Volume II - Article 3

Personal Jurisdiction Over The Internet: How International Is Today's Shoe

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Fall 2002

Introduction

With the advent of the Internet and the World Wide Web, a novel question of procedural law has taken the legal arena by storm: how do we effectively apply traditional concepts of personal jurisdiction to the seamless world of cyberspace? In a world where politically recognized territorial boundaries will typically lead the discussion into where a party may be haled into court as a result of its activities, the Internet presents us with an anomaly of that traditional principle. Courts are now being launched into the unchartered waters of cyberspace where the traditional concept of personal jurisdiction often finds itself lost at sea.

Over the past six years, American courts have been forced to grapple with a multitude of questions involving personal jurisdiction and the Internet in the United States. However, with websites accessible to virtually anyone in the world, how can a business predict where its Internet activity will ultimately end up in the stream of commerce overseas? Should a California corporation be required to foresee with any degree of certainty whether its Internet activities will cause tortious effects in Pennsylvania, or across the Atlantic Ocean in France? Should that corporation be held

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liable for damages if such effects indeed occur? How can an American company protect itself from being subject to the potentially costly and inconvenient personal jurisdiction of courts in distant states or foreign nations?

The rise in popularity of the Internet as a means of doing business across both domestic as well as international borders has opened the door to an increasing number of legal conflicts. As the number of Internet users grows globally, there will likely be a commensurate increase in the amount of legal turbulence surrounding online business activities conducted-intentionally or unintentionally-across jurisdictional lines. With the dawn of a new brand of litigation comes the need to evaluate the current standards of personal jurisdiction, and to determine if they provide sufficient legal certainty upon which individuals and businesses wishing to conduct international Internet commerce may rely.

Surprisingly there is scarcely any literature available that addresses the question of how to solve today's Internet personal jurisdiction problems on an international level. There is, however, an abundance of literature discussing the development of personal jurisdiction in America and the problems faced by courts in adjudicating domestic Internet disputes. This paper emphasizes the need to carry this discussion beyond our own borders and to consider the serious legal consequences that typical Internet conduct can have internationally. These consequences can be particularly severe for individuals who conduct business over the Internet. Electronic commerce can have widespread effects in other countries, subjecting businesses to the costly and time-consuming litigation necessary to adjudicate threshold questions of jurisdiction. Often times this litigation will occur in unfamiliar legal systems or in distant courtrooms, thus increasing

the cost and inconvenience of settling Internet disputes. Consequently, individuals and businesses are faced with grave uncertainty and the continuous vulnerability of being haled into court halfway around the world. Against this backdrop, we must expand the discussion of how to solve international personal jurisdiction disputes while providing more certainty to individuals engaged in online commerce across national borders.

On a domestic level, scholars and commentators have suggested numerous solutions to help reduce the uncertainty surrounding the issue of Internet personal jurisdiction. Many writers propose conservative solutions that preserve the traditional concepts of personal jurisdiction but change the mechanisms in which those concepts operate. For instance, one writer suggests a system of registration by which a party could choose an appropriate forum in which to be sued, or else submit to traditional jurisdictional analyses.[1] Another writer suggests that the existing due process analysis is flexible enough to protect defendants, but that the "fair play and substantial justice" prong will become the primary consideration for courts.[2] Alternatively, authors have proposed more radical approaches to analyzing and adjudicating cases where personal jurisdiction is in dispute, such as the creation of a cybercourt to be used in conjunction with a registration system to handle any matters resulting from the Internet.[3] Still other authors express a desire to refrain from altering the current system of Internet personal jurisdiction as it has developed through American case law to date, instead advocating

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[1] *See* Susan Nauss Exon, *A New Shoe Is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1, 50 (2000).

[2] *See* Michael S. Rothman, *It's a Small World After All: Personal Jurisdiction, the Internet and the Global Marketplace*, 23 MD. J. INT'L L. & TRADE 127, 129 (1999).

[3] *See* Exon, *supra* note 1, at 51.

employment of the Zippo test, "effects test" and "totality of contacts" analysis as most efficient tools for analyzing Internet personal jurisdiction cases.[4]

While each of these approaches provides us with a valuable contribution towards finding an appropriate solution for analyzing personal jurisdiction over Internet users domestically, we must not end our dialogue there. As the Internet brings members of the global economy closer together and international business transactions increase via the Internet, so does the need for a solution which provides a business conducting activities online with more legal certainty regarding where it may be haled into court should a foreign party bring suit against it.

The primary purpose of this note is to examine the current status of personal jurisdiction laws as they pertain to individuals conducting commercial activities internationally over the Internet, and to propose solutions for reducing the legal uncertainties and risks involved with such activities, particularly when those activities have effects upon Internet users situated in other countries. Any discussion analyzing personal jurisdiction on an international scale must begin with an understanding of how our courts have dealt with the issue domestically. Thus, the first section of this note examines the development of personal jurisdiction and how that concept has been applied to recent Internet cases in the United States. The next section looks at the recent French judgment against Yahoo!, Inc. and the ongoing litigation as a case study in illustrating the risks inherent in conducting business over the Internet, as well the shortcomings of current available standards for analyzing personal jurisdiction when Internet disputes

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[4] *See* Mark C. Dearing, *Personal Jurisdiction and the Internet: Can the Traditional Principles and Landmark Cases Guide the Legal System into the 21st Century?*, 4 J. TECH. L. & POL'Y 4 (1999).

arise.[5] Next, this note explores the hurdles that must be overcome in order to progress towards a more manageable, predictable and uniform standard for analyzing personal jurisdiction over the Internet. The note concludes by proposing solutions to either (1) work towards the creation of an international treaty that will provide a central forum in which parties in contracting states agree to submit to personal jurisdiction over any disputes arising specifically from activities over the Internet, or in the alternative, (2) to make our shoe more international in respect to Internet activities. In regards to this second solution, I suggest that the current standard of personal jurisdiction employed by U.S. courts may be too restrictive a tool in adjudicating international Internet disputes, and therefore may require technical modification in order to adequately deal with transnational Internet litigation. These solutions represent approaches at both the conservative as well as the radical end of the jurisdictional spectrum. However, it is useful to consider both alternatives in light of the advantages and disadvantages of each approach.

