LOST IN THE VIRTUAL MALL: IS TRADITIONAL PERSONAL JURISDICTION ANALYSIS APPLICABLE TO E-COMMERCE CASES?

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I. INTRODUCTION

Assume Bob's Widgets makes deluxe widgets (everyone makes widgets in legal hypotheticals). Naturally, Bob's Widgets wants to reach as broad a customer base as possible. What will Bob's Widgets do? Odds are, Bob's Widgets will join the majority of the business world and set up a site on the World-Wide Web to advertise, or even sell, its products. Will this web site help Bob's Widgets make money? Assuming the widgets are the type most people want, absolutely. The Internet and, specifically, the World-Wide Web, is the place for businesses to be these days.

Currently, approximately 196 million people use the Internet worldwide, and commentators have predicted that that number will grow to more than 500 million by 2003.[1] At the outer limits, one author predicts that one billion people may be online by 2005.[2] One-third of Americans with access to the Web do some shopping online.[3] For the twelve-month period ending in June 1999, total e-commerce retail sales almost tripled, jumping from $2.7 billion to $7.9 billion.[4] That number has been predicted to reach anywhere between $80 billion[5] and $184 billion[6] within the next few years.

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1. *See The Dawn of E-Life*, NEWSWEEK, Sep. 20, 1999, at 40, 41. In the United States alone, 80 million people are currently connected to the Internet. *See id.* at 40.

2. *See* Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 926 (1998).

3. *See The Dawn of E-Life*, *supra* note 1, at 40–41.

4. *See* Rebecca Winters, *Tales from the E-Commerce Front*, TIME, Oct. 4, 1999, at 121.

5. *See id.* at 124 (predicting retail sales to reach $80 billion by 2003).

6. *See* Steven Levy, *Wired for the Bottom Line*, NEWSWEEK, Sep. 20, 1999, at 43, 43 (predicting retail sales to reach $184 billion by 2002).

Not surprisingly, businesses are eager to cash in on this enormous and rapidly growing consumer market. Virtually all of the major American companies, along with a sizable number of large international companies, have created web sites for their businesses.[7] According to one recent article, "concocting Internet business schemes [has become] the world's most desirable creative outlet, the contemporary successor to writing the Great American Novel."[8] Company leaders know that, whatever business they are in, they need to jump on the e-commerce bandwagon or get left behind by their competitors.[9]

E-commerce is a boon to retailers for more than just the enormous market potential it provides. The idea behind such online retailers as Amazon.com is to shed the costs of a physical store, allowing the companies to realize a profit margin far greater than what companies with physical stores can achieve.[10] Retailers also believe that e-commerce allows for better customer service because sellers can have direct contact with buyers over the Internet.[11] Therefore, more and more companies are moving online in one way or another. The effect of this business revolution is immense. E-commerce is already seen as playing a major part in economic factors such as low inflation and rapid growth and productivity, and yet the area is still in its infancy.[12]

The digital revolution affects more than just business—it has altered, and will continue to alter, issues that the legal community has taken for granted for decades. As the number of companies doing business online increases, the number of legal disputes based on those business contacts also will increase.[13] The courts deciding those cases must have personal jurisdiction over the parties involved in order to resolve the disputes.[14] However, the Internet does not lend itself to assertions of personal jurisdiction. The Internet allows people to communicate with others in every state and worldwide.[15] However, cyberspace is non-physical. So, how can any court assert jurisdiction over the parties to the transaction? Moreover, without the physical signposts relied upon for so long, can courts apply traditional personal jurisdiction analysis in such a way as to provide due process to the parties involved?

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7. *See* Mark Sableman, *Business on the Internet, Part I: Jurisdiction*, 53 J. MO. B. 137, 137 (1997).

8. *The Dawn of E-Life*, *supra* note 1, at 41.

9. *See id.* For example, Hewlett-Packard, Apple, and Bank of America have plans to create "Commerce Net," an Internet service that will allow users to bank and buy goods and services online. *See* Craig Peyton Gaumer, *The Minimum Cyber-Contacts Test: An Emerging Standard of Constitutional Personal Jurisdiction*, 85 ILL. B.J. 58, 60 (1997).

10. *See* Levy, *supra* note 6, at 44.

11. *See id.*

12. *See* George J. Church, *The Economy for the Future?*, TIME, Oct. 4, 1999, at 113, 114.

13. *See* David Thatch, *Personal Jurisdiction and the World-Wide Web: Bits (and Bytes) of Minimum Contacts*, 23 RUTGERS COMP. & TECH L.J. 143, 144 (1997).

14. *See* RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 25 (2d ed. 1997).

15. *See* Gaumer, *supra* note 9, at 59.

In an attempt to answer these questions, Part II of this Note explores traditional personal jurisdiction analysis as developed by the United States Supreme Court. Part III compares and contrasts various e-commerce cases in which personal jurisdiction issues have been raised. Finally, Part IV considers alternatives to traditional personal jurisdiction analysis and suggests the most reasonable alternative.

II. TRADITIONAL PERSONAL JURISDICTION ANALYSIS

In order for a court to consider a case, the court must have personal jurisdiction over the parties to the case.[16] The exercise of personal jurisdiction by a court is predicated on the concept that such exercise must comport with due process.[17] Determining whether due process requirements are met entails looking at a number of factors, including state long-arm statutes, contacts with the forum state, and the nature of the dispute itself.

A. State Long-Arm Statutes

In order for a state to assert personal jurisdiction over a non-resident defendant, the state must utilize a long-arm statute.[18] Long-arm statutes provide jurisdiction over non-residents based on acts by the non-resident within the state or acts by the non-resident that caused injury within the state.[19] Two types of state long-arm statutes exist. A state can extend personal jurisdiction to the maximum extent allowable under the Due Process Clause,[20] or the state can use a more limited long-arm statute.[21]

Courts' analyses as to whether personal jurisdiction is proper depend on the type of long-arm statute used. If the state has a limited long-arm statute, the court will first determine whether state law provides for the exercise of personal jurisdiction by the court over the given defendant and will then consider whether asserting personal jurisdiction comports with due process.[22] If the state uses a long-arm statute that extends personal jurisdiction to the maximum allowed by the Due Process Clause, the court will simply look to whether asserting personal jurisdiction comports with due process.[23] However, the personal jurisdiction analysis does not end with long-arm statutes.

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16. *See* FREER & PERDUE, *supra* note 14, at 25.
17. *See* Jason H. Eaton, Annotation, *Effect of Use, or Alleged Use, of Internet on Personal Jurisdiction in, or Venue of, Federal Court Case*, 155 A.L.R. FED. 535, 546 (1999).
18. *See id.*
19. *See id.*
20. U.S. CONST. amend. XIV, § 1.
21. *See id.*
22. *See id.*
23. *See id.* at 546–47.

