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## There is a There There: How the Zippo Sliding Scale Has Destabilized the Structural Foundation of Personal Jurisdiction Analysis

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THERE IS A THERE THERE: HOW THE *ZIPPO* SLIDING SCALE HAS DESTABILIZED THE STRUCTURAL FOUNDATION OF PERSONAL JURISDICTION ANALYSIS

*Catherine Ross Dunham*\*

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

I. INTRODUCTION

*A. HOW ZIPPO AND ITS PROGENY HAVE DESTABILIZED PERSONAL JURISDICTION ANALYSIS*

In 1997, the Federal District Court for the Western District of Pennsylvania evaluated one in a line of emerging personal jurisdiction cases that raised the question of whether Internet-based contacts with citizens of the forum state can alone establish the defendant purposefully availed himself of the benefits and protections of the forum state. In this unlikely watershed case, *Zippo Mfg. Co. v. Zippo Dot Com*,<sup>1</sup> the District Court wrangled with the new concept of purposeful availment through electronic contact with the forum state. The court viewed *Zippo* and its antecedents as

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<sup>1</sup> *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa 1997).

components of a new body of personal jurisdiction law: Internet-based personal jurisdiction. In *Zippo*, the District Court created a new test, the *Zippo* sliding scale, to evaluate the purposeful availment issue when the defendant's contacts are based on Internet conduct. Many courts then followed *Zippo*'s impulse to categorize Internet-based contacts differently than other contacts and applied the sliding scale to a variety of cases possessing the common thread of Internet activity.

*Zippo* and its progeny raise the question of to what extent the law should customize doctrine to address the practical changes created by technological advances. Courts now stand in a similar position to Courts at the turn of the Twentieth Century when the country struggled with the realities of industrialization and cross-country travel. Through *Pennoyer*,<sup>2</sup> then later through *International Shoe*,<sup>3</sup> courts mediated the tensions between national growth and the tradition of territoriality through tests based on a defendant's contacts with the forum, rather than a defendant's physical presence in the forum. Territoriality, or place, served as the foundation of Twentieth Century personal jurisdiction jurisprudence and the use of a minimum contacts analysis formed the analytical structure.

Tensions exist between the role of contacts based on Internet activity and the foundation and structure created through theories based on place.

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<sup>2</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1877).

<sup>3</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The *Zippo* sliding scale was the Federal District Court's response to the tension created by the perceived amelioration of place as a determinant of contacts and purposeful availment. The *Zippo* approach responded to a rising fear that if entities are able to contact citizens of the forum through the Internet alone, those contacts will fail the test of minimum contacts because Internet-based contacts can be disseminated so widely, purposeful availment with any particular forum is non-existent.

This article argues judicial responses such as the Court's response in *Zippo* constitute premature, non-functional and destabilizing reactions to Internet-based contacts analysis. First, the article argues the *Zippo* sliding scale has destabilized the foundation of personal jurisdiction jurisprudence by directing courts to analyze the defendant's contacts by reference to a linear scale which serves as a non-functional addition on the existing foundation. The article further argues the hasty construction of *Zippo* creates a new need to shore up the established framework of contacts analysis based on the place theory directives of *International Shoe* and *Pennoyer*. Finally, the article evaluates how place theory fits in the modern context through the hypothetical analysis of a case wherein a defendant's only contacts with the forum are through Internet-based activity.

## II. BACKGROUND

*A. THE ROLE OF PLACE IN PERSONAL JURISDICTION ANALYSIS*

Throughout this article, I will refer to the visual image of a house, offered as a metaphor for personal jurisdiction analysis. The house is not an elaborate mansion, but a small frame structure built on a subterranean stone foundation. It is a stable, functional, traditional house, common to many American neighborhoods in the middle part of the Twentieth Century. And, as with any structure, the house began with a foundation.

Personal jurisdiction analysis is the offspring of procedural due process and really came into being in American Jurisprudence after the application of the Fifth Amendment to the states through the adoption and ratification of the Fourteenth Amendment.<sup>4</sup> In fact, the foundation for modern personal jurisdiction analysis was laid before the Fourteenth Amendment applied the due process clause to the states.<sup>5</sup> In the latter part of the Nineteenth Century, the courts began to adjust to the birth of a mobile American society.<sup>6</sup> Prior to the era of industrialization and the meshing of cross-country connections through a transcontinental railroad, American dispute resolution was local.<sup>7</sup> The Anglo-based procedures and customs were

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<sup>4</sup> The Fourteenth Amendment was proposed June 13, 1866 and ratified on July 28, 1868. The history of the ratification of the Fourteenth Amendment is described in *Coleman v. Miller*, 307 U.S. 433 (1939).

<sup>5</sup> See *Pennoy*, 95 U.S. 714.

<sup>6</sup> See Philip L. Merkel, *The Origins of an Expanded Federal Court Jurisdiction: Railroad Development and the Ascendancy of the Federal Judiciary*, THE BUSINESS HISTORY REVIEW, Vol. 58, No., 3 (Autumn, 1984), 336-358.

<sup>7</sup> See Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, THE SUPREME COURT REVIEW, Vol. 1978 (1978) 39-79.

nurtured in American courts and much civil dispute still relied on face-to-face resolution before a judge.<sup>8</sup> Not until the nation stretched from east to west did the courts face the challenge of determining proper procedural due process when one party did not reside within the forum state.

*Pennoyer* was the first United States Supreme Court response to the challenge of a more mobile society.<sup>9</sup> In *Pennoyer*, the original landowner, Neff, moved from Washington State to California, leaving behind a parcel of land and a debt owed to his lawyer.<sup>10</sup> Neff's lawyer filed suit against Neff for a \$300 fee bill and sought a post-judgment seizure of Neff's land in order to satisfy the judgment.<sup>11</sup> Neff's land was sold to Neff's lawyer for \$300 through a Sheriff's sale without notice to Neff.<sup>12</sup> The land was later re-sold to Pennoyer.<sup>13</sup> When Neff returned to Washington, he filed suit to quiet title to his land, relying in part on a theory that he was deprived of

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<sup>8</sup> *Id.*

<sup>9</sup> *Pennoyer*, 95 U.S. 714.

<sup>10</sup> *Id.* at 717. Marcus Neff hired an attorney, John H. Mitchell, to help him with paperwork for a land grant. Mitchell later sued Neff in the Oregon state court system for unpaid bills; Neff was living in California and unaware of the proceedings. Mitchell won the lawsuit by default judgment. When Mitchell won the lawsuit in February 1866, Neff's land grant hadn't yet been conferred. Mitchell, possibly waiting for the arrival of the grant, waited until July 1866 to get a writ of attachment on the property. The court later ordered the land seized and sold in order to pay the judgment. Mitchell bought the land at that very auction and later sold the land for approximately \$15,000 and transferred the title to Sylvester Pennoyer. In 1874, Neff sued Pennoyer in federal court to recover his land. The trial court held in favor of Neff and Pennoyer appealed to the United States Supreme Court. RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE 50 (2006).

<sup>11</sup> Freer, *supra* note 10.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

procedural due process when the sale was made without notice to him.<sup>14</sup>

Although this case is most cited for its definitional distinctions regarding *in rem* and *in personam* jurisdiction, a more interesting and less explored attribute of the case is its illustration of the changing tensions in American life. Neff left the state, thus leaving his property.<sup>15</sup> When his creditor filed suit on a debt owed, the very practical question of notice and jurisdiction necessarily arose.<sup>16</sup> Although *Pennoyer* post-dates the intercontinental railroad and falls in the midst of the Industrial Revolution, efficient means of communication were not developed in the far west of Washington and California.<sup>17</sup> In fact, the travel distance between Neff and his property could not easily be negotiated and mail service as we know it today was not an existing option.<sup>18</sup> The creditor's best option was to seek *in rem* jurisdiction over Neff predicated on his real property, thus the Court made a bold statement toward progress when it failed to uphold the original judgment against Neff based on the plaintiff's failure to identify Neff's property at the outset of the litigation.<sup>19</sup> Of course, the error is more than

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See generally Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, THE SUPREME COURT REVIEW, Vol. 1965 (1965), 241-288.

<sup>18</sup> See *supra* note 6.