I. The Development and Contemporary Application of Personal Jurisdiction Law

A. Personal Jurisdiction Law in the United States: An Overview

Today's concept of personal jurisdiction finds its genesis in the Supreme Court opinion of *International Shoe v. Washington*.[6] The case represented a break away from

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[5] *Cited in*, the French Order in the County Court of Paris is LICRA, et. al. v. Yahoo!, Inc., T.G.I. Paris, May 22, 2000, aff'd T.G.I. Paris, Nov. 20, 2000; the subsequent American Order *discussed infra* is Yahoo!, Inc. v. LICRA, 145 F. Supp. 2d 1168 (N.D. Cal. 2001).

[6] 326 U.S. 310, 316 (1945).

the inflexible territorial presence rule articulated decades before in *Pennoyer v. Neff*.[7] Under *International Shoe*, a defendant located without the jurisdiction of a particular court may only be subjected to in personam jurisdiction of that court in accord with the Due Process Clause of the U.S. Constitution, which requires that the defendant have "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[8] The Due Process analysis is essentially a two-prong test which a court must satisfy before it may acquire personal jurisdiction over a defendant.[9] The first prong of the analysis involves determining whether sufficient minimum contacts exist between the parties and the forum state.[10] The second prong requires that the exercise of jurisdiction over a defendant "does not offend 'traditional notions of fair play and substantial justice.'"[11] It is important to note that a court will only reach the Due Process analysis if it has been granted such power by the enactment of a state long-arm statute.[12] Some states have enacted long-arm statutes allowing the fullest exercise of personal jurisdiction permitted by the U.S. Constitution.[13]

However, if the forum state uses a more limited, enumerated long-arm statute, then the court must first determine whether personal jurisdiction over a given defendant

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[7] 95 U.S. 714 (1877).
[8] *Int'l Shoe*, 316 U.S. at 316 (*quoting* Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
[9] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-292 (1980) (noting that the minimum contacts analysis performs "two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum . . . and it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.").
[10] *Id*. at 291.
[11] *Id*. at 292 (*quoting* Int'l Shoe, 326 U.S. at 316).
[12] *See* Sarah K. Jezairian, *Lost in the Virtual Mall: Is Traditional Personal Jurisdiction Analysis Applicable to E-Commerce Cases?*, 42 ARIZ. L. REV. 965, 967 (2000).
[13] *See Id*.

would be permissible under state law.[14] Only then will the court proceed to determine whether personal jurisdiction comports with the Due Process Clause.[15]

While the two-prong test articulated in *International Shoe* and *World-Wide Volkswagen* is typically the starting point for a court's determination of whether or not to exercise personal jurisdiction over a defendant, the analysis does not necessarily end here. The court must consider which type of personal jurisdiction it can exercise over the defendant. If a defendant has maintained "continuous and systematic" activities in the forum state,[16] then the International Shoe test is satisfied and he will therefore be subject to general jurisdiction in the courts of that state regardless of whether or not the cause of action arose from those activities. However, if his activities do not rise to such a level, then the court must be able to exercise specific jurisdiction over the defendant by finding that his activities were specifically related to the claim.[17] In order to exercise specific jurisdiction, a court must find that the defendant purposefully availed itself of the privilege of conducting business in the forum state.[18] Thus, where a defendant has created "continuing obligations"[19] with residents of the forum state and his activities are "shielded by the benefits and protections of the forum's laws" it is reasonable to exercise personal jurisdiction over him.[20]

While the "purposeful availment" factor[21] is usually the primary focus in any personal jurisdiction analysis, another important factor in deciding whether to require a

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[14] *See Id*.
[15] U.S. CONST. amend. XIV, § 1.
[16] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984).
[17] *Id*. at 414.
[18] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985).
[19] *Id*. at 476 (*quoting* Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648 (1950)).
[20] *Id*; *see also* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-223 (1957).
[21] *Burger King Corp*., 471 U.S. at 475-76.

defendant to litigate in the forum state is reasonableness.[22] Under this analysis, it is not enough for a defendant to simply foresee that his conduct might subject him to personal jurisdiction in the forum state.[23] If this were the case, then "every seller of chattels would in effect appoint the chattel his agent for service of process."[24] Rather, "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[25] Finally, a plurality of the Supreme Court in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*[26] held that the defendant must purposefully direct his actions towards the forum state.[27] This requires something more than a defendant's awareness that "the stream of commerce may or will sweep the product into the forum state."[28] In articulating its "stream of commerce plus" principle of personal jurisdiction, the Court suggested that additional conduct by the defendant might indicate an intent to serve the forum state, such as designing the product to serve the market of the forum state, advertising in the forum state, establishing channels through which advice is regularly given to customers in the forum state, or marketing the product through a distributor in the forum state.[29]

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[22] *World-Wide Volkswagen Corp.*, 444 U.S. at 297.
[23] *Id*. at 295.
[24] *Id*. at 296. (In other words, every seller would be subject to suit in any State in which his product is ultimately located and in which that product causes injury. The seller's "amenability to suit" would travel with his product. The Court here declined to adopt such an outmoded rule.)
[25] *Id*. at 297.
[26] 480 U.S. 102 (1987).
[27] *Id*. at 112.
[28] *Id*.
[29] *Id*.

As the following sections illustrate, the concepts of purposeful availment, foreseeability and reasonableness have become key factors for U.S. courts analyzing personal jurisdiction in Internet disputes.

B. Personal Jurisdiction in the Internet Age

The traditional concept of personal jurisdiction outlined above is designed primarily for a world where jurisdictions are delineated by territorial and geographical boundaries. Thanks to the abundance of lower court and somewhat insightful Supreme Court opinions on the subject, personal jurisdiction analysis benefits from a reasonable degree of certainty when litigants who conduct business across discernable state and national lines are called to appear before courts of another jurisdiction. However, the Internet presents courts with a new seamless cyber-landscape which acts as a vehicle for national and international commerce without the benefit of noticeable physical boundaries. Herein lies the problem created for personal jurisdiction analysis in the new millennium.