B. General and Specific Personal Jurisdiction

Assuming the long-arm statute permits the assertion of jurisdiction, a court can exercise two types of personal jurisdiction over a party. Which type may be asserted depends on the contacts the party has had with the forum state. *Specific* personal jurisdiction may be asserted over non-resident parties in cases where the cause of action arises out of the non-resident's contacts with the forum state.[24] *General* personal jurisdiction may be asserted in cases where the cause of action does not arise out of the non-resident's forum contacts but where the non-resident has had other contacts with the forum state such that due process is not offended by assertion of personal jurisdiction.[25] Whether specific or general personal jurisdiction is asserted, the assertion must not offend "traditional notions of fair play and substantial justice."[26]

The determination of whether personal jurisdiction is fair depends on the type of personal jurisdiction asserted. In *Helicopteros Nacional de Colombia, S.A. v. Hall*[27] ("*Helicol*"), the United States Supreme Court stated the test for fair assertion of general personal jurisdiction.[28] The Court held that in order for a court to assert general personal jurisdiction over a non-resident defendant, the non-resident's contacts with the forum state must be "continuous and systematic."[29] Unilateral activity by another party, or purchases and occasional trips to the forum state by the defendant, were not enough to allow general personal jurisdiction.[30]

The test for specific jurisdiction has changed over the years. In 1877, the Court in *Pennoyer v. Neff*[31] held that a defendant had to be present in the forum state in order for the court to assert personal jurisdiction.[32] However, with the advent of more rapid and convenient travel, physical presence became less important. In *International Shoe Co. v. Washington*,[33] the Court held that assertion of personal jurisdiction required only that the non-resident "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[34] The Court stated that isolated activity in the forum state would not be enough to allow personal jurisdiction because the burden on the non-resident of defending the suit would be

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24. *See id.* at 547.

25. *See id.* The Supreme Court has never made a clear statement of what types of activity within the forum state will produce general jurisdiction; however, general jurisdiction has been found in cases where the defendant lived in the state or where a corporation had an office and employees in the state. *See* FREER & PERDUE, *supra* note 14, at 102–03.

26. Eaton, *supra* note 17, at 547–48 (citing International Shoe Co. v. Washington, 326 U.S. 310 (1945)).

27. 466 U.S. 408 (1983).

28. *See id.*

29. *Id.* at 416.

30. *See id.* at 417.

31. 95 U.S. 714 (1877).

32. *See id.* at 733.

33. 326 U.S. 310 (1945).

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

too great.[35] The Court then held that if the non-resident defendant had conducted sufficient activities in the forum state, had benefited from state laws, and had created obligations within the state, then due process would not be offended by the assertion of personal jurisdiction.[36]

The Court later refined the "minimum contacts" test in *World-Wide Volkswagen v. Woodson*.[37] The Court noted that the purposes of the minimum contacts test were to ensure that defendants would not be forced to litigate in inconvenient forums and that the states would not overuse their power to assert personal jurisdiction.[38] The Court stated that it was not enough for a defendant simply to be able to *foresee* that suit in the forum state was a possibility.[39] Rather, the defendant's connection with the forum state, along with the defendant's conduct, should be "such that he should reasonably anticipate being haled into court there."[40] Finally, in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*,[41] a plurality of the Supreme Court held that the defendant had to purposefully direct actions at the forum state.[42] The plurality also stated that merely placing a product into the stream of commerce was not purposeful direction.[43]

C. Technology, the Internet, and Personal Jurisdiction

Personal jurisdiction analysis has, to a certain extent, changed with the times. This change is demonstrated by the movement from the strict requirement of physical presence seen in *Pennoyer v. Neff*[44] to the more flexible minimum contacts rule of *International Shoe*.[45] The United States Supreme Court has also made an effort to incorporate changing technology in personal jurisdiction decisions. In *Hanson v. Denckla*,[46] the Court stated that "[a]s technological progress has increased the flow of commerce between the states, the need for jurisdiction over nonresidents has undergone a similar increase."[47] The Court pointed out that the rules for personal jurisdiction must become more flexible to accommodate changes in technology.[48]

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35. *See id.* at 317.
36. *See id.* at 319.
37. 444 U.S. 286 (1979).
38. *See id.* at 291–92.
39. *See id.* at 295.
40. *Id.* at 297.
41. 480 U.S. 102 (1986).
42. *See id.* at 112.
43. *See id.*
44. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877).
45. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
46. 357 U.S. 235 (1958) (holding that unilateral activity of a person who had a relationship with a nonresident defendant was not sufficient to produce personal jurisdiction over the nonresident in the forum state).
47. *Id.* at 250–51.
48. *See id.* at 251.

Nonetheless, as the Court made clear in *World-Wide Volkswagen*, state lines still must be considered in determining the existence of personal jurisdiction.[49] And it is here that the problem of the Internet arises. Traditional American personal jurisdiction analysis is firmly based on territory and geography.[50] Cyberspace, on the other hand, is a world without physical boundaries,[51] a world that has been described as a "barrier-free world marketplace."[52] Internet transactions are unlike any other kind of business transaction ever dealt with by the law. Transactions occur without either party ever technically leaving its own forum.[53] The business concepts of export and import, traveling, and sending and receiving, concepts that have been relied upon in the past for determining who went to what forum state, are altered beyond recognition when operating online.[54] Most troubling of all, an immense number of people who do business online have no idea of the physical location of the other parties to the transaction.[55]

These previously uncharted issues in personal jurisdiction may mean that parties to online transactions run the risk of being subject to inconsistent obligations throughout the United States and the world.[56] Some have suggested that cyberspace may make personal jurisdiction analysis, as it is presently understood, obsolete.[57] And yet courts *are* applying traditional personal jurisdiction analysis, with few or no alterations and with varying results, to e-commerce cases.

III. E-COMMERCE PERSONAL JURISDICTION CASES

The history of traditional personal jurisdiction analysis in e-commerce and Internet cases is short, with the earliest cases appearing only in the mid-1990s, but fascinating. In general, cases can be broken down into three types: cases

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49. *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 293 (1979).

50. *See* Andrew E. Costa, Comment, *Minimum Contacts in Cyberspace: A Taxonomy of the Case Law*, 35 HOUS. L. REV. 453, 456 (1998).

51. *See id.*

52. Gaumer, *supra* note 9, at 59.

53. *See* Thatch, *supra* note 13, at 155.

54. *See* Christopher S.W. Blake, *Destination Unknown: Does the Internet's Lack of Physical Situs Preclude State and Federal Attempts to Regulate It?*, 46 CLEV. ST. L. REV. 129, 135 (1998). David R. Johnson and David Post gave great insight into the problem of the Internet's lack of physicality, pointing out:

> Because events on the Net occur everywhere but nowhere in particular, are engaged in by online personae who are both 'real'...and 'intangible'...and concern 'things'...that are not necessarily separated from one another by any physical boundaries, no physical jurisdiction has a more compelling claim than any other to subject these events exclusively to its laws.

David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1376 (1996).

55. *See* Thatch, *supra* note 13, at 158.

56. *See* Costa, *supra* note 50, at 459.

57. *See* Thatch, *supra* note 13, at 152.

relating to online advertising alone, cases relating to online advertising plus some other contact (such as non-electronic sales within the forum state), and cases in which online sales occurred. In each category, courts have made varying decisions based on the application of traditional notions of personal jurisdiction.

