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Comment

Personal Jurisdiction and the Internet: Waiting for the Other *Shoe* to Drop on First Amendment Concerns

I. INTRODUCTION

Believing that First Amendment concerns already receive sufficient protection from any “chilling effect,” the Supreme Court has held that personal jurisdiction analysis should not contain additional levels of scrutiny in speech-oriented cases.¹ Reasoning that the “actual malice” requirement for public figures enunciated in *New York Times, Inc. v. Sullivan*² was sufficient protection, the Court has been content to analyze personal jurisdiction over nonresident defendants within the established but “imprecise inquiry,”³ even when the defendant’s speech or expression may be penalized by a claim for damages.

Enter Internet-based contacts. Courts attempting to impose traditional personal jurisdiction analysis on Internet-related contacts have no guidance from the Supreme Court and continue to reach inconsistent results as they attempt to force territorial-based analysis onto a one-

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1. See *Calder v. Jones*, 465 U.S. 783, 790 (1984).
 2. 376 U.S. 254, 270-80 (1964).
 3. See *Calder*, 465 U.S. at 790.

dimensional universe lacking any concept of boundaries, territories, or other physical properties. A "sliding scale" model proposed by a district court in Pennsylvania in 1997⁴ has been cited with approval in most circuits.⁵

The sliding scale model was crafted to deal primarily with commercial interaction via the Internet, and it contains imprecise terms that are often misapplied by other courts attempting to use it. In the rush to force the Internet into traditional analysis, courts must pause to clarify the terms "interactive" and "passive" lest they pull unsuspecting town criers into foreign courts. To the extent "interactivity" is defined by commercial precedents, freedom of speech is threatened by litigation that speakers will have to defend in unpredictable foreign jurisdictions—an outcome that will produce a chilling effect on speech, regardless of existing First Amendment jurisprudence.

If, as in *Blumenthal v. Drudge*,⁶ a court imprecisely characterizes contacts with the forum and assumes personal jurisdiction based on traditional, geographical-based precedents rather than a careful factual analysis, publishers will be required to litigate claims fully prior to appealing them rather than having them dismissed for lack of personal jurisdiction early in the process. Incorrect characterization of Internet-based contacts threatens a collision between personal jurisdiction and the First Amendment that will destroy the unique platform of free speech provided by the Internet. "[T]he Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs . . . are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and magazines."⁷ Additionally, "the Internet is an especially attractive means for not-for-profit entities or public interest groups to reach their desired audiences."⁸ It is not for

4. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997).

5. *Zippo* has been cited with approval in more than ninety cases. See, e.g., *K.C.P.L., Inc. v. Nash*, No. 98 Civ. 3773 (LMM), 1998 WL 823657 (S.D.N.Y. Nov. 24, 1998); *Resnick v. Manfredy*, 52 F. Supp. 2d 462 (E.D. Pa. 1999); *Alantech Distribution, Inc. v. Credit Gen. Ins. Co.*, 30 F. Supp. 2d 534 (D. Md. 1998); *Mink v. AAAA Dev., LLC*, 190 F.3d 333 (5th Cir. 1999); *International Star Registry of Ill. v. Bowman-Haight Ventures, Inc.*, No. 98 C 6823, 1999 WL 300285 (N.D. Ill. May 6, 1999); *Hobby Lobby Stores, Inc. v. Boto Co.*, 968 F. Supp. 1356 (W.D. Ark. 1997); *Colt Studio, Inc. v. Badpuppy Enters.*, 75 F. Supp. 2d 1104 (C.D. Cal. 1999); *Patriot Sys., Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318 (D. Utah 1998); see also 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067 (2d ed. Supp. 1999).

6. 992 F. Supp. 44 (D.D.C. 1998).

7. *ACLU v. Reno*, 929 F. Supp. 824, 843 (E.D. Pa. 1996).

8. *Id.* at 842.

the commercial publisher that this concern is voiced, but for the lone voice crying out in the wilderness. Rather than risk being subject to worldwide jurisdiction, the lone voice must be stilled unless the sliding scale is refined to protect what has been described by Congress as “an extraordinary advance in the availability of educational and informational resources to our citizens.”⁹ Individuals will be “chilled” from publishing on the Internet because a foreign plaintiff will be able to hale them into court in jurisdictions unknown, regardless of whether the analysis from *Sullivan* might later extract them from the clutches of a jury. “Uncertainty about the jurisdictional reach of territorially defined courts over the trans-territorial Internet may already be chilling Internet participation.”¹⁰

Section II of this Comment reviews the evolution of traditional personal jurisdiction analysis and then traces the foray into Internet-contact analysis. Section III explains the sliding scale model that has received such wide acceptance and reviews various courts’ findings upholding or declining jurisdiction based on Internet contacts. Section IV reviews the analysis in *Blumenthal v. Drudge*, a case that incompletely categorized Web contacts and identifies three critical areas on which courts should focus their analysis. Section V attempts to clarify the ambiguous points on the sliding scale with which courts are struggling. Finally, Section VI applies the clarified scale to *Blumenthal* to demonstrate that application of the clarified scale would yield available forums while simultaneously affording greater litigation protection for Internet speakers.

II. HISTORY OF PERSONAL JURISDICTION

Personal jurisdiction, as any law student will relate, is one of the critical “three-rings,”¹¹ along with subject matter jurisdiction and venue, that must be satisfied before a court may exercise its power over a nondomiciliary defendant.

A. Personal Jurisdiction—*Pennoyer to Asahi*

Historically, personal jurisdiction was based on raw power—the power a court exercised over the person or property within its territorial jurisdiction. A person’s “presence within the territorial jurisdiction of

9. 47 U.S.C.A. § 230(a)(1) (West Supp. 1999).

