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Jurisdictional Rules in the  
Context of the Internet

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# Summary

Private international law, or conflict of laws as it is usually referred to in the U.S., is an historically old body of law. As long as cross-border trade has been practiced, disputes have arisen which needed their ordering and resolution. The traditional jurisdictional doctrine was based on territoriality, i.e. the serving of a suit upon the person of the defendant while he was physically present within the forum state. Over the course of the 20<sup>th</sup> century, especially the latter half, the way interstate business was conducted saw dramatic changes which in turn compelled corresponding changes in the traditional jurisdictional doctrine.

Enter the Internet, a public international network of networks whose impact on society and cross-border business patterns is orders of magnitude greater than anything coming before it. However, as courts tried to master this changed situation, it soon became apparent that this time a change in jurisdictional doctrine was not so easily accomplished. Existing jurisdictional rules and principles were premised on geography and physical location, and were seemingly impossible to meaningfully interpret and apply in a fair and just manner to the virtual and “borderless” Internet medium. Courts have struggled since.

In this thesis I examine U.S. Internet jurisdiction case law with the ultimate goal of concluding whether or not courts in the U.S. are in fact managing a change in the jurisdictional doctrine, and whether or not this change is bringing about workable standards for determining personal jurisdiction in the Internet context.

I conclude that the legal reasoning of the courts suggests that they are increasingly revisiting traditional jurisdictional rules and principles in seeking to accomplish fair and just results in Internet jurisdiction cases. In connection with this, two approaches, the targeting-based approach and the effects-based approach, are concurrently emerging as jurisdictional standards at the expense of the long-prevalent *Zippo* approach.

These standards are no panacea, although they do more effectively deal with the problems and challenges of Internet jurisdiction and bring greater clarity to this opaque area of the law.

# Preface

Having completed this Master's thesis, I owe a few individuals my most sincere gratitude. Professor Michael Bogdan, for inspiring me to pursue a deeper comprehension of this highly complex area of the law. My dear friend Martin Torgeby, for making the writing of this thesis logistically possible, and my dear friend Kian Foh Lee, for assisting me in proofreading the thesis.

I wish to give a special thanks to Professor Ralph Reisner for always sharing with me his insights regarding both life in general as well as the law and the legal profession in particular.

Finally, I wish to thank my muse, Pernilla, for being the wonderful person she is.

This done, I am a lawyer.

Fredrik Wennerberg Andersson

Lund, January 2002

# Abbreviations

<b>ABA</b>	American Bar Association
<b>ALI</b>	American Law Institute
<b>ARPA</b>	Advanced Research Project Agency
<b>BNA</b>	Bureau of National Affairs
<b>CA</b>	Certificate Authority
<b>Cal. Civ. Proc. Code</b>	California Civil Procedure Code
<b>DSL</b>	Digital Subscriber Line
<b>F., F. 2d, F. 3d</b>	Federal Reporter (Second and Third Series) U.S. Circuit Courts of Appeals (Federal)
<b>F. Supp., F. Supp.2d</b>	Federal Supplement (Second Series) U.S. District Courts (Federal)
<b>Harv. L. Rev.</b>	Harvard Law Review
<b>IP</b>	Internet Protocol
<b>ISDN</b>	Integrated Service Digital Network
<b>N.E. 2d</b>	North Eastern Reporter Second Series
<b>OECD</b>	Organization for Economic Co-operation and Development
<b>S.Ct.</b>	Supreme Court Reporter
<b>T1, T3</b>	Leased line connections
<b>TCP/IP</b>	Transmission Control Protocol / Internet Protocol
<b>URL</b>	Uniform Resource Locator
<b>U.S.</b>	United States Reports
<b>U.S.C.</b>	United States Code
<b>USD</b>	United States Dollars

# 1 Introduction

## 1.1 THE ISSUE

The body of law concerning jurisdiction in the U.S. is facing great new challenges due to the advent and amazing growth of the Internet. Internet commerce<sup>1</sup> has had a fundamental impact on the global marketplace, and the monetary value of said commerce is staggering.<sup>2</sup>

Succinctly put, the greatest challenge to this area of the law is the fact that, traditionally, the jurisdictional limits of courts and other tribunals has been defined in geographical or spatial terms, but these definitions, as well as the resulting jurisdictional assumptions and legal frameworks, are arguably not functioning adequately in the online environment. The Internet is perceived to be indefinable in geographic or spatial terms since it is a non-linear network within which data moves in a widely diffused fashion, and thus existing jurisdictional rules and principles are not only hard, but in some instances seemingly impossible to apply to behavior and actions carried out on, or through, the Internet.

This thesis will show, *inter alia*, that courts in the U.S. have tried to apply traditional rules and principles in a good number of Internet jurisdiction cases with similar fact-patterns and obtained highly different results. Needless to say, in a legal system based on the principle of precedent (*stare decisis*) where courts have legislative power, this situation is undesirable. Even though, intuitively, the fact and law permutations of Internet jurisdiction cases seem so numerous and variable that they defy intelligent forecasting of both the problems and their solutions, efforts to bring about clarity and predictability in this area of the law are paramount. Without predictability, enterprise is bound to be stifled. Naturally, in order to run a successful business there need to be legal predictability, since without that, one does not know what the liabilities are. And if one does not know what the liabilities are, it is hard to know what the costs will be. And if one does not know the costs, one can not run a business. Consequently, legal certainty is needed in order to facilitate a full exploitation of the development of

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<sup>1</sup> Interchangeable terms are Electronic commerce, Digital commerce, E-business et al. However, in this thesis the preferred term is Internet commerce since it refers to the strictly online commercial behavior which forms the foundation for the legal issues and problems discussed herein.

<sup>2</sup> See e.g. Boston Consulting Group's estimates that the U.S. E-marketplace revenues will approach \$9 billion in the next four to five years. Available online at [http://www.bcg.com/new\\_ideas/new\\_ideas\\_subpage28.asp](http://www.bcg.com/new_ideas/new_ideas_subpage28.asp) (visited 2001-11-23). See also shop.org's estimates that worldwide business-to-business e-commerce will generate incredible \$2.6 trillion in revenue by 2004. Available online at [http://www.shop.org/learn/stats\\_ebizz\\_b2b.html](http://www.shop.org/learn/stats_ebizz_b2b.html) (visited 2001-11-23).



electronic commerce. It is my design to through this thesis hopefully be able to elucidate the current situation in the United States.

## 1.2 PURPOSE AND LIMITATIONS

This thesis deals exclusively with personal jurisdiction in matters relating to the Internet, i.e. the problems and uncertainties of personal jurisdiction in Internet-based controversies within the United States. Specifically, I will examine under which circumstances U.S. courts will, and will not, exercise their constitutional power to find proper personal, *in personam*, jurisdiction over out-of-state/nonresident defendants which can be deemed to have a nexus with the forum based in whole, or in part, on behavior/occurrences promoted through computer-mediated open networks (i.e. the Internet). The cardinal part of this exercise will involve analyzing different approaches to the question of how to localize conduct on the Internet for purposes of jurisdiction. In a broader perspective, my goals are to frame and bring into focus the current constitution of this relatively new area of the law, as well as to discern potential trends, and thereby conclude whether a workable set of legal standards exist. Concisely stated, the aim of this thesis is to analyze, and to provide a snapshot, of the law of personal jurisdiction in connection with the Internet (hereinafter Internet Jurisdiction). In connection with this a brief exploration of the status quo ante of American conflict of laws will be necessary.

In the United States the subject of private international law is usually referred to as conflict of laws, and is perceived as covering three areas: jurisdiction, choice of law, and the recognition and enforcement of foreign judgements. This thesis deals exclusively with questions of jurisdiction, and accordingly the areas of choice of law and recognition and enforcement of foreign judgements will not be covered.

Furthermore, there are three categories of jurisdiction: jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce.<sup>3</sup> In this thesis only jurisdiction to adjudicate will be examined, in part since I believe that this category of jurisdiction is presented with the greatest challenges by the advent of Internet commerce, and in part since I believe legal certainty and guidance in this area to be of most immediate practical value for businesses seeking to embrace the promises of Internet commerce.

I wish to impress upon the reader that, given the fact that websites are regularly accessible world-wide, the prospect that a sponsor of a website might be hauled into a courtroom in a remote jurisdiction is a most real possibility, and hence much more than a mere academic exercise.

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<sup>3</sup> Restatement (Third) of the Foreign Relations Law of the U.S. § 401 (1987).

Accordingly, only the novel issues presented by, and specific for, Internet commerce will be explored in this thesis.

The fact that the U.S. is a federal state with at least fifty jurisdictions has several ramifications for the subject of this thesis (as will be further explored in section 3.2), however suffice it to say here that this makes the U.S. an interesting object of study from the field of private international law. This coupled with the fact that the Internet arguably spawned in the U.S.<sup>4</sup> as well as the fact that roughly fifty percent of the turnover generated by electronic commerce can be found in the U.S.

Although this thesis will focus on the domestic conflict-of-laws rules and principles in effect as between the different jurisdictions of the U.S. federal state, it deserves mentioning that essentially the same considerations apply (internationally) as between the U.S. federal state and other nation-states, albeit with the additional consideration of the international principle of *comity* among nations.<sup>5</sup> Thus the findings presented in this thesis ought to be of value, *mutatis mutandis*, in the international context.

### 1.3 SCIENTIFIC METHOD AND DISPOSITION

In this thesis I examine and analyze the case law and the scholarly discourse, i.e. the relevant jurisprudence for the field of study, with an emphasis on the case analysis, in a synthetic approach. This exercise will constitute the bulk of the thesis.<sup>6</sup> Hence, in chapter three I review the traditional jurisdictional rules and principles which constitute the fundament of Internet jurisdiction, whereas in chapter four I proceed with a more comprehensive qualitative analysis of Internet jurisdiction cases and the emerging body of law in this field. I will conclude the latter chapter by proffering some comments on the law *de lege ferenda*.<sup>7</sup> Finally, in chapter five, I offer my concluding remarks, which will include my view on the law of Internet jurisdiction in the U.S. *de lege lata*, as well as what follows from this in terms of practical implications for participants in Internet commerce. As a legal scholar primarily trained in a civil-law legal culture, *ergo* accustomed to the relative structure of code-type lists of jurisdictional rules and reasoning from general principles, and given the fact that I have chosen the U.S. as the object of study, a country with a common-law legal culture, I believe that the method I have utilized

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<sup>4</sup> See *infra*, section 2.1.

<sup>5</sup> See e.g. Restatement (Third) of the Foreign Relations Law of the United States, Introductory Note to Part IV p. 231, and § 403, Comment a.

<sup>6</sup> Chapters 3 and 4.

<sup>7</sup> This will also include some comments on the future of this area of the law in general, for instance the work of the Hague Conference On Private International Law and the Draft Convention on Jurisdiction and Foreign Judgments In Civil and Commercial Matters, See e.g. online <http://www.hcch.net/e/workprog/jdgm.html> (visited 2001-11-29).

when drafting this thesis has enabled me to heed the demands on scholarly research and analysis laid down by both legal cultures.

Mind the reader that since this relatively new area of law is signified by a prevailing legal uncertainty, many of the scholarly contributions to the debate, as well as some of the outcomes in the courts, could be said to be rather diverging, and at times speculative. My analysis should preferably be viewed in the light thereof. Nevertheless, in part because of the fact that the discussion has been enriched by such a multitude of different approaches, I have tried to include as many of these as possible in a critical analysis, albeit treating some of the arguably more extreme approaches only peripherally, or even omitting them all together<sup>8</sup>.

