannica Online: <http://www.britannica.com/EBchecked/topic/147819/cyberspace>.

⁶¹ *Id.*

⁶² Carlos J.R. Salvado, *An Effective Personal Jurisdiction Doctrine for the Internet*, 12 U. Balt. Intell. Prop. L.J. 75, 76 (2003) (suggesting a new personal jurisdiction analysis for Internet-based activity by implementing a combination of the “Zippo sliding scale” and the “Caldor effects test.”).

⁶³ *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 543 (1999).

⁶⁴ Cooper, Alan. “The Myth of Metaphor,” *Visual Basic Programmer’s Journal*, July 1995.

systems, as judges grope for ways to analyze the Internet. The cumulative effect, however, is that by thinking about the Internet as an abstract idea, courts lose sight of the Internet as a system of computers subject to the same laws and legal analysis in existence for hundreds of years.

If the Internet truly had a separate existence detached from the real world, a method would have to be created for determining jurisdiction where an offense was not committed in a particular state. The federal laws of criminal procedure offer one possibility to handle the issue: “The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought.”⁶⁵ However, such a statute for Internet-based jurisdiction is moot because existing legal doctrine is fully capable of handling Internet issues.

B. Traditional Personal Jurisdiction Analysis is Flexible

“The Supreme Court has never held that courts should apply different standards for personal jurisdiction depending on the type of contact involved. To the contrary, the Court long ago rejected the notion that personal jurisdiction might turn on mechanical tests. The purpose of the “minimum contacts” test set forth in *International Shoe* was to create a standard flexible enough that specialized tests were not needed.”⁶⁶ Other courts have rejected *Zippo* while noting that traditional principles of due process are sufficient to decide personal jurisdiction questions in the internet context.⁶⁷

⁶⁵ 18 U.S.C. § 3238 – Offenses not committed in any district.

⁶⁶ *Hy Cite* at 1160-61 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (quoting *International Shoe* at 319)).

⁶⁷ *Hy Cite* at 1160-61. See, e.g., *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 750 (2000) (“The need for a special Internet-focused test for ‘minimum contacts’ has yet to be established. It seems to this court that the ultimate question can still as readily be answered by determining whether the defendant did, or did not, have sufficient ‘minimum contacts’ in the forum state.”).

Over fifty years ago, the United State Supreme Court noted that federal courts should be sensitive to changes in technology, communication, and transportation when conducting a personal jurisdiction analysis.⁶⁸ “Allowing computer interaction via the web to supply sufficient [minimum contacts] to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists.”⁶⁹

The U.S. District Court for the District of Oregon in *Millennium Enterprises* conceded that the Internet is the epitome of a recent technological development that tests the traditional personal jurisdiction standard because it is not restricted by physical territorial boundaries.⁷⁰ “Unlike newspaper, mailing, radio, television and other media containing advertisements and solicitations, most Internet advertisements and solicitations are not directed at a specific geographic areas or markets; to the contrary, advertising on the Internet targets no one in particular and everyone in particular in any given geographic location.”⁷¹

The Fourth Circuit has noted that “while technological advances may alter the landscape of personal jurisdiction, it nonetheless has remained clear that technology cannot eviscerate the constitutional limits on a state’s power to exercise jurisdiction over a defendant.”⁷²

The Appellate Court of Illinois recognized that “the Internet does not pose unique jurisdictional challenges. People have been inflicting injury on each other from afar for a long time. Although the Internet may have increased the quantity of these occurrences, it has not

⁶⁸ *Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958) (“These constant changes [in technology] demand a flexible constitutional standard that can evolve alongside society. ...it is a mistake to assume that [progress in technology] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.”)

⁶⁹ *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 910 (1999).

⁷⁰ *Id.* at 923.

⁷¹ *Id.* at 914.

⁷² *Estate of Stephen Bank v. Swiss Valley Farms, Co.*, 286 F. Supp. 2d 514, 518-519 (D. Md. 2003) (*quoting ALS Scan* at 711).

created problems that are qualitatively more difficult.”⁷³ In other words, legal issues should not be subjected to a different set of legal principles simply because they arose via the Internet.

In choosing to exercise jurisdiction based on Internet activity, the court in *Hageseth* advised the use of judicial caution “in accepting technology-based arguments against the assertion of jurisdiction, as that would eliminate incentives for technology developers to innovate in ways that would facilitate law enforcement and support public values.”⁷⁴ That court chose to exercise personal jurisdiction over the defendant using the traditional analysis.