<sup>19</sup> *Pennoyer*, 95 U.S. 721-722. "...every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Id.* at 722. A state has power over people and things inside its boundaries. Such power is demonstrated by the fact that the courts of the state can seize people and property found within the state. Thus, California has power over people and things inside California, and Oregon cannot exercise

just one of timing and, as the Court asserts, the failure to identify the property at the outset of the litigation deprives the defendant of pre-judgment notice, thus failing to provide a basis for the court's exercise of jurisdiction over Neff, leading to an invalid judgment.<sup>20</sup> However, and perhaps more boldly, the Court in *Pennoyer* laid the foundation for a territorial idea of personal jurisdiction.

The Court's decision reflects the Post-Civil War climate of *Pennoyer* and the new American tension around the idea of individual states and territoriality.<sup>21</sup> Before *Pennoyer*, territoriality ruled the civil process.<sup>22</sup> In *Pennoyer*, the court wrestles with that tension and ultimately incorporates the traditions of territoriality into a modern era of Fourteenth Amendment due process.<sup>23</sup> *Pennoyer* mediated the tension when upholding the value of territoriality by affirming *quasi in rem* jurisdiction as a proper jurisdictional predicate for a valid judgment while requiring the plaintiff to notify the defendant that the land will serve as the jurisdictional basis of the suit at the outset of the litigation.<sup>24</sup>

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authority over such people or things. *See also* Freer, *supra* note 10 at 55.

<sup>20</sup> *Pennoyer*, 95 U.S. 722.

<sup>21</sup> *See supra* note 7.

<sup>22</sup> *Pennoyer*, 95 U.S. 723 (quoting *Penn v. Lord Baltimore*, 1 Ves. 444; *Massie v. Watts*, 6 Cranch, 148; *Watkins v. Holman*, 16 Pet. Corbett v. Nutt, 10 Wall. 464).

<sup>23</sup> *See Pennoyer*, 95 U.S. 721-722. *See also* Freer, *supra* note 10 at 55, *supra* note 4.

<sup>24</sup> *Pennoyer*, 95 U.S. 725-726. "...if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding..."  
Id.

The Court's value of territoriality forms the foundation of modern personal jurisdiction jurisprudence. Despite the emerging tensions of growth, the Court required some contact with the territory as a basis for personal jurisdiction.<sup>25</sup> Thus, after *Pennoyer*, the stone foundation of the metaphorical house of personal jurisdiction was complete. Despite growing mobility, the defendant's "place" would be a factor in determining the court's power over that person.

The structure of the metaphorical house of personal jurisdiction was built in the middle of the Twentieth Century, framed with the new test of "minimum contacts."<sup>26</sup> In 1942, the Supreme Court analyzed personal jurisdiction involving that most mobile of the new Americans: the traveling salesman. In *International Shoe v. Washington*, the Court evaluated the power courts in the State of Washington had over a company who reached the forum state only through its sales people.<sup>27</sup> The International Shoe

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<sup>25</sup> *Id.* at 721-722.

<sup>26</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See 4 Fed. Prac. & Proc. Civ.3d § 1067. "...International Shoe became a watershed case that redefined the constitutional limitations on state court jurisdiction and, indirectly, the principles of personal jurisdiction, almost completely."

<sup>27</sup> *Id.* at 310. The plaintiff, responsible for filing this suit in the State of Washington, established a tax on employers doing business therein. The "tax" was a mandatory contribution to the state's Unemployment Compensation Fund. The defendant, International Shoe, was a company that was incorporated in Delaware with its principal place of business in Missouri. The corporation had maintained for some time a staff of 11-13 salesmen in Washington who were residents of that state, and who occasionally rented space to put up displays, as well as met with prospective customers in motels and hotels, thus having no permanent "situs" of business in the State. International Shoe did not pay the tax, so the state effected service of process on one of their salesmen with a notice of assessment. Washington also sent a letter by registered mail to their place of business in Missouri. International Shoe made a special appearance at the trial court to dispute the

Company manufactured shoes in St. Louis, Missouri.<sup>28</sup> It employed salesmen who resided in the state of Washington.<sup>29</sup> International Shoe did not own any land in the state of Washington, but occasionally rented rooms for the purpose of displaying shoes.<sup>30</sup> Salesmen had no authority to accept purchase offers; rather, they forwarded the offers to buy shoes to St. Louis, where all decisions were made.<sup>31</sup> Although the defendant company sold shoes in Washington, the defendant, through its salesperson, had no real presence in the forum state.<sup>32</sup> The State argued, however, that the defendant should be subject to personal jurisdiction within the forum state because it sells its product in the state and thus enjoys the benefits and protections of Washington state law.<sup>33</sup> The Court responded to this basic question of presence and personal jurisdiction by creating the “minimum contacts” test,

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state's jurisdiction over it as a corporate "person." Personal jurisdiction was upheld in the trial court and the Supreme Court of Washington, so International Shoe Co. appealed to the U.S. Supreme Court.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Freer, *supra* note 10, at 69. The International Shoe Company paid its salesmen on commission. Additionally, it permitted salesmen to show only one shoe of a pair; the argument was that by failing to ship an entire pair, the company was not really doing business in Washington. *Id.*

<sup>31</sup> *Id.* The International Shoe Company argued that by structuring the business in this manner, the company was not subject to jurisdiction in Washington. Additionally, the shoes were shipped “f.o.b.” from St. Louis. This means “free on board,” which requires the purchaser to pay the freight charges to get the shoes from St. Louis. Thus, International Shoe argued it did not ship anything into Washington and again reasoned that it should not be subject to jurisdiction there.

<sup>32</sup> *Id.* at 314. *See also supra* notes 27, 30, and 31.

<sup>33</sup> *Id.* at 320. “... the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities.”

thus creating the modern standard for personal jurisdiction analysis.<sup>34</sup> The test, in its infancy, instructed that if a defendant had “minimum contacts” with the forum state such that he availed himself of the benefits and protections of the forum state’s laws, he would be subject to personal jurisdiction in the forum state.<sup>35</sup>

The “minimum contacts” test forms the basic structure of the metaphorical house of personal jurisdiction. Through the years, the structure has been refined and up-fitted with more detailed interpretations of the test, including the development of sub-tests for purposeful availment through contracting and placing products into the stream of commerce.<sup>36</sup> However, throughout these refinements and the many to follow, the Court has relied on the same basic concept held dear in *Pennoyer*: territoriality.<sup>37</sup> The very essence of the minimum contacts test is an evaluation of the defendant’s physical contacts within the forum state. The analysis typically turns on the quality and nature of these contacts demonstrated through sale revenues from products sold in the state, points of destination for products shipped into the state, faxes, electronic mail and

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<sup>34</sup>*Id.* at 310. For cases demonstrating the living nature of the test see *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp v. Rudzewicz*, 471 U.S. 462 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

<sup>35</sup> *International Shoe*, 326 U.S. 310 (1945).

<sup>36</sup> See e.g. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp v. Rudzewicz*, 471 U.S. 462 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

<sup>37</sup> *Pennoyer*, 95 U.S. 721-722; see also *supra* note 19.

telephone calls placed to individuals within the forum state, and other fact-based mechanisms for assessing the defendant's contact with the forum.<sup>38</sup> Although modern life has afforded more opportunities for individuals to contact the forum state without being physically present in the state, the test still relies on the very physical notion of contact. Thus, minimum contacts analysis is rooted in place, just as the Court's analysis was in *Pennoyer*, and the metaphorical house of personal jurisdiction is framed upon a longstanding theory of territoriality, a place theory of personal jurisdiction.

#### *B. TENSIONS CREATED BY INTERNET-BASED CONTACTS*

The importance of place has been challenged by an increasing digital world. The house of personal jurisdiction began to feel crowded in the 1990s when national businesses began to use the Internet as a base for commerce.<sup>39</sup> New methods of digital business increased the accessibility of information and materials and expanded our ability to interact nationally and internationally.<sup>40</sup> With the frame structure of minimum contacts bursting at the seams, courts began to plan and ultimately build an addition onto the metaphorical house to accommodate digital commerce. Unfortunately, the addition was built without adequate consideration of the

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<sup>38</sup> See e.g. *Burger King Corp v. Rudzewicz*, 471 U.S. 462 (1985); *Silver Ring Splint co. v. Digisplint, Inc.*, 508 F.Supp.2d 508 (W.D.Va., 2007); *Taltwell, LLC v. Zonet USA Corp.*, Slip Copy, 2007 WL 4562874, (E.D.Va, 2007); *Sostre v. Leslie*, Slip Copy, 2008 WL 245837 (D.R.I., Jan 04, 2008).