A. Cases Finding Personal Jurisdiction

1. Online Advertising Alone

One of the earliest e-commerce personal jurisdiction cases was *Inset Systems, Inc. v. Instruction Set, Inc.*[58] Inset, a Connecticut software company, registered INSET as a federal trademark.[59] Instruction Set, a Massachusetts computer technology company, then registered "INSET.COM" as a domain name and "1-800-US-INSET" as a phone number.[60] Inset sued Instruction Set in federal court in Connecticut for trademark infringement.[61] Instruction Set did not have any employees or offices in Connecticut, nor did Instruction Set do any type of regular business in Connecticut.[62] Nonetheless, the court held that the assertion of personal jurisdiction in Connecticut was fair.[63]

The Connecticut court based its holding on traditional personal jurisdiction analysis. The court first held that jurisdiction was proper under Connecticut's long-arm statute because Instruction Set had continuously advertised over the Internet, which could be accessed from more than 10,000 computers in Connecticut at the time.[64] According to the court, such advertising was sufficiently repetitive to allow for use of the long-arm statute.[65] The court then looked to minimum contacts by Instruction Set in Connecticut and held that sufficient minimum contacts had, indeed, occurred.[66] According to the court, Instruction Set's Internet advertising and the toll-free number were directed "not only toward the state of Connecticut, but to all states."[67] That fact, along with the fact that such advertisements are permanently available online, provided the basis for the court's finding that Instruction Set had purposefully directed its activity toward Connecticut and so could have reasonably anticipated being haled into court there.[68]

At first glance, *Inset* seems to be a rather overzealous application of personal jurisdiction. However, the Connecticut court's decision does not stand alone. In 1997, the United States District Court for the Eastern District of Virginia

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58. 937 F. Supp. 161 (D. Conn. 1996).
59. *See id.* at 162–63.
60. *See id.* The Connecticut court capitalized the domain name in its opinion.
61. *See id.* at 162.
62. *See id.* at 162–63.
63. *See id.* at 162.
64. *See id.* at 164.
65. *See id.*
66. *See id.* at 165.
67. *Id.*
68. *See id.*

similarly decided *TELCO Communications v. An Apple a Day.*[69] Apple, a Missouri telemarketing corporation, claimed ownership of the service mark "DIAL & SAVE."[70] TELCO, a Virginia corporation, had a long-distance telephone-service subsidiary in Missouri, also called "Dial & Save."[71] Apple sued TELCO in Missouri for trademark infringement, and TELCO subsequently filed a defamation suit against Apple in Virginia based on two online press releases and some phone calls by Apple.[72]

The Virginia court decided to follow *Inset* in holding that online advertising was a "persistent course of conduct" that satisfied the Virginia long-arm statute, given that Virginia residents could access the Internet twenty-four hours a day.[73] Further, the court held that because the online service onto which Apple placed the press releases distributed those releases to Virginia corporations, including America Online, the cause of action for defamation had occurred in Virginia.[74] Therefore, the court stated, Apple's "activities were sufficient to serve as an analogue for physical presence," and Apple could reasonably anticipate being subject to personal jurisdiction in Virginia.[75]

Inset and *TELCO* are indeed outliers in the realm of e-commerce personal jurisdiction.[76] However, neither case has been overturned, and both have been cited in numerous other opinions considering personal jurisdiction based on online contacts.

2. Online Advertising Plus More

Despite the precedent set by *Inset* and *TELCO*, courts appear to be far more comfortable with finding personal jurisdiction when a passive advertising web site is combined with some form of traditional contact with the forum state, for example, sales within the state or the presence of a distributor within the state. This line of cases can be best illustrated by three recent opinions.

In 1997, a California district court decided *Rubbercraft Corp. of California v. Rubbercraft, Inc.*,[77] a case involving, among other claims, trademark

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69. 977 F. Supp. 404 (E.D. Va. 1997).

70. *See id.* at 405.

71. *See id.*

72. *See id.* The calls were made to a securities analyst in Maryland, and the press releases were placed online in Missouri "for distribution into Connecticut, New York, and New Jersey." *Id.* at 407.

73. *Id.* at 406–07

74. *See id.* at 407–08.

75. *Id.* at 408.

76. *Compare* cases discussed in Part III.B.1, *infra.*

77. No. CV 97-4070-WDK, 1997 WL 835442 (C.D. Cal. Dec. 17, 1997). Several unreported cases are discussed in this Note. While the precedential value of those cases is certainly less than that of reported cases, the unreported cases have been included to demonstrate the ways in which various courts have chosen to handle the dilemma of personal jurisdiction from online contacts.

dilution and unfair competition claims.[78] Rubbercraft CA and Rubbercraft OH both made custom rubber goods.[79] The companies had been aware of each other for many years; however, when Rubbercraft CA learned that Rubbercraft OH had transacted business with California residents, Rubbercraft CA filed suit.[80] Rubbercraft OH had advertised in national trade magazines, had a toll-free phone number, and maintained a web site.[81] Rubbercraft OH's sales to California residents were based on contacts initiated by the customers and accounted for less than .5% of its yearly sales.[82] Furthermore, Rubbercraft OH's web site had never led to any sales in California or elsewhere.[83]

First stating that general jurisdiction could not apply because of a lack of systematic activities in California, the court turned to specific jurisdiction.[84] The court held that because Rubbercraft OH sold to California residents, provided a toll-free phone number, and advertised both online and in trade magazines, it had purposefully availed itself of the benefits of doing business in California.[85] Next, the court looked to whether the controversy arose out of Rubbercraft OH's activities in California and held that Rubbercraft CA's injuries in California would not have occurred but for the use of the web page, the toll-free number, and the sales into California.[86] Finally, the court held that exercise of jurisdiction was reasonable, based on factors including purposeful interjection, the burden of defending the suit in California, the forum's interest in adjudicating the dispute, and judicial efficiency.[87]

In *Mieczkowski v. Masco Corp.*,[88] a Texas district court considered a wrongful death action in which the defendant's contacts with the forum state included a slightly more interactive web site than the one involved in *Rubbercraft*.[89] The Mieczkowskis bought a bunk bed originally sold by a North Carolina furniture company.[90] After the Mieczkowskis moved to Texas, their son asphyxiated when his head became caught in the bed.[91] The Texas court declined to exercise specific personal jurisdiction, citing a lack of foreseeability that the bed would end up in Texas.[92] The court then turned to general personal jurisdiction. The defendant had no offices, employees, agents, or property in Texas, nor did it advertise in Texas.[93] However, the company had sold products to Texas residents

78. *See id.* at *1.
79. *See id.*
80. *See id.*
81. *See id.*
82. *See id.*
83. *See id.*
84. *See id.* at *2.
85. *See id.* at *3.
86. *See id.* at *4.
87. *See id.* at *5–*6.
88. 997 F. Supp. 782 (E.D. Tex. 1998).
89. *See id.* at 787.
90. *See id.* at 783.
91. *See id.*
92. *See id.* at 785.
93. *See id.*

that amounted to 3.2% of the defendant's gross sales income and had bought .2% of its furniture from an El Paso company.[94] The defendant also had an Internet web site "accessible to approximately 2.2 million Texans."[95]

The Texas court stated that the effect of the Internet on jurisdiction required special consideration and proceeded to analyze the web site in question.[96] The court determined that the defendant's web site was more than just an advertisement, in that the site provided information for customers to browse, showed pictures of the company's furniture, provided an order form that could be printed out, allowed customers to check on the status of orders, and provided for e-mail communication with sales representatives.[97] This combination of factors, the Texas court stated, was "designed to solicit business in a manner that exceeds traditional notions of advertising," and, when considered along with the traditional business contacts, created continuous and systematic contacts such that the exercise of personal jurisdiction was reasonable.[98] However, the court pointedly noted that it was not deciding whether the web site or the business contacts alone would have provided a basis for jurisdiction.[99]

3. Online Sales

Not surprisingly, courts are most comfortable with asserting personal jurisdiction in e-commerce cases where actual online sales have occurred. In 1997, a Pennsylvania district court deciding just such a case enunciated what has become the most commonly used test for determining whether personal jurisdiction exists in e-commerce cases. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*[100] arose out of a dispute over an Internet domain name.[101] Zippo Manufacturing (the maker of Zippo lighters), a Pennsylvania company, argued that Zippo Dot Com's web site, based in California, infringed on Zippo Manufacturing's trademark.[102] Zippo Dot Com's web site provided information about the company and an online application for the company's online news service with provisions for online payment.[103]