The task of conducting legal analysis in the dynamic area of Internet jurisdiction law is burdened by the fact that technological change in the field of Information technology and the Internet is constant, as well as takes place at an incredible pace. Accordingly, one of the most apparent challenges one is faced with is to remain neutral in regard to technology. Legal analysis and standards that do not heed this demand will before long become outdated, accompanied by a consequential decline in credibility.

More often than not, the failure to remain neutral in regard to technology can be linked to insufficient knowledge of the core technology of the Internet, as well as of the overarching policy considerations behind the law of jurisdiction. Thus I will include a brief, but concise, depiction of the technology and nature of the Internet,<sup>9</sup> as well as an examination of the essential rules and principles of the law of personal jurisdiction in the U.S. without Internet commerce considerations<sup>10</sup>.

## 1.4 MATERIAL

Legal research within the field of study for this thesis has now been well established in the U.S. As mentioned in the above, it has seen a remarkable development since Internet commerce took off seriously in the late 1990's, both in the diversity of approaches as well as the plain production of

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<sup>8</sup> Some theoretical approaches have been unmistakably surpassed by a more comprehensive understanding of the technology, as well as by the legal development, in both the courts and in the scholarly debate, of more sensible and logically attractive approaches. Representative for some of the arguably outdated approaches are the thought that the Internet, or Cyberspace, is immune against nations' assertions of jurisdiction, and that Cyberspace in fact is a new and totally independent entity for purposes of jurisdiction, calling for entirely new principles, rules and institutions (often compared to the *Lex Mercatoria*). Cf. David R. Johnson and David G. Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 *Stanford Law Review* 1367 (1996). Available online at [http://www.cli.org/X0025\\_LBFIN.html](http://www.cli.org/X0025_LBFIN.html) (visited 2001-10-09).

<sup>9</sup> Chapter 2.

<sup>10</sup> Chapter 3.

scholarly work. The cases decided, as well as pending, in regard to Internet jurisdiction are numbering in the hundreds. There can be no doubt that legislators, judges and corporate interests have realized the importance of achieving legal certainty in this field.

Since legal research, as well as the availing of sources found on the Internet are not yet fully accepted or appreciated, even though they are becoming more so, one should take special care in making certain the authenticity of such sources found and referred to on the Internet. Nevertheless, the subject of this thesis, Internet Jurisdiction, lends itself particularly well to the use of articles in general, and articles published on the Internet in particular. Foremost since, given the prevailing legal uncertainty, and the volatile characteristics of the Internet, research in this field in particular runs the risk of quickly becoming outdated. Moreover, not only are these sources more easily available to a scholar of American law positioned in Sweden, but also considering the fact that most of the authoritative work on Internet jurisdiction are usually published on the Internet, either on private initiatives by the authors or under the auspices of leading organizations or conferences on the subject.

In regards to American law, companies such as Lexis<sup>11</sup> or Westlaw<sup>12</sup> provide excellent, although subscription-required, online services for legal research.<sup>13</sup> Regarding subscription-free services for legal research on American Internet jurisdiction law I have found good use of different law schools' online resources<sup>14</sup>, private organizations' websites<sup>15</sup>, online legal search-engines<sup>16</sup>, or even private law firms' online legal research resources<sup>17</sup>.

Due to the legal uncertainty prevailing in the area of Internet jurisdiction, and the rapid and seemingly ever-changing character of the technology, it is generally hard to find any apparent authorities on the subject. It is hard to speak of any conventional wisdom in this area, and the jurisprudence seems to be left to swing in the pendulum. However, the situation is not quite as

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<sup>11</sup> Available online at [www.lexis.com](http://www.lexis.com) (visited 2001-10-09).

<sup>12</sup> Available online at [www.westlaw.com](http://www.westlaw.com) (visited 2001-10-09).

<sup>13</sup> Another private publisher which provides an exceptional online legal research tool, which I have had good use of, is the Bureau of National Affairs (BNA), available online at [www.bna.com](http://www.bna.com) (visited 2001-11-01). Although a subscription is normally required, BNA offers periodic free trial subscriptions for everyone.

<sup>14</sup> See e.g. The John Marshall Law School, Chicago, available online at [www.jmls.edu/cyber/index/index.html](http://www.jmls.edu/cyber/index/index.html), and The Legal Information Institute at Cornell Law School, available online at <http://www.law.cornell.edu> (visited 2001-10-15).

<sup>15</sup> See e.g. The Internet Law and Policy Forum, available online at [www.ilpf.org](http://www.ilpf.org) (visited 2001-10-09).

<sup>16</sup> See e.g. [www.findlaw.com](http://www.findlaw.com) (visited 2001-10-09).

<sup>17</sup> See e.g. Baker & McKenzie's excellent resource available online at <http://www.bmck.com/elaw/default.asp> (visited 2001-10-09), which is free upon registration.

ominous as implied in the foregoing. After extensive research eventually authorities on the subject begin to emerge.

Naturally, the first and foremost object of study is the case law of U.S. courts as well as the relevant federal and state legislation. After this, private expert initiatives such as the American Bar Association's (ABA) Project on Internet Jurisdiction at Chicago-Kent College of Law<sup>18</sup> and the Internet Law and Policy Forum<sup>19</sup> can be regarded as authoritative sources. Constantly re-occurring authoritative figures in this field are, among others, Henry H. Perritt, Jr., Thomas Vartanian, John L. Gedid, and Michael Geist. Needless to say, I have also used a multitude of scholarly work published in printed books as well as published in both printed and electronic legal reviews and journals.

I want to convey one final caveat to the reader: the area of Internet jurisdiction is highly susceptible to change, thus it is important to remain critical when analyzing any arguably generally accepted and predominant approach to the problems, or otherwise run the risk of conducting analysis too speculative in nature. Accordingly, this thesis should preferably be viewed in the light thereof.

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<sup>18</sup> The American Bar Association's Business Law Section, through its Cyberspace Law Committee, and with joint sponsorship of four other sections, funded the two-year transnational jurisdiction in cyberspace project (on nine different areas of the law) [hereinafter ABA Internet Jurisdiction Project] which was presented at the London 2000 Annual Meeting (the report has yet to be adopted formally), *see* <http://www.abanet.org/buslaw/cyber>. The ABA Internet Jurisdiction Project's reports and work documentation is available online at <http://www.kentlaw.edu/cyberlaw> (visited 2001-10-09).

<sup>19</sup> *See supra* note 15.

# 2 THE INTERNET

## 2.1 A Brief History of the Internet

The Internet is commonly perceived to have been created 1969 in the U.S. when the Advanced Research Project Agency (ARPA) formed a network that linked computers and computer networks (i.e. an internet). This network, then called ARPANET, was owned by the military, a number of defense contractors, and different university laboratories. The common aim of the participants was to create a decentralized and self-maintaining network, comprised of redundant links between computers and computer networks, with the ability to automatically re-route communications if any link was damaged or unavailable, in order to facilitate defense-related research.<sup>20</sup> Eventually, as the original network grew, it came to include other networks worldwide and *ipso facto* a public international network of networks had been created. However, it was the World Wide Web, which was introduced in 1994, that undoubtedly prompted the phenomenal growth in both the size and use of the Internet, also marking the inception of today's Internet commerce.

## 2.2 The Nature of the Internet

### 2.2.1 General Comment

A solid comprehension of the technological architecture and operation of the Internet is absolutely essential to understanding the unique jurisdictional questions that is created by the Internet. In the following I will therefore explain the basic features of the nature of the Internet. Nevertheless, an excessively protracted explanation of the technology of the Internet would carry beyond the scope and expected magnitude of this thesis. Thus I will henceforth presume that the reader is fairly familiar with the basic architectural structure, as well as the operation, of the Internet.

### 2.2.2 The Architectural Structure of the Internet

As mentioned in the above (section 2.1), the Internet can be broadly defined as a public international network of computer networks.<sup>21</sup> Each link in this network of networks is a computer connected to other computers through a

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<sup>20</sup> See e.g. *ACLU v. Reno*, 929 F.Supp. 824, 830-39 (E.D. Pa.1996).

<sup>21</sup> Lilian Edwards and Charlotte Waelde (Eds.), *Law & the Internet – A Framework for Electronic Commerce*, Hart Publishing, 2000, pp. 1-2.

variety of connections, some of which are fiber optic cables, copper wires and microwave transmissions.<sup>22</sup> Although the most common way of connecting to the Internet today still is through traditional telephone lines, transfer mediums such as digital subscriber lines (DSL), Integrated Service Digital Network (ISDN) lines, dedicated T1 or T3 leased lines, or cable modem access are becoming increasingly commonplace. The data transfer capacity and speed of these different connections are usually measured in terms of “bandwidth” – as bandwidth increases, more data can be sent and retrieved faster.<sup>23</sup> Once connected one can exchange electronic mail, transfer files in any direction, and remotely log on to any other computer system or network connected to the Internet.

Since the different computers connected to the Internet have varying operating systems, such as Unix, Windows and Macintosh, they communicate with each other through a machine language called Transmission Control Protocol/Internet Protocol (TCP/IP). This is the suite of protocols that define the Internet as they specify how computers talk to each other in a network.

Each computer connected to the Internet is, and must be, assigned a unique IP Number (or IP Address), or it is not really on the Internet. Simply put, the IP Address is the computer’s unique address on the Internet that enables other remote computers to locate it among the millions of computers connected to the Internet. Perhaps a superfluous point, but nevertheless an important one, is that this “address” is a logical one, i.e. defined in logical, not in geographic or spatial, terms. Hence the expression that “there is no there there”.<sup>24</sup>

The World Wide Web is designed to allow easier navigation of the network through the use of graphical user interfaces and hypertext linking between hundreds of millions of electronic documents (webpages) on millions of computers (websites) across the Internet, each of which are reachable via a unique but changeable name or Uniform Resource Locator (URL).<sup>25</sup>

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<sup>22</sup> Thomas Vartanian, *A US Perspective on The Global Jurisdictional Checkpoints in Cyberspace*, article available online at

<http://www.ilpf.org/events/jurisdiction/presentations/vartanianpr.htm> (visited 2001-10-09).

<sup>23</sup> See e.g. the ABA Internet Jurisdiction Project’s London Meeting Draft Report, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet* [hereinafter Jurisdiction Project Draft Report], p. 13, available online at <http://www.kentlaw.edu/cyberlaw/docs/drafts/draft.rtf> (visited 2001-10-09).

<sup>24</sup> See, e.g., *Digital Equipment Corp. v. Altavista Technology, Inc.*, 960 F. Supp. 456 (D. Mass. 1997) [hereinafter *Digital Equipment*]; “The Internet has no territorial boundaries. To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps ‘no there there,’ the ‘there’ is everywhere where there is Internet access.”.

<sup>25</sup> Thus a website is simply a collection of webpages.

### 2.2.3 The Operation of the Internet

Transmissions over the Internet employ *packet switching technologies*. This means that the Internet operates by breaking up the data into distinct packets, which can then be transmitted individually along different available routes to its destination.<sup>26</sup> Each of these packets contains the data, its origin and destination, as well as the information needed in order to enable the recipient computer server to reassemble the data once it is received at the destination.<sup>27</sup>

Another crucial feature of the Internet is so-called *smart communications*. Essentially, this means that when data are being sent, computer intelligence monitors packet traffic on the network and accordingly route packets via the least congested route to the next node in the network. Each computer, or node, in the network autonomously perform the determination of whether to send packets forward to another node in the network, or to wait until network traffic is reduced, or to redirect packets via alternate routes in the network.<sup>28</sup> This is partly why the Internet as a system can be said to be self-maintaining.