10. Leif Swedlow, Note, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA CITY U. L. REV. 337, 366 (1997).

11. See JOSEPH W. GLANNON, CIVIL PROCEDURE 73-74 (3d ed. 1997).

court was prerequisite to [the court's] rendition of a judgment."¹² The notion of physical presence gave way in the middle of the twentieth century to a contacts-based analysis for in personam personal jurisdiction.¹³ To be amenable to suit, a nonconsenting, nondomiciliary defendant who cannot be served within the forum must have "certain minimum contacts" such that a suit does not offend "traditional notions of fair play and substantial justice."¹⁴ General jurisdiction over all claims is found when the defendant has continuous contacts with a state that are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."¹⁵ The more limited concept of specific jurisdiction asserts jurisdiction one claim at a time based on claim-relatedness.¹⁶ When the defendant has purposefully availed itself of the privilege of conducting beneficial activities within a state, it should be amenable to suit in that state for claims arising out of those specific contacts.¹⁷ The contacts that should be analyzed for specific jurisdiction are those demonstrating the defendant's enjoyment of the "benefits and protection of the laws of [the] state."¹⁸ These tests cannot be "simply mechanical or quantitative," but, for due process requirements, must depend on the quality and nature of the activity.¹⁹

In the late 1950s, the Court began to constrict the assertion of personal jurisdiction by limiting the types of contacts sufficient to support the assertion of specific jurisdiction.²⁰ The Court noted that "technological progress has increased the flow of commerce between States" and that "progress in communication and transportation has made the defense of a suit in a foreign tribunal less burdensome."²¹ Nevertheless, the Court held that "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."²² The unilateral activity of someone with whom the nonresident defendant has dealings "cannot satisfy the

12. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citing *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877)).

13. *See id.*

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

15. *Id.* at 318.

16. *Id.* at 319.

17. *Id.*

18. *Id.*

19. *Id.*

20. *See Hanson v. Denckla*, 357 U.S. 235 (1958).

21. *Id.* at 250-51.

22. *Id.* at 251.

requirement of contact with the forum State."²³ To subject a nonresident defendant to jurisdiction, "there [must] be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."²⁴

In *World-Wide Volkswagen Corp. v. Woodson*,²⁵ the Court thoroughly analyzed the foreseeability necessary for the assertion of personal jurisdiction and held that, if personal jurisdiction was based on the foreseeability of a product entering the forum, "amenability to suit would travel with the chattel."²⁶ The Court then defined the foreseeability that was critical as the defendant's conduct and connection with the forum being such that it was reasonably foreseeable that he would be haled into court within the forum.²⁷ In *Helicopteros Nacionales de Colombia v. Hall*,²⁸ the Court addressed whether defendant's purchases and related trips to the forum were sufficient to constitute purposeful availment.²⁹ In *Helicopteros* the Court held that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction . . . in a cause of action not related to those purchase transactions."³⁰ Neither sending personnel into the forum in connection with the equipment purchases nor the training of those parties there to use the equipment "enhanced the nature of [defendant's] contacts."³¹

In two subsequent cases in the middle to late 1980s, the Court retained its restrictions on the contacts that render an individual amenable to suit, but added a second layer of "reasonableness" to the analysis. In *Burger King Corp. v. Rudzewicz*³² and *Asahi Metal Industry Co. v. Superior Court of California*,³³ the Court further defined the requirements for personal jurisdiction. First, in *Burger King* the Court held that "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state'

23. *Id.* at 253.

24. *Id.*

25. 444 U.S. 286 (1980).

26. *Id.* at 296.

27. *Id.* at 297.

28. 466 U.S. 408 (1984).

29. *Id.* at 417.

30. *Id.* at 418.

31. *Id.*

32. 471 U.S. 462 (1985).

33. 480 U.S. 102 (1987).

are subject to regulation . . . in the other State."³⁴ Individuals must "purposefully derive benefit[s]' from their interstate activities."³⁵ Once minimum contacts have been established, the contacts must be analyzed to determine whether, in light of other factors, "the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"³⁶ Other factors that courts should consider include (1) "the burden on the defendant," (2) "the forum State's interest in adjudicating the dispute," (3) "the plaintiff's interest in obtaining convenient and effective relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of the controversies," and (5) "the shared interest of the several States in furthering fundamental substantive social policies."³⁷ Although the burden of defeating jurisdiction is on a defendant who has purposefully directed his activities at a forum resident, "jurisdictional rules may not be employed in such a way as to make litigation so gravely difficult and inconvenient that a party unfairly is at a severe disadvantage in comparison to his opponent."³⁸ This analysis ensures "that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts or of the unilateral activity of another party or a third person."³⁹ Although the Court did not require a defendant to have actually entered the forum to justify personal jurisdiction, the defendant himself must "create a 'substantial connection' with the forum."⁴⁰

In *Asahi* the Court dealt with a foreign defendant who, though aware that its products were entering the forum, had not directed them at the forum. Defendant was aware that some of its products would be incorporated into merchandise sold in the forum, but defendant did not purposefully avail itself of the benefits and protections of the forum's laws.⁴¹ The Court found that defendant did not "create, control, or employ the distribution system that brought its [product] to [the forum]."⁴² "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum."⁴³ Finally the Court noted that "a defendant's

34. 471 U.S. at 473 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)).

35. *Id.* (quoting *Kulko v. California Superior Court*, 436 U.S. 84, 96 (1978)).

36. *Id.* at 476 (quoting *International Shoe*, 326 U.S. at 320).