<sup>39</sup> See generally Janet Abbate, *Government, Business, and the Making of the Internet*, THE BUSINESS HISTORY REVIEW, Vol. 75, No. 1 (Spring, 2001) 147-176.

<sup>40</sup> *Id.*

underlying structure and the integrity of the framing, leaving an awkward add-on to the frame structure that fails to add function and threatens the foundational integrity of the entire house.

The renovation planning began in 1996 when federal courts addressed the role of the Internet in three trademark infringement cases.<sup>41</sup> In *Bensusan v. Kingd/b/a The Blue Note*, a New York restaurateur brought a trademark infringement suit against the operator of an Internet web site which shared the restaurant's famous name.<sup>42</sup> The court granted the defendant's motion to dismiss for lack of personal jurisdiction noting that the web site operator did not make any effort to use the Internet to reach out to New York, the forum state.<sup>43</sup> Rather, the site derived revenue from substantially local sources, rather than sources in New York or national sources.<sup>44</sup> In addition to offering now quaint explanations of such new

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<sup>41</sup> *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y. 1996); *CompuServe Inc v. Patterson*, 89 F.3d 1257 (6<sup>th</sup> Cir. 1996); *Maritz, Inc. v. Cybergold, Inc.*, 947 F.Supp. 1328 (E.D. Mo. 1996).

<sup>42</sup> *Bensusan*, 937 F.Supp. at 297 (1996). The Plaintiff's New York club and the Defendant's Internet site both had the name "The Blue Note". The defendant's site advertises a nightclub in Columbia, Missouri that serves Columbia residents almost exclusively, mostly Univ. of Missouri students. The Missouri club created a site on the Internet advertising the club in Missouri, which gave information about the club, an events calendar, and ticketing information. The ticketing information included the names and contact information of ticket outlets in Columbia, Missouri and a charge-by-phone telephone number through which tickets could be ordered and picked up at the club.

<sup>43</sup> The Court, in distinguishing this case from the almost simultaneous decision from the Sixth Circuit in *CompuServe*, found that the facts of this case did not demonstrate the defendant "reached out" from Missouri to New York. The Court held "[t]his action ... contains no allegations that King in any way directed any contact to, or had any contact with, New York or intended to avail itself of any of New York's benefits." *Id* at 301.

<sup>44</sup> The Court notes that no goods were shipped from Missouri to New York and the defendant did not earn any revenues from New York residents. *Id.* at 299.

concepts as “site”<sup>45</sup> and “Internet”<sup>46</sup>, the court in *Bensusan* importantly identifies that Internet activity can have a passive or active character, determined by the site operator’s ability to foresee the site would be accessed by users in other geographical regions.<sup>47</sup>

Also in 1996, the federal appeals court for the Sixth Circuit addressed the question of minimum contacts through the Internet in *CompuServe v. Patterson*.<sup>48</sup> In *CompuServe*, the plaintiff CompuServe filed a declaratory judgment action in the federal district court in Ohio against the defendant, a CompuServe subscriber, to settle defendant’s allegations that CompuServe had infringed on defendant’s software trademarks.<sup>49</sup> The District Court dismissed the action, finding that the defendant had not purposefully availed

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<sup>45</sup> “A ‘site’ is an Internet address which permits users to exchange digital information with a particular host ... and the World Wide Web refers to the collection of sites available on the Internet. *Id.* at 297.

<sup>46</sup> “The Internet is the world’s largest computer network (a network consisting of two or more computers linked together to share electronic mail or files). The Internet is actually a network of thousands of independent networks, containing several million ‘host’ computers that provide information services. An estimated 25 million individuals have some form of Internet access, and this audience is doubling each year. ...” *Id.*

<sup>47</sup> The Court uses the existing tenet of foreseeability to delineate between the passive and active nature of Internet sites; “... mere foreseeability of an in-state consequence and a failure to avert that consequence is not sufficient to establish personal jurisdiction.” *Id.* at 300.

<sup>48</sup> *CompuServe Inc v. Patterson*, 89 F.3d 1257 (6<sup>th</sup> Cir. 1996).

<sup>49</sup> *Id.* *CompuServe* addressed the business relationship between defendant Patterson, a Texas domiciliary, and plaintiff CompuServe, an Ohio corporation that provided subscribers access to more than 1700 information services on the Internet. The defendant entered into an agreement with the plaintiff for plaintiff to market and sell defendant’s electronic programs, referred to as “shareware”, to other subscribers. The defendant claimed plaintiff had stolen the design of his shareware products and marketed them under the CompuServe name. When the parties could not resolve the dispute, the plaintiff filed a declaratory judgment action. The defendant then moved the court to dismiss the case for lack of personal jurisdiction in Ohio. The district court dismissed the case and the plaintiff appealed.

himself of the benefits and privileges of Ohio law.<sup>50</sup> The plaintiff appealed, arguing, among other points, that the defendant had purposefully availed himself of Ohio law through the process of entering into a contract with the plaintiff for the sale and marketing of “shareware” to CompuServe subscribers. The Sixth Circuit agreed with CompuServe, noting that Patterson knowingly made an effort and purposefully contracted to market his product nationally, with CompuServe’s Ohio operations serving as his distribution center.<sup>51</sup> The Sixth Circuit considered the case to present a “novel question of first impression” regarding the sufficiency of electronic contacts under the Due Process Clause analysis of personal jurisdiction.<sup>52</sup> However, the Court reasoned the case through the lens of a contract-based jurisdiction inquiry.<sup>53</sup> Despite grand allusions to the Internet as “the latest

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<sup>50</sup> *Id.* at 1260-61. The district court held that the electronic links between the defendant Patterson, who is a Texan, and Ohio, where CompuServe is headquartered, were “too tenuous to support the exercise of personal jurisdiction.” The district court also denied CompuServe’s motion for reconsideration.

<sup>51</sup> *Id.* at 1263.

<sup>52</sup> *Id.* at 1262. The Court stated the issue as “[d]id CompuServe make a prima facie showing that Patterson’s contacts with Ohio, which have been almost entirely electronic in nature, are sufficient, under the Due Process Clause, to support the district court’s exercise of personal jurisdiction over him?”

<sup>53</sup> The *CompuServe* Court asserted that a defendant does not have to be physically present in the forum state to satisfy the requirements of purposefully availment. The Court cited *Burger King*; “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. *Burger King Corp.*, 471 U.S. at 476.” *Id.* at 1263. Further, the *CompuServe* Court reasoned, “the defendant consciously reached out from Texas to Ohio to subscribe to CompuServe, and to use its service to market his computer software on the Internet. He entered into a contract which expressly stated that it would be governed by and construed in light of Ohio law. Ohio has written and interpreted its long-arm statute, and particularly its “transacting business” subsection, with the intent of reaching as far as the Due Process Clause will allow, and it certainly has an interest in providing effective means of redress for its residents. As the *Burger King*

and greatest manifestation of [these] historical, globe-shrinking trends”<sup>54</sup>, the Court again relied on the imbedded concept of foreseeability to find the defendant was subject to personal jurisdiction in Ohio.<sup>55</sup> Thus, despite the defendant’s lack of any other contact with the forum state, the act of reaching out into Ohio electronically satisfied the Due Process requirements.<sup>56</sup>

The third case<sup>57</sup> in the trilogy of trademark infringement cases which led to the addition on the house of personal jurisdiction also found the defendant subject to the forum state’s jurisdiction through the lens of traditional minimum contacts analysis.<sup>58</sup> However, as in *Bensusan*<sup>59</sup> and *CompuServe*,<sup>60</sup> the District Court in *Maritz v. Cybergold, Inc.* bolstered the importance of the case around the newness of the Internet, again identifying

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*Corp.* Court noted, the purposeful direction of one’s activities toward a state has always been significant in personal jurisdiction cases, particularly where individuals purposefully derive benefits from interstate activities. *Burger King Corp.*, 471 U.S. at 472-73.” *Id.* at 1266.