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<sup>26</sup> The capacity and availability of wire space determine which routes the different packets of data take. The available wire space in a channel between two computers is used only in a matter of nano-seconds when packets are transferred in one direction. *See Vartanian, supra* note 22.

<sup>27</sup> *See* Jurisdiction Project Draft Report, note 23 *supra*, p. 12.

<sup>28</sup> *C.f.* Vartanian, *supra* note 22.



# 3 PRIVATE INTERNATIONAL LAW IN THE US

## 3.1 General Comment

This section is not intended to be an exhaustive examination of the modern jurisdictional doctrine in the U.S. Rather, its purpose is to briefly depict the relevant fundamental rules and principles of the law of personal jurisdiction in the U.S. in order to facilitate a further analysis of the jurisdictional issues uniquely presented by Internet commerce. Mind the reader that this chapter will come to bear on the main analysis.

## 3.2 Jurisdictional Standards: General Overview

As familiar, the United States is a federal state and as such it has both a federal and a state court system. For the purposes of the main analysis in this thesis, it is only important to remember that this means that controversies can be heard in either state or federal courts based on essentially the same legal premises. The question of whether the applicable law is federal law or state law typically has nothing to do with whether a controversy is heard in a state court or in a federal court. For instance, suits involving citizens of different states in the U.S. can, and often are, heard in federal courts sitting in so-called diversity jurisdiction,<sup>29</sup> although there is theoretically nothing to prevent the same case from being heard in a state court. A federal court adjudicating such a dispute will, subject to constitutional limitations, still apply the same substantive state law as a state court located in the state where the federal court sits would apply.<sup>30</sup> Thus the federal court will apply state jurisdictional statutes when determining if it has jurisdiction to hear the controversy at bar.

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<sup>29</sup> The aim of this scheme being to provide parties with different state citizenship with an opportunity to select a more neutral forum to bring suit in. The other requirement, besides the parties having “diverse” citizenship, is that the amount in controversy exceeds a certain value (USD 75 000), *See* 28 U.S.C. Section 1332(a).

<sup>30</sup> The so-called Erie Doctrine; *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The purpose of this rule is to prevent forum shopping and to avoid the unfair administration of the laws.

## 3.3 State Long-Arm Statutes and Due Process Analysis

### 3.3.1 State Long-Arm Statutes

In the United States, regardless of whether a suit is brought in federal court or state court and whether the underlying cause of action is based on federal law or state law, essentially two rules of law govern a court's assertion of personal jurisdiction over a nonresident defendant: state long-arm statutes and the Due Process Clauses of the Federal Constitution.<sup>31</sup>

State long-arm statutes are the procedural rules that provide state courts with the power to haul out-of-state/foreign defendants into court, i.e. before asserting jurisdiction, a court must be statutorily authorized to do so. Thus the court interprets the state rule and determines whether it intended to authorize jurisdiction over the defendant under the circumstances of the case under review. Today, every state in the U.S. has enacted long-arm statutes. Some long-arm statutes authorize courts to assert jurisdiction up to the limits permitted by Due Process,<sup>32</sup> i.e. the limit of personal jurisdiction over nonresident defendants are coextensive with the limits of federal Due Process, thus merging the statutory long-arm and constitutional jurisdictional questions into one inquiry; whether federal Due Process is satisfied.<sup>33</sup> Most states have enacted long-arm statutes that stipulate specific categories for which assertions of jurisdiction by the courts are permissible, not reaching to the fullest extent of the Due Process Clause. Others still have long-arm statutes that reach to the extent of Due Process, but nevertheless limit the state's assertion of jurisdiction under certain specific circumstances.<sup>34</sup> It could be said that the trend in the past decades has been to extend the reach of long-arm statutes. However, this trend is arguably mitigated by an increased willingness of courts to employ the doctrine of *forum non conveniens*.<sup>35</sup>

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<sup>31</sup> Federal court jurisdiction is limited by the Due Process Clause of the 5<sup>th</sup> Amendment to the U.S. Federal Constitution. It provides, in pertinent parts, that no person shall be "deprived of life, liberty, or property, without due process of law". State court jurisdiction is limited in the same manner by the Due Process Clause of the 14<sup>th</sup> Amendment to the U.S. Federal Constitution, Section 1.

<sup>32</sup> See e.g. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 106 (1987) [hereinafter *Asahi*] (the Court finding that "California's long-arm statute authorizes the exercise of jurisdiction 'on any basis not inconsistent with the Constitution of this state or of the United States'."), *C.f.* Cal. Civ. Proc. Code, section 410.10.

<sup>33</sup> *C.f.* Paul R. Dubinsky, *The Reach of Doing Business Jurisdiction and Transacting Business Jurisdiction Over Non-U.S. Individuals and Entities*, Article published by the Office of the Legal Adviser at the U.S. State Department, available online at [http://www.state.gov/www/global/legal\\_affairs/dubinsky.html](http://www.state.gov/www/global/legal_affairs/dubinsky.html) (visited 2001-10-26).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

### 3.3.2 Due Process Analysis

If the long-arm statute does not support an assertion of jurisdiction in the case before the court, the case is dismissed. If it does support jurisdiction, the court then continues to determine whether the rule's attempt to assert jurisdiction comport with the strictures of Due Process. This constitutional jurisdictional inquiry has since 1945 focused on the contacts between the defendant, the forum, and the litigation.<sup>36</sup> In the words of the *Shoe* court, "[...] due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."<sup>37</sup> Furthermore, when a court considers the minimum-contacts requirement, it examines the quality and nature of the defendant's acts in the forum "in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure",<sup>38</sup> i.e. the degree to which the defendant acted in the forum state and the relationship between that activity and the claim brought against him.

The minimum-contacts requirement has since the *Shoe* decision been further refined and is now construed to mean that there must be an act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws".<sup>39</sup> If a defendant does so purposefully avail itself of the benefits and protections of the forum state, thereby forming a substantial connection between itself and the forum state, the defendant might reasonable expect to be hauled into court there to defend a suit.<sup>40</sup> Moreover, an assertion of jurisdiction must ultimately be "reasonable" for it to comport with the strictures of Due Process.<sup>41</sup>

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<sup>36</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) [hereinafter *Shoe*]. C.f. also the influential article by Arthur von Mehren and Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966). Before *Shoe*, the jurisdiction of courts to render judgment *in personam* was grounded on their *de facto* power over the defendant's person, hence the defendant's physical presence within the territorial jurisdiction of the adjudicating court was required (See *Pennoyer v. Neff*, 95 U.S. 714 (1877)).

<sup>37</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), citing *Milliken v. Meyer*, 311 U.S. 457 (1940).

<sup>38</sup> *Ibid.*

<sup>39</sup> See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) [hereinafter *Hanson*].

<sup>40</sup> See e.g. *World-Wide Volkswagen Corp. V. Woodson*, 444 U.S. 286, 297 (1980) [hereinafter *World-Wide Volkswagen*].

<sup>41</sup> See *Asahi*, *supra* note 32, at 113.

### 3.4 General Jurisdiction

General jurisdiction is one of two categories of personal jurisdiction.<sup>42</sup> A court have general jurisdiction over a nonresident defendant when the defendant is found to have “continuous and systematic”<sup>43</sup> contacts with the forum state, by which the defendant has purposefully availed itself of the privilege of *doing* business in that state, thereby invoking the benefits and protections of its laws, making an assertion of jurisdiction foreseeable (for the defendant) and reasonable, i.e. such contacts make the nonresident defendant “present” in the state for purposes of litigation. Furthermore, if a court finds that it has general jurisdiction over a nonresident defendant, it *ipso facto* has jurisdiction with respect even to causes of action that do not arise from, or are unrelated to, the defendant’s contacts with the forum state.<sup>44</sup> When determining whether the defendant’s contacts with the forum state are continuous and systematic enough to support an assertion of jurisdiction compatible with federal Due Process, the court typically analyzes the substantiality and nature of those contacts.<sup>45</sup>

### 3.5 Specific Jurisdiction

The other category of personal jurisdiction is specific jurisdiction. The main difference for a court sitting in specific jurisdiction rather than general jurisdiction is that it can only adjudicate claims that arise out of, or directly relate to, the nonresident defendant’s contacts with the forum state.<sup>46</sup> In this sense, specific jurisdiction is a much narrower concept than general jurisdiction. However, specific jurisdiction is nevertheless a broader concept in the sense that the court need not establish that the nonresident defendant has substantial and systematic contacts with the forum state. Rather, the court must determine whether the nonresident defendant merely has certain minimum contacts with the forum state, by which the defendant has purposefully availed itself of the benefits of *transacting* business in that

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<sup>42</sup> The other category is specific jurisdiction – *see infra* section 3.5.

<sup>43</sup> *See Shoe, supra* note 36; *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437 (1952) [hereinafter *Perkins*]; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418 (1984) [hereinafter *Helicopteros*]. Although, as the *Helicopteros* case illustrates, the exact meaning of these criteria is somewhat elusive. In that case, the Court stated that contacts in the form of purchases of merchandize and related trips, even if occurring at regular intervals (activity that quite clearly could be described as continuous and systematic), were *not*, standing alone, sufficient basis for a state’s assertion of general jurisdiction. At any rate, one can reasonably conclude that the Court appeared to set a very high standard in this regard.

<sup>44</sup> *C.f.* Restatement, Second, Conflict of Laws § 35, section 3 and comment e.

<sup>45</sup> *See Vartanian, supra* note 22. *C.f. also supra*, note 44 *in fine*. *See also Shoe supra*, note 36, at 319: “It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, *cannot be simply mechanical or quantitative*. [...] Whether due process is satisfied must depend rather upon *the quality and nature of the activity* [...]”. [emphasis added]

<sup>46</sup> *C.f. supra* section 3.3.2. *See also Helicopteros, supra* note 43, at 414.

state, thereby invoking the benefits and protections of its laws.<sup>47</sup> If the minimum-contacts requirement is satisfied, the defendant should have reasonably anticipated that it could be hauled into court in the forum state to defend claims arising out of, or relating to, its contacts with it.

Next to examine is under what circumstances a court will find that a nonresident defendant has minimum contacts with the forum state sufficient to sustain specific jurisdiction, i.e. what kind of activity constitutes “minimum contacts”? The Supreme Court has developed this concept in a number of significant cases, the most important of which I will briefly analyze in the following.

An appropriate starting point is arguably the *World-Wide Volkswagen* case,<sup>48</sup> in which the Court significantly limited the *stream of commerce* doctrine.<sup>49</sup> In this case the plaintiffs, New York residents and buyers of a car they claimed was defective in a way which had caused an accident in Oklahoma, sued the defendant, a wholesale distributor (World-Wide Volkswagen) based in New York, in an Oklahoma court. The defendant only distributed cars in the states of New York, New Jersey, and Connecticut, and accordingly the plaintiffs had purchased the car in New York, after which they drove it to Oklahoma. Consequently, the defendant did not sell any cars in the state of Oklahoma, nor did it advertise there, nor did it play any part in causing the car to be driven to Oklahoma. In fact, the defendant's only connection with Oklahoma was that they sold a car in New York after which the plaintiffs unilaterally decided to drive the car through Oklahoma. Accordingly, whether the defendant had continuous and systematic contacts (*C.f. Shoe*) was not the proper question here (hence not general jurisdiction), but rather whether whatever contacts the defendant could be deemed to have with the forum state reached the bare minimum level required by federal Due Process for an assertion of specific jurisdiction.