Courts have always been aware of the potential for changing technological conditions and the need for a flexible standard to encompass those changes. In *Hanson v. Denckla*,[30] the Supreme Court acknowledged that the flexible standard of International Shoe was created in response to technological changes, particularly the increased flow of commerce between States as well as progress in communication and transportation.[31]

As the next section of this paper illustrates, courts during the last five years have attempted to apply that very same standard to encompass the immense expanse of cyberspace. While the history of cases addressing personal jurisdiction over the Internet

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[30] 357 U.S. 235 (1958).
[31] *Id*. at 250-251.

is relatively short, it is useful (and quite interesting) to examine the rubrics employed by courts in determining what level of activity satisfies the minimum contacts analysis. A survey of the early Internet cases begins to reveal some of the weaknesses inherent in our current standard of International Shoe when applied to Internet disputes across jurisdictional boundaries.

1. The Early Internet Jurisdiction Cases

One of the first cases to address personal jurisdiction and the Internet was *Inset Systems, Inc. v. Instruction Set, Inc.*[32] Plaintiff, a Connecticut software company, sued in a federal district court in Connecticut alleging trademark infringement.[33] Defendant, a Massachusetts computer technology company, allegedly used plaintiff's trademark as an Internet domain name address.[34] Defendant moved to dismiss the complaint for lack of personal jurisdiction.[35] Defendant claimed it did not have minimum contacts in Connecticut since it had no employees or offices within Connecticut, and otherwise conducted no regular business there.[36] Plaintiff argued that defendant's continuous display of an advertisement for its company on the website which included a toll-free telephone number was enough to satisfy minimum contacts in Connecticut.[37]

The court held for plaintiff, stating that defendant had purposefully availed itself of the benefits and privileges of conducting business in Connecticut.[38] According to the court, defendant could have reasonably foreseen being haled into court in Connecticut

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[32] 937 F. Supp. 161 (D. Conn. 1996).
[33] *Id*. at 162.
[34] *Id*. at 162-163.
[35] *Id*.
[36] *Id*. at 164.
[37] *Id*.
[38] *Id*. at 165.

since its advertisement was permanent and could be viewed by anyone at anytime.[39] The court noted that such an advertisement could reach up to 10,000 Internet users in Connecticut alone.[40] Despite the court's attempt to quantify the potential number of users who might access the defendant's website, the court's analysis here nevertheless seems to suggest that almost any website can cause its owner to be haled into court should a resident of the forum State claim injury.

Other courts quickly followed suit on the heels of Inset, although they ultimately adopted slightly different standards. In *Maritz, Inc., v. Cybergold, Inc.*,[41] the United States District Court for the Eastern District of Missouri exercised personal jurisdiction over defendant, a California corporation that allegedly committed trademark infringement over the Internet.[42] The court based its power to hale defendant into Missouri upon the state's long-arm statute which provides for the exercise of personal jurisdiction over persons who commit a tortious act within the state.[43] The court considered the website carrying the infringing trademark a tortious act, as it caused economic injury upon plaintiff in Missouri.[44] The court then found that defendant's contacts were "of such a quality and nature" that the exercise of personal jurisdiction did not violate Due Process.[45] Also, the court noted that since defendant transmitted information into Missouri approximately 131 times, defendant purposefully availed itself of the privilege

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[39] *Id*.
[40] *Id*.
[41] 947 F. Supp. 1328 (E.D. Mo. 1996).
[42] *Id*. at 1334.
[43] *Id*. at 1331.
[44] *Id*.
[45] *Id*. at 1333.

of conducting business within the state.[46] Compared to the Connecticut court's analysis in *Inset* discussed *supra*, the Missouri court, in examining the "quality and nature" of the website, suggests a higher threshold requirement for a finding of purposeful availment sufficient to hale defendant into court.

In 1997, in *TELCO Communications, Inc. v. An Apple a Day, Inc*.[47] a Virginia federal district court also followed the analysis of Inset in holding that online advertising was a "persistent course of conduct" satisfying the state's long-arm statute.[48] Since Apple had placed allegedly defamatory press releases on a business wire Internet service which served Virginia, the court found that the defamation action occurred inside the forum state.[49] Defendant's activities were considered analogous to physical presence within the state, and therefore Apple could reasonably anticipate being haled into court in Virginia.[50] The court's "physical presence" analogy suggests a relatively low threshold requirement upon which to obtain personal jurisdiction over defendants.

In fact, one might read the court's opinion as suggesting that a website operator can be served process in any jurisdiction where users have access to its site. This rule would subject website operators to the exercise of transient jurisdiction. Such a test could have serious implications for anyone considering engaging in electronic transactions from anywhere in the country (and perhaps anywhere in the world).

The divergent analyses adopted in each of these cases should raise red flags for anyone seeking to apply a uniform standard of personal jurisdiction to Internet disputes.

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[46] *Id*.
[47] 977 F. Supp. 404 (E.D. Va. 1997).
[48] *Id*. at 407.
[49] *Id*. at 408.
[50] *Id*.

Slightly different standards, like those employed in the cases above, can have dramatically different consequences for defendants depending upon where the plaintiff resides. As mentioned above, such problems suggest that the standards embodied in International Shoe may be nearing their practical limits as they are tested in the Internet age.

These early cases represent the most conservative end of the jurisdictional spectrum, finding the exercise of personal jurisdiction to be proper where defendants merely operated a passive advertising website. However, moving towards the other end of the spectrum, some courts have found it much more acceptable to exercise personal jurisdiction over defendants only where more traditional contacts with the forum state could be found. Among the more traditional contacts found to support the exercise of personal jurisdiction include: the advertisement of products both online and in trade magazines within the forum state,[51] trips to the forum state, the conducting of mail, fax and telephone correspondence with residents of the forum state,[52] and as explored in the next section, entering into contractual relationships with individuals and Internet access providers within the forum state.[53]

2. The Zippo Sliding Scale: A Tool of Website Categorization

In 1997, in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[54] a Pennsylvania federal district court formulated a "sliding scale" test whereby the likelihood that personal jurisdiction could be exercised over a defendant was "directly proportionate to the nature