<sup>54</sup> *Id.* at 1262. “The Internet represents perhaps the latest and greatest manifestation of these historical, globe-shrinking trends. It enables anyone with the right equipment and knowledge—that is, people like Patterson—to operate an international business cheaply, and from a desktop. That business operator, however, remains entitled to the protection of the Due Process Clause, which mandates that potential defendants be able ‘to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit.’ *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567. Thus, this case presents a situation where we must reconsider the scope of our jurisdictional reach.”

<sup>55</sup> *Id.* at 1265. (“Patterson deliberately set in motion an ongoing marketing relationship with CompuServe, and he should have reasonably foreseen that doing so would have consequences in Ohio.”)

<sup>56</sup> *See id.* at 1266.

<sup>57</sup> *Maritz v. Cybergold, Inc.*, 947 F. Supp 1328 (E.D. Mo 1996).

<sup>58</sup> *Id.*

<sup>59</sup> *See supra* text accompanying note 41.

<sup>60</sup> *See supra* text accompanying note 50.

the personal jurisdiction question as an issue of first impression.<sup>61</sup> The Court labeled the Internet as an entirely new means of information exchange and found that analogies to cases involving mail and telephone contacts inapposite based on the ability of electronic mail to efficiently reach a global audience.<sup>62</sup> The subtext of the District Court's opinion is a reticence to accept the advent of electronic communication and an unspoken fear of this new medium of commercial communication.<sup>63</sup> Despite this reticence, the Court sets out and follows the Eighth Circuit's five-prong test for measuring minimum contacts, focusing the analysis on the nature and quality of the defendant's contacts with the forum state.<sup>64</sup>

Two points of influence flow from the District Court's decision in

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<sup>61</sup> *Maritz*, 947 F. Supp. at 1332. The Court frames the issue as follows: "Whether maintaining a website, such as the one maintained by Cybergold, which can be accessed by any internet user, and which appears to be maintained for the purpose of, and in anticipation of, being accessed and used by any and all internet users, including those residing in Missouri, amounts to promotional activities or active solicitations such as to provide the minimum contacts necessary for exercising personal jurisdiction over a non-resident corporation, presents an issue of first impression to this Court." In similar language to that used in *Bensusan* and *CompuServe*, the *Maritz* Court highlights the new and mysterious character of the Internet and electronic communication and suggests the Internet raises new questions of due process.

<sup>62</sup> *Id.* at 1332. The Court notes that electronic mail differs from posted mail in its efficiency and reach and different from an 800 number telephone contact scheme because the use of an Internet site puts the operator in immediate contact with interested persons, whereas the use of an 800 number requires the operator to advertise the number, then having interested persons call in to the operator). *See also* *Inset Systems, Inc. v. Instruction Set*, 937 F. Supp. 161 (D. Conn. 1996).

<sup>63</sup> *Id.* at 1330; The Court defines the terms "Internet" and "information superhighway", describing CyberGold's web service as an example of the Internet's ability to interconnect computers to each other.

<sup>64</sup> *Id.* at 1332. The Eighth Circuit's five part test includes: (1) the nature and quality of the contacts with the forum state; (2) the quality of the contacts; (3) the relationship between the contacts and the cause of action; (4) the interest of the forum state; (5) the convenience of the parties.

*Maritz*. First, the Court concludes that the nature and quality of contacts provided by the maintenance of a website on the Internet are of a different nature and quality than other means of contact with the forum state.<sup>65</sup> This conclusion flows from the Court's limited understanding of electronic mail and Internet use, rather than from the actual facts of this case and the actions of the defendant. The Court finds the website's ability to respond to each and every person who accesses the site evidence of Cybergold's intent to reach out to all Internet users everywhere, thus establishing purposeful availment and sufficient contacts for personal jurisdiction.<sup>66</sup> Secondly, the Court's opinion introduces the concept of a passive web site but reasons this distinction irrelevant as any website on the Internet demonstrates an intent to reach all Internet users.<sup>67</sup>

### C. THE DISTRICT COURT'S REMEDY IN ZIPPO

The infant jurisprudence birthed in 1996 cried out for more space. The District Court for the Western District of Pennsylvania responded in January 1997 when it renovated the house of personal jurisdiction with the

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<sup>65</sup> *Id.* at 1333.

<sup>66</sup> *Id.* at 1333.

<sup>67</sup> *Id.* at 1333. Cybergold introduced the concept of passive web sites by characterizing its website as passive. The Court disagreed with Cybergold's reasoning: "CyberGold's posting of information about its new, up-coming service through a website seeks to develop a mailing list of internet users, as such users are essential to the success of its service. Clearly, CyberGold has obtained the website for the purpose of, and in anticipation that, Internet users, searching the Internet for websites, will access CyberGold's website and eventually sign up on CyberGold's mailing list. Although CyberGold characterizes its activity as merely maintaining a "passive website," its intent is to reach all internet users, regardless of geographic location."

addition of a new sliding scale to be used in evaluating minimum contacts based on Internet activity.<sup>68</sup>

*Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* arose from a trademark infringement action, brought under the Lanham Act<sup>69</sup>, by a frequent enforcer of its trademarks, Zippo Manufacturing Company, the Pennsylvania manufacturer of “Zippo” tobacco lighters.<sup>70</sup> Zippo Manufacturing complained that Zippo Dot Com, a California-based Internet news service, infringed on the Zippo trademark by use of domain names, including the name “Zippo.”<sup>71</sup> Zippo Dot Com moved to dismiss for lack of personal jurisdiction arguing it was not subject to personal jurisdiction in Pennsylvania.<sup>72</sup> Zippo Manufacturing argued that Zippo Dot Com’s web site was accessible to Pennsylvania residents and Pennsylvania residents were subscribers to the news service through the Internet site<sup>73</sup>, thus Zippo

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<sup>68</sup> *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

<sup>69</sup> *See id.* at 1121; see also the Federal Trademark Act, 15 U.S.C. § 1051-1127.

<sup>70</sup> *Id.* *See e.g.* *Zippo Manufacturing Co. v. Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y. 1963).

<sup>71</sup> *Id.* at 1121-22. (Zippo Dot Com obtained the exclusive right to use the domain names “zippo.com”, “zippo.net”, and “zipponews.com”. Zippo Dot Com operated a web site which contained information about the company, advertisements and an application to become a subscriber to the news service. Through the use of the word “Zippo” in the domain name, activity on the site generates the use of the word “Zippo” in numerous locations on the company’s web site and in many downloads and messages sent from and posted on the web site.)

<sup>72</sup> *Id.* at 1121.

<sup>73</sup> *Id.* All of Zippo Dot Com’s contacts with Pennsylvania occurred over the Internet. The web site was accessible nationally. Zippo Dot Com had approximately 140,000 subscribers worldwide, and approximately 2% of the subscribers, 3000, were Pennsylvania residents. In addition, Zippo Dot Com had entered into seven agreements with Internet Service Providers in Pennsylvania.

Dot Com had sufficient minimum contacts with Pennsylvania to allow for the exercise of specific personal jurisdiction over Zippo Dot Com.<sup>74</sup>

The Zippo Court's analysis again begins at the "Constitutional touchstone" of minimum contacts, recognizing the role of foreseeability and "reaching out" in the determination of purposeful availment.<sup>75</sup> Then, relying specifically on the 1996 trilogy of trademark infringement cases<sup>76</sup>, the Court devises a sliding scale to be applied to evaluate the nature and quality of commercial activity that an entity conducts over the Internet<sup>77</sup>.

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<sup>74</sup> *Id.* at 1122. The Court holds that Zippo Dot Com would not be subject to general jurisdiction in Pennsylvania, thus narrowing their inquiry to whether the defendant has sufficient minimum contacts with the forum, whether the claim asserted arises out of the defendant's contacts, and whether the exercise of personal jurisdiction over the defendant is reasonable.

<sup>75</sup> *Id.* at 1123.