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94. *See id.*
95. *Id.*
96. *See id.* at 786.
97. *See id.* at 787.
98. *See id.* at 787–88.
99. *See id.* For another recent example of personal jurisdiction based on online advertising plus more, see *Coastal Video Comm. Corp. v. Staywell Corp.*, 59 F. Supp. 2d 562 (E.D. Va. 1999), arising out of a copyright dispute. The court stated that Staywell's web site "established an on-line storefront that [was] readily accessible to every person in Virginia with a computer, a modem, and access to the World Wide Web." *Id.* at 569. The court also stated that a finding of personal jurisdiction should be based on the commercial nature of the site, the number of sales from that site, and the number of times it was accessed by forum state residents. *See id.* at 572.
100. 952 F. Supp. 1119 (W.D. Pa. 1997).
101. *See id.* at 1120.
102. *See id.* at 1121.
103. *See id.*

About two percent of Zippo Dot Com's online subscribers were Pennsylvania residents.[104]

In order to decide the dispute, the Pennsylvania court used a "sliding scale" test, based on the concept that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."[105] At one end of the scale are entities that do business with residents of another state over the Internet, in which case the exercise of personal jurisdiction is proper.[106] At the other end are cases where the entity has merely advertised or posted information on a passive web site, in which case asserting personal jurisdiction would be improper.[107] Finally, in between the two extremes are cases involving interactive web sites where information is exchanged.[108] Jurisdiction in middle-ground cases is to be determined based on "the level of interactivity and the commercial nature of the exchange of information."[109]

Applying the above test to the case at hand, the Pennsylvania court stated that Zippo Dot Com had gone beyond posting information or creating an interactive site—the Zippo Dot Com web site allowed the company to do business online with Pennsylvania residents.[110] The court noted that Zippo Dot Com had given passwords to 3000 Pennsylvania residents and had contracts with various Internet service providers that served Pennsylvania residents.[111] The court pointed out that Zippo Dot Com deliberately processed applications from Pennsylvania, and that if Zippo Dot Com did not want to be subject to personal jurisdiction in that state, it could have refused to process the applications.[112] Based on the above factors, the court concluded that the assertion of personal jurisdiction was reasonable.[113]

A recent example of the use of *Zippo*'s "sliding scale" test appears in *International Star Registry of Illinois v. Bowman-Haight Ventures, Inc.*[114] International Star Registry (Illinois) sued Bowman-Haight (Virginia) under the Lanham Act[115] based on Bowman-Haight's use of a web site to sell star

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104. *See id.*
105. *Id.* at 1124.
106. *See id.*
107. *See id.*
108. *See id.*
109. *Id.*
110. *See id.* at 1125–26.
111. *See id.* at 1126.
112. *See id.*
113. *See id.* at 1127. Pennsylvania's interest in adjudicating disputes for resident corporations and Zippo Dot Com's deliberate pursuit of business within the state supported the finding that jurisdiction was proper. *See id.*
114. No. 98 C 6823, 1999 WL 300285 (N. D. Ill. May 6, 1999).
115. The Lanham Trade-Mark Act, 15 U.S.C. §§ 1051–1127 (1994, Supp. I 1995 & Supp. IV 1998), provides for registration and protection of trademarks.

registrations.[116] Bowman-Haight's web site allowed customers to buy star registrations by mail, phone, and online via credit card.[117] Sixty-five stars were registered by Bowman-Haight to Illinois residents—twenty-two via the web site, thirty-nine via phone, and four via mail—adding up to about four percent of Bowman-Haight's gross revenue.[118] Bowman-Haight claimed that these contacts were not sufficient to allow assertion of personal jurisdiction in Illinois, and the court applied the "sliding scale" test.[119] The court held that Bowman-Haight was conducting business in Illinois via the web site, based on the fact that twenty-two Illinois residents had bought star registrations online, and that Bowman-Haight had, therefore, purposefully availed itself of the benefits of doing business in Illinois.[120] In a statement slightly reminiscent of *Inset*, the court commented that by putting its goods on the Internet, Bowman-Haight had made the goods available to *all* Internet users.[121]

Stomp, Inc. v. NeatO, LLC,[122] provides a final example of the assertion of personal jurisdiction based on online sales. Stomp (CA) filed for a declaratory judgment against NeatO (CT), claiming that NeatO's patent on a self-adhesive labeling system was invalid.[123] Stomp claimed that jurisdiction was permissible due to NeatO's sales of the disputed item online through NeatO's web site.[124]

The California court applied *Zippo*'s "sliding scale" test and held that NeatO's web site was "highly commercial,"[125] given that a large portion of the site was devoted to online shopping.[126] The court said that the web site had allowed NeatO to place its products into the stream of commerce and that NeatO should have expected to be haled into court in California because many Internet users live in California.[127]

The California court did note that important issues must be considered in e-commerce cases. First, the court recognized that personal jurisdiction based on e-commerce contacts obviously had not been considered when due process was first enunciated, but the court pointed out that the concept of due process has evolved to encompass such contacts.[128] The court also stated that personal jurisdiction based on Internet contacts would become problematic if "[it] served to

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116. *See International Star Registry of Illinois*, 1999 WL 300285, at *1. Star registries allow people to register a star in someone's name.

117. *See id.* at *2.

118. *See id.*

119. *See id.* at *4.

120. *See id.* at *6.

121. *See id*; *see also Inset*, 937 F. Supp. 161, 165 (1996) ("Instruction has directed its advertising activities via the Internet...toward not only the State of Connecticut, but to all states.").

122. 61 F. Supp. 2d 1074 (C.D. Cal. 1999).

123. *See id.* at 1075.

124. *See id.*

125. *Id.* at 1078.

126. *See id.*

127. *See id.* at 1079.

128. *See id.* at 1080.

expose an entity to state law claims which it had no notice of, or which were entirely foreign to the laws of its home forum."[129] The court further recognized that broad assertions of personal jurisdiction based on Internet contacts might harm small businesses' attempts to expand to online sales, but pointed out that such concerns must be balanced against consumers' right to sue.[130]

B. Cases Not Finding Personal Jurisdiction

1. Internet Advertising Alone

One of the earliest e-commerce personal jurisdiction cases, *Benusan Restaurant Corp. v. King*,[131] made a clear argument for why personal jurisdiction should not be asserted in cases of mere online advertising.[132] Benusan, the owner of a New York jazz club called "The Blue Note," sued King, the owner of a Missouri club also called "The Blue Note," for trademark infringement.[133] King used a web site containing information about club events and provided a Missouri phone number to call for tickets to club events.[134] The web site also contained a disclaimer stating that the Missouri club was in no way related to the New York club, along with a hyperlink that allowed visitors to the site to connect to the New York club's site.[135]

The court refused to assert personal jurisdiction over King for a number of reasons. First, the court pointed out that affirmative actions were required in order for someone to view King's web site and use the information it provided, including accessing the site, calling the box office to get tickets, and traveling to Missouri to get the tickets.[136] Second, the possibility that someone could gain information on the infringing product did not equate to an attempt to target New York consumers.[137] Finally, according to the court, King did not receive substantial revenue from interstate commerce on the web site, King did not foresee being haled into court in New York despite his awareness that Benusan's club was

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129. *Id.*
130. *See id.*
131. 937 F. Supp. 295 (S.D.N.Y. 1996).
132. *See id.* at 299–301.
133. *See id.* at 297.
134. *See id.* The tickets were available for pick up only before shows at the club; tickets were not delivered. *See id.* at 299.
135. *See id.* at 297–98.
136. *See id.* at 299.
137. *See id.*

located there,[138] and due process forbade assertion of personal jurisdiction without purposeful availment of the benefits of the forum state.[139]