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[51] *Rubbercraft Corp. of California v. Rubbercraft, Inc.*, No. CV 97-4070-WDK, 1997 WL 835442, at *1 (C.D. Cal. Dec. 17, 1997).
[52] *Edias Software Int'l, LLC v. Basis Int'l Ltd.*, 947 F. Supp. 413, 417 (D. Ariz. 1996).
[53] *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125-26 (W.D. Pa. 1997).
[54] *Id.*

and quality of commercial activity [a defendant] conducts over the Internet."[55] This sliding scale was an attempt to summarize the existing case law on the subject of personal jurisdiction and the Internet.[56] In *Zippo*, plaintiff was Zippo Manufacturing Company ("Zippo"), a Pennsylvania corporation with its principal place of business in Bradford, Pennsylvania.[57] Zippo filed a complaint against defendant Zippo Dot Com, Inc. ("Dot Com"), a California corporation with its principal place of business in Sunnyvale, California.[58] The complaint alleged that Dot Com committed trademark dilution, infringement, and false designation under the Federal Trademark Act, as well as dilution under state law, for its use of the word "Zippo" in the company's domain name address, in various locations on its website, and in Internet newsgroup messages.[59]

Dot Com moved to dismiss the action for lack of personal jurisdiction and improper venue or, in the alternative, to transfer the case.[60] In denying Dot Com's motion, the court engaged in an intricate discussion of the development of personal jurisdiction and its application to the Internet, ultimately fitting the matter into what it called the "doing business over the Internet" category of cases.[61] In exercising personal jurisdiction over Dot Com, the court concluded that defendant's conducting of electronic commerce with Pennsylvania residents amounted to "purposeful availment of doing business in Pennsylvania."[62]

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[55] *Id*. at 1124.
[56] *Id*.
[57] *Id*. at 1121.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*. at 1125.
[62] *Id*. at 1125-26.

Specifically, the court noted that Dot Com contracted with approximately 3,000 individuals and seven Internet access providers in Pennsylvania, finding that Dot Com intended to conduct business within the state and was in full control of the transmission of files to Pennsylvania residents.[63] Thus, the exercise of personal jurisdiction over the defendant comported with both the Pennsylvania long-arm statute and the Due Process Clause since both the cause of action and resulting injury occurred in Pennsylvania, and it was not unreasonable to require Dot Com to defend itself in Pennsylvania.[64]

The key to the court's analysis in Zippo is the sliding scale test of Internet activity. The court suggests that at the most conservative end of the spectrum are "passive websites" that do little more than to offer information to Internet users and thus are free from the exercise of personal jurisdiction.[65] The middle ground consists of interactive websites where Internet users can exchange information through the site itself. Here, the ability to exercise jurisdiction depends upon the "level of interactivity and commercial nature of the exchange of information" through the website.[66] Finally, at the other end of the spectrum is the "active website" in which a defendant is actively doing business over the Internet.[67] The court placed the Zippo case into this third category in order to find the exercise of personal jurisdiction proper over the California defendant.[68]

Since the *Zippo* decision, courts have grappled with the task of trying to fit websites into one of the three categories outlined by Zippo. At either end of the *Zippo* spectrum, a majority of courts have formulated reasonably predictable tests to guide the

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[63] *Id*. at 1126.
[64] *Id*. at 1127.
[65] *Id*. at 1124.
[66] *Id*.
[67] *Id*.
[68] *Id*. at 1125-26.

personal jurisdiction analysis.[69] However, the area that has generated the most controversy among courts involves fitting cases into *Zippo's* "middle ground" category, which turns upon an evaluation of the "level of interactivity and commercial nature" of the information exchanged via the website.[70]

While the *Zippo* test has suffered divergent judicial analyses and considerable erosion of its clear-line rule with respect to the "middle ground" category, it appears that whenever a website is a commercial setting over which business is conducted, courts will exercise personal jurisdiction.[71] Many courts have found the use of the "something more" test attractive, finding that interactive websites will generate sufficient minimum contacts whenever a company engages in additional conduct within the forum state reminiscent of the more traditional "pre-Internet" minimum contacts (i.e., advertising within the forum state or entering into contracts with citizens of the forum state).[72]

At least one commentator suggests that the courts' inconsistent analyses of Internet cases over the past five years indicates that the traditional basis for establishing personal jurisdiction simply does not function effectively in the context of Internet activities.[73] Another writer calls the Zippo categories "enigmatic" since the test does not take into account contacts such as e-mail and message databases, and does not consider

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[69] *See* e.g. Amberson Holdings v. Westside Story Newspaper, 110 F. Supp. 2d 332 (D.N.J. 2000); Barrett v. Catacombs Press, 44 F. Supp. 2d 717 (E.D. Pa. 1999); Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738 (W.D. Tex. 1998); Colt Studio, Inc. v. Badpuppy Enter., 75 F. Supp. 2d 1104 (C.D. Cal. 1999).

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

[71] *See* Exon, *supra* note 1, at 22.

[72] *See* Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738, 743-44 (W.D. Tex. 1998).

[73] *See* Exon, *supra* note 1, at 42.

the cause of action where the standard for injury will vary greatly between lawsuits involving tort versus contract litigation, for example.[74]

In examining the American courts' struggle to agree upon concrete rules of personal jurisdiction analysis involving Internet activities, one might conclude that the threads of International Shoe are being stretched to their limits. This concern is exacerbated when we begin to discuss Internet activities that have their effects not only in other States, but also in other countries. The following section explores the risks of conducting business over the Internet where a website is accessible in virtually any country in the world.

3. The Yahoo! Case: A Digital Culture Clash

On November 20, 2000, the County Court of Paris entered final judgment in a case against Yahoo!, Inc., a California-based company, in a suit involving the online giant's auction site.[75] The case arose when the International League Against Racism and the Union of French Jewish Students filed suit in French court arguing that Yahoo!'s auction site violated a French law barring the sale of racist materials.[76] The plaintiffs alleged that Yahoo! placed Nazi-related memorabilia on its auction site, which was accessible by French users.[77] The principal issue was whether French law permitted the exhibition or sale of items that cause or promote racial hatred.[78] In the case, *LICRA v., et al. v. Yahoo!, Inc.*,[79] Judge Jean-Jacques Gomez of the French court ordered Yahoo! to

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[74] *See* Rothman, *supra* note 2, at 148 (suggesting that the Zippo categories are "hardly determinative" and "downright misleading" in a personal jurisdiction analysis.)