37. *Id.* at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

38. *Id.* at 477-78 (internal quotation marks omitted).

39. *Id.* at 475 (citations and internal quotation marks omitted).

40. *Id.* (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

41. 480 U.S. at 112-13.

42. *Id.* at 112.

43. *Id.*

awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum.⁴⁴

During the same period of time that the Court decided *Burger King* and *Asahi*, the Court dealt with an extraterritorial tort aimed at the forum that caused injury to a resident plaintiff. Utilizing an effects test, the Court in *Calder v. Jones*⁴⁵ held that defendants “wrote and . . . edited an article that they knew would have a potentially devastating impact on respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives . . .”⁴⁶ The Court said that “[u]nder the circumstances, [defendants] must ‘reasonably anticipate being haled into court’” in the forum to answer for their statements.⁴⁷ Although the Court did not use the purposeful availment standard to evaluate forum contacts, it noted that the magazine in which the article was published had its largest circulation in plaintiff’s home state.⁴⁸ Although the effects test provides a tempting direction in the analysis of Internet-based contacts, it has not been widely accepted in Internet cases and does not comport with the technological difference between a magazine that currently is circulated within all fifty states and a Web site that is only available to users in all fifty states.

B. Personal Jurisdiction—Via the Internet

Early Internet cases attempted to analyze Internet-related contacts under the territorial “contacts analysis” already developed. Courts attempted to push Internet contacts into the framework of existing telephone, print medium, and land-based case law.

In 1996 the Sixth Circuit held that personal jurisdiction could be found when a software designer transmitted software to an Ohio-based system via the Internet knowing that the system would distribute the software.⁴⁹ The court found that the designer “purposefully contracted—to market a product in other states, with Ohio-based CompuServe operating, in effect, as his distribution center.”⁵⁰ While recognizing that “the nature and quality of contacts provided by the maintenance of a website on the internet are clearly of a different nature and quality than other means of contact,” a district court in Missouri found

44. *Id.*

45. 465 U.S. 783 (1984).

46. *Id.* at 789-90.

47. *Id.* at 790 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

48. *Id.* at 789-90.

49. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996).

50. *Id.*

purposeful availment because a company "obtained the website for the purpose of, and in anticipation that, internet users . . . will access CyberGold's website and eventually sign up."⁵¹

A New York district court refused to find personal jurisdiction based on a passive Internet Web site alone and attempted to explain Internet contacts in a more detailed analysis.⁵² The court described Web sites as an "Internet address which permits users to exchange digital information with a particular host."⁵³ The court noted that "several affirmative steps" must be made by the forum resident seeking to obtain information posted on the Web site and held that the "mere fact that a person can gain information . . . is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product [in the forum]."⁵⁴

In contrast, on nearly identical facts, a Connecticut district court held that maintenance of a passive Web site with a toll free telephone number displayed on it provided a basis for jurisdiction.⁵⁵ There the court compared Internet Web siteposting to supplying "interested potential customers with catalogs advertis[ing] in periodicals having Connecticut circulation" and stated that defendant "demonstrated its readiness to initiate telephone solicitation of Connecticut customers," thus, purposefully availing itself of the Connecticut market.⁵⁶ The court acknowledged in dicta that the Connecticut resident would gain the information only through the "stroke of a few keys of a computer."⁵⁷

III. THE SLIDING SCALE AND PERSONAL JURISDICTION

In 1997 a district court in Pennsylvania fashioned the sliding scale standard that many courts have since adopted.⁵⁸ At one end of the scale were situations in which the "defendant clearly does business over the Internet," entering into contracts with residents of foreign jurisdictions and knowingly and purposefully transmitting files over the Internet.⁵⁹ At the other end of the scale was what has come to be called a "passive Web site, that does little more than" post information

51. *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328, 1333 (E.D. Mo. 1996).

52. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

53. *Id.* at 297 n.1 (citing *MTV Networks v. Curry*, 867 F. Supp. 202, 203 n.2 (S.D.N.Y. 1994)).

54. *Id.* at 299.

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

56. *Id.* (quoting *Whelen Eng'g Co. v. Tomar Elecs.*, 672 F. Supp. 659, 664 (D. Conn. 1987)).

57. *Id.* at 163.

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

59. *Id.* at 1124.

accessible to users in a foreign jurisdiction.⁶⁰ In the middle of the scale were “interactive Web sites where a user can exchange information with the host computer.”⁶¹ The court reviewed prior courts’ Internet analyses, and though it noted that a consumer’s logging onto a server in a foreign jurisdiction was a “fundamentally different type of contact” manifested by an entity using the Internet to sell or market services to a resident in a foreign forum, the court concluded that defendant was subject to personal jurisdiction.⁶²

The court specifically rejected defendant’s argument that its contacts with the forum were fortuitous because the forum residents “happened to find its Web site or heard about its . . . service elsewhere.”⁶³ The court reasoned that because defendant processed forum resident’s applications and assigned them passwords, defendant “knew that the result of these contracts would be transmission of electronic messages into [the forum].”⁶⁴ Courts dealing with personal jurisdiction, like the court in *Zippo*, have spent most of their efforts on the distinction between interactive and passive Web sites, with a presumption that the Web sites that exchange commercial information with forum residents have purposefully availed themselves of the forum.