Another court considering an early case of mere online advertising declined to exercise personal jurisdiction in *Cybersell, Inc. v. Cybersell, Inc.*,[140] which dealt with a trademark dispute.[141] Cybersell AZ found Cybersell FL's web site containing Cybersell AZ's registered name and sued when Cybersell FL refused to change the name on the web site.[142]

The Ninth Circuit determined that Cybersell FL's web site was basically passive, with no commercial activity.[143] The court derived its determination from the fact that Cybersell FL had done nothing to direct Arizona residents to its web page and that the company did no business in Arizona.[144] Therefore, the court held Cybersell FL had not purposefully availed itself of the benefits of doing business in Arizona.[145]

A more recent case, arising out of a wrongful death action, also shows courts' reluctance to assert personal jurisdiction in cases involving passive web sites. In *Grutkowski v. Steamboat Lake Guides & Outfitters, Inc.*,[146] Steamboat Lake Outfitters ("SLO") provided information about their company on their own web site and on other travel-related web sites.[147] The SLO web site provided information and pictures of the tours offered by SLO, a way for interested customers to e-mail SLO, a Colorado phone number to reach SLO, and a coupon that could be printed out.[148] Yet again, the court followed the "sliding scale" test and held that SLO's Internet presence was not sufficient to allow personal jurisdiction in Pennsylvania.[149] The court stated that SLO's web site, while commercial, was essentially passive and did not create systematic or continuous contacts with Pennsylvania.[150]

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138. *See id.* at 300. The *Benusan* court pointed out that "[m]ere foreseeability of an in-state consequence and a failure to avert that consequence is not sufficient to establish personal jurisdiction." *Id.*

139. *See id.* The court stated that there was no purposeful availment in this case because King had merely created a web site that others could access, rather than attempting to make contact with any New York residents. *See id.* at 301.

140. 130 F.3d 414 (9th Cir. 1997).

141. *See id.* at 415.

142. *See id.* at 416.

143. *See id.* at 419.

144. *See id.* In fact, Cybersell AZ was apparently the only Arizona entity/resident to "hit" Cybersell FL's web site. *See id.*

145. *See id.* at 419–20.

146. No. Civ.A. 98-1453, 1998 WL 962042 (E.D. Pa. Dec. 28, 1998).

147. *See id.* at *2. SLO also apparently used a booking agency and advertised in monthly American Express billing statements. *See id.*

148. *See id.* at *4.

149. *See id.* at *3.

150. *See id.* at *5.

2. Online Advertising Plus More

A striking case of refusal to assert personal jurisdiction in a situation where more than mere online advertising had occurred appears in *Fix My PC, L.L.C. v. N.F.N. Associates, Inc.*[151] Fix My PC, a Texas computer-consulting company, sued N.F.N. Associates, a New York computer-repair company, over N.F.N.'s use of the domain name www.fixmypc.com and a toll-free phone number of the same name (1-800-FIX-MY-PC).[152] N.F.N. did not do any business in Texas but had purchased computer parts from a Texas company.[153] The Texas court noted that while some courts have asserted jurisdiction based solely on a web site, something more usually was required in order for the purposeful direction requirement to be met,[154] and the court recognized that toll-free phone numbers and forum contacts were often seen as something more.[155] However, in this case, the court refused to assert personal jurisdiction, despite the existence of contacts with Texas and the toll-free phone number,[156] relying on the fact that the phone number was not posted on N.F.N.'s web site.[157] Therefore, the court held N.F.N. did not purposefully direct its activities at Texas.[158]

An Illinois district court also refused to assert personal jurisdiction over a defendant whose contacts with the forum state consisted of online advertising plus something more in *Scherr v. Abrahams*.[159] Scherr produced a humor publication called the *Journal of Irreproducible Results* ("JIR") in Illinois and distributed the JIR worldwide.[160] Abrahams had worked as an editor for JIR but left after a few years and created the *Annals of Improbable Research* ("AIR"), a similar publication, in Massachusetts.[161] AIR had less than sixty subscribers in Illinois, but a "mini" version was also distributed to online subscribers, and two members of the AIR's editorial board lived in Illinois.[162]

The *Scherr* court considered each type of contact in turn. The court held that AIR's subscriber contact with Illinois was minimal, based on the fact that considering both Illinois subscribers and Illinois newsstand sales, only about three percent of AIR's total distribution occurred in Illinois.[163] Next, the court noted that

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151. 48 F. Supp. 2d 640 (N.D. Tex. 1999).
152. *See id.* at 641.
153. *See id.* at 642.
154. *See id.* at 642–43.
155. *See id.* at 643.
156. *See id.* at 644. Fix My PC had produced evidence that people had called N.F.N.'s toll-free number while actually trying to reach Fix My PC. However, the court held that this fact did not prove that N.F.N. was purposefully directing activities at Texas. *See id.*
157. *See id.*
158. *See id.*
159. No. 97 C 5453, 1998 WL 299678 (N.D. Ill. May 29, 1998).
160. *See id.* at *1.
161. *See id.*
162. *See id.* at *1.
163. *See id.* at *3. The *Scherr* court looked to *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 483 (1984), in determining that sales in

the two editorial board members in Illinois were not active on the board and were not considered employees of AIR.[164] Finally, the court turned to the online distribution of the "mini-AIR," which was sent to about 20,000 subscribers.[165] The court held that the web site provided a low level of interactivity by taking only potential subscribers' e-mail addresses, advertised only for AIR and products by the same company, and was not targeted at Illinois.[166] Therefore, the court held personal jurisdiction over AIR in Illinois would be improper.[167]

3. Online Sales

Finally, a few courts have declined to exercise personal jurisdiction even where sales have occurred over the web site in question. One notable case that came to such a conclusion is *Origin Instruments Corp. v. Adaptive Computer Systems, Inc.*[168] Origin is a Texas company that produces equipment that allows the handicapped to interact with computers, including a device called the "HeadMouse."[169] Adaptive, an Iowa corporation, makes similar products, advertises those products on its web site, allows communication with the company via the web site, and allows customers to download software for the products through the web site.[170] Adaptive also produced a product it called the "HeadMouse," and Origin sued for trademark infringement, claiming personal jurisdiction in Texas based on the web site, a letter sent by Adaptive to Origin in Texas, and Adaptive's advertisements in trade journals.[171]

The Texas court followed the "sliding scale" test and placed Adaptive's web site in the middle (interactive) category, despite the fact that online sales had occurred.[172] The court stated that the site was moderately interactive but that there was no evidence that anyone in Texas had interacted with the web site, and Adaptive had never sold any products in Texas via the web site.[173] Therefore, "something more" would have had to occur in terms of contacts with Texas, and the court held that neither the letter sent by Adaptive to Texas nor the

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Illinois were minimal (noting that the sales at issue in *Keeton* numbered between 10,000 and 15,000 in the forum state per month and that the sales in *Calder* numbered 600,000 per week). *See Scherr*, 1998 WL 299678, at *3.

164. *See Scherr*, 1998 WL 299678, at *4.

165. *See id.*

166. *See id.* at *5.

167. *See id.*

168. No. CIV.A 397CV2595-L, 1999 WL 76794 (N.D. Tex. Feb. 3, 1999).

169. *See id.* at *1. The "HeadMouse" controls a computer via head movements rather than by hand. *See id.*

170. *See id.*

171. *See id.* at *1–*2.

172. *See id.* at *3.