Applying the minimum-contacts test to these facts, the Court concluded that the defendant had not purposefully availed itself of the benefits and protections of the state of Oklahoma. The car had made its way into Oklahoma without any *direction* or *intention* on the part of the defendants, and although it might have been foreseeable that a car sold in New York might end up in Oklahoma, mere foreseeability was not sufficient to support jurisdiction by Oklahoma courts. Purposeful availment requires efforts more *clearly targeted* at the forum state, such as selling products regularly to that market or serving, or seeking to serve, that market. Consequently, even if the car was deemed to have entered a stream of commerce, it left that stream

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<sup>47</sup> Again, as with general jurisdiction, even if the defendant is found to have purposefully availed itself of the benefits and protections of the law of the forum state, an assertion of specific *in personam* jurisdiction must nevertheless ultimately be found to be reasonable in order to be compatible with the Due Process Clause.

<sup>48</sup> See *supra*, note 40.

<sup>49</sup> *C.f. Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).

at the point of its purchase in New York.<sup>50</sup> The subsequent unilateral actions by the plaintiffs could in no way be attributed to the defendant as an intentional contact between him and the forum state. Moreover, the Court ultimately found an assertion of specific *in personam* jurisdiction by Oklahoma courts to be unreasonable.<sup>51</sup>

A 1985 case, *Burger King Corp. v. Rudzewicz*,<sup>52</sup> involved a claim for breach of contract. As in the other cases, the nonresident defendant had never been physically present in the forum state, although this did not prevent the Court from finding that the forum state could assert jurisdiction over him. The Court stated that:

“Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. [...]Nevertheless, minimum requirements inherent in the concept of “fair play and substantial justice” may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.”<sup>53</sup>

Furthermore, when a court, hearing a claim for breach of contract, seeks to determine whether a defendant purposefully established minimum contacts within the forum sufficient to support specific jurisdiction, it must evaluate such circumstances as the prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing.<sup>54</sup>

Reaffirming the position that a defendant must have purposefully directed or targeted his activity towards the forum state seeking to establish specific

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<sup>50</sup> *C.f.* the ABA Internet Jurisdiction Project, *An Overview of the Law of Personal (Adjudicatory) Jurisdiction: The United States Perspective* [hereinafter ABA Internet Jurisdiction Project - U.S. Perspective], article available at <http://www.kentlaw.edu/cyberlaw/docs/rfc/usview.html> (visited 2001-11-08).

<sup>51</sup> In determining reasonableness, the Court balanced such factors as, *inter alia*, the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies. *See World-Wide Volkswagen supra*, note 40, at 292.

<sup>52</sup> 471 U.S. 462 (1985) [hereinafter *Burger King*].

<sup>53</sup> *Ibid.*, at 476 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 783 (1984)) and at 477-478 (citing *World-Wide Volkswagen*).

<sup>54</sup> *Ibid.*, at 479.

jurisdiction, the Court in the *Asahi* case instructively concluded that mere awareness that a product inserted in the stream of commerce, absent some purposeful act by which the defendant has availed itself of the benefits or protections of the forum state, is not sufficient to support an assertion of specific *in personam* jurisdiction compatible with federal Due Process.<sup>55</sup> Furthermore, the Court ultimately found that an assertion of jurisdiction would be unreasonable.<sup>56</sup>

Concluding the Due Process analysis for specific jurisdiction, it follows that once the defendant has been found to have minimum contacts with the forum state, those contacts are sufficient to permit an assertion of jurisdiction with respect to related claims, but are presumptively insufficient to permit jurisdiction to be asserted with respect to claims that have no relationship to those contacts. In addition, an assertion of jurisdiction must invariably and ultimately be reasonable.

Another situation relevant for Internet jurisdiction issues is exemplified in *Calder v. Jones*,<sup>57</sup> involving the “effects doctrine”. In cases involving tortious injury this doctrine focus on caused effects in the forum state. The doctrine essentially states that specific *in personam* jurisdiction in such cases is predicated on 1) intentional actions 2) expressly aimed at the forum state 3) causing harm, the brunt of which is suffered, and which the defendant knows is likely to be suffered, in the forum state.<sup>58</sup>

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<sup>55</sup> See *supra*, note 32, at 112, the Court stating that “[t]he ‘substantial connection,’ [...] between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed* toward the forum State. [...] The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.” (emphasis added and citations omitted).

<sup>56</sup> This reasonableness analysis was accomplished in review of the five-factor test of *World-Wide Volkswagen, C.f. supra*, note 51.

<sup>57</sup> *Calder v. Jones*, 465 U.S. 783 (1984) [hereinafter *Calder*].

<sup>58</sup> *Ibid.*, at 789-790.

# 4 Personal Jurisdiction & The Internet

## 4.1 Initial Approaches

### 4.1.1 An Expansive Approach

“In the present case, Instruction has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states. The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut.”<sup>59</sup>

A proper starting point for an analysis of US Internet jurisdiction case law is the 1996 *Inset* case. As made abundantly clear by the citation of the court’s reasoning in the above, the knowledge and understanding of the architecture and operation of the Internet in American courts was murky to say the least. Mind the reader that this was only five years ago, yet another testimony of how fast the Internet has become an increasingly natural part of our modern day-to-day life. Unfortunately, however quite predictably, many cases soon followed the analytical framework presented in the *Inset* case.

The *Inset* case, and the line of cases following it, has been widely and strongly criticized elsewhere. Indeed, as some well-informed scholars have stated, “[t]he decision was wrong, and is not now widely followed, but it left its mark.”<sup>60</sup> However, since the case was the first reported decision in which Internet activity had a pivotal role for a court’s finding of personal jurisdiction proper, a few key observations will be made.

The *Inset* decision in essence stated that all Internet activity was equivalent – that the *mere use* of the Internet by a nonresident defendant, e.g. through maintaining a publicly accessible website, even though entirely passive in nature, constituted minimum contacts for the purpose of Due Process analysis. The necessary implication of this legal reasoning would be that every court in every state could assert jurisdiction over the same defendant

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<sup>59</sup> *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, at 165 (D. Conn. 1996) [hereinafter *Inset*].

<sup>60</sup> See London Meeting Draft Report, *supra* note 23, p. 57.



based solely on its maintenance of a non-interactive website on the Internet. Needless to say, such a jurisdictional standard is too broad, and less appropriate, from a policy standpoint. Even though the *Inset* rationale was given persuasive authority in a number of ensuing cases,<sup>61</sup> this expansive jurisdictional standard was eventually modified.<sup>62</sup>

The *Inset* case, as the rest of the Internet cases under review in this thesis, concerns *specific in personam* jurisdiction. To the author's knowledge, no case, except for one – the *Mieczkowski* case - have held that Internet contacts can create general jurisdiction,<sup>63</sup> although several courts have concluded that it is virtually impossible to establish general jurisdiction exclusively through Internet contacts. Hence the *Mieczkowski* case must be considered an aberration in the context of Internet jurisdiction case law. However, there is nothing inherent in the nature of the test for general jurisdiction making it impossible to be exercised on the basis of exclusive Internet contacts.<sup>64</sup>

The *Inset* line of cases has certain common features, which ultimately makes them flawed. First, since the doctrine of personal jurisdiction is highly fact-specific, its proper application is contingent upon a solid comprehension of the factual circumstances. The courts hearing the early cases arguably did not possess sufficient knowledge about the principal structure and operation of the Internet, thus they did not analyze the underlying facts, nor frame the jurisdictional issues, properly. Since mere use of the Internet was perceived to be sufficient to establish minimum contacts, a nonresident defendant's actual activity on the Internet was not assessed, i.e. whether forum residents in fact had accessed the defendant's website, whether the defendant had sought to interact commercially with forum residents and thereby solicit business, and whether the defendant was selling products, or providing services, directly through its website.<sup>65</sup> Second, the courts failed to convert and balance the policy considerations behind the existing jurisdictional

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<sup>61</sup> See e.g. *Maritz v. Cybergold*, 947 F. Supp. 1328 (E.D. MO. 1996) [hereinafter *Maritz*]; *Heroes, Inc. v. Heroes Foundation*, 958 F. Supp. 1 (D.C. 1996) [hereinafter *Heroes*]; *Edias Software International, L.L.C. v. Basis International, Ltd.*, 947 F Supp. 413 (D. Ariz. 1996) [hereinafter *Edias*]; *Telco Communications v. An Apple A Day*, 977 F.Supp. 404 (E.D.Va. 1997) [hereinafter *Telco*].

<sup>62</sup> See e.g. *Rannoch, Inc. v. Rannoch Corp.*, 52 F. Supp.2d 681 (E.D.Va. 1999) [hereinafter *Rannoch*] (creating a website, like placing a product into the stream of commerce, may be felt nationwide - or even worldwide - but without more, it is not an act purposefully directed toward the forum state); *Barrett v. Catacombs Press*, 44 F.Supp.2d 717, 727 (E.D.Pa. 1999) [hereinafter *Barrett*] (the rationale of *Inset* would subject anyone who posted information on the Internet to nationwide jurisdiction).

<sup>63</sup> *Mieczkowski v. Masco Corp.*, 997 F.Supp. 782 (E.D. Tex. 1998) [hereinafter *Mieczkowski*]. Although in all fairness, the court did factor other, non-Internet contacts into their analysis.

<sup>64</sup> C.f. ABA Internet Jurisdiction Project – U.S. Perspective, *supra* note 50. C.f. also *supra* note 43.

<sup>65</sup> C.f. Michael Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction* (article forthcoming 16(3) Berkeley Tech Law Journal), pp. 16-17, available at <http://aix1.uottawa.ca/~geist/geistjurisdiction-us.pdf> (visited 2001-11-20).

jurisprudence. In *Shoe* and its progeny, the Supreme Court emphasized certain features emanating from changes in interstate commercial practice, in turn caused by modern technology, and in the relative situations of sellers and buyers.<sup>66</sup> The rigid territorial/physical-presence based test of *Pennoyer*<sup>67</sup> was no longer adequate so the Court modified it with *Shoe*'s minimum-contacts test and made it more flexible. However, the increased plaintiff need for forum was balanced against defendants' need to be able to calculate risks and operate business in a predictable manner, examination of actual contacts of defendants, and fundamental fairness to defendants. The Supreme Court quickly manifested this counterbalancing policy in *Hanson*, and subsequently in *World-Wide Volkswagen*, *Burger King*, and *Asahi*, making plain that the minimum-contacts test did not allow a defendant to be sued simply anywhere a plaintiff or a product was located.<sup>68</sup>

In a broader perspective, a sweeping and all-inclusive jurisdictional standard such as the one formed in the *Inset* case would undoubtedly stifle the use and development of Internet technology, ultimately preventing any meaningful use of this medium.

#### 4.1.2 A Moderate Approach

When analyzing U.S. Internet jurisdiction case law, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,<sup>69</sup> emerges as a seminal case. The comprehensive analytical framework formulated and applied in the *Zippo* case has subsequently been followed in a multitude of Internet jurisdiction cases.<sup>70</sup>

As will be further explored in the following (section 4.2), the *Zippo* approach is no panacea. Nevertheless, the logical appeal of the approach in congruence with the view that it arguably presents a workable set of jurisdictional standards for this novel and uncertain area of the law, has made it a widely followed precedent.