<sup>76</sup> *See supra* note 30. *See also* Panavision Intern., L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996); Inset Systems, Inc. Instruction Set, 937 F. Supp. 161 (D. Conn. 1996).

<sup>77</sup> *See id.* at 1123-24. The Court textually explains a sliding scale used to differentiate between activity on web sites. The graphic used below is a visual interpretation of the Court's textual description of the scale.

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

*Zippo Mfg. Co. v. Zippo Dot Com Sliding Scale*

The sliding scale demonstrates the spectrum of a defendant's business activity on the Internet.<sup>78</sup> On one end of the scale, the Court describes situations where businesses clearly conduct business on the Internet through contracting with foreign residents and the repeated and knowing transmission of computer files through the Internet.<sup>79</sup> The Court opines that defendants with activity falling at this end of the scale are subject to personal jurisdiction. At the opposite end of the scale, the Court describes passive web sites which provide information only to Internet users and are

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* Citing *Compuserve Inc. v. Patterson*, 89 F. Supp. 1257 (6<sup>th</sup> Cir. 1996).

not sufficient to subject the defendant to personal jurisdiction.<sup>80</sup> The Court then describes the “middle ground” of Internet activity, a space occupied by interactive sites wherein the user and host computer can exchange information, which requires the court to examine the nature of activity on the individual site to determine whether the exercise of personal jurisdiction is proper.<sup>81</sup>

The sliding scale confirms the outcome of minimum contacts analysis on Internet-based activity that is either predominantly passive or overwhelmingly active and interactive. As in prior cases of mail or telephone communication between remote parties, the level and nature of the activity controls the jurisdictional analysis.<sup>82</sup> If a defendant uses the Internet to attract foreign customers and contacts then continues to deal with the out-of-state entity through the Internet or otherwise, the traditional basis for personal jurisdiction is formed. Likewise, if the defendant does nothing more than make information available to the general public, through the Internet or through traditional advertising, the test for personal jurisdiction is likely not met as the activity does not demonstrate purposeful availment. The passive and active ends of the *Zippo* sliding scale contribute nothing to the established understanding of minimum contacts and purposeful availment. It is the vast mid-section of the scale, the interactive web sites,

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<sup>80</sup> *Id. Citing* Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996).

<sup>81</sup> *Id. Citing* Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996).

<sup>82</sup> *See supra* note 62.

that present the difficult questions.

*D. THE ISSUE OF POST-ZIPPO DESTABILIZATION*

The *Zippo* Court reasoned its scale was a new approach to personal jurisdiction analysis developed to intercept the “global revolution looming on the horizon”, thus staging its own opinion as the next step in a progression of personal jurisdiction law<sup>83</sup>. However, the *Zippo* Court’s creation and application of the scale fails to offer any new approach to personal jurisdiction analysis. In fact, the scale itself has led to more confusion as courts have tried to comprehensively wedge Internet-based contacts questions into the inadequate and poorly structured scale, essentially over-building and over-crowding the addition to the house of personal jurisdiction.

*1. The Structural Stress of Zippo’s Progeny*

The renovated house of personal jurisdiction has become an attractive gathering place for courts and litigants wrestling with motions to dismiss predicated on Internet-based contacts.<sup>84</sup> Specifically, crowds have gathered

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<sup>83</sup> *Zippo*, 952 F. Supp. at 1123 (quoting *Hanson v. Denckla*, 357 U.S. 235 (1958) (“As technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase.”)). The *Zippo* Court also quotes *Burger King v. Rudzewicz*, 471 U.S. 462 (1985) for the principle that physical presence in the forum is not required for the exercise of personal jurisdiction.

<sup>84</sup> See e.g. *ALS Scan, Inc. v. Digital Service Consultants*, 293 F.3d 707 (4<sup>th</sup> Cir. 2002); *Mink v. AAAA Development LLC*, 190 F.3d 333 (5<sup>th</sup> Cir. 1999); *Roberts v. Paulin*, 2007 WL 3203969 (E.D.Mich., Oct 31, 2007)(NO. 07-CV-13207); *Premedics v. Zoll*, 2007 WL 3012968 (M.D.Tenn., Oct 09, 2007)(NO.3:06-0716).

in the new addition, and even more specifically, within the particular space on the scale, the middle section, ascribed to an interactive, commercial web presence.<sup>85</sup> Despite the fact that the *Zippo* sliding scale is the creation of a federal district court, many courts began to import the test into decisions invoking a website as a predicate for personal jurisdiction.<sup>86</sup> Discussion of the scale emerged in all of the circuits at the time of the scale's creation in 1999. [Reference to the scale has continued](#) through the present, however, some circuits have been reluctant to affirmatively adopt the scale.<sup>87</sup> Other circuits have been less reticent.<sup>88</sup>

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<sup>85</sup> See *supra* chart page 21.

<sup>86</sup> See *e.g.* *Roberts v. Paulin*, 2007 WL 3203969 (E.D.Mich., Oct 31, 2007)(NO. 07-CV-13207 (The court evaluates the question of personal jurisdiction regarding a California Company that advertises its product through a website which is accessible to Michigan residents but does not allow for purchases online).

<sup>87</sup> See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9<sup>th</sup> Cir. 1997); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (9<sup>th</sup> Cir. 1998) (requiring “something more” than a passive website with advertising and contact information to indicate defendant purposefully directed activity at forum state; “something more” may be established if the plaintiff can establish the effects test); *Bird v. Parsons*, 289 F.3d 865 (6<sup>th</sup> Cir. 2002); *Noegen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883 (6<sup>th</sup> Cir. 2002) (The presence of a website that is “interactive to a degree that reveals specifically intended interaction with residents of the state” is sufficient to show purposeful availment); *Toys R Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003) (requiring the defendant had knowledge demonstrated by “directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts.”); *Ginsburg v. Dinicola*, 2007 U.S. Dist. LEXIS 41418 (D. Mass. June 7, 2007) (ten decisions from this circuit cite the *Zippo* scale but the Circuit has neither elaborated or adopted the scale); *Abbot Labs v. Mylan Pharms, Inc.*, 2006 U.S. Dist. LEXIS 13782 (N.D. Ill. Mar. 28, 2006) (district court decisions from the 7<sup>th</sup> circuit have not adopted the *Zippo* scale; however the district courts weigh the presence of the website into the analysis, placing significant emphasis on how much control the defendant has in designing, maintaining, and updating the website); *Baker v. Carnival Corp.*, 2006 U.S. Dist. LEXIS 85114 (S.D. Fla. Nov. 20, 2006) (district courts in the 11<sup>th</sup> Circuit have focused on evaluating continuous and systematic contacts perhaps sustained through Internet activity); *GTE New Media Servs., Inc. v. Ameritech Corp.*, 21 F.Supp. 2d 27 (1998) (seven cases from the D.C. Cir. have cited *Zippo* but only one District court case has textually adopted the scale).

<sup>88</sup> See *ALS Scan, Inc. v. Digital Service Consultants*, 293 F.3d 707 (4<sup>th</sup> Cir. 2002) (4<sup>th</sup>

The 4<sup>th</sup> Circuit recognized the Internet-based contacts question invoked an existing controversy between the traditional minimum contacts analysis and the effects test developed through *Calder v. Jones*<sup>89</sup> and applied in cases of intentional tort actions.<sup>90</sup> When the plaintiff alleges an intentional tort via use of a website, the two tests coalesce around the nexus of the Internet activity. In *ALS Scan*, the plaintiffs alleged a Georgia-based Internet Service Provider subjected itself to personal jurisdiction in Maryland by enabling a website owner to publish photographs on the Internet, staging arguments from the traditional contacts perspective and the effects test perspective.<sup>91</sup> Given that the contact arguments were centered on Internet activity, the Circuit Court invoked the *Zippo* sliding scale, stating its adoption of the scale while creating a new test which essentially imports the *Zippo* scale into a *Calder*-like effects test.<sup>92</sup> The Fourth Circuit test adopting the *Zippo* scale provides a court can exercise personal

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Circuit adopts the *Zippo* scale but creates a test for personal jurisdiction that combines the *Zippo* scale and the test used in *Calder v. Jones*, 465 U.S. 783 (1984). Thus, a court may find personal jurisdiction when: (1) the defendant directs electronic activity into the state, (2) with the manifested intent of engaging in business or other interactions within the state, and (3) that activity creates a potential cause of action in the state); *Lakin v. Prudential Securities, Inc.*, 348 F.3d 704 (8<sup>th</sup> Cir. 2003) (the *Zippo* scale is properly used in cases where specific jurisdiction is alleged but the *Zippo* scale alone is not sufficient when general jurisdiction is alleged to exist); *Soma Med. Int'l v. Std. Chtd. Bank*, 196 F.3d 1292 (10<sup>th</sup> Cir. 1999); *Mink v. AAAA Development LLC*, 190 F.3d 333 (5<sup>th</sup> Cir. 1999); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239 (2<sup>nd</sup> Cir. 2007) (using *Zippo* scale not as a separate analytical framework but as a tool to decide whether a defendant has transacted business in the forum).