The *Zippo* court itself stated: “Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper. Different results should not be reached simply because business is conducted over the Internet.”⁷⁵ Depending on the facts presented, website interactivity may have some bearing on the jurisdictional analysis, but it does not control the outcome.⁷⁶ “It is the conduct of the defendants, rather than the medium utilized by them, to which the parameters of specific jurisdiction apply.”⁷⁷

Although the *Zippo* sliding scale provides a useful guide to how courts have approached such claims in the recent past, it does not amount to a separate framework for analyzing internet-based jurisdiction, and traditional statutory and constitutional principles remain the touchstone of the inquiry.⁷⁸

⁷³ *Howard* at 744 (quoting A. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 Nw. U. L. Rev. 411 (2004)).

⁷⁴ *Id.* at 1423-24.

⁷⁵ *Zippo* at 1124.

⁷⁶ *Shamsuddin v. Vitamin Research Prods.*, 346 F. Supp. 2d 804, 811 (D. Md. 2004).

⁷⁷ *Millenium Enterprises, Inc., v. Millenium Music, LP*, 33 F. Supp. 2d 907, 921 (D. Or. 1999).

⁷⁸ *Freeplay Music, Inc. v. Cox Radio, Inc.*, 2005 U.S. Dist. LEXIS 12397, 19-21 (S.D.N.Y. June 22, 2005) (citing *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 750 (E.D. Mich. 2000) (“The ultimate question can still as readily be answered by determining whether the defendant did, or did not, have sufficient ‘minimum contacts’ in the forum state.”)).

C. Inconsistent Internet-Based Personal Jurisdiction Tests

If you are the owner of a website, current Internet-based personal jurisdiction analysis offers extremely little predictability. Depending on which state your website appears in and the location of users accessing your website, among other factors, you will be subjected to different tests and receive different outcomes. The Fourth and Ninth Circuits have individual tests for Internet-based personal jurisdiction, as do the states of Maryland and Indiana to name a few. This type of inconsistency does not satisfy the goal of traditional personal jurisdiction analysis, which is the predictability of the legal system.

D. The Law of the Horse Argument

The threshold question when the Internet and the law intersect is whether a separate body of law is necessary to deal with the complicated legal issues surrounding the Internet. When asked to discuss “Property in Cyberspace,” Judge Frank H. Easterbrook of the United States Court of Appeals for the Seventh Circuit questioned whether that was merely “The Law of the Horse.”⁷⁹

Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into [one] course on “The Law of the Horse” is doomed to be shallow and to miss unifying principles. Teaching 100 percent of the cases on people kicked by horses will not convey the law of torts very well. Far better for most students ... to take courses in property, torts, commercial transactions, and the like ... Only by putting the law of the horse in the context of broader rules about commercial endeavors could one really understand the law about horses.”⁸⁰

Easterbrook argued that the unhurried evolution of the law is incapable of keeping pace with the rapid expansion of the Internet. His theory is that the best way to learn the law applicable to specialized endeavors is to study general rules, and that most cyberspace issues are easily

⁷⁹ Easterbrook, *Cyberspace and the Law of the Horse*, U. Chi. Legal F. 207 (1996).

⁸⁰ *Id.*

classified into existing legal principles. Judge Easterbrook advised that we should not “struggle to match an imperfect legal system to an evolving world that we understand poorly. Let us instead do what is essential to permit the participants in this evolving world to make their own decisions.”⁸¹ Under this theory, we should use traditional personal jurisdiction analysis and apply it to the Internet and other emerging technology as necessary.

E. Lack of Predictability

In 2000, the D.C. Circuit said that it did “not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction. The Due Process Clause exists, in part, to give a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”⁸²

In 2004, the U.S. District Court for the Western District of Wisconsin declined to adopt the *Zippo* sliding scale. The court acknowledged that a “website’s level of interactivity may be one component of a determination whether a defendant has availed itself purposefully of the benefits or privileges of the forum state. ... However, the ultimate question remains the same, that is, whether the defendant’s contacts with the state are of such a quality and nature such that it could reasonably expect to be haled into the courts of the forum state.”⁸³

Similarly, in October 2008, the U.S. District Court for the Northern District of West Virginia stated that in light of the *ALS Scan* test for Internet-based personal jurisdiction “the controlling issue is whether, based on their alleged Internet activity, [defendants] could have reasonably anticipated being haled into court in West Virginia. An individual will only be

⁸¹ *Id.*

⁸² *GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000).