The *Zippo* case was an Internet domain name dispute where the defendant sued the plaintiff for, inter *alia*, trademark infringement. The plaintiff was a Pennsylvania corporation with its principal place of business in Bradford, Pennsylvania. Defendant was a California corporation, with its principal place of business in Sunnyvale, California, which operated an Internet website and an Internet news service with the exclusive rights to the domain names "zippo.com", "zippo.net" and "zipponews.com". Defendant maintained no offices, employees or agents in Pennsylvania, hence the

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<sup>66</sup> See *supra*, note 50.

<sup>67</sup> See *supra*, note 36 *in fine*.

<sup>68</sup> *Ibid.*, *C.f. also Rannoch*, note 62, *supra*.

<sup>69</sup> 952 F. Supp. 1119 (W.D. Penn. 1997) [hereinafter *Zippo*].

<sup>70</sup> See *infra* note 81.

defendant's contacts with Pennsylvania had occurred almost exclusively over the Internet. Defendant's website contained advertisement and an online application form for subscription of the Internet news service. The application form asked for a variety of information, including the applicant's name, address and credit card number. Upon approval the applicant was given a password for access to defendant's news service. Approximately two percent (3000) of the total amount of subscribers to the defendant's news service were Pennsylvania residents, and retained their subscription through the above stated online procedure. Furthermore, defendant had contracted with seven Internet access providers in Pennsylvania to furnish its service to subscribers in Pennsylvania.<sup>71</sup>

Confronted with these facts, the *Zippo* court made an extensive examination of the existing case law, of the nature of the Internet, i.e. of its architectural structure and operation, and of the jurisdictional principles of the Shoe precedent.

First, in regard to traditional jurisdictional principles, the court acknowledged the underlying policies supporting the Supreme Court's development of the concepts of personal jurisdiction, stating that "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase."<sup>72</sup> and that "it is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted."<sup>73</sup>

Having recognized these factual circumstances of modern commercial enterprise and their implications for jurisdictional policy, the court thence synthesized the traditional jurisdictional principles with the new medium and stated that "[t]raditionally, when an entity intentionally reaches out 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."<sup>74</sup> This statement of principle in essence meant that the *Zippo* court repudiated the notion of the Internet as being beyond the jurisdictional grasp of traditional courts, thus making it clear that local laws would continue to matter and be applied to the Internet.

Second, after having reviewed the available case law and materials on Internet jurisdiction, the court concluded 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

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<sup>71</sup> *Zippo*, *supra* note 69, at 1121.

<sup>72</sup> *Ibid.*, at 1123 (citing *Hanson*).

<sup>73</sup> *Ibid.*, (citing *Burger King*).

<sup>74</sup> *Ibid.*, at 1124.

Internet.”<sup>75</sup> For purposes of analysis, the court formulated a sliding scale with three levels for measuring the appropriateness of finding personal jurisdiction in Internet-based controversies.

At one end of the sliding scale is the passive website, which does little more than make information available to those interested users that decide to visit the website. In this situation the defendant is seen to at most advertise its business through the Internet medium. A passive website does not, according to the *Zippo* court, constitute grounds for the exercise of personal jurisdiction.

At the opposite end of the scale is the wholly interactive website. Here the defendant is clearly doing business over the Internet, and consequently personal jurisdiction is proper. This situation typically involves a website through which the defendant can enter into contracts, with both domestic and foreign residents, which involves the “knowing and repeated transmission of computer files over the Internet.”<sup>76</sup>

The intermediate level of the scale involves situations in which the defendant operates through an interactive website, although it is not immediately clear that the defendant is transacting business over the Internet. In these situations, the appropriateness of exercising personal jurisdiction over the defendant is determined by “examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.”<sup>77</sup> Thus, at this intermediate level of the sliding scale, further inquiry as to the factual circumstances and ad hoc evaluation in each case is needed. Needless to say, from a policy point of view, as will be further explicated on in section 4.2, this has rather serious implications for defendants’ ability to reasonably foresee the location of potential lawsuits.

When the court applied the sliding-scale analysis to the factual circumstances of the *Zippo* case, it concluded that the defendant’s behavior fell under the doing-business end of the scale, hence personal jurisdiction could be constitutionally asserted without violating federal Due Process. The court noted that “[w]e are not being asked to determine whether Dot Com’s website alone constitutes the purposeful availment of doing business in Pennsylvania. [...] We are being asked to determine whether Dot Com’s conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania. We conclude that it does.”<sup>78</sup> Thus the court found that the defendant’s electronic contacts with the forum state demonstrated that it had directed its activities towards said state. Accordingly, the defendant had purposefully availed itself of the benefits and protections of the forum state and reasonably should have

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<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, at 1125-1126.

anticipated being hauled into court there to defend itself in actions related to these electronic contacts.

Furthermore, the *Zippo* court distinguished the facts of the case before it from those of *World-Wide Volkswagen*, holding that defendant's contacts were not "fortuitous" within the meaning of *World-Wide Volkswagen*.<sup>79</sup> The defendant in *Zippo* had consciously and repeatedly transmitted computer files over the Internet to Pennsylvania residents in fulfillment of its contracts with said residents, which *ipso facto* gave it clear notice that it would be liable to suit there.

The court concluded its analysis by finding that an exercise of personal jurisdiction to be reasonable under the reasonableness standard of *International Shoe*, and that the defendant's contacts were not insignificant. In connection with this latter finding, the court emphasized that the test has always focused on the "nature and quality", not the quantity, of the forum-related contacts.<sup>80</sup>

The sliding-scale analytical framework developed and used in the *Zippo* decision has, as indicated in the foregoing, been relied upon in a number of subsequent decisions, both in order to support and to reject Internet jurisdiction over nonresident defendants, as well as been used to explain the reasoning of both preceding and subsequent decisions.<sup>81</sup>

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<sup>79</sup> *Ibid.*, at 1126.

<sup>80</sup> *Ibid.*, at 1127 (citing *International Shoe*).

<sup>81</sup> For cases where specific jurisdiction has been found proper, see e.g., *CompuServe v. Patterson*, 89 F.3d 1257 (6<sup>th</sup> Cir, 1996) (The *Zippo* court actually considered this CompuServe case as a prime example of category 3 of the sliding scale, doing business, as a result of entering into contracts with plaintiff and knowing and repeated transmission of computer files over the Internet to plaintiff.); *Thompson v. Handa-Lopez, Inc.*, 998 F.Supp. 738 (W.D. Tex. 1998); *Blumenthal v. Drudge and America Online, Inc.*, 992 F.Supp. 44 (D.D.C. 1998); *GTE New Media Services, Inc. v. Ameritech Corp., et al.*, 21 F.Supp.2d 27 (D.C. 1998); *Park Inns International v. Pacific Plaza Hotels*, 5 F.Supp.2d 762 (D. Ariz. 1998); *Resuscitation Technologies, Inc. v. Continental Health Care Corp.*, 96 C 1457 (S.D. Ind., 03/24/97); *Stomp, Inc. v. Neato LLC*, 61 F. Supp.2d 1074 (C.D. Cal. 1999); *Multi-Tech Systems Inc. v. VocalTec Communications Inc.*, D. Minn., No. CIV. 00-1541 ADM/RLE, 12/4/00; *Euromarket Designs Inc. v. Crate & Barrel Limited, Ltd.*, 96 F.Supp.2d 824 (N.D. Ill., 2000); *American Eyewear Inc. v. Peeper's Sunglasses and Accessories Inc.*, 106 F. Supp.2d 895 (N.D. Tex. 2000); *School Stuff, Inc. v. School Stuff, Inc.*, N.D. Ill., No. 00 C 5593, 5/17/01; *Ty Inc. v. Baby Me Inc.*, N.D. Ill., No. 00 C 6016, 4/6/01; *Starmedia Network Inc. v. Star Media Inc.*, S.D.N.Y., Case No. 00 CIV. 4647, 4/23/01. For cases holding specific jurisdiction not proper, see e.g., *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d. 414 (9<sup>th</sup> Cir, 1997); *Millennium Enterprises, Inc. v. Millennium Music, LP*, 33 F.Supp.2d 907 (D.Or. 1999); *Transcraft v. Doonan Trailer*, 45 U.S.P.Q.2d (BNA) 1097 (N.D.Ill., 11/12/97); *Smith v. Hobby Lobby Stores, Inc. v. Boto*, 968 F.Supp. 1356 (W.D. Ark. 1997); *SF Hotel Company v. Energy Investments*, 985 F.Supp. 1032 (D. Kan., 1997); *Patriot Systems, Inc v. C-Cubed Corporation*, 21 F. Supp.2d 1318 (D. Utah 1998); *Decker v. Circus Circus*, 49 F. Supp.2d 743 (D.NJ. 1999); *Mink v. AAAA Development LLC*, 190 F.3d. 333 (5<sup>th</sup> Cir, 1999); *Amberson Holdings, LLC v. Westside Story Newspaper*, 110 F.Supp.2d. 332 (D.NJ. 2000). For cases holding general jurisdiction not proper, see e.g., *Millennium Enterprises, Inc. v. Millennium Music, LP*, 33 F.Supp.2d 907 (D.Or. 1999); *McDonough v. Fallon McElligott*, 40 U.S.P.Q.2d (BNA) 1826 (S.D. Cal.

The “passive website” category has in most cases, with few exceptions, not presented any greater problem to the court applying the *Zippo* test, since those cases involving passive websites have regularly also involved, in addition to Internet contacts, other non-Internet contacts. Arguably has neither the third “doing business” category of the test produced any greater disconcert. However, courts applying *Zippo* have struggled somewhat with the middle “interactive” category and reached different conclusions in regard to cases falling into this category, both in those cases involving exclusive Internet contacts as well as cases involving additional non-Internet contacts.

In connection with this it is probably instructive to briefly revisit the fundamentals of U.S. personal jurisdictional law, as articulated by the U.S. Supreme Court. Jurisdiction is about contacts, which the defendant has chosen, between himself and the forum. Thus, if a defendant does not wish to have any contacts with a particular forum, it ought to be possible for him to control and structure his behavior in a way so that he can not be deemed to have any contact with this forum.<sup>82</sup>

Unfortunately, a trend developed as courts tried to construe the middle category by which the *Zippo* test turned into a two-pronged one instead of a three-pronged one. Thus only a passive respectively an interactive category were applied, with the effect that an interactive website alone *ipso facto* was sufficient to establish minimum contacts. Hence the middle category’s purpose and intent to evaluate actual activity/conduct on the Internet was misconstrued. Moreover, in other instances minimum contacts were found through an interactive website in congruence with additional non-Internet activity by the defendant in the forum state, even regardless of whether that activity was related to the underlying claim or not.<sup>83</sup> Hence it would appear that the *Zippo* test was not applied in a consistent manner by U.S. courts,<sup>84</sup> and that Internet actors’ ability to predict and calculate the legal risks of their commercial activity were impeded as a result.

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1996); *Esab Group, Inc. v. Centricut, LLC*, C.A. No. 4:98-1654-22 (D.S.C. 1999); *Grukowski v. Steamboat Lake Guides & Outfitters, Inc.*, 1998 WL 962042 (E.D. Pa., 12/21/98). Only case to date, to my knowledge, to hold general jurisdiction proper, *see e.g.*, *Mieczkowski v. Masco Corp.*, 997 F.Supp. 782 (E.D. Tex. 1998).