<sup>89</sup> *Calder v. Jones*, 465 U.S. 783 at 787 (1984).

<sup>90</sup> *See ALS Scan, Inc. v. Digital Service Consultants*, 293 F.3d 707 (4<sup>th</sup> Cir. 2002).

<sup>91</sup> *Id.* at 707.

<sup>92</sup> *See id.* at 714.

jurisdiction over a person outside of the forum when that person (1) directs electronic activity into the state, (2) with the manifested intent of engaging in business or other interactions within the forum, and (3) that activity creates, in a person within the forum, a potential cause of action cognizable within under the laws of the forum.<sup>93</sup> The test devised by the Fourth Circuit substitutes an intent analysis for the *Zippo* scale's determination of website interactivity.<sup>94</sup> As applied, the test places websites used to intentionally direct electronic commercial activity into the forum into the interactive arm of the scale.<sup>95</sup> However, the Fourth Circuit's professed adoption of the *Zippo* scale arguably adds no dimension to the already one-dimensional

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<sup>93</sup> *Id.* at 714. (“Thus, adopting and adapting the *Zippo* model, we conclude that a State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State); *see also* *Calder v. Jones*, 465 U.S. 783 at 787 (1984) (Under *Calder*, personal jurisdiction can be based upon: (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>94</sup> *Id.*

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

nature of the middle portion of the scale since activity and intent measure the same element of the defendant's conduct, measuring the defendant's acts to purposefully engage persons in the forum.

The Fifth Circuit also crowded into the new room in the house of personal jurisdiction by crafting the *Zippo* sliding scale into a test relying on commercial traffic.<sup>96</sup> In *Mink*, the defendant company did not take purchase orders through their website, thus no interactive commercial activity could be conducted through the site.<sup>97</sup> The website at issue was essentially a bulletin board that merely posted information about the defendant's products.<sup>98</sup> By employing the scale to resolve the personal jurisdiction question, the Fifth Circuit created its own version of *Zippo* which provided that if the website in question allows visitors to purchase products and services online, the Court will exercise personal jurisdiction over the

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<sup>96</sup> See *Mink v. AAAA Development LLC*, 190 F.3d 333 (5<sup>th</sup> Cir. 1999) (“We find the reasoning of *Zippo* is persuasive and adopt it in this Circuit.”)

<sup>97</sup> *Id.* *Mink* was a Texas resident and furniture salesman. In January 1997, Mink claimed that he began to develop a computer program designed to track information on sales made and opportunities missed on sales not made. On May 13, 1997, Mink applied for a patent. Mink claimed that in June 1997 he was approached by a Colorado resident, Stark, whom he eventually shared information with regarding his computer program. Between June 1997 and October 1997, Stark allegedly shared all of Mink's ideas and information about the program with Middlebrook. According to Mink's complaint, Middlebrook and two companies, AAAA Development and Profitsystems, conspired to copy Mink's copyrighted and patent-pending program and create an identical system of their own for financial gain. AAAA Development is a Vermont corporation with its principal place of business in Vermont. Middlebrook is a Vermont resident. Neither AAAA Development nor Middlebrook own property in Texas. The company had advertised in a national furniture trade journal and maintained a website advertising its sales management software on the Internet.

<sup>98</sup> *Id.* at 336.

defendant.<sup>99</sup> However, the analysis employed by the Circuit Court did not require the use of the scale. A simple factual analysis of purposeful availment would have rendered the same result.<sup>100</sup>

Implementation of the *Zippo* sliding scale has led to a confusing array of decisions which demonstrate the gimmickry of the scale. In cases where the issue of personal jurisdiction centers on product sales between states, the court has invoked *Zippo* when the company had a website which either advertised or sold products, despite other evidence of contact between the defendant and the forum state.<sup>101</sup> In the product cases, the court relies on the traditional device of the amount of revenue from product sales, despite the invocation of *Zippo* by the litigants or the court, to determine the issue

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<sup>99</sup> *Id.* “... AAAA’s website does not allow consumers to order or purchase products and services online.” See also *Roberts v. Paulin*, 2007 WL 3203969 (E.D. Mich., Oct. 31, 2007) (No. 07-CV-13207) (evaluating defendant’s presence in the forum, the court notes the defendant has sold less than \$500 worth of products in the forum); *Tamboro v. Dworkin*, 2007 WL 3046216 (N.D. Ill., Oct. 9, 2007) (No. 04 C 3317) (holding that a website which allows visitors to access information about canine pedigrees is not interactive because it does not allow communication regarding products and services).

<sup>100</sup> See *id.* See also *Bensusan Restaurant Corp v. King*, 937 F. Supp 295 (S.D.N.Y. 1996) and *supra* notes 41-47.

<sup>101</sup> See e.g. *George Kessel Intern. Inc. v. Classic Wholesales, Inc.*, 2007 WL 3208297 (D. Ariz., Oct 30, 2007)(NO.CV-07-323-PHXSM) (holding the defendant’s website was “passive”, lacking the “additional conduct” which would place it on the interactive end of the scale; however, the court ignores other communications between the parties which potentially establish purposeful availment); *Roberts v. Paulin*, 2007 WL 3203969 (E.D.Mich., Oct 31, 2007)(NO. 07-CV-13207) (court employs the *Zippo* scale and rests interactivity decision on amount of commercial revenues from the forum despite the evidence showing the California defendant had no commercial contact with the forum state); *Premedics, Inc. v. Zoll Medical Corp.*, 2007 WL 3012968 (M.D.Tenn., Oct 09, 2007)(NO.3:06-0716); *Beightler v. Produkte Fur Die Medizin*, 2007 WL2713907 (N.D. Ohio Sep. 17, 2007)(NO. 3:07C1604) (appellate court reversing district court decision that defendant was not subject to personal jurisdiction because the defendant’s website fell to the passive end of the scale when facts of the case demonstrated the defendant hacked into the plaintiff’s website intending to pirate information and directly contacted the plaintiff).

of presence in the forum.<sup>102</sup> A product site that does not generate revenue of a substantial amount is not deemed to be an interactive site when set upon the sliding scale.<sup>103</sup> The scale has also been argued and employed when the defendant's site is not commercial in nature.<sup>104</sup> Courts and litigants seem to overlook the basic logic of contacts analysis when confronted with an Internet-based business or communication between the parties through electronic mail.<sup>105</sup> Despite the lack of any commercial Internet activity, *Zippo* is applied in the analysis and the court finds the

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<sup>102</sup> See e.g. *Roberts v. Paulin*, 2007 WL 3203969 (E.D. Mich., Oct. 31, 2007) (No. 07-CV-13207); *Tamboro v. Dworkin*, 2007 WL 3046216 (N.D. Ill., Oct. 9, 2007) (No. 04 C 3317).

<sup>103</sup> See *supra* note 101.

<sup>104</sup> See *Vax-D Medical Technologies, LLC v. Allied Health Management, LTD.*, 2006 WL 4847740 (M.D.Fla., Mar 14, 2006)(NO. 804-CV-1617-T-26TGW)(the defendant's website is a referral site that directs users to chiropractors who employ the VAX-D technique); *Chicago Architecture Foundation v. Domain Magic, LLC*, 2007 WL 3046124 (N.D.Ill., Oct 12, 2007)(NO. 07 C 764) (defendant created website portal specifically designed to pirate plaintiff's website hits in order to create advertising revenues; the court cites to *Zippo* and places the defendant's website on the *Zippo* scale despite the absence of any commercial traffic between the plaintiff and defendant).