[75] *See* Brendon Fowler et al., *Can You Yahoo!? The Internet's Digital Fences*, 12 DUKE L. & TECH. REV. (2001).

[76] *See* Keith Perine, *Yahoo Asks U.S. Court to Rule French Court Out of Bounds*, THE INDUSTRY STANDARD, Dec. 21, 2000.

[77] *See* Fowler et al., *supra* note 75.

[78] *Id.*

[79] T.G.I. Paris, May 22, 2000, aff'd, T.G.I. Paris, Nov. 20, 2000.

block all French users from accessing the Nazi-related materials or face penalties of 100,000 francs a day, or approximately U.S. $13, 948.[80] Although Yahoo!'s French mirror site already blocked French users from accessing the Nazi-related materials, the court's ban extended to Yahoo!'s United States sites, as well.[81] While the French court acknowledged the protection given to such materials in the United States under the First Amendment, the court nevertheless based its jurisdiction upon the assertion that Yahoo! "addressed French parties … by transmitting advertising banners written in the French language."[82] The order essentially requires Yahoo! to police both the information placed on its website by private parties and the geographical location of the parties who then access that information.[83]

In response to Judge Gomez's order, Yahoo! filed for a declaratory judgment in U.S. District Court in San Jose, California, claiming that the French government lacks personal jurisdiction over the California company and that the French order was thus unenforceable.[84] Yahoo! also argued that the French court order violates the First Amendment and the Communication Decency Act's immunization from liability for third-party content placed on an Internet service provider.[85] Finally, Yahoo! asserted a technological defense, stating that it would be physically impossible to implicate the French court's ban given the nature of the Internet.[86] Essentially, Yahoo! argued that the

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[80] *Id*.
[81] *See* Fowler et al., *supra* note 75.
[82] *LICRA, et al. v. Yahoo!, Inc.*, T.G.I. Paris, May 22, 2000, aff'd, T.G.I. Paris, Nov. 20, 2000.
[83] *See* Fowler et al., *supra* note 75.
[84] *Id*.
[85] *Id*.
[86] *Id*.

only way to ensure that French users did not access the materials on the international website was to prohibit everyone in the world from accessing it.[87]

Responding to Yahoo!'s motion for a declaratory judgment, the French organizations in turn filed their own motion to dismiss for lack of personal jurisdiction. On June 7, 2001, Judge Jeremy Fogel of the U.S. District Court in San Jose entered an order denying the French parties' motion to dismiss.[88] The court exercised personal jurisdiction over the French defendants, stating that the foreign defendants purposefully availed themselves of the forum state by 1) sending a cease and desist order to Yahoo!'s Santa Clara headquarters, 2) requesting that Yahoo! be required to perform specific acts in Santa Clara, and finally, by 3) utilizing United States Marshals to effect service of process on Yahoo! in California.[89] The court concluded that the American court is the more efficient and effective forum in which to decide the question of "whether the French order is enforceable in the United States in light of the Constitution and laws of the United States."[90]

Yahoo! won its greatest victory on November 7, 2001, when Judge Fogel entered his final order refusing to recognize the French ban on Yahoo!'s website and granting Yahoo!'s motion for summary judgment.[91] The court held that it was inconsistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be

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[87] *Id*.
[88] *Yahoo!, Inc. v. LICRA et al.*, 145 F. Supp. 2d 1168 (N.D. Cal. 2001).
[89] *Id*. at 1174.
[90] *Id*. at 1179.
[91] *Yahoo!, Inc. v. LICRA et al.*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

accessed by Internet users in another nation.[92] The court noted that this case was "uniquely challenging" since the Internet "in effect allows one to speak in more than one place at the same time."[93] The court discussed the concept of comity, acknowledging that United States courts generally recognize foreign judgments "unless enforcement would be prejudicial or contrary to the country's interests."[94] Essentially, the court concluded that there was no way it could enforce the French order in the United States without violating the First Amendment freedom of speech.

Although the court decided the case primarily upon Constitutional grounds and principles of comity, the opinion did leave the door open for the possibility that some international legislation might change the result in this case. The court suggested that:

[a]bsent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity is outweighed by the Court's obligation to uphold the First Amendment. The court expresses no opinion as to whether any such treaty or legislation would or could be constitutional.[95]

The court's suggestion strikes an important chord that is relevant to our discussion of how to find a manageable solution to the problems plaguing international personal jurisdiction analysis over the Internet. The court hints at a point of central importance to any discussion regarding the enactment of international legislation for the Internet: constitutionality. This issue is explored more carefully later in the paper.

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[92] *Id*. at 1192.
[93] *Id*.
[94] *Id*.
[95] *Id*. at 1193 & n.12.

The *Yahoo!* case illustrates the increasing difficulty of reconciling the growth of the Internet with divergent international laws. As of yet, there exists no international court to assert jurisdiction over the operators of websites and Internet service providers.[96] This results in a tug of war between the various potential forums and parties to litigation, all wishing to protect their citizens to the greatest extent possible. In addition, *Yahoo!* illustrates the lack of clear, manageable standards on jurisdiction over the Internet. One might conclude that the court in Yahoo! was forced to resort to the age-old (and sometimes vague) principle of comity for lack of a more predictable test for adjudicating Internet disputes. As the *Yahoo!* court suggested, the dispute presents "novel and important issues arising from the global reach of the Internet" as well as "issues of policy, politics, and culture that are beyond the purview of one nation's judiciary."[97]

The *Yahoo!* case also demonstrates the significant risks involved in operating a website since it is accessible virtually anywhere in the world, often simultaneously by Internet users in many different countries. More importantly, however, *Yahoo!* shows us just how difficult it would be to apply the Zippo sliding scale test to such a unique set of facts. Generally, under the Zippo test, the operation of an interactive website does not generate sufficient minimum contacts in the forum state without some examination of "the nature and quality of commercial activity" conducted over the Internet.[98]

As discussed *supra*, the archetypical case to which the *Zippo* test has been applied involves websites through which a company sold items to consumers, thus targeting the forum state in a manner more satisfactory of Due Process requirements. However, in the

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[96] *See* Fowler, et al., *supra* note 75.
[97] *Id*. at 1186.
[98] *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

Yahoo! case, the auction website at issue is one in which all transactions occur between two individual consumers who have unilaterally chosen to utilize *Yahoo!* as nothing more than a vehicle of transmission to one another. Into which Zippo category would cases like *Yahoo!* fall?