<sup>82</sup> *C.f.* Jurisdiction Project Draft Report, *supra* note 23, p. 64, and ABA Internet Jurisdiction Project – U.S. Perspective, *supra* note 50.

<sup>83</sup> *C.f. Hasbro, Inc. v. Clue Computing, Inc.*, 994 F.Supp. 34 (D. Mass. 1997).

<sup>84</sup> Whether this was a result of flaws in the courts’ application of the test or a result of intrinsic deficiencies in the test itself, or both, will be further analyzed in the following under section 4.2.

## 4.2 The Zippo Approach No Longer The Situs Of Internet Jurisdiction?

### 4.2.1 General Comment

As previously mentioned, the *Zippo* approach is no panacea, and even though the *Zippo* sliding-scale test has been widely adopted, an analysis of recent case law and of the current jurisprudence reveals that a major change in the analytical framework for Internet jurisdiction is looming in the horizon. In recent years, a number of decisions have implicitly or outright rejected the analytical framework of *Zippo*. In addition, both informed scholars and expert practitioners have increasingly been raising their concern about the perceived ineptitude of the *Zippo* approach to effectively deal with the problems and challenges of Internet jurisdiction. Arguably, new standards are emerging, and I will devote the lion's share of the remaining part of this thesis to analyze this proposition.

### 4.2.2 The First Step: Zippo Refined

A proper starting point should reasonably be the 1999 case of *Millennium Enterprises, Inc. v. Millennium Music, LP*,<sup>85</sup> since the court in this case was arguably the first to recognize that the *Zippo* test, essentially its standard for the middle “interactive” category, needed analytical refinement, i.e. *prima facie* it was insufficient, and hence made several additions and clarifications to it. *Inter alia*, the *Millennium* court was not content with holding that the mere existence of an interactive website mechanically should be equated with purposeful availment, rather “something more” was required, i.e. actual and deliberate activity/conduct by the defendant over the Internet towards the forum state.

Although the *Millennium* court was not the first, or last, to present such legal reasoning,<sup>86</sup> it nevertheless was arguably the first to formulate it theoretically so as to reconcile both the *Zippo* approach as well as other alternate approaches.

In *Millennium*, the plaintiff, Millennium Enterprises, an Oregon-based music store, brought a trademark infringement suit against defendant, Millennium Music, Inc., a South Carolina-based music store, in an Oregon District Court. Millennium Enterprises claimed that Millennium Music's website, which contained an interactive order form to order CDs over the Internet, justified a finding of jurisdiction over Millennium Music in

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<sup>85</sup> 33 F.Supp.2d 907 (D. Or. 1999) [hereinafter *Millennium*].

<sup>86</sup> *C.f. e.g. Winfield Collection, Ltd. v. McCauley*, 105 F.Supp.2d 746 (E.D. Mich., 2000) [hereinafter *Winfield*], and *Wildfire Communications Inc. v. Grapevine Inc.*, D. Mass., No. 00-CV-12004-GAO, 10/28/01 [hereinafter *Wildfire*].

Oregon. Defendant's only direct contact with Oregon was through a single purchase (probably feigned) of a CD by an Oregon resident at the request of plaintiff's lawyer.

First, the *Millennium* court concluded that this was a *Zippo* middle category case, which therefore required further inquiry as to the level of interactivity and commercial nature of the exchange of information to determine whether jurisdiction should be exercised. As a matter of principle, the court stated that the potential interactivity of a nonresident defendant's website, along with the mere capability of the defendant's website to conduct commercial activity over the Internet with forum residents, is not enough to support an assertion of personal jurisdiction. Instead, deliberate action by the nonresident defendant, i.e. "actual exchanges or transactions" with forum residents or evidence that forum residents are "targeted", i.e. the intent of the defendant, is required to justify an assertion of specific jurisdiction.<sup>87</sup> In the words of the court:

"Defendants' Internet Web site, interactive though it may be, is not 'conduct and connection' with Oregon giving defendants 'fair warning' so that they would reasonably anticipate being 'haled' into court there. Defendants have not taken action creating 'a substantial connection' with Oregon, or deliberately engaged in 'significant activities' within Oregon, or created 'ongoing obligations' with residents of Oregon in a manner related to plaintiff's claims.[...] *It is the conduct of the defendants, rather than the medium utilized by them, to which the parameters of specific jurisdiction apply.*"<sup>88</sup>

Unsurprisingly, the *Millennium* court ultimately found jurisdiction lacking under the factual circumstances presented before it.

I find the legal reasoning of the *Millennium* court promising for several reasons, mainly because it indicates a move towards a more sensible approach to Internet jurisdiction. I perceive it to commendably convert traditional jurisdictional rules and principles, as articulated by the U.S. Supreme Court, to the novel issues of Internet jurisdiction. Furthermore, the *Millennium* court exhibits a remarkably solid understanding of the basic features of the Internet medium. Although I would not herald the *Millennium* decision as the blueprint for Internet jurisdiction, it perceivably provides an excellent starting point from which it is possible to elaborately refine the jurisdictional standards for Internet jurisdiction.

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<sup>87</sup> *Millennium supra*, note 85, at 921. *C.f. also supra* note 23, Jurisdiction Project Draft Report, p. 65 note 161, "[t]he court in *Millennium* [...] refused to conflate the potential of doing business on an interactive site with citizens of the state with actually doing such business."

<sup>88</sup> *Ibid.*, at 921 (citing *Burger King* and *World-Wide Volkswagen*) [emphasis added].



### 4.2.3 The Shift Away From Zippo

The problems with the analytical framework of *Zippo* are legion. An initial problem is that it is too narrow and insufficient in classifying websites, or rather activity via the Internet, as passive or interactive, and thence letting this classification being determinative for the jurisdictional rules (c.f. *Millennium*). Today, almost every website contains features that can potentially render it classified as “interactive”. As the *Millennium* case shows, in order for the minimum contacts requirement to be satisfied, i.e. that the defendant has purposefully availed himself of the privilege of transacting business in the forum state and thereby formed a substantial connection making an assertion of jurisdiction reasonably foreseeable (given that the relatedness and reasonableness prongs are satisfied), it must be established that he took deliberate action to intentionally target the forum via the Internet. In essence, mere defendant capability to engage in business transactions with forum residents is not enough, actual transactions are required.

Another crucial problem with the *Zippo* test is that its jurisdictional standards are constantly shifting since it is not technology-neutral, hence the test does not provide sufficient legal certainty. Thus the *Zippo* test presumably is flawed since it ultimately is not capable of remaining neutral in regards to technology. Furthermore, from a policy viewpoint, it would seem that the *Zippo* “passive versus interactive” test induces perverse behavior by encouraging less interactivity for websites.

As a matter of principle in regard to a jurisdictional model, instead of trying to objectively determine technology-specific criteria by which to determine purposeful availment, and hence the appropriateness of personal specific jurisdiction, it is presumably more proper to establish a legal analytical framework by which it is possible to weigh and measure intentional acts performed on/usage of the Internet, and then letting these criteria be determinative for the appropriateness of asserting personal specific jurisdiction. In simply terms, there is arguably no need for a test based exclusively on technological criteria as determinative for jurisdictional rules. Instead, the test should be based on actual activity on the Internet intentionally targeted at a particular forum, and what constitutes sufficient evidence of that intent. Accordingly, there is no benefit of having a distinction between passive and interactive websites in an Internet jurisdiction model/theory. If a nonresident defendant is conducting business in-state using the Internet as a means to do this (i.e. Internet commerce), jurisdiction should, as a matter of policy, be proper. The reason for this is simple, yet on-point: if off-line, a court would assert jurisdiction, why not online? The opposite, as the *Zippo* court emphasized, is also true. The preceding considerations of policy seem to more closely adhere to those underlying the traditional jurisdictional principles, as articulated by the Supreme Court.

The eventual shift away from the *Zippo* test ultimately appears to have been inevitable. The test was predicated on an unfit and overly restraining categorization of Internet technology and thus it did not square with the fundamental requirement of remaining technology-neutral. Hence it proved to be fundamentally unfair to defendants.

There are different approaches, and criteria, for determining what level of deliberate forum-directed defendant activity should be sufficient to find an assertion of personal specific jurisdiction constitutionally proper. Under the next section (4.3) – emerging trends in Internet jurisdiction - I will examine the two approaches that arguably are increasingly practiced in U.S. courts, the effects-based approach and the targeting approach.

## **4.3 Emerging Trends in Internet Jurisdiction**

### **4.3.1 General Comment**

Recent court decisions involving Internet jurisdiction have perceivably evidenced an emerging trend of a return to the Due Process standards that govern personal jurisdiction outside the Internet context due to the widespread dissatisfaction with the sliding-scale test of Internet activity employed in *Zippo*. Some commentators argue that the *Zippo* precedent actually exacerbated the confusion surrounding the interpretation of Internet contacts in personal jurisdiction analysis, mainly since neither the *Zippo* court nor the courts trying to apply the *Zippo* passive versus active test really understood the fundamental architecture and operation of the Internet, and as a result failed to correctly convert and apply the traditional jurisdictional standards. Other commentators note that U.S. courts have, for quite some time now, in effect been using a broader, effects-based approach when determining whether or not to assert jurisdiction in the Internet context. Others still emphasize that U.S. courts are increasingly factoring “targeting” considerations into their analysis of the appropriateness of asserting jurisdiction over Internet-based controversies. The common denominator for these approaches is that they mark a shift as to the trend in determining Internet jurisdiction, signalling a move towards use of the traditional jurisdictional principles.

### **4.3.2 The Effects-Based Approach**

The effects-based approach to Internet jurisdiction ultimately rests on the U.S. Supreme Court precedent of *Calder*.<sup>89</sup> The effects-based approach emphasize that personal jurisdiction in cases involving tortious injury is

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<sup>89</sup> See *supra* note 57.

predicated on 1) intentional actions 2) expressly aimed at the forum state 3) causing harm, the brunt of which is suffered, and which the defendant knows is likely to be suffered, in the forum state.

Applied to the context of Internet jurisdiction, the effects-based approach, or the “effects test”, essentially focuses on the extent to which the defendant’s Internet conduct is aimed at or has effect in the forum state, rather than focusing on the specific characteristics of the Internet application used.

Although the effects test has found its greatest employment in cases involving intentional tort, such as online defamation<sup>90</sup>, courts have also relied on the test to find jurisdiction proper in cases involving other types of claims such as for instance trademark infringement.<sup>91</sup> Nevertheless, most courts have declined to use the effects test to find jurisdiction proper in online trademark infringement cases<sup>92</sup>, mainly since they have felt that it would give courts an overly expansive jurisdictional reach.<sup>93</sup>

One informed scholar, Michael Geist, has argued that the refusal of the *Millennium* court<sup>94</sup> to assert jurisdiction, as well as the legal reasoning of other courts following that decision, should be interpreted as in effect being based on “what is best described as insufficient commercial effects”.<sup>95</sup> Intuitively, I find Geist’s point interesting. He makes a good case suggesting that, as courts have been moving away from the *Zippo* “passive versus interactive” standard, recent decisions seem to have turned on whether or not a nonresident defendant’s Internet activity has in fact produced effects in the forum, e.g. commercial transactions between forum residents and the defendant resulting in the accrual of economic benefits. However, such an interpretation of *Millennium et al* gives no guidance as to the question of what constitutes “sufficient commercial effects”. Moreover, courts would most likely experience considerable difficulty in gauging “commercial effects”.