<sup>105</sup> See *Motley Rice, LLC v. Baldwin & Baldwin, LLP*, 518 F.Supp.2d 688, D.S.C., Jul 30, 2007 (NO. C.A.2:07-01368-PMD)(two law firms litigated fee sharing contracts after 19 years of working together on class action litigation; the district court follows the 4<sup>th</sup> Circuit in applying *Zippo* through test stated in *ALS Scan* to find that the defendant's web presence was not enough to establish "purposeful availment"); *Dearwater v. Bond Mfg. Co.*, 2007 WL 2745321 (D.Vt., Sep 19, 2007)(NO. 1:06-CV-154)(plaintiff brought a wrongful termination lawsuit against defendant employer Bond Mfg. The plaintiff acquired the job through e-mails in response to advertisements on Craigslist and CareerBuilder.com. Defendant Bond has no connection to the forum state and the plaintiff's only basis for asserting personal jurisdiction was the defendant's advertisements on national websites. The plaintiff argued the *Zippo* scale should apply, using the job search sites (which are at the most active end of the *Zippo* scale) as a basis to assert personal jurisdiction over the defendant).

website is passive, lacking the “something more” required to find purposeful availment.<sup>106</sup>

## 2. *The House Destabilized*

The *Zippo* sliding scale has had the reverse effect on personal jurisdiction jurisprudence. Rather than enhancing the house of personal jurisdiction, the scale has directed courts and parties to a less stable area of the house, a room not supported by the original place-based structure. The house of personal jurisdiction has been destabilized by the *Zippo* renovations.

The original posture for the scale followed the reasoning of courts which relied on the newness of Internet activity.<sup>107</sup> The Internet was described in terms of its ephemeral existence online, with devices now as commonplace as electronic mail described as different than posted mail and telephone calls through an 800 number because electronic mail does not place a person in actual contact with another person in the forum state.<sup>108</sup> Thus, the predicate for the *Zippo* scale was based on the concept of non-contact rather than on the longstanding concepts of minimum contacts and

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<sup>106</sup> See *Zombech v. Amada*, 2007 WL 4105231 (W.D. Pa. Nov. 15, 2007)(NO.CIV.A. 06-953) (in a products liability case against a foreign component part manufacturer, plaintiff converts a stream of commerce analysis into a *Zippo* analysis by alleging the defendant is subject to personal jurisdiction in the forum when the defendant has a website that allows e-mail comment, despite no other evidence of contact with the forum state).

<sup>107</sup> See *supra* note 61-63 and text accompanying notes 52,54 and 62. See also *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996); *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *Compuserve Inc. v. Patterson*, 89 F. Supp. 1257 (6<sup>th</sup> Cir. 1996).

<sup>108</sup> See *supra* note 62.

purposeful availment. The early decisions identified the issue of Internet-based contacts as matters of first impression, distinct from the traditional personal jurisdiction case.<sup>109</sup> By so doing, courts have turned away from traditional place-based analysis and attempted to create a new arm of personal jurisdiction jurisprudence for Internet-based contacts.

This new analysis is, by definition, not based on the traditional tenets of territoriality and contacts. Given the historical import of territory and contact<sup>110</sup>, a new analysis for Internet-based contacts which attempts to define itself separately finds itself inadequately supported. The new approach's lack of architectural support is demonstrated through the post *Zippo* decisions themselves.<sup>111</sup> A court may invoke the scale only as a means to describe the Internet basis for the jurisdictional argument.<sup>112</sup> The decisions often then revert to a more traditional contacts analysis, relying on the secure ground of revenues, contracts, and communication despite sometimes lengthy discussions of the passivity or interactivity of the website.<sup>113</sup> In essence, when the courts invoke the scale, they find themselves in a destabilized portion of the house of personal jurisdiction and they move the case onto more stable ground.

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<sup>109</sup> See *supra* notes 61-63 and text accompanying notes 52,54 and 62.

<sup>110</sup> See *supra* notes 19, 33.

<sup>111</sup> See *e.g.* *Premedics v. Zoll*, 2007 WL 3012968 (M.D. Tenn., Oct. 9, 2007)(NO.3:06-0716)

<sup>112</sup> See *e.g.* *Words Music, LLC v. Priddis Music, Inc.*, 2007 WL 32321835 (M.D. Tenn., Oct. 30 3007)(NO. 3:07CV0502)

<sup>113</sup> See *e.g.* *Chicago Architectural Foundation v. Domain Magic, LLC*, 2007 WL 3046124 (N.D.Ill. Oct. 12, 2007)(NO. 07 C 764).

### III. UTILIZING THE PLACE THEORY FRAMEWORK IN INTERNET-BASED CONTACTS ANALYSIS

Place theory is the theory of personal jurisdiction created through the early law of *Pennoyer* and *International Shoe*.<sup>114</sup> The core of place theory is the understanding that for a defendant to be subject to personal jurisdiction within the forum, the defendant must have some contact with the territory of the forum.<sup>115</sup> Although contacts have been traditionally viewed as variations of physical contact, such as actual physical presence through travel, sales or corporate operations, or telephone, facsimile, or mail correspondence, the core value in a contacts analysis is a “reaching out” from the defendant’s forum to the plaintiff’s forum.<sup>116</sup> Since jurisdictional analysis is largely a fact-based analysis, tying contact analysis to place provides courts a framework under which the defendant’s activity can be evaluated and weighed against other factors in the overall jurisdictional analysis. When electronic contacts through websites are considered untethered to a physical place, courts are deprived of the framework for evaluating the defendant’s purposeful availment.

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<sup>114</sup> See *supra* notes 19, 33.

<sup>115</sup> See *supra* notes 19-24.

<sup>116</sup> See *supra* note 38.

*A. ATTRIBUTES OF PLACE THEORY*

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

The first attribute of place theory is a basis in established jurisprudence.<sup>118</sup> The theory recognizes that the entire concept of *in personam* jurisdiction has rested across centuries on the concept of territorialism: the idea that a forum's reach extends to its borders and the forum has a duty to protect its citizens from harm.<sup>119</sup> This core concept has evolved into a test based on contacts with the forum<sup>120</sup> and the reach of the forum has extended with the development of the contacts test.<sup>121</sup> As courts expanded contacts to include more remote interaction, courts shifted the

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<sup>117</sup> See *supra* notes 19-24.

<sup>118</sup> See *id.*

<sup>119</sup> See *supra* notes 17, 19

<sup>120</sup> See *supra* note 33.

<sup>121</sup> See *e.g.* *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).

focus to whether the contacts demonstrate a defendant purposefully availed itself of the benefits and protections of the forum.<sup>122</sup> Thus the place theory framework for personal jurisdiction analysis was created around the coalescing concepts of presence, contacts, and purposeful availment.

Place theory framework provided the necessary flexibility to deal with over fifty years of commercial progress in the Twentieth Century.<sup>123</sup> The issue of purposeful availment has been measured in the modern context of remote communications, such as facsimile transmissions, telephone calls, mail order business, and other devices of commercial communication that allow parties to develop contacts without travel to the forum.<sup>124</sup> When the framework relies on purposeful contacts to assess jurisdiction, it is able to flex around technology. If the framework were less flexible, it would have required change with each Twentieth Century advancement, generating a new line of analysis when fax communications replaced posted mail and mail order sales replaced the traveling salesperson.

The Internet has brought what are arguably the most significant communications changes of the late Twentieth and early Twenty-First centuries. As fax replaced mail and mail order replaced traveling salespersons, electronic mail now makes all other forms of communication dated and Internet commerce now offers conveniences other sales

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<sup>122</sup> See *supra* note 33.

<sup>123</sup> See *supra* note 36.