⁸³ *Hy Cite* at 1161.

subject to personal jurisdiction pursuant to the test articulated in *ALS Scan* if there is manifest evidence that he both intended to enter a state and also actually did so.”⁸⁴

One of the unique challenges presented by the Internet is that compliance with local laws is rarely sufficient to assure an online business that it has limited its exposure to legal risk. Since websites are instantly accessible worldwide, the prospect that a website owner might be hauled into a courtroom in a far-off jurisdiction is much more than a mere academic exercise; it is a very real possibility.

In 1998 the U.S. District Court for the District of Maryland held that to “subject [a defendant] to general personal jurisdiction based on its Internet presence would mean that it would presumably be subject to general personal jurisdiction in every jurisdiction in the country, thereby allowing a plaintiff to sue it for any matter anywhere in the nation. This the constitution does not permit.”⁸⁵

The U.S. District Court for the District of Connecticut decided that if jurisdiction were to be based upon a defendant’s mere presence on the Internet, “this would lead to a defendant’s being subjected to jurisdiction on a worldwide basis and would eviscerate the personal jurisdiction requirements as they currently exist.”⁸⁶

VI. Conclusion

Hundreds of law review and journal articles have discussed Internet-based personal jurisdiction and either analyzed *Zippo* and *ALS Scan*, or proposed a new rule for Internet-based

⁸⁴ *Williams v. Adver. Sex LLC*, 2008 U.S. Dist. LEXIS 77719 (N.D. W. Va. Oct. 3, 2008).

⁸⁵ *Atlantech Distrib. v. Credit Gen. Ins. Co.*, 30 F. Supp. 2d 534, 537 (D. Md. 1998).

⁸⁶ *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104, 115 (D. Conn. 1998) (citing *McDonough v. Fallon McElligott, Inc.*, 1996 U.S. Dist. LEXIS 15139, (S.D. Cal. 1996)).

personal jurisdiction.⁸⁷ This article recommends a return to traditional personal jurisdiction analysis and applying it to Internet activity.

The First Circuit uses a three-pronged test for the exercise of personal jurisdiction over out-of-state defendants. “First, the defendant must have sufficient *minimum contacts* with the state. For specific jurisdiction, the plaintiff’s claim must be related to the defendant’s contacts. For general jurisdiction, in which the cause of action may be unrelated to the defendant’s contacts, the defendant must have continuous and systematic contacts with the state. Second, for either type of jurisdiction, the defendant’s contacts with the state must be *purposeful*. And third, the exercise of jurisdiction must be *reasonable* under the circumstances.”⁸⁸

The Due Process clause of the U.S. Constitution protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful “contacts, ties, or relations.”⁸⁹ The Constitution prohibits the exercise of personal jurisdiction over a non-resident defendant unless his contact with the state is such that he has “fair warning” that he may be subject to suit there.⁹⁰ This “fair warning” requirement is satisfied if the defendant has “purposefully directed” his activities at residents of the forum,⁹¹ and the litigation results from alleged injuries that “arise out of or relate to” those activities.⁹² Once those factors are decided, a court “must consider whether the forum’s interest in [the] dispute and the plaintiff’s interest in obtaining relief are outweighed by the burden on the defendant of

⁸⁷ See, for example, Carlos J.R. Salvado, *An Effective Personal Jurisdiction Doctrine for the Internet*, 12 U. Balt. Intell. Prop. L.J. 75, 76 (2003).

⁸⁸ *Harlow v. Children’s Hosp.*, 432 F.3d 50, 57 (1st Cir. Me. 2005) (citing *United Elec. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992). (emphasis added).

⁸⁹ *International Shoe* at 319.

⁹⁰ *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment).

⁹¹ *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).

⁹² *Helicopteros* at 414.

having to defend himself in [that forum].”⁹³ These existing, traditional requirements for personal jurisdiction should be used for Internet-based causes of action.

As for Washington State resident Tabatha Marshall having to defend herself against a lawsuit in Florida, Plaintiff ISC maintains its argument that Marshall “should have known that her conduct would subject her to litigation in the court’s jurisdiction.” However, the court held that “[b]ased on the information presented, there is nothing to support that Marshall should reasonably anticipate being called before a Florida court to answer for her alleged conduct.” The court, like many joining the recent trend away from Internet-based personal jurisdiction, determined that “ISC failed to meet its burden of establishing sufficient minimum contacts, and that exercising personal jurisdiction over Marshall would not comport with the requirements of Due Process or the traditional notions of fair play and substantial justice.”⁹⁴

⁹³ *Licciardello v. Lovelady*, 544 F.3d 1280, 1284 (11th Cir. Fla. 2008).

⁹⁴ *Internet Solutions Corp.* at 5.