173. *See id.* at *4. The court stated that the *possibility* of doing business in Texas via the web site was not sufficient to rise to the level of purposeful availment. *See id.*

advertisements in trade publications rose to the necessary level of "something more."[174]

Another case of a court refusing to find personal jurisdiction despite the presence of online sales appears in *Millennium Enterprises, Inc. v. Millennium Music, LP*.[175] The plaintiff (Millennium OR) is an Oregon corporation with two music retail stores in Oregon that also sells its products via mail, telephone, and a web site.[176] The defendant (Millennium SC) is a South Carolina company that also sells music products through retail stores and a web site.[177] Millennium SC had no stores in Oregon but had purchased some compact discs from an Oregon company.[178] In addition, one Oregon resident had purchased a compact disc from Millennium SC via Millennium SC's web site.[179]

The Oregon court first held that Millennium SC's contacts with Oregon were not continuous or systematic enough to allow for the exercise of general jurisdiction.[180] Turning to specific jurisdiction, the court noted that the one web site sale in Oregon appeared to be an attempt by Millennium OR's law firm to create a contact within the state and could not, therefore, be considered purposeful availment by Millennium SC of the benefits of doing business in Oregon.[181] Nor were Millennium SC's compact disc purchases from Oregon substantial enough to create a basis for personal jurisdiction.[182] Finally, the court looked to the web site, noting that online contacts are still a new area for personal jurisdiction, and conducted an in-depth examination of the Internet and the relevant case law.[183]

In terms of the web site at issue, the *Millennium* court declined to follow other courts that have seen doing business online as "confer[ring] personal jurisdiction almost as a matter of course."[184] Rather, the court stated, personal jurisdiction based on "doing business" online should be asserted only in cases where a significant portion of the company's business is done online and ongoing

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174. *See id.* at *4–*5. The court's language suggests that, had the trade journals been distributed nationwide, its finding might be different; however, the only evidence of the journals' nationwide publication was the belief of Origin's president, which the court held to be insufficient. *See id.* at *5.

175. 33 F. Supp. 2d 907 (D. Or. 1999).

176. *See id.* at 908.

177. *See id.*

178. *See id.* at 909. The compact disc purchases from the Oregon company totaled about one-half of one percent of all Millennium SC's inventory purchases for 1994–97. *See id.*

179. *See id.* The purchase was made by an employee of the law firm Millennium OR retained to sue Millennium SC for trademark infringement and was apparently made at the request of one of the firm's lawyers. *See id.*

180. *See id.* at 910.

181. *See id.* at 911.

182. *See id.*

183. *See id.* at 913–20. The court noted the difficulty other courts have had with the middle, "interactive" category of the *Zippo* "sliding scale" test. *See id.* at 916.

184. *Id.* at 920.

relationships are in place.[185] In Millennium SC's case, the web site fell into *Zippo*'s middle category despite the online sales, and that test would probably confer jurisdiction because the potential interactivity was commercial in nature.[186] However, the Oregon court felt that the *Zippo* test for the middle category should be refined to include "'deliberate' action within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state."[187] Foreseeability, according to the court, was not enough—rather, enough of a connection must exist that a defendant has "fair warning" of the possibility of a suit in the forum state.[188]

C. Analysis of E-Commerce Personal Jurisdiction Cases

1. Areas of Focus for Courts in E-Commerce Personal Jurisdiction Cases

Courts have tended to focus on certain specific issues in finding or refusing to find a basis for personal jurisdiction. When deciding that personal jurisdiction is proper, courts have noted the existence of a toll-free phone number,[189] the possibility of e-mailing the company through the site,[190] and, especially, sales within the forum state.[191] In refusing to find personal jurisdiction, courts have focused most intently on the low dollar value of, or complete lack of, sales in the forum state.[192]

2. Areas of Discrepancy

Despite the relatively small number of factors that courts consider, a comparison of the holdings in the above cases demonstrates the difficulties that courts have had with personal jurisdiction in e-commerce cases. Several similar cases have produced utterly different results in terms of whether or not the court chose to assert personal jurisdiction.

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185. *See id.* The court specifically pointed to *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1260–61 (6th Cir. 1996), as an example of such continuing relationships—the defendant had subscribed to the plaintiff's Internet service and had an agreement with the plaintiff in which the defendant transmitted multiple files to the plaintiff. *See Millennium*, 33 F. Supp. 2d at 920.

186. *See Millennium*, 33 F. Supp. 2d at 921.

187. *Id.*

188. *See id.*

189. *See* Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996); Rubbercraft Corp. of California v. Rubbercraft, Inc., No. CV 97-4070-WDK, 1997 WL 835442, at *3 (C.D. Cal. Dec. 17, 1997).

190. *See* Coastal Video Comm. Corp. v. Staywell Corp., 59 F. Supp. 2d 562, 569 (E.D. Va. 1999).

191. *See Rubbercraft*, 1997 WL 835442, at *5; Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1125–26 (W.D. Pa. 1997).

192. *See* Scherr v. Abrahams, No. 97 C 5453, 1998 WL 299678, at *3 (N.D. Ill. May 29, 1998); Origin Instruments Corp. v. Adaptive Computer Systems, Inc., No. CIV.A 397CV2595-L, 1999 WL 76794, at *4 (N.D. Tex. Feb. 3, 1999).

For example, different courts have treated the presence of a toll-free phone number in conjunction with a web site very differently. *Inset* held that the presence of a toll-free number was part of an attempt to target all states.[193] *Rubbercraft* considered the presence of a toll-free number an indicator of purposeful availment.[194] However, *Fix My PC* did not consider the presence of a toll-free phone number along with a web site to be an indicator of purposeful availment.[195]

Interactivity is another stumbling block for courts dealing with online contacts. The *Mieczkowski* court held that a site that provided e-mail, browsing, and order status information was interactive enough to be considered as soliciting business from the forum state.[196] However, *Scherr* held that a web site that provided not only e-mail but also allowed people to subscribe to the publication was not targeted at forum-state consumers.[197]

The question of how much activity in the forum state (in combination with the presence of a web site) is sufficient to produce personal jurisdiction has not yet been satisfactorily answered. The *Rubbercraft* court found less than .5% of sales in the forum state to be enough,[198] and *Mieczkowski* asserted personal jurisdiction in a case where the company sold 3.2% of its goods to the forum state and bought .2% of its goods from that state.[199] However, in *Scherr* the court was unwilling to find personal jurisdiction despite the fact that 3% of sales were made to the forum state,[200] and the *Millennium* court refused to assert personal jurisdiction despite the company's having bought .5% of its inventory from the forum state.[201]

Courts appear to have the greatest trouble with cases that fall in the mid-range of possibilities, where an interactive web site exists but online sales are not made. As one commentator described the middle-ground cases, "[T]he current hodgepodge of case law is inconsistent, irrational, and irreconcilable."[202] However, discrepancies in holdings appear even in cases with wholly passive advertising sites and cases with online sales and traditional forum contacts. To make matters worse, different courts apply different tests: some apply the "sliding scale" test; some do not. Courts that do use the "sliding scale" test often define its terms very differently. Without question, courts considering the same issue can be expected to produce somewhat different results. But the wide range of results found in cases

193. *See Inset*, 937 F. Supp. at 165.
194. *See Rubbercraft*, 1997 WL 835442, at *3.
195. *See* Fix My PC, L.L.C. v. N.F.N. Assoc., Inc., 48 F. Supp. 2d 640, 644 (N.D. Tex. 1999).
196. *See* Mieczkowski v. Masco Corp., 997 F. Supp. 782, 788 (E.D. Tex. 1998).
197. *See Scherr*, 1998 WL 299678, at *5.
198. *See Rubbercraft*, 1997 WL 835442, at *1.
199. *See Mieczkowski*, 997 F. Supp. at 788.
200. *See Scherr*, 1998 WL 299678, at *3–*4.
201. *See* Millennium Enters., Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907, 911 (D. Or. 1999).
202. Stravitz, *supra* note 2, at 939.

involving personal jurisdiction and online contacts suggests that an adequate resolution has not yet been found.