Auction websites are abundant on the Internet, as well as similar websites on which users can post products for sale online, trade digitally downloaded music with one another, place personal ads on dating services, or simply engage in user group discussions in real-time chat rooms or bulletin boards on any given topic. Where do we place such "third-party medium" websites in the *Zippo* sliding scale rubric? Future litigation involving these kinds of websites will no doubt test the limits of *Zippo* and enlighten us on the adequacy of the test as a solution to the traditional *International Shoe* standard.

II. Looking Ahead: New Approaches to Internet Personal Jurisdiction

1. General Problems With Drafting a Uniform International Treaty

In searching for a solution to the jurisdictional dilemma facing courts in international Internet disputes, one might suggest drafting an international treaty to address the problems surrounding the standard of personal jurisdiction and the recognition of judgments. Currently there is no such treaty in existence that will apply concrete, uniform rules to resolve disputes arising out of Internet activities having effects across international borders.[99] However, the task of drafting an international treaty in this area may prove more problematic than helpful. One of the most significant obstacles to drafting such a treaty may be the fear of being locked into a standard governing a novel,

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[99] *See*, e.g., Rothman, *supra* note 2, at 129.

technological issue which has not yet been resolved in most national legal systems (i.e. the United States).[100] This fear of being locked into such a new rule is exacerbated in regards to the United States since under the Supremacy Clause of the U.S. Constitution, treaties, if implemented, will become the supreme law of the land.[101]

Another obstacle emerges from the varying standards of personal jurisdiction and recognition among different nations. While the *Zippo* test incorporates the *International Shoe* standard of establishing sufficient minimum contacts in order to satisfy the Due Process requirement of the U.S. Constitution, such a test is not easily applicable in an international context, where many countries have adopted markedly different standards for personal jurisdiction.

To illustrate the way in which differences between personal jurisdiction standards could prove troublesome to the task of drafting an international Internet treaty, one need look no further than the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, popularly known as the Brussels Convention.[102] There are currently 15 members of the European Community, which comprise the contracting states of the Brussels Convention.[103] Completed in 1968, the

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[100] *See* Ronald A. Brand, *Forum Selection and Forum Rejection in U.S. Courts: One Rationale for a Global Choice of Court Convention, in Reform and Development of Private International Law*: FESTSCHRIFT FOR SIR PETER NORTH (James J. Fawcett ed.) (forthcoming 2002).

[101] U.S. CONST. art. VI, cl. 2. ("This Constitution . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

[102] *See* European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 41 O.J. EUR. COMM. (C27/1) (Jan. 26, 1998).

[103] As of March 1, 2002, through the passage of European legislation, the Brussels Regulations went into effect and thus replaced the current draft of the Brussels Convention. One of the effects of this legislation was to create implied consent to be subject to the Brussels Regulations upon any state's future entrance into the European

Brussels Convention provides the rules for both personal jurisdiction and the recognition of judgments for "civil and commercial matters" for parties domiciled in contracting states.[104] There is a stark difference regarding personal jurisdiction analysis between U.S. law and the Brussels Convention. While the U.S. Due Process analysis focuses upon the relationship between the court of the forum state and the defendant, the Brussels Convention focuses upon the relationship between the court of the forum state and the claim.[105] The focus of the Brussels Convention between the court and the claim "would lead to jurisdiction likely in violation of the Due Process Clause under U.S. law."[106]

This divergence in personal jurisdictional analysis can be explained in part by the civil law system's preference for predictable and efficient standards, rather than the less predictable, more malleable (and often more litigated) standard adopted by U.S. courts. In addition, unlike many other countries, the U.S. has constitutionalized its system of personal jurisdiction. Consequently, jurisdictional analysis under the 14th Amendment Due Process Clause, which is so deeply engrained in our system of jurisprudence, is not likely susceptible to change in the near future.

Additionally, the Brussels Convention prohibits the use of transient jurisdiction, or "tag" jurisdiction,[107] as well as general "doing business" jurisdiction,[108] which are both

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Community. While the new regulation is very similar to the current Convention, there are some changes.

[104] *See* European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, art. 1-2, 41 O.J. EUR. COMM. (C27/1) (Jan. 26, 1998).

[105] *See* RONALD A. BRAND, FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 508 (Klumer Law International 2000).

[106] *Id*. at 512.

[107] *See* European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, art. 3, 33, 41 O.J. EUR. COMM. (C27/1) (Jan. 26, 1998). ("Tag jurisdiction" refers to the concept of transient jurisdiction, which allows a court to obtain personal jurisdiction over a defendant based solely upon his physical presence within the

well-settled grounds for personal jurisdiction under U.S. law. In light of such distinctions in the fundamental concept of personal jurisdiction between the United States and the European Community alone, it becomes apparent just how challenging a task it would be to draft a uniform international treaty on Internet personal jurisdiction, particularly one which encompasses all these varying concepts. In fact, the United States and members of the European Community are currently negotiating a treaty that could potentially cover issues of intellectual property and electronic commerce. The following discussion explores some of the hurdles that the treaty delegates have been struggling with in recent years.

2. The Hague Conference on Private International Law

In May, 1992, Edwin Williamson, then U.S. Department of State legal adviser, sent a letter to the Secretary General of the Hague Conference suggesting negotiations on a multilateral treaty which would address issues of jurisdiction and recognition of judgments on an international scale.[109] In October 1996, the negotiations for a Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

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State at the time service is effected upon him. *See* Burnham v. Superior Court of California, 495 U.S. 604 (1990)).

[108] *See* European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, art. 2-18, 41 O.J. EUR. COMM. (C27/1) (Jan. 26, 1998). ("General doing business jurisdiction" exists when a defendant has conducted "continuous and systematic" business activities in the forum State such that he will be subject to the personal jurisdiction of that State regardless of whether or not the plaintiff's claim arises out of those particular activities. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415-16 (1984)).