Although many courts have since adopted the sliding scale to analyze Internet contacts, courts often fail to give heed to the full language of the court in *Zippo* in describing interactive Web sites. The court in *Zippo* wrote that in the middle of the scale “lay interactive Web sites where a user can exchange information with a host computer.”⁶⁵ What often gets downplayed is the language about the exercise of jurisdiction depending on “the *level* of interactivity and *commercial nature of the exchange of information*.”⁶⁶ The omission of this crucial distinction blurs the scale into two areas—totally passive sites that do not provide jurisdiction and interactive sites that do. Interactivity alone cannot be the basis for jurisdiction because all Web sites are interactive. “[T]he critical issue for the court to analyze is the ‘nature and quality of *commercial* activity conducted by an entity over the Internet in the forum state.’”⁶⁷ In *Zippo* the court dealt with a company operating on the commercial end of the scale—actually conducting sales over the

60. *Id.*

61. *Id.*

62. *Id.* at 1125-26.

63. *Id.* at 1126.

64. *Id.*

65. *Id.* at 1124.

66. *Id.* (emphasis added).

67. *Brown v. Geha-Werke GmbH*, 69 F. Supp. 2d 770, 777 (D.S.C. 1999) (quoting *ESAB Group, Inc. v. Centricut, LLC*, 34 F. Supp. 2d 323, 330-31 (D.S.C. 1999)) (emphasis added).

Internet. The court stated that defendant's site was more than a site that "exchanges information with [forum] residents in hopes of using that information for commercial gain later."⁶⁸

A. Courts Refusing to Find Personal Jurisdiction Based on Internet Contacts

In *E-Data Corp. v. Micropatent Corp.*,⁶⁹ the Connecticut district court reviewed personal jurisdiction via the Internet in the context of an interactive Web site. Defendant maintained a Web site that allowed users to purchase photographic images by credit card and have those images downloaded over the Internet to the user. Defendant claimed it had no knowledge of the user's residence because there was no geographic connection with the user and because defendant did not receive the names or addresses of its customers.⁷⁰ The court refused to find jurisdiction, mainly because plaintiff could not demonstrate any contacts with the forum; defendant did not even retain credit card numbers beyond the amount of time necessary to be paid.⁷¹ However, the court explained its previous decision in *Inset*⁷² as being based on the fact that users could type a trademark protected name into the computer and access the infringing defendant's Web site.⁷³ The court then held that because defendant's Web site was not capable of being accessed "accidentally," the activity necessary for solicitation was distinguishable from the facts in *Inset*.⁷⁴

In 1999 an Oregon district court refused to find specific personal jurisdiction based on Internet contacts and held that other courts asserting jurisdiction over defendants who maintained passive Web sites had done so on the basis of additional contacts with the forum.⁷⁵ The court stated that "[a] passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction."⁷⁶ The court reviewed other courts' assertions of jurisdiction based on interactive Web sites and noted that often the courts would not look into whether, regardless of any conscious decision on the part of the defendant, material actually

68. 952 F. Supp. at 1125.

69. 989 F. Supp. 173 (D. Conn. 1997).

70. *Id.* at 175.

71. *Id.* at 177-78.

72. *See supra* text accompanying notes 58-60.

73. 989 F. Supp. at 176.

74. *Id.* at 176-77.

75. *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 916 (D. Or. 1999).

76. *Id.* at 915-16 (quoting *Zippo*, 952 F. Supp. at 1124).

had been transmitted into the forum.⁷⁷ The court crafted the process by which Internet jurisdiction should be analyzed and held that a court must first determine where the defendant's Web site landed on the sliding scale of interactivity.⁷⁸ A finding that the defendant's Web site exists in the middle area—the interactive Web site—requires additional analysis. The court concluded that interactivity alone was insufficient and that there must be “‘deliberate action’ within the forum state in the form of transactions between the defendant and residents of the forum.”⁷⁹ The court finished by saying that defendant's interactive Web site was not “‘conduct and connection’ with Oregon giving defendants ‘fair warning’ so that they would reasonably anticipate being ‘haled’ into court [in Oregon].”⁸⁰

Also in 1999, a Louisiana court declined to find jurisdiction over an Illinois bowling alley operator for an allegedly trademark-infringing Web site.⁸¹ The court found that defendant's Web site was an “expanded advertisement” that listed the defendant's address, its local phone number, and a small map to defendant's establishment.⁸² “Internet users could not purchase any items over the website, nor could they communicate directly with the Defendants.”⁸³ All inquiries had to be directed to defendant via telephone.⁸⁴

Other courts analyzing the interactivity of a Web site have declined to find personal jurisdiction proper when: (1) the user had to mail to the defendant downloadable order forms;⁸⁵ and (2) even when there was an e-mail address/link on the Web site, the defendant did not “do anything but reply to e-mail initiated by website visitors.”⁸⁶

B. Courts Finding Personal Jurisdiction Based on Internet Contacts

Internet advertising in conjunction with maintenance of a Web site was found to be directing activities toward the forum in a Texas case.⁸⁷ Handa-Lopez, Inc. maintained an Internet-based arcade advertised as “Funscape's Casino Royale” and the “World's Largest Internet Casino.”

77. *Id.* at 917.

78. *Id.* at 920.

79. *Id.* at 921.

80. *Id.*

81. *Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest, Inc.*, 35 F. Supp. 2d 507, 512 (E.D. La. 1999).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Resnick v. Manfredy*, 52 F. Supp. 2d 462 (E.D. Pa. 1999).

86. *Mink v. AAAA Development LLC*, 190 F.3d 333, 337 (5th Cir. 1999).

87. *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738, 743 (W.D. Tex. 1998).