<sup>124</sup> See *e.g.* *Burger King Corp v. Rudzewicz*, 471 U.S. 462 (1985).

approaches cannot offer. However, the underlying act between the parties in an electronic communication or an Internet sale is the same. In all scenarios there is a reaching out from one party to the other through some means of contact. The reaching out is the measure of purposeful availment. If a defendant's telephone contacts to the forum state can demonstrate purposeful availment, so can his electronic mail. If a defendant company purposefully avails itself of the forum through mailing a catalog and order form, then a defendant company which uses the Internet for direct sales is purposefully availing itself of the forums where it makes sales to customers within the forum. The devices for sales and communications have become more complicated but the behavioral analysis should remain with the same framework. Whether the court finds itself analyzing telephone calls or electronic mail transmissions, it should still be analyzing whether the defendant's pattern of commercial behavior suggests the defendant acted purposefully to engage in commerce within the forum.

The fallacy of the *Zippo* scale is its attempt to recast the place theory framework in the context of the Internet. The sliding scale has been erroneously adopted as a new framework for analyzing situations where the parties dealt through the Internet. At the most, the scale has defined a way to measure purposeful availment through Internet sites by determining whether the site in question is passive or interactive. An interactive site

occupies the most purposeful end of the scale, creating what is in essence a presumption that interactive web sites subject the site operators to personal jurisdiction in any forum the site accesses. However, a place-based analysis of Internet activity, without consideration of the sliding scale, would yield the same result as the quantity and quality of the contacts would demonstrate purposeful availment. Likewise, the passive end of the scale is equally superfluous as passive web sites indicate low contact and little effort to reach out to a forum. The issue using either the place theory framework or the sliding scale is the determination of jurisdiction when the commercial interaction falls some place in between passive and active. To the extent the scale is used to identify cases which fall into this more complex area, it can be helpful. However, the scale itself offers no framework for resolving the jurisdictional questions generated by activity falling in the middle of the scale.

*B. PLACE THEORY EXEMPLIFIED IN THE MODERN CONTEXT*

The absence of an analytical framework in the *Zippo* scale is exemplified in cases which struggle to apply the scale. Consider the following example of a case involving conduct through an Internet web site.

MedicOne<sup>125</sup> is a Tennessee corporation that markets and distributes automated external defibrillators (AEDs). As part of its business, MedicOne offers programs and support services to AED purchasers and users through an Internet web site. MedicOne manages its online support services through a patent-pending “three prong readiness” web-based interface system developed by MedicOne called the “AED Manager.” The AED Manager checks the status of participating AEDs, and sends automated “action item” emails to customers to have their AED units tested for readiness. MedicOne operates a website that lists general information about the company, including contact information and a description of its services. The MedicOne website contains an access point to the AED Manager, which users may access only after entering in a correct login name and password.

In July 2002, MedicOne and CALL Medical Corporation (CALL), a Massachusetts-based company that manufactures and markets AEDs, entered into a contract whereby MedicOne agreed to provide certain CALL customers with support services, including the AED Manager. In 2004, CALL took steps to reverse engineer and copy the AED Manager, ultimately creating and advertising its own web-based interactive database application. According to MedicOne, CALL engaged ProM Management to reproduce the MedicOne web-based support system.

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

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<sup>125</sup> The hypothetical case summarized here is based on *Premedics v. Zoll*, 2007 WL 3012968 (M.D. Tenn., Oct. 9, 2007)(NO.3:06-0716) which involved allegations against a rival company based on the unauthorized use of the plaintiff’s intellectual property. In *Premedics v. Zoll*, the District Court rejected the defendant’s Zippo-based argument it was not subject to personal jurisdiction.

on its website in October 2004, advertising its CALL MD program.

MedicOne has brought a number of claims against ProM and CALL, including claims of conspiracy, misappropriation of trade secrets, violation of the Uniform Trade Secrets Act, conversion, violation of the Electronic Communications Privacy Act, and violation of the Computer Fraud and Abuse Act.

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

In cases where the Defendant's website is argued as the basis for the court's exercise of personal jurisdiction, the temptation is for courts to turn to the *Zippo* sliding scale to determine whether the website itself demonstrates the appropriate level of interactivity to demonstrate purposeful availment.<sup>126</sup> However, the sliding scale is misdirection in cases where the Internet activity involves purposeful behavior.<sup>127</sup> If the court

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<sup>126</sup> See *Premedics v. Zoll*, 2007 WL 3012968 (M.D. Tenn., Oct. 9, 2007)(NO.3:06-0716) ("Undoubtedly, the determination of purposeful availment becomes more challenging when applied to situations involving the use of the internet. The prevalence and scope of the internet allows individuals to communicate, conduct business, or casually browse across state lines and international borders without leaving their desk. Information once part and parcel to transactions, such as knowledge of another party's physical location, is no longer a prerequisite to communication. Federal courts have applied a specific analysis in determining whether a defendant's internet activity constitutes purposeful availment, commonly referred to as the '*Zippo* sliding scale.'")

<sup>127</sup> See *id.* at 11("However, the sliding scale approach is not applicable in every case merely because facts touch on internet activity. Rather, the *Zippo* analysis is appropriately applied in personal jurisdiction inquiries where the facts center on the defendant's activities conducted through its *own* website.")

utilizes the sliding scale analysis and looks to the number of hits on CALL's website from Tennessee residents and the amount of revenue received from sales in Tennessee, the court may completely overlook the fact that CALL intentionally accessed MedicOne's website for the purpose of reverse engineering MedicOne's web-based product.<sup>128</sup>

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

If the court were to focus on CALL's website and its placement on the sliding scale, the result of the case may be highly illogical. It is possible that when placed on the sliding scale, the CALL website would fail to meet the necessary level of interactivity to establish personal jurisdiction over CALL in Tennessee.<sup>129</sup> A misdirected focus on the defendant's website can overtake the heart of the plaintiff's allegations, the defendant's purposeful

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<sup>128</sup> See *id.* at 12 ("...Defendants' activities on their own website are irrelevant for purposes of determining personal jurisdiction. Instead, the issue at hand focuses on the unauthorized actions taken by the Defendants against Plaintiff's website. In short, this is a case involving computer hacking, and therefore, personal jurisdiction turns on the tortious injury that Defendants allegedly inflicted upon Premedics.")

<sup>129</sup> In fact, if the defendant is aware of the sliding scale prior to designing the website, he can design a website that meets the description of a passive website on the sliding scale.

act. When the same facts are analyzed through the place theory framework, the court would focus on first determining the defendant's contacts with the forum state, then on whether those contacts demonstrate purposeful availment.<sup>130</sup> In this hypothetical, the contacts include CALL's entry into a contract with MedicOne, a Tennessee company, CALL's access of MedicOne's website, CALL's receipt of e-mails from MedicOne's site, and any and all other interactions with MedicOne. These contacts demonstrate purposeful availment as CALL's contact with the MedicOne website, on its own and through its agent ProM, were undertaken for the purpose of reverse engineering the MedicOne technology. Under the place theory framework, CALL's actions should be analyzed as the electronic version of a product purchase for the same improper motive.<sup>131</sup> The place theory framework supports the logical conclusion that CALL would be subject to personal jurisdiction in Tennessee; however the sliding scale analysis may reach the opposite result by focusing on CALL's website rather than its actions.

#### IV. CONCLUSION

All things new do not require new things. The *Zippo* sliding scale is itself the most compelling example of why functional doctrine should not be supplanted to address the societal changes brought forth through

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<sup>130</sup> See *supra* note 33.

<sup>131</sup> See *Premedics* at 12-16,19 (The Court in *Premedics* applied the effects test, focusing on the tortious injury the defendant allegedly inflicted on the plaintiff. Applying the effects test, the Court denied the defendants' motions to dismiss for lack of personal jurisdiction.)

technology. The scale is a naïve device to categorize Internet sites on a linear continuum for the purpose of assessing whether the attributes of a website suggest conduct directed at the forum. Despite invocation of the scale by courts and litigants as a device for analyzing the forum's constitutional reach, the scale itself offers no framework for evaluating purposeful activity within the forum. In contrast, place theory allows courts and litigants to analyze an Internet-based contacts case through the vertical constitutional framework defined and refined through over one hundred years of precedent.

The addition of the sliding scale onto the house of personal jurisdiction already appears dated and the house itself suffers under the structural stress of the scale. Courts should abandon the sliding scale and return to the place theory analytical framework when analyzing Internet-based contacts, thereby preparing litigants to address the inevitable next technological change on the global horizon.

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