IV. SUGGESTED SOLUTIONS TO THE PERSONAL JURISDICTION DILEMMA

Clearly, courts must be able to logically and reasonably apply personal jurisdiction in e-commerce cases in some type of systematic manner. An inequitable result would occur if businesses were able to avoid personal jurisdiction simply by conducting business online.[203] As a result of the novel issues posed by e-commerce in terms of jurisdiction and the problems courts have had in the area, various authorities and authors have proposed numerous solutions. Those alternatives run the gamut from a total hands-off attitude to extensive government regulation. The major alternatives are presented here, along with analysis of their benefits and drawbacks.

A. Federal Regulation

Under the Commerce Clause, Art. I § 8 of the Constitution, Congress has the power "[t]o regulate commerce...among the several states."[204] Courts have held that online communication can be considered interstate commerce, which means that Congress could choose to regulate e-commerce under the Commerce Clause.[205] Various writers have suggested ways in which Congress could regulate e-commerce so as to have an effect on personal jurisdiction. Most notably, it has been suggested that Congress might require all people doing business online to include a forum selection clause in their transactions.[206] Forum selection clauses could certainly end any complaints that parties did not know where they were subjecting themselves to liability. However, the counter-argument to the forum selection clause resolution is that public policy issues could arise if all businesses stated (as they very likely would) that jurisdiction would be in their state.[207]

Substantial congressional regulation of e-commerce appears an unlikely proposition at best. The statutes that have been enacted to date are purely substantive; they do not deal with personal jurisdiction at all.[208] Furthermore, the

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203. *See* Thatch, *supra* note 13, at 162.

204. U.S. CONST. art. I, § 8.

205. *See* Blake, *supra* note 54, at 139.

206. *See* Thatch, *supra* note 13, at 163.

207. *See id.* Thatch also pointed out that Congress could require anyone transacting business online to consent to the personal jurisdiction of the state of the other party to the transaction. However, this approach surely implicates the same public policy issues that the forum selection clause requirement does.

208. *See* Joanna B. Bossin, *What Constitutes Minimum Contacts in Cyberspace After CompuServe, Inc. v. Patterson: Are New Rules Necessary for a New Regime?*, 13 GA. ST. U. L. REV. 521, 539–41 (1997). A few notable bills passed or suggested include the Communications Decency Act of 1995 (prohibiting the transmission of obscenity), the Internet Freedom and Family Empowerment Act of 1995 (encouraging parental controls),

federal government has repeatedly proclaimed its intent to further a "hands-off" policy in regards to the Internet.[209] This hands-off policy is specifically enunciated in a federal statute regarding protection for blocking and screening "offensive material."[210] The statute asserts that the United States' policy on the Internet is to promote Internet development and to preserve the free market environment online, "unfettered by [f]ederal or [s]tate regulation."[211]

Finally, it has been suggested that the very quality that makes the Internet and e-commerce so very relevant, its rapid growth, will inhibit congressional ability to legislate in the area.[212] Legislative solutions will be limited in two ways: first, the current lack of policy considerations for the computer information industry will limit what the legislature can do in the future; second, a lack of understanding as to what issues have to be addressed will also place limits on legislative possibilities.[213]

B. State Regulation

If the federal government will not regulate e-commerce so as to provide an answer to the personal jurisdiction question, can (or should) states do so? In one instance of attempted state regulation, Minnesota Attorney General Hubert Humphrey III in 1996 issued an announcement asserting personal jurisdiction in Minnesota over anyone who provided online information to any Minnesota resident.[214] This pronouncement was an effort to deal with online gambling and lotteries;[215] however, one could just as easily apply it to any online business.

But state regulation of online contacts is no more promising a concept than federal regulation. As discussed earlier, boundaries disappear in cyberspace. Therefore, commentators have suggested that the creation of laws to regulate online contacts within a fixed locale is "misconceived."[216] Given the fact that the Internet is not constrained by state borders, a strong possibility exists that any state regulation could clash with the Dormant Commerce Clause.[217] After all, such a law

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and the Protection of Children from Computer Pornography Act of 1995 (prohibiting service providers from transmitting obscene material to children). *See id.* at 539.

209. *See* Blake, *supra* note 54, at 155. President Clinton has stated that any reforms in this area should be left to private industry and has enunciated the desire to "reduce the government's role as traffic cop for the Internet." *Id.* at 155–56.

210. 47 U.S.C. § 230 (1994 & Supp. III 1997). The statute addresses blocking and screening of offensive material on the Internet.

211. 47 U.S.C. § 230(b)(1), (b)(2) (1994 & Supp. III 1997).

212. *See* Thatch, *supra* note 13, at 162.

213. *See id.* at 162–63.

214. *See* Sableman, *supra* note 7, at 142.

215. *See id.*

216. Blake, *supra* note 54, at 138.

217. *See id.* at 141 (recognizing the limited power of states to regulate interstate commerce).

would be likely to have some sort of effect on Internet sites outside the state in which the law was passed.[218]

C. Self-Regulation

Some commentators have posited that the best solution to the current quagmire in Internet law would be regulation by the online community itself. Cyberspace would be treated as a "distinct place"[219] and would be allowed to develop its own regulations.[220] Like entry into a state, entry into cyberspace would subject a person to the laws of the locality.[221] According to some, treating cyberspace as a place unto itself is a natural progression of the Internet and our relationship to it.[222] Johnson and Post speak of a "placeness" created in cyberspace by the fact that messages placed there persist and can be accessed by numerous people.[223] Also, the argument goes, one knows when one is online because people enter cyberspace through a screen and, often, password boundaries.[224] Therefore, it would seem reasonable to subject people who transact business online to the distinct laws of cyberspace, and all jurisdictional issues would be alleviated.

However, there are inherent flaws in the concept of regulation by the online community. First of all, Johnson and Post admit that the various areas of cyberspace will probably develop individual sets of rules.[225] Although such differences could be analogized to the differing laws of various countries, it is arguably harder to tell when one passes into a different area in cyberspace than it is to tell that one is passing into a different country. Furthermore, while such heterogeneity online could be expected to cause problems, some have suggested that the *homogeneity* of the online community also weakens its ability to govern itself.[226] Despite the growth of the Internet, most users remain young, Caucasian American males with the finances to buy expensive computers and enough time to use them.[227] Rules created by such a group of people might not take into consideration the needs of all Internet users worldwide.

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218. *See id.* at 141–42. In 1997, a New York District Court held state regulation of online contacts unconstitutional, partially on Commerce Clause grounds. *See* American Libraries Ass'n. v. Pataki, 969 F. Supp. 160, 181 (S.D.N.Y. 1997).

219. Johnson & Post, *supra* note 54, at 1378.

220. *See id.* at 1381.

221. *See* Costa, *supra* note 50, at 494. The laws of cyberspace would, according to the above paradigm, be enforced by the community of online users and Internet service providers. *See id.*

222. *See* Johnson & Post, *supra* note 54, at 1379.

223. *Id.*

224. *See id.*

225. *See id.*

226. *See* Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385, 437 (1998).

227. *See id.* To allow such people to make all the laws for the Internet, it has been said, would be like "allowing the guys with the coolest cars to make the rules for the highway." *Id.*

Moreover, the Internet is not much of a "community." It is organized, generally, by topic, which means that most users only interact with those who have similar interests and never have to deal with anyone else.[228] And the anonymous nature of online communication leads many to "refuse to observe even a semblance of civility."[229] Surely, to allow such a community to regulate itself, separate from the "real" world, would be inviting difficulties.