Consumers purchased "Funbucks" with a credit card and used the game tokens to play blackjack, poker, keno, slots, craps, and roulette. When a player won, the player was entitled to "\$1.00 for each one hundred Funbucks" won.⁸⁸

Defendant was a California domiciliary with its principle place of business in California. The server for the Web site was located in California. Buried within the Internet contract that the players entered into was a choice of law provision designating California law as controlling.⁸⁹ Although purporting to analyze defendant's contacts, the court found that "[p]laintiff played the casino games while in Texas, as if they were physically located in Texas, and . . . the Defendant would send the winnings to the Plaintiff in Texas."⁹⁰ The court disregarded defendant's argument that plaintiff "unilaterally contacted and voluntarily entered Defendant's Web site and contest without any contact by Defendant toward Plaintiff" and noted that Texas had a strong interest in protecting its citizens.⁹¹

A California court recently found personal jurisdiction proper when defendant conducted its business over the Internet and sold goods via the Internet to residents of the forum.⁹² The court held that defendant NeatO's activities were "highly commercial" in that a "substantial portion of the site is dedicated to allowing the consumer to purchase NeatO's products on-line."⁹³ The court disregarded NeatO's argument that its contacts with the forum were fortuitous and held that "NeatO marketed its products over the Internet directly to consumers."⁹⁴ Finally, the court stated that NeatO was not being "haled into a court in some unexpected location where the Internet is not commonly available, but into a court in California, where a large portion of the world's Internet users presumably reside."⁹⁵

The district court in New Jersey refused to assert personal jurisdiction over a lodging establishment based on its Web site.⁹⁶ Because Internet users were able to reserve rooms through the Web site, the court found that it was a classic commercial Web site.⁹⁷ However, the court declined to assert personal jurisdiction because it found that the use of

88. *Id.* at 741.

89. *Id.*

90. *Id.* at 744.

91. *Id.*

92. *Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074 (C.D. Cal. 1999).

93. *Id.* at 1078.

94. *Id.* at 1078-79.

95. *Id.* at 1079.

96. *Decker v. Circus Circus Hotel*, 49 F. Supp. 2d 743 (D.N.J. 1999).

97. *Id.* at 747.

the Web site to reserve a room was conditioned on acceptance of a forum selection clause.⁹⁸

Courts asserting personal jurisdiction based on analysis of sliding scale contacts have little problem properly finding personal jurisdiction when the defendant uses its Web site to engage in commercial activity. Classifying activity as commercial and defining what level of Internet exchange is necessary to constitute interactive has been troubling, particularly when Web sites do not fit the traditional notion of commercial.

IV. BLUMENTHAL V. DRUDGE: AN INCOMPLETE ANALYSIS

A. Case Analysis

In *Blumenthal v. Drudge*,⁹⁹ plaintiff sued defendant for an allegedly defamatory article distributed via e-mail to direct subscribers and posted on defendant's Web site. Defendant also transmitted the text of the article to America Online, which made the article available to its members. The article was retracted the next day following a letter from plaintiff's counsel.¹⁰⁰

The court found that there was no dispute; although defendant's conduct was outside the forum, it caused tortious injury within the District of Columbia.¹⁰¹ Relying on its precedents that the District of Columbia's long-arm statute did not reach the limits of due process, the court did not analyze personal jurisdiction but found that the only relevant question was whether defendant "(1) regularly . . . solicit[ed] business in the District of Columbia, or; (2) deriv[ed] substantial revenue from goods used or consumed or services rendered in the District, or (3) engag[ed] in any other persistent course of conduct."¹⁰²

The court then reviewed defendant's various contacts with the District of Columbia. The court gave weight to plaintiff's argument that the Drudge Report was "regularly transmitted" over the Internet and that it had been "available 24 hours a day to District [of Columbia] residents."¹⁰³ The court dismissed defendant's contention that the only information about subscribers available to defendant was the subscriber's e-mail address and that "unlike a postal address or even a telephone number, [the e-mail address] typically provides no geographic informa-

98. *Id.* at 747-48.

99. 992 F. Supp. 44 (D.D.C. 1998).

100. *Id.* at 47-48.

101. *Id.* at 53-54.

102. *Id.*

103. *Id.* at 54.

tion."¹⁰⁴ The court also noted that defendant had traveled to the District of Columbia on two occasions and solicited contributions from subscribers within the District.¹⁰⁵ Finally, the court pointed to defendant's regular phone calls to the District of Columbia, soliciting gossip and information for his report, and held that defendant: (1) maintained an interactive Web site accessible to and used by District of Columbia residents, (2) had sufficient non-Internet related contacts with the District, and (3) engaged in a "persistent course of conduct in the District."¹⁰⁶

Unless the language of the court indicates that it found general jurisdiction over the defendant, jurisdiction should have only been proper if there was significant claim-relatedness to the contacts analyzed. To that extent, the territorial contacts analyzed by the court were not closely related to the alleged harm. The harm sprang from the Internet publication of the alleged defamatory article, and the court's analysis of those contacts was not complete.

B. *Three Critical Areas*

In reaching its holding, the court in *Drudge* failed to adequately address three areas critical to Internet-based contacts analysis. A more thorough analysis of these areas could provide the level of certainty and predictability not currently available to Web publishers.

In its opinion the court incorrectly described the level of knowledge available to the sender of e-mail to "janedoe@aol.com," by stating that defendant "has no idea where Jane Doe lives or receives the Report."¹⁰⁷ While e-mail addresses alone provide no geographic location for the recipient, the "@aol.com" does provide at least some notion as to where the party receives the e-mail.

The court also classified the "constant exchange of information" that District of Columbia users were able to have as the "epitome of web site interactivity."¹⁰⁸ Under this definition no Web sites will ever fail to create jurisdiction in all forums. Unless it is defined in some manner that includes the exchange of actual geographic locations as applied to the sliding scale spelled out in *Zippo*, interactivity will effectively eliminate the case-by-case analysis afforded to mid-level Web sites by the court in *Zippo*.