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<sup>90</sup> See the leading case in this area, *Panavision International, LP. v. Toeppen*, 141 F.3d 1316 (9<sup>th</sup> Cir, 1998) [hereinafter *Panavision*]. *C.f. also Blakey v. Continental Airlines, Inc.*, 164 N.J. 38; 751 A.2d 538 (2000) [hereinafter *Blakey*].

<sup>91</sup> See e.g. *Euromarket Designs, Inc. v. Crate & Barrel, Ltd.*, 96 F.Supp.2d 824 (N.D. Ill., 2000) [hereinafter *Euromarket*], and *Nissan Motor Co., Ltd. v. Nissan Computer Corporation*, 89 F.Supp.2d 1154 (C.D. Cal., 2000) [hereinafter *Nissan*].

<sup>92</sup> *C.f. Bancroft & Masters, Inc. v. Augusta National, Inc.*, 45 F.Supp.2d 777 (N.D. Cal., 1998) [hereinafter *Bancroft*], and *Cybersell, Inc. v. Cybersell, Inc.*, *supra* note 81.

<sup>93</sup> For a relatively recent judgment in this regard, See *Cognigen Networks Inc. v. Cognigen Corp.*, W.D. Wash., Case No. C01-1077L, 12/3/01 [hereinafter *Cognigen*].

<sup>94</sup> See *supra* note 85.

<sup>95</sup> See e.g. Michael Geist, *supra* note 65, pp. 29-32. Geist fears that the use of the effects test will move into other areas of Internet jurisdiction since he holds the effects-based approach to be at least as problematic as the now outdated *Zippo* approach. Geist further notes that this move into other areas of Internet jurisdiction has already begun and that it potentially grants jurisdiction to every court everywhere. Incidentally, Mr. Geist holds the Chair for the Sales of Services Working Group of the ABA Internet Jurisdiction Project. Mr. Geist is also a professor at law at the University of Ottawa Law School.

Additionally, it seems less useful to utilize an effects-based approach as a general jurisdictional standard since the test is highly fact-intensive, and therefore does not enhance legal certainty or help bring about the foreseeability needed for actors in Internet commerce. Geist also points to this fact in saying that “Internet-based activity can ordinarily be said to create some effects in most jurisdictions.”<sup>96</sup>

### 4.3.3 The Targeting Approach

The concept of targeting is not a novel idea, neither in the Internet context nor in the off-line context. Yet it would appear that the exact meaning of this concept is somewhat elusive, both to the courts seeking to apply it and to some expert commentators. Much of this uncertainty is likely to derive from one of the overarching problems of Internet jurisdiction issues, the lack of understanding of the Internet technology, in return causing applications of this approach which are not technology-neutral. In other words, the concept of targeting has not been given a coherent set of criteria by which to determine the appropriateness of asserting jurisdiction in cases involving predominantly, or exclusively, Internet-based contacts. The unfortunate but logical consequence of the stated problem is a number of cases with similar fact-patterns having highly inconsistent and irreconcilable outcomes, all posing under the guise of a targeting approach.

Broadly stated, in the context of Internet commerce, targeting means that a party directs its sales or purchasing activity to a particular jurisdiction.<sup>97</sup> Although the general perception of the concept of targeting seems somewhat muddled, the concept seems to have received increased acceptance recently and there is a large number of different initiatives which are working towards formulating and refining the concept.<sup>98</sup>

As mentioned, the targeting approach have been used in a number of recent judicial decisions.<sup>99</sup> One such case is *GTE New Media Services, Inc. v.*

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<sup>96</sup> *Ibid.*, p. 36.

<sup>97</sup> By the same token, if a party do not wish to have any contact with a particular jurisdiction it should be able to structure its behavior in a way so that it “detargets” that particular jurisdiction.

<sup>98</sup> See e.g. the previously mentioned Hague Conference On Private International Law and the Draft Convention on Jurisdiction and Foreign Judgments In Civil and Commercial Matters , *supra* note 7, (the targeting concept as a means of distinguishing when consumers should be entitled to sue in their home jurisdiction); OECD, *Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce* (Paris, 9 December 1999), available online at [http://www1.oecd.org/dsti/sti/it/consumer/prod/CPGuidelines\\_final.pdf](http://www1.oecd.org/dsti/sti/it/consumer/prod/CPGuidelines_final.pdf) (visited 2001-12-18); ABA Internet Jurisdiction Project, *supra* note 18. The targeting concept have also been at the forefront of the work of a large number of private expert organizations such as for instance the Internet Law and Policy Forum, *supra* note 15.

<sup>99</sup> See e.g. the *Millennium* case, *supra* note 85 (analyzed in the above under section 4.2.2).

*BellSouth Corp.*<sup>100</sup> In this case the U.S. Court of Appeals for the District of Columbia Circuit overturned the district court's holding that it had jurisdiction over the nonresident defendants because of forum residents' access to and use of their yellow-pages Internet website.<sup>101</sup> The court essentially said that the forum residents' use of the websites were unilateral acts, not purposeful activity in the forum by the defendants themselves, and in doing so outright rejected the *Zippo* framework.<sup>102</sup> The reasoning of the court closely resembles that of the U.S. Supreme Court in the *World-Wide Volkswagen* and *Asahi* cases,<sup>103</sup> and the court also did call for a return to the traditional principles of Due Process that have long governed jurisdictional inquiries.

A case in which the court clearly factored targeting considerations into the jurisdictional analysis is *American Information Corporation v. American Infometrics*,<sup>104</sup> where the court instructively stated that “[a] company’s sales activities focusing ‘generally on customers located throughout the United States and Canada without focusing on and targeting’ the forum state do not yield personal jurisdiction.[...] Nor should a Web presence that permits no more than basic inquiries from Maryland customers, that has never yielded an actual inquiry from a Maryland customer, and that does not target Maryland in any way.”<sup>105</sup>

In the *Infometrics* case, as in the *BellSouth* case, the court found that the nonresident defendant had not purposefully directed (targeted) its Internet activities towards the forum. Likewise, the fact that forum residents had accessed defendant’s website were seen as unilateral actions, beyond the control of the defendants, which could in no way be attributed to the defendant as an intentional contact between him and the forum state.<sup>106</sup>

Another case in point is the previously mentioned *Bancroft* case, on appeal in the 9<sup>th</sup> Circuit Court.<sup>107</sup> The 9<sup>th</sup> Circuit Court noted, in regard to the meaning and significance of the *Calder* precedent, that:

“[...] cases have struggled somewhat with *Calder*’s import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific

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<sup>100</sup> 199 F.3d 1343 (D.C. Cir, 2000) [hereinafter *BellSouth*].

<sup>101</sup> See *GTE New Media Services, Inc. v. Ameritech Corp., et al.*, 21 F.Supp.2d 27 (D.C. 1998).

<sup>102</sup> Under *Zippo*, since forum residents had visited the commercial and highly interactive websites, personal jurisdiction over the nonresident defendants would most likely have been found proper.

<sup>103</sup> *C.f.* the analysis of these cases in the above under section 3.5.

<sup>104</sup> 139 F. Supp.2d 696 (D Md. 2001) [hereinafter *Infometrics*].

<sup>105</sup> *Ibid.*, at 700.

<sup>106</sup> *C.f. supra* section 3.5, paragraph 4 (*World-Wide Volkswagen*).

<sup>107</sup> *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 223 F. 3d 1082 (9<sup>th</sup> Cir, 2000). Plaintiff, Bancroft & Masters, appealed the district court’s dismissal (*see supra* note 92). The 9<sup>th</sup> Circuit Court found that the district court had specific jurisdiction and thence reversed and remanded.

jurisdiction. We have said that there must be ‘something more,’ but have not spelled out what that something more must be. See *Panavision*, 141 F.3d at 1322. We now conclude that ‘something more’ is what the Supreme Court described as ‘express aiming’ at the forum state. See *Calder*, 465 U.S. at 789. Express aiming is a concept that in the jurisdictional context hardly defines itself. From the available cases, we deduce that the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.”<sup>108</sup>

The *Bancroft* court’s conclusion in the above clearly focus on the *purposeful direction, intention, and knowledge* of the defendant, in accordance with traditional jurisdictional principles. Similarly, the Jurisdiction Project Report emphasizes that “the critical issues are the intent of the web site sponsor and what constitutes sufficient evidence of that intent.”<sup>109</sup>

Another recent and illustrative decision is the *Wildfire* case,<sup>110</sup> which involved a claim for breach of contract. The *Wildfire* court refused to find the minimum-contacts requirement fulfilled, and hence specific jurisdiction proper, since “[t]he sum of defendant’s contacts with Massachusetts include three web pages that are accessible from Massachusetts; a contract with a Massachusetts corporation for the sale of a domain name, which is governed by a Massachusetts choice-of-law provision but which does not contain a forum-selection clause; and a one-time, unsuccessful, solicitation of a Massachusetts corporation for an Internet advertisement [...]”<sup>111</sup> Thus the court found that these contacts in the aggregate were not tantamount to intentional targeting of the forum.

The outcome of the *Wildfire case* conforms fairly well with the Supreme Court’s reasoning in the *Burger King* case, where it stated that “[...] a ‘contract’ is ‘ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.’ It is these factors - prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing - that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.”<sup>112</sup>

The following can be inferred from the courts’ legal reasoning under the targeting approach. First, even if forum residents have accessed a nonresident defendant’s commercial website on the Internet, absent actual business transactions courts are reluctant to hold an assertion of personal jurisdiction proper. Second, if in fact there has been business transacted between forum residents and the defendant via the Internet, courts turn to

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<sup>108</sup> *Ibid.*, at 1087.

<sup>109</sup> See Jurisdiction Project Draft Report, *supra* note 23, p. 31.

<sup>110</sup> See *supra* note 86 *in fine*.

<sup>111</sup> *Ibid.*, at 7.

<sup>112</sup> See *supra* note 52. *C.f. also Shoe*, *supra* note 43 *in fine*.

determining the question of whether or not the defendant has intentionally targeted the forum.<sup>113</sup>

What criteria, then, do courts use when assessing whether or not a particular forum has been intentionally targeted? Two of the most common offered factors have been language and currency. However, these factors should become increasingly irrelevant owing to new technologies providing real-time translation that are now becoming readily available.<sup>114</sup> This fact illustrates the importance of using factors that, to the highest extent possible, are technology-neutral.

There are a number of other factors which courts may consider when seeking to establish whether or not a defendant has intentionally targeted the forum via the Internet, i.e. what steps the defendant has taken to either enter or avoid a jurisdiction. One of the more simple, and probably most common, ways for a defendant to positively manifest which jurisdictions it will, and will not, transact business with is through disclaimers on its website. It would seem that in order for this to be given any weight as a factor illustrating intent to target or “detarget”, such disclaimers must be highly specific and explicit.