D. Judicial Resolutions

A last category of possible resolutions takes the form of judicial intervention. The list of suggestions made by both courts and commentators as to how courts might best resolve the e-commerce personal jurisdiction issue is nearly infinite. However, a few possibilities are worth noting. One commentator, David Thatch, suggests that courts should take a broad reading of the *Asahi* "purposeful availment" factors.[230] Justice O'Connor's opinion in the *Asahi* case suggested several factors that could be seen as constituting purposeful direction by the defendant, including the creation of channels for advice to customers in the forum state, marketing of the product through a distributor who acts as a sales agent in the forum state, advertising in the forum state, or designing the product for the forum state.[231] Under Thatch's hypothesis, the Web could be viewed as an established distribution line into the forum state, and since setting up e-commerce is a purposeful act, this could be seen as purposeful direction of the product into the forum state.[232]

There are flaws to this theory, though. First of all, the *Asahi* case was a plurality. Therefore, that case is necessarily less persuasive than one with a majority holding. Second of all, the concept of the Web as an established distribution line has dangerous ramifications. Under such a theory, anyone who sets up e-commerce can be seen as establishing a distribution line into any and every state and country where people have Internet access. Surely this is not the result contemplated by the *Asahi* plurality.

A more prevalent and useful suggestion appears in the form, once again, of forum selection clauses. It has been suggested that the purposeful availment test should be rephrased in the context of Internet contacts as "[t]he defendant must be on sufficient notice of the forum state while engaging in the contacts to constitute purposeful availment of the state."[233] According to this view, notice of the forum would be an absolute prerequisite to finding personal jurisdiction over a defendant in an e-commerce case.[234] Such a result could be achieved by having providers

228. *See id.*
229. *Id.*
230. *See* Thatch, *supra* note 13, at 165.
231. *See* Asahi Metal Industry, Co., Ltd. v. Superior Court of California, 480 U.S. 102, 112 (1986).
232. *See* Thatch, *supra* note 13, at 165–67.
233. Darren L. McCarty, *Internet Contacts and Forum Notice: A Formula for Personal Jurisdiction*, 39 WM. & MARY L. REV. 557, 591–92 (1998).
234. *See id.* at 591.

display their physical location on their web site.[235] Presumably, if a company did *not* post its location on its web site, it would not be allowed to hale a defendant into court in that state.

Forum notice alone, however, is simply not enough to provide jurisdiction. Consider cases like *Origin Instruments*, where the issue arose from the use of a web site *by* the infringing company. Whether or not the company pursuing the suit had a forum notice clause on its own web site (assuming it even had one) would be irrelevant to the consideration of purposeful availment. Also, as discussed above, policy issues would arise if forum notice were the only requirement to get personal jurisdiction over a defendant. So forum notice clearly must be combined with something else to produce useful results.

The most likely candidate for a judicial resolution to the e-commerce personal jurisdiction issue appears in the opinion in *Millennium*. The *Millennium* court suggested that the *Zippo* test continue to be used, but with certain clarifications.[236] Specifically, the court suggested, the middle category of the *Zippo* "sliding scale" test should be refined to include "deliberate action within the forum state in the form of transactions between the defendant and the residents of the forum or conduct of the defendant purposefully directed at residents of the forum state."[237] Under this test, the court stated, the mere existence of a web site would not be a deliberate action toward the forum state.[238] If maintaining a web site alone is *not* a deliberate action under the test, then cases such as *Inset* and *TELCO*, in which a web site was the only contact with a state,[239] will not result in a finding of personal jurisdiction. Such a result would be consistent with the *Zippo* test.

Furthermore, requiring "deliberate action" within the forum state would mean that courts addressing cases like *Stomp* (where there were online sales but no sales within the forum state[240]) would refuse to assert personal jurisdiction—likely the right result under the *Zippo* test. On the other end of the spectrum, a case such as *Fix My PC*, dealing with a web site, a toll-free phone number, and business contacts *within the forum state*, might well be decided in favor of personal jurisdiction.

Perhaps the most reasonable judicial solution would be a combination of the *Zippo/Millennium* test and a forum notice requirement. With forum notice, a defendant could not complain that she was unaware of the laws she was subjecting herself to should she choose to transact business online. With clearly posted notice at each site, the situation would be analogous to crossing into a new state or country—if a person pays attention, he or she should be aware that new laws may

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235. *See id.* at 593.

236. Millennium Enterprises, Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907, 921 (D. Or. 1999).

237. *Id.*

238. *See id.* at 922.

239. *See* Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 164 (D. Conn. 1996); Telco Communications v. An Apple a Day, 977 F. Supp. 404, 405 (E.D. Va. 1997).

240. *See* Stomp, Inc. v. Neato, LLC, 61 F. Supp. 2d 1074, 1079 (C.D. Cal. 1999).

apply. Further, the forum notice requirement would not be difficult to implement. If courts simply refused to assert personal jurisdiction unless the web site or sites in question had clearly posted their physical location, companies would likely comply with the notice requirement rather than forfeit their chance to assert personal jurisdiction.

Add to forum notice the requirement of *deliberate* action within the forum state, and the likelihood of a misapplication of personal jurisdiction by a court becomes far smaller. The deliberate action requirement would solve the issue posed by cases such as *Origin Instruments*, where the web site at issue is the defendant's, rather than the plaintiff's[241]. While forum notice by the plaintiff would not help in such a case, the requirement that the defendant act deliberately in the forum state would mean that the defendant would have a difficult time arguing that he or she did not expect to be subject to personal jurisdiction in that state.

While making the additions suggested by *Millennium* to the *Zippo* sliding scale test would not solve all the confusion in the e-commerce personal jurisdiction area, it would certainly be an excellent clarification. The middle ground is, as stated earlier, the area in which most courts have the most difficulty. Cases such as *Inset* are rare, but the middle-ground cases are a tangle of flawed reasoning and differing results. A requirement of deliberate action on the part of the defendant in order to assert personal jurisdiction in cases involving moderately interactive web sites could only serve to make the results in such cases clearer and more reasonable.

V. CONCLUSION

The growth of the Internet and e-commerce has been unprecedented and shows no sign of slowing. With the explosive growth has come the inevitable development of litigation regarding online contacts—litigation that is a particular challenge, given that the non-corporeal nature of the Internet resists the clear application of personal jurisdiction law. Case law has run the gamut, from courts' refusal to assert personal jurisdiction in cases involving substantial contact with the forum state to cases implying that to create a web site is to subject the owner to personal jurisdiction anywhere in the world.

Such wide variation in results is untenable. By all accounts, e-commerce is destined to become a major force in the economy of the United States, and, indeed, the world economy. As more and more companies join the lucrative e-commerce bandwagon, they must be able to do so with confidence that they know where they could reasonably end up being subject to personal jurisdiction. Since state legislatures likely cannot solve the current problems in the area, and the federal government likely *will* not do so, courts can and must take control of the situation.

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241. *See* Origin Instruments Corp. v. Adaptive Computer Sys., Inc., No. CIV.A 397CV2595-L, 1999 WL 76794, at *1 (N.D. Tex. Feb. 3, 1999).

A workable solution exists in the form of the *Zippo/Millennium* "sliding scale" test when combined with forum notice, but only if courts uniformly apply the test. So far, courts have applied the *Zippo* test with differing degrees of clarity. However, the case law is young. No opinions in this area are more than four or five years old. Over the next four or five years, courts will find themselves confronting this issue on an ever-increasing basis. Most likely, a more uniform body of case law will emerge over that time.