[109] Letter from Edwin D. Williamson, Legal Adviser, U.S. Department of State, to Georges Droz, Secretary General, Hague Conference on Private International Law (May 5, 1992)(distributed with Hague Conference document L.c. ON no. 15 (92)).

were officially placed on the conference agenda.[110] Since then, the delegations have encountered several obstacles which have put the prospect of developing a globally acceptable convention in question for now.[111] The problems discussed above, as well as new challenges, have emerged during the drafting of the new treaty.

Informal meetings of the delegations from October 2000 to April 2001 resulted in a new consensus requirement in which everyone has veto power.[112] This has proved troublesome for the United States in several respects. First, all other delegations disfavor the concept of "general doing business jurisdiction," which the U.S. delegation supports.[113] Additionally, the majority process of negotiation had resulted in a 1999 draft that was unacceptable to the U.S. delegation.[114] Since the negotiations before July 2001 were conducted under a process of majority vote, and since many of the delegations at the Hague Conference were either member states of the European Union (EU) or states that desired to enter the EU, the Draft and Interim Text resemble much of the language found in the Brussels Convention.[115] In addition, it is understandable that members of EU states would prefer rules which resemble those provisions they are most accustomed to dealing with in their own legal systems.[116]

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[110] Eighteenth Session Final Act, Hague Conference on Private International Law, at 21 (Oct. 19, 1996).
[111] *See* Ronald A. Brand, *Where to From Here? Prospects for a Hague Convention on Jurisdiction and the Enforcement of Judgments*, 16 INT'L ARB. REP. 38, 44 (Oct. 2001).
[112] The Hague Conference on Private International Law, Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference, Prel. Doc. No. 10 (June 2000).
[113] *Id.*
[114] *Id.*
[115] *See* Brand, *supra* note 100, at 6.
[116] *Id.*

Although the bases of general doing business jurisdiction and transient jurisdiction are currently prohibited under Article 18[117] of the new 2001 Interim Text, efforts have been made to incorporate the Due Process requirement elsewhere in the convention. Article 10 "torts or delicts" attempts to combine both the Brussels Convention and Due Process concepts of specific jurisdiction discussed in the previous section.[118] Under Article 10, a plaintiff may bring an action against a defendant not only in the State in which the harmful act occurred or injury arose, but also in the State into which a defendant has directed frequent or significant activity related to the claim, "and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State."[119] Still other questions remain as of the most recent draft, such as whether to include a section addressing intellectual property rights, damages limitations, and of course, electronic commerce and similar Internet disputes.

The previous discussion aims to illustrate the difficulties which would threaten the prospects of drafting a uniform treaty addressing Internet jurisdiction and recognition of judgments. One commentator on the subject of international treaties and trademark

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[117] *See* Hague Conference of Private International Law: Commission II Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Interim Text, art. 18, June 20, 2001.

[118] *Id*. at art. 10(1)-(2). (Allows a plaintiff to bring an action against a defendant not only in the State in which the harmful act occurred or injury arose, but also in the State into which a defendant has directed frequent or significant activity related to the claim, "and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.")

[119] *Id*.

disputes over the Internet describes the drafting of multilateral treaties as "economically inefficient."[120] He continues:

> The high transaction costs that accompany multilateral, and even bilateral, negotiations necessarily imply that reaching a mutually acceptable agreement will require a great deal of time and effort. The negotiations surrounding NAFTA and the Uruguay Round of the General Agreement on Tariffs and Trade demonstrate that brokering international agreements is an expensive and arduous process - one that is frequently hampered by conflicting cultural nuances.[121]

While international treaties play an essential role in opening markets and promoting free trade, the lethargic and complicated process of drafting multilateral treaties may not be a compatible solution for the demands of the ever-changing technological world of the Internet.

3. The Future of Internet Personal Jurisdiction

Since the Internet has "broken down many of the geographical and temporal premises of international law,"[122] we are faced with a new challenge to keep one step ahead of swiftly changing technologies and must forge solutions that will enable us to function as a global economy over the Internet. As the previous discussion suggests, the most efficient solution may not be the drafting of a new multilateral treaty, particularly if negotiations prove too costly and time consuming to address the changing needs of the Internet. Additionally, as discussed earlier, many national legal systems have yet to adopt and test their own solutions for Internet jurisdiction domestically. Consequently there is

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[120] *See* Marcelo Halpern & Ajay K. Mehrota, *From International Treaties to Internet Norms: The Evolution of International Trademark Disputes in the Internet Age*, 21 U. PA. J. INT'L ECON. L. 523, 529 (2000).

[121] *Id.*

[122] *Id*.

little empirical evidence of how proposed solutions might work in practice once adopted in an international treaty.

If the delegations at the Hague Conference on Private International Law can agree on a manageable solution to address jurisdiction over the Internet that is compatible with the differing focus on personal jurisdiction analysis, then it will likely be more efficient to include it in the text of the current draft rather than to seek the creation of a new treaty to independently address Internet disputes. Such a treaty would provide for a uniform set of rules as well as a central forum to which parties in contracting states could submit questions of jurisdiction. However, given the cultural and political differences between the United States and most other countries of the world, this could prove to be an insurmountable hurdle in practice. As previously discussed, many of the difficulties associated with such differences have already emerged as a result of the negotiations of the Hague Conference of Private International Law and continue to threaten the successful drafting of a globally acceptable treaty text.

A radical alternative to drafting a new treaty to address Internet personal jurisdiction is to modify our own national policy of personal jurisdiction, but strictly as it relates to Internet disputes. Previous sections of this note demonstrate that the current *International Shoe* standard is not wholly compatible with the borderless landscape of the Internet, particularly when tested on an international scale. In addition, *Yahoo!* shows us that litigation under our current standard is exceedingly costly and time consuming, requiring American companies to expend endless resources to resolve novel questions of Internet jurisdiction in courts both home and abroad. While e-commerce is currently in its infancy as part of the global economy, more disputes are likely to arise as new

technology allows companies to conduct an increased amount of business over the Internet. The growth of Internet commerce demands a swift solution that will not prove obsolete once it goes into effect. Most importantly, the increased flow of Internet commerce requires a predictable test upon which businesses seeking to expand their activities onto the Internet can rely in the future. The current *International Shoe* standard fails to provide website operators with such a reliable test. Instead, our current standard of personal jurisdiction burdens website operators with great uncertainty and potential vulnerability to being haled into courts hundreds or perhaps thousands of miles away.