104. *Id.*

105. *Id.*

106. *Id.* at 57.

107. *Id.* at 54.

108. *Id.* at 56.

Finally, the court in *Drudge*, like other courts, tended to blend the contacts together. A Web site may be commercial in nature by offering merchandise for sale, but unless someone from the forum has actually purchased the merchandise through the Web site, the Web site's status is the same as any other passive Web site. Until the relationship shifts from one in which the user seeks the Web site to one in which the operator enters into a commercial exchange with a forum user via the Web site, the operator has not purposefully availed itself of the benefits and protections of doing business in the forum.

Because the majority of cases dealing with Internet contacts have been commercial cases, these areas of concern have not risen to the level of a constitutional threat to free speech. However, if used to hale small publishers into unexpected foreign courts, these three areas—(1) the information contained in e-mail addresses, (2) interactivity correctly defined, and (3) the blurring of contacts—represent a serious threat to First Amendment freedoms that will not be ameliorated by the analysis from *Sullivan*.

V. CLARIFYING THREE CRITICAL AREAS

While the sliding scale standard enunciated by the court in *Zippo* is the best model proposed thus far, greater clarity is required in defining what constitutes an interactive and a passive Web site. There are "many methods of communication and information retrieval [that] are constantly evolving and are therefore difficult to categorize concisely."¹⁰⁹ Each method has unique characteristics that may lead to differing degrees of contact affecting personal jurisdiction analysis. Courts that fail to understand the interactive nature of the Internet will collapse the sliding scale into a two-tier analysis and find jurisdiction in a host of improper situations. Contacts that consist of exchanging e-mails also must be analyzed to find out what kind of e-mail was exchanged.

A. *Mechanics of the Internet*

The Internet is a vast network of interconnected computers spanning states, countries and continents. It is the outgrowth of a military network begun in 1969 to enable defense contractors, the military, and universities conducting defense-related research to communicate over redundant channels. It is a "unique and wholly new medium of

109. *ACLU*, 929 F. Supp. at 834.

worldwide human communications.”¹¹⁰ Computers on the network range from supercomputers acting as “host computers—those that store information and relay communications,” to personal computers, those that act as remote terminals.¹¹¹

Individuals access the Internet generally through affiliation with a host computer, whether the affiliation is with a commercial host, a business, or a university. Estimates of the number of subscribers to commercial online services such as America Online, Inc. (“AOL”) exceeds twelve million.¹¹²

“Anyone with access to the Internet” may participate in a variety of communication services and “information retrieval methods.”¹¹³ AOL offers its customers e-mail, instant messages, bulletin boards, Web site hosting, chat rooms, and World Wide Web access. Members may utilize multiple screen names, which are, essentially, complete cyber-identities. Members may opt to fill out a profile that is published to anyone who enters the member’s screen name as a search term. The profile contains information that members choose to post, including the geographic location of the member, but these profiles are notorious for their creative identities.¹¹⁴ No effective way exists to determine the true identity of a user accessing material through e-mail, newsgroups, chat rooms, and Web sites.¹¹⁵ The most conclusive proof of identity, which is possession of a credit card number, “impose[s] cost[s] on noncommercial Web sites that would require many of them to shut down.”¹¹⁶

Unlike traditional broadcast media and despite repeated attempts by various courts to classify it as such, a Web site on the Internet is not a broadcast into the forum twenty-four hours a day, seven days a week. Instead the Web page is an electronic document or series of documents that exist in one or more servers in geographical locations scattered around the world.¹¹⁷ The Web site does not lurk in phone lines just waiting for an unsuspecting user’s terminal to be turned on so it can

110. *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

111. Matthew Oetker, *Personal Jurisdiction and the Internet*, 47 *DRAKE L. REV.* 613, 620 (1999).

112. 521 U.S. at 850-51.

113. *Id.* at 851.

114. See *Reno*, 521 U.S. at 855 n.20 (holding that “[a]n e-mail address provides no authoritative information about the addressee, who may use an e-mail ‘alias’ or an anonymous remailer”); see also *id.* at 889-90 (O’Connor, J., concurring in part, dissenting in part).

115. *Id.* at 876.

116. *Id.* at 856.

117. *ACLU*, 929 F. Supp. at 836.

pounce onto the screen. A user must type in the document's address to retrieve it.¹¹⁸ Once the user types in the address of the document sought, the host computer, or server, accesses the document sitting in the server's memory and sends it to the user. Again, unlike the broadcast medium or even telephonic delivery, the delivery of the document is not necessarily in a coherent, readable fashion.

"The Internet uses 'packet switching' communication protocols . . . to be subdivided into smaller 'packets' that are then sent independently to the [user's computer]."¹¹⁹ The packets may be routed through the same connections, but they also may be routed through many different connections depending on the level of activity on any one computer.¹²⁰ The documents are then reassembled on the user's computer.