Another factor weighed in a targeting analysis is whether the defendant has contractually manifested its intent to target or “detarget” a jurisdiction, i.e. through forum-selection clauses in transactional click-wrap agreements or website terms of use agreements. In the context of contractual relationships, U.S. courts usually attach importance to the inclusion of forum-selection clauses and/or choice of law provisions into contracts as indicia in the jurisdictional inquiry. It is the defendant’s act of signing (or clicking the “I agree” button) a contract containing said provisions that is deemed as a deliberate act taking advantage of the benefit and protections of the forum state (i.e. its legal rules).<sup>115</sup>

As for the *per se* enforceability of forum-selection clauses in the Internet context, U.S. courts appear to be more willing to uphold enforceability of forum-selection clauses in transactional click-wrap contracts than they are if the forum-selection clauses are incorporated into the terms of use agreement for websites.<sup>116</sup> Nevertheless, in most cases U.S. courts have upheld enforceability.<sup>117</sup> Typically, a court will consider whether there has been

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<sup>113</sup> In this regard, *c.f.* Jurisdiction Project Draft Report, *supra* note 23, p. 31, which states that “[m]aintenance of a web site, by itself, should not constitute *targeting the world*. There is no legal or practical reason why it should.” [emphasis added]. The phrase “targeting the world” is an oxymoron, evidencing its own unreasonableness.

<sup>114</sup> See Geist, *supra* note 65, pp. 39-40 and note 109.

<sup>115</sup> See Dubinsky, *supra* note 33.

<sup>116</sup> *C.f. Kilgallen v. Network Solutions, Inc.*, 99 F.Supp.2d 125 (D. Mass. 2000) [hereinafter *Kilgallen*], and *Ticketmaster Corp. et al. v. Tickets.com, Inc.*, No. CV 99-7654 (C.D. Cal. 2000) [hereinafter *Ticketmaster*].

<sup>117</sup> Margaret Jane Radin, John Rothchild and Gregory M. Silverman, *Internet Commerce: Doing Business in a Networked World* (2001), available online at

valid assent to the choice of forum provision and whether it is otherwise “unreasonable under the circumstances”<sup>118</sup>.

However, a defendant may not want to simply rely on a counterpart’s statements regarding its geographical, and hence “jurisdictional” location, since ignorance as to a party’s actual location will frequently not excuse personal jurisdiction (and the counterpart may fraudulently state false information concerning its location).<sup>119</sup> Courts may consider whether defendant has employed technical measures on- and off-line to verify its counterpart’s location, both based on, as well as independently of, stated information. For quite some time, verification through financial off-line intermediaries of online supplied credit card data have been the predominant way of seeking to establish geographic location. Online technical measures have traditionally involved the use of attribute certificates from certificate authorities (CAs)<sup>120</sup>, i.e. trusted third parties, and IP lookups.<sup>121</sup>

From the available cases it appears that the likelihood of a court asserting jurisdiction would be proportionate to how much precaution a nonresident defendant has taken before transacting business with forum residents via the Internet. Consequently, the more precaution a defendant has taken to avoid transacting business with a particular forum, the less the likelihood that a court will assert jurisdiction over the defendant when it is alleged to have transacted business with forum residents. The targeting approach thus creates incentives for actors using the Internet for commercial purposes (Internet commerce) to remain vigilant towards which jurisdictions they actually transact business with.

Indeed, the jurisdictional standards for Internet jurisdiction has shifted. From at the outset being a determination of whether or not a defendant had used the Internet, to being a question of whether a defendant’s website is deemed passive or interactive, to now considering and measuring the actual activity conducted on the Internet as well as the intent of the parties/defendant.

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[http://www.law.upenn.edu/fac/pwagner/law619/f2001/week05/casebook\\_choice\\_of\\_law.pdf](http://www.law.upenn.edu/fac/pwagner/law619/f2001/week05/casebook_choice_of_law.pdf) (visited 2001-12-18).

<sup>118</sup> *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) [hereinafter *Bremen*].

<sup>119</sup> *C.f.* Jurisdiction Project Draft Report *supra* note 23, p. 31, “When transactions are involved, the best evidence of intent is the willingness to deal with persons in the forum state.”

<sup>120</sup> *See Geist supra* note 65, pp. 53-55.

<sup>121</sup> *Ibid.*, pp. 50-53. *C.f. also*, for an explanation of the technology, and a listing of leading businesses on such technology, online at <http://www.business2.com/webguide/0.1660.56470.FF.html> (visited 2001-12-18).



## 4.4 Possible Future Developments

Currently there are a number of initiatives aiming towards achieving legal certainty within the field of Internet jurisdiction, both domestically within the U.S. and internationally. Among the international initiatives, the work of the Hague Conference On Private International Law and the Draft Convention on Jurisdiction and Foreign Judgments In Civil and Commercial Matters<sup>122</sup> stands out as the most comprehensive approach to date. The work of the Conference and the draft Convention has stirred up intense debate in the U.S. and has been met with much criticism internationally as well.

In the U.S., the critics mainly fall into two categories: those that feel that a global consensus regarding this field is much needed although they have significant reservations regarding the work of the Conference thus far, and those which oppose harmonization *per se*, such as the intended convention, on the basis that continued experimentation with the problems of Internet jurisdiction is needed, both within the public and the private sector.<sup>123</sup>

The main U.S. reservations preventing agreement on the draft convention as it stands are, *inter alia*, that it would put severe limitations on general “doing business” jurisdiction, that it would extend tort jurisdiction to the place of injury without regard to the purposefulness test of *World-Wide Volkswagen*, and that it would exclude consumer and employment contracts from forum selection clauses (the U.S. furthermore emphasize the general importance of party autonomy).<sup>124</sup>

In light of the legal uncertainty in Internet jurisdiction in general, and the move towards a targeting approach in U.S. courts in particular, businesses involved in Internet commerce seem to be adapting and are becoming increasingly vigilant of ways to avoid undesirable jurisdictions. It would seem that the view that technology can help resolve some of the very problems it created is gaining credibility with the expeditious development of so-called geo-targeting technologies. As one informed scholar notes, “[t]he rapid emergence of these new technologies challenge what has been treated as a truism in cyberlaw – that the Internet is borderless and thus

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<sup>122</sup> See *supra* note 7. General information and documentation is available online at <http://www.hcch.net/e/workprog/jdgm.html> (visited 2001-12-18).

<sup>123</sup> For the former *c.f. e.g.*, Statement of the Internet Law and Policy Forum regarding the Hague Conference on Private International Law Preliminary Draft Convention on Jurisdiction and Foreign Judgments In Civil and Commercial Matters, available online at <http://www.ilpf.org/groups/hague-stmt2.htm> (visited 2001-10-09). For the latter *c.f. e.g.* Henry H. Perritt, Jr., *The Directive on Electronic Commerce at International Level*, available online at [http://www.ilpf.org/events/jurisdiction2/presentations/perritt\\_pr](http://www.ilpf.org/events/jurisdiction2/presentations/perritt_pr) (visited 2001-10-09).

<sup>124</sup> *Ibid.* It further deserves mentioning that the American Law Institute (ALI) is exploring the possibility of implementing the convention through a federal statute for enforcement of judgments, see online at [www.ali.org](http://www.ali.org) (visited 2001-12-18).

impervious to attempts to impose on it real-space laws that mirror traditional geographic boundaries.”<sup>125</sup>

Although geographic identification technologies have been available for many years, both with “filtering” and “tracking” capabilities, the newly emerging technologies are exhibiting such efficiency and accuracy in their tasks that they have left many commentators wondering whether borders are indeed returning to the Internet.<sup>126</sup>

As these technologies are becoming increasingly available, U.S. courts will no doubt have to factor their existence into a targeting-based jurisdictional analysis.<sup>127</sup> As for actors of Internet commerce, it will most likely become increasingly difficult to remain willfully blind towards which jurisdictions they do and do not do business with.

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<sup>125</sup> Geist, *supra* note 65, p. 48.

<sup>126</sup> Instead of here engaging in a detailed depiction of these new technologies and their capabilities, I simply suggest that the reader visit for instance Infosplit’s webpage at <http://www.infosplit.com> (visited 2001-12-20) and then wait a few seconds for the result. Suffice it to say, essentially all these new technologies rest on the same ground, which is the mapping of user IP addresses to their geographic and network point of origin. For a list of companies that provide these technologies, *see supra* note 121.

<sup>127</sup> *C.f.* in connection with this the insightful remarks made by U.S. Supreme Court Justice Sandra Day O’Connor in the 1997 case *Reno v. American Civil Liberties Union et al.*, No. 96-511, 06/26/97; 117 S. Ct. 2329 (1997), “Until gateway technology is available throughout cyberspace, and it is not in 1997, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an ‘adult zone.’ [...] Although the prospects for the eventual zoning of the Internet appear promising”.

## 5 CONCLUSIONS

The U.S. Supreme Court has yet to render judgment in an Internet jurisdiction case. Although if that occasion should arise, I consider it reasonably safe to expect, in light of the preceding analysis, that the Court will declare the *Zippo* approach to Internet jurisdiction incompatible with constitutional Due Process requirements.

The cases reviewed in this thesis indicates that U.S. courts seem to be moving towards a return to a standard of purposeful direction and intended effects, leaving behind them the limited and technology-specific, and hence outdated, *Zippo* approach. In doing so, courts are revisiting and seeking to convert traditional jurisdictional rules and principles to commercial activity via the Internet.

The rationale for this trend-shift in Internet jurisdiction is fairly manifest. Before this shift, a company who did no business in a particular jurisdiction might have been captured by the *Zippo* test merely because its website was found to be “interactive”. On the other hand, a libel defendant might have escaped jurisdiction because its website was a “passive” website that merely displayed a defamatory statement that could, and did, have effects only in a particular jurisdiction.

The emerging standards for Internet jurisdiction, the targeting-based test and the effects-based test, recognize the underlying policy considerations of *Shoe* and its progeny, i.e. that the plaintiff’s need for a forum must be balanced against fundamental fairness to defendants. Thus the emerging standards, relative to *Zippo*, significantly enhance Internet commerce participants’ ability to effectively calculate both their exposure to legal risk as well as the enforceability of their contracts. Prudence thence will dictate the extent to which the individual participants in Internet commerce choose to employ precautions and limitations as to the jurisdictions they do business with.

Perhaps one of the underlying reasons for this shift in trend is not a matter of law. Ostensibly, the Internet has increasingly become a part of everyone’s everyday life, including U.S. judges’. The mysticism, and both the skepticism and the unrestrained optimism, surrounding the Internet when Internet commerce took off during the latter part of 1990s appears to be wearing off, or at least becoming more balanced. Virtually every court in the United States today have a website as well as an electronic case filing system (which further makes judgments available to the public via the Internet).<sup>128</sup> This is quite a contrast to the situation just a few years ago when computers actually had to be carried into the courtroom during the

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<sup>128</sup> See e.g. <http://www.uscourts.gov> and <http://pacer.psc.uscourts.gov/cmecf> (visited 2001-12-18).

trial in order to show, and instruct, the judges what the counsels were talking about when they referred to “the Internet”.<sup>129</sup> Nevertheless, the short of the matter is that the jurisdictional standard developed in and with *Zippo* ultimately proved unworkable, in part because it did not fulfill the basic requirement of remaining technology-neutral, and in part because it did not manage to balance the fundamental policy considerations underlying traditional jurisdictional principles.

Upon reflection, *Zippo* might have meant that U.S. courts straddled the horse backwards, but it nevertheless got the horse moving. That is to say, *Zippo* played its part in spurring efforts towards resolving the problem, most certainly a *causa sine qua non* the current state of Internet jurisdiction. It is no panacea, but the prospects for greater legal certainty appear promising.

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<sup>129</sup> The term jurisdictional *discovery* seems to have never been more fitting.

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