Modifying our standard of personal jurisdiction over the Internet will allow the United States to enter into more acceptable multilateral agreements. Additionally, it will provide a more predictable rubric by which to analyze jurisdiction over the Internet when international disputes arise.

History demonstrates that such a landmark modification of personal jurisdiction rules may not be as radical or uncommon as one may think. As pointed out earlier, the Supreme Court recognized that the International Shoe standard was created in response to technological changes and an increased flow of interstate commerce which our nation witnessed more than a half century ago.[123] I suggest that perhaps another such occasion has finally presented itself in the United States, only today the technological changes have strong implications for international trade as well as for domestic interstate commerce.

However, any change in our standard of personal jurisdiction must comport with the Constitution and Due Process. Ironically, it may be the very foundations of the

[123] *See* Hanson v. Denckla, 357 U.S. 235, 250-251 (1958).

International Shoe standard which currently threaten the Due Process of defendants in Internet disputes. It is well understood that the minimum contacts analysis propounded in *International Shoe* was formulated to ensure defendants are afforded Due Process when their interests are balanced with the interests of the forum state in exercising personal jurisdiction over non-residents. Nevertheless, today the minimum contacts test suffers from grave ambiguity when applied to the borderless landscape of the Internet. As is demonstrated in the case law to date, courts disagree on precisely what Internet activities amount to minimum contacts sufficient to allow the reasonable exercise of personal jurisdiction. Consequently, tests are ultimately formulated on a factual, case-by-case basis, thus depriving website operators of any degree of certainty as to where and when they might be subject to the personal jurisdiction of a foreign court. Allowing potential defendants to be exposed to such jurisdictional vulnerability undermines the very interests the Due Process Clause was originally meant to protect.

Currently, the Supreme Court is best equipped to provide us with a solution to Internet personal jurisdiction, as the High Court is vested with the sole and exclusive authority to interpret the meaning of the U.S. Constitution. Unfortunately, the Court will not render an opinion on the subject until such a dispute is presented before it. Should the Court embrace the opportunity to rule on the issue of Internet personal jurisdiction, I suggest that the Court's focus should be on the Due Process prong of our current analysis.

There are two primary considerations which must accompany the discussion of modifying our standard of Due Process as it pertains to Internet disputes. First, the minimum contacts analysis must be refined to reflect the non-physical nature of many of the Internet activities from which today's disputes arise. While *Zippo* merely attempts to

define special categories for the operation of websites, it fails to provide courts with concrete guidance on what amounts to a "contact" for purposes of Due Process. I suggest that in regard to Internet disputes involving contracts, contacts should be limited to those activities accompanied by some particularized physical nexus, including but not limited to: entering into a contract for Internet service, entering into a contract for sale of merchandise in the forum state, the unsolicited contacting of an individual by a website operator through means of e-mail or physical mail directing the potential customer to his website, or the advertisement in print, radio or television markets in the forum state which alert residents to the existence of a website.

A minimum contacts analysis based upon particularized unilateral activities with a physical nexus promotes the key elements of personal jurisdiction so engrained in our system of jurisprudence: purposeful availment, foreseeability and reasonableness. When a website operator reaches out to a potential customer by targeting him through more particularized means, he is able to foresee when and where his activities might cause injury, and may decide for himself whether he wishes to reach out to a resident of a foreign jurisdiction. This conscious decision made by every website operator will allow for the reasonable exercise of personal jurisdiction over him. Some may argue that such a physical nexus requirement leaves plaintiffs in a worse position than before, requiring them to bring suit in foreign courts if they are injured by a website operator. However, for cases arising in tort, such as defamation, libel or slander, plaintiffs would not need to establish a physical nexus from the defendant. Instead, defendants would be subject to the more traditional effects test first adopted by the Supreme Court in *Calder v. Jones*.[124] In

[124] 465 U.S. 783, 788-89 (1984).

such cases, the key elements of personal jurisdiction would again be satisfied since personal jurisdiction would only be exercised where the defendant takes some particularized unilateral action toward the plaintiff and can foresee the injurious effects his activities might cause in the forum state.

A second, more complicated consideration is the implication of a modified standard of Due Process upon transnational Internet litigation. As mentioned earlier, a modified standard of Due Process would allow the United States to enter more easily into international agreements, such as the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. Due to the differing focus between the U.S. concept of Due Process and the concept of specific jurisdiction embraced by the Brussels Convention, negotiations for a globally acceptable treaty have been frustrated. Perhaps a modified, more predictable standard of Due Process with regard to the Internet might prove more acceptable to members of EU states where predictability and efficiency has traditionally been the hallmark of many regional legal systems. While the intricacies of such a discussion are likely beyond the scope of this paper, it raises important questions about the possibilities of directing negotiations towards a globally acceptable multilateral treaty in the near future.

Conclusion

The Internet has presented courts across our nation and around the world with a new challenge. Litigation continues to erupt and test the limits of the *International Shoe* standard as it applies to international Internet disputes. Increased litigation costs will likely discourage businesses from engaging in commerce over the Internet to the detriment of corporations and consumers alike. A solution is needed which will protect

businesses from inconvenient or needless litigation, while ensuring more predictability when establishing a website which will be instantly accessible anywhere in the world. Any solution to Internet personal jurisdiction must be "upgradeable" such that it can be modified to conform to the needs of future technological advances. Finally, the solution must be manageable by courts in the United States and abroad. Thus, any new standard must comport with well-settled principles of customary international law.

As purposeful availment, foreseeability and reasonableness have become the focus of Internet personal jurisdiction analyses by American courts to date, a modification of the current Due Process analysis is needed in order to satisfy these fundamental requirements. In addition, modifying our standard of personal jurisdiction will allow the United States to enter into more acceptable multilateral agreements pertaining to Internet disputes. Currently, the Supreme Court is best equipped to formulate a more flexible standard of personal jurisdiction over the Internet.

As the Internet plays an increasingly important role as a medium in a global economy, the need for a solution to personal jurisdiction will increase proportionately. The traditional territorial concepts embodied in *International Shoe* are proving less effective in disputes arising out the seamless landscapes of the Internet. Until such a solution is found, however, our Shoe will continue to be stretched thin as it attempts to encompass the new technological challenges emerging in the Internet age.