Communication over the Internet can take one of several forms, and those forms may be further subdivided into categories for purposes of forum contact analysis. Relevant to this discussion is use of the World Wide Web and the use of e-mail. Communication by e-mail may be further categorized into: (1) personal e-mail in which one person types out a letter to another person; (2) listserv, or "mail exploders," in which a document is sent to all the e-mail addresses on the mailing list; and (3) distributed message databases in which all messages are posted to a newsgroup and automatically forwarded to the servers that furnish access to the newsgroup.¹²¹

Because so many courts define interactivity on the sliding scale by determining whether the Web site has the capability of linking a user to the Web site publisher's e-mail address, further consideration must be given to the nature of the different types of e-mail. Personal e-mail is quite similar to land-based mail in that it is a purposeful contact, albeit, not necessarily a purposeful contact with a specific forum. Sending it, at least, is done deliberately. Contrast this with listservs or mail exploders that frequently are designed to be automatic. Users of listservs can "add or remove their names from the mailing list automatically, with no direct human involvement."¹²² A listserv is closed if a user's acceptance into the listserv requires a human moderator.¹²³ Similar to listservs, distributed message databases disseminate

118. *Id.*

119. *Id.* at 832.

120. *Id.*

121. *Id.* at 834-35.

122. *Id.* at 834.

123. *Id.*

messages to database servers throughout the Internet in an automated process that requires no direct human intervention or review.¹²⁴

An important difference between cyberspace and geographical analysis is the nature of the individual user's relationship to the medium. Unlike traditional mail, e-mail is not actually sent to the recipient's geographic home. Host computers, or servers, "those that store information and relay communications," act as the post office for e-mail.¹²⁵ The recipient does not receive the mail until she "travels to the post office" by "logging on" via a modem or other Internet connection.¹²⁶ Unless the recipient has programmed her computer to automatically log on to the server and retrieve mail, the mail is not downloaded to the recipient's computer but instead is read with the recipient's computer acting as a remote terminal. When the recipient logs off from the server, the mail, if it is stored, is typically stored on the server's computer. AOL provides its customers with several "megs" of memory in a "personal filing cabinet" on the server's computer. Because a recipient may log on from any phone line anywhere in the world, directing e-mail to the recipient simply cannot, absent other registration information, be categorized as "purposeful availment" of the recipient's geographical home address.

B. Internet "Contacts" Analysis

While the sliding scale standard announced by the court in *Zippo* remains a viable standard, better understanding of the nature of contacts along the scale is required for courts to accurately decide whether to exercise jurisdiction. On one end, there is the fully commercial Internet entity, such as Amazon.com, that transacts one hundred percent of its business over the Internet and delivers its product to the geographical location of its clients. Because the entity is both aware of the recipient's geographical location and has purposefully directed and entered into commercial transactions with that location, the exercise of personal jurisdiction is proper.¹²⁷ The assertion of jurisdiction is proper if such contacts either: (1) are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities;" or (2) spawn the action based on claim-relatedness by enjoying the "benefits and protection of the laws of [the forum]."¹²⁸ Contacts that do not include directing the

124. *Id.* at 834-35.

125. *Reno*, 521 U.S. at 850.

126. *Id.* at 851.

127. See *International Shoe Co.*, 326 U.S. at 318-19.

128. *Id.*

product at the geographical location of the recipient must be analyzed individually in the proper context of the contact.

1. E-mail Activity. Incomplete analysis results from classifying all e-mail activity as interactivity on the middle of the sliding scale. At least one court employing the sliding scale analysis has acknowledged this.¹²⁹ Dangerous circular logic occurs when Web site owners are found to have purposefully availed themselves of the forum because of the ability to interact with Web site visitors utilizing an e-mail link. For a user-initiated contact to the nonresident defendant to be considered in the jurisdictional analysis, a court must first find that the nonresident defendant targeted advertising to the forum. The situation then arises that a Web site owner is said to have purposefully availed itself of the forum, regardless of whether the Web site was targeted to the forum, if a resident of the forum contacted the Web site, thus collapsing the argument into a statement that any contact proves purposeful availment. Further, given the automatic listserv capabilities to register a user on a mailing list without direct human involvement on the part of the Web site operator, a degree of interactivity can be blamed on the computer software itself. Courts should not choke off technological progress by punishing Web site operators who use the latest software designed to facilitate communication.

Also missing from judicial analysis of Web sites that e-mail material to users is analysis of the data after the "@" symbol in e-mail addresses. E-mail addresses are notorious for clever names and provide "no authoritative information about the addressee, who may use an e-mail 'alias.'"¹³⁰ Although the recipient's geographical location is unknowable on the face of the recipient's computer name, the geographical location of the server is more ascertainable. Roughly sixty percent of the almost ten million servers are located in the United States.¹³¹ In the same fashion that a post office box is geographically locatable, a server is also geographically locatable. Although the recipient may log on to the server from any remote location, the server is fixed in its location. To that extent, although the sender is not aware of where the e-mail ultimately will be accessed, the server can be identified and the argument may be made that the sender has purposefully availed itself

129. See *Mink v. AAAA Development LLC*, 190 F.3d 333, 337 (5th Cir. 1999) (declining to assert personal jurisdiction based on a Web site that had an e-mail "hyperlink" and holding that the Web site publisher did nothing but "reply to e-mail initiated by website visitors").

130. *ACLU*, 929 F. Supp. at 845.

131. *Id.* at 831.

of that location. This is particularly true of university servers and large corporate servers, but it also has an application with commercial public servers such as AOL, MindSpring, and Earthlink. Even when commercial Internet service providers have multiple mail servers, it is not an infinite number, and the servers still retain a known or discoverable geographical location. Well-known commercial hosts such as MindSpring and Earthlink have servers in ascertainable geographic locations—Georgia and California. E-mail addressed to recipients using commercial hosts, university hosts, and other readily identifiable servers, at least, has availed itself of the forum wherein the server is located.

If sufficient e-mail has been directed to the same server, the geographic location of the server may be suitable for general jurisdiction and certainly would be amenable to specific personal jurisdiction on any action arising out of such e-mail interactivity. This has the possibility of creating so-called “super districts” where much of the Internet jurisprudence would occur because of the location of commercial servers, but rare indeed would be the district lacking any server at all.

2. Defining Interactivity. In speaking about Internet interactivity, the first point to establish is that *all* Web sites are interactive. All Web sites require requests from users to activate delivery of the data packets. For purposes of the sliding scale analysis promulgated by the court in *Zippo*, interactivity requires something more.¹³² Analyzing interactivity in the sliding scale context requires examination of the “level of interactivity *and* commercial nature of the exchange of information.”¹³³ Critical in this analysis is the “nature and quality of commercial activity conducted by an entity over the Internet in the forum state.”¹³⁴

Analysis of the nature and quality of commercial activity must focus on what opportunity the Web site publisher has to learn or discover the geographical location of the Web site user. The more commercial the exchange of information (i.e., the more likely that the Web site operator is learning the user’s home address), the more proper the assertion of personal jurisdiction. Web site publishers conducting such commercial interactivity over the Internet are free to attempt to limit their exposure through traditional forum selection clauses. Information that should weigh heavily in favor of the assertion of personal jurisdiction includes, in descending order, geographical home addresses, home telephone numbers, credit card numbers, minimum identifying information such

132. *Zippo Mfg. Co.*, 952 F. Supp. at 1124.

133. *Id.* (emphasis added).

134. *Brown v. Geha-Werke*, 69 F. Supp. 2d at 778 (quoting *ESAB Group, Inc.*, 34 F. Supp. 2d at 330).

as actual (as opposed to a screen name) names, and server information. The farther down on the list the gathered information is the less immediately ascertainable is the forum of which the Web site publisher is availing himself and the less proper the assertion of personal jurisdiction.

3. Blurring of Contacts. In the extremely factual analysis of Internet contacts it is easy to become enamoured with identifying the type of possible contacts and fail to require the plaintiff to establish that the potential contacts actually resulted in forum contacts.¹³⁵ Unlike a traditional forum contact, the mere fact that a Web site has the capability of a forum availing contact does not establish that as forum contact. On the sliding scale, all Web sites exist at multiple levels on the scale. All Web sites exist on the passive end of the scale when published and when first accessed by Web users because the Web site does not enter the forum uninvited.¹³⁶ Unlike traditional media, including radio or television, the "receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial."¹³⁷ Not only does the posting of a Web site not constitute purposeful availing of the geographic area where the passive Web site is received, the posting entity cannot control the geographic locations that receive the Web site.¹³⁸ All analysis of Internet contacts must recognize that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"¹³⁹ In the same regard, all Web site operators have transmitted files to a geographical location, the location of their host server, and entered into contracts to have the Web site hosted by the entities in that geographical location, thus existing at the commercial end of the scale. As in *Compuserve*, assertion of jurisdiction is proper in the geographical location of the server that hosts the Web site. However, this jurisdiction must be either claim related to the hosting, or the posting of the Web site must be an activity "so substantial and of such a nature as to justify suit against [the Web site operator] on causes of action arising from dealings entirely distinct from [that posting]."¹⁴⁰

135. See *E-Data Corp.*, 989 F. Supp. at 175.

136. *ACLU*, 929 F. Supp. at 844.

137. *Id.* at 845.

138. *Id.* at 843.

139. *Id.* at 844.

140. *International Shoe Co.*, 326 U.S. at 318.

When a Web site has the capability of receiving information from a user that identifies the geographical location of that user, the plaintiff must establish not just that the site is capable of receiving such information but that the information was actually received. Numerous Web site contacts do not result in any more exchange of information than the user being numerically registered on the Web site's counter. Until there has been an actual exchange of information, the Web site retains its passive nature with regard to forum contact analysis. When Web sites are designed for multiple layers of interactivity, a mere exchange of e-mail or registrations on a listserv should not count as purposeful contact. Only when interactivity rises to the level of exchange of geographical information followed by continued purposeful contacts by the publisher of the Web site should an Internet contact be used to establish personal jurisdiction.

VI. BLUMENTHAL V. DRUDGE: A "CLARIFIED" ANALYSIS

In reaching its holding that the assertion of personal jurisdiction was proper over Matt Drudge, the court did not analyze the constitutional limits of due process but instead relied on precedents holding that the long-arm statute of the District of Columbia did not reach the limits of due process.¹⁴¹ In *Crane v. Carr*,¹⁴² the case relied upon by the court in *Blumenthal*, the court did not reach a conclusion about assertion of personal jurisdiction as to the New York Zoological Society but instead vacated a lower court's dismissal for lack of personal jurisdiction and remanded the case for further discovery into forum contacts.¹⁴³ The court in *Crane* noted its previous holding that the "D.C. long-arm statute may indeed stop short of the outer limit of the constitutional space."¹⁴⁴ At issue in *Crane* was whether defendant's conduct resulted in an allegedly defamatory letter being distributed within the District of Columbia¹⁴⁵—a much easier analysis than whether an allegedly defamatory Web site "purposefully availed" itself of the forum.

By relying on geographical-based precedents, the court in *Blumenthal* failed to adequately consider the "new" contacts it analyzed. The court noted in its analysis that "[a]ccess to defendant Drudge's world wide web site is available at no cost to anyone who has access to the

141. *Blumenthal*, 992 F. Supp. at 57-58.

142. 814 F.2d 758 (D.C. Cir. 1987).

143. *Id.* at 763-64.

144. *Id.* at 762 (citing *Moncrief v. Lexington Herald-Leader Co.*, 807 F.2d 217, 221 n.8 (D.C. Cir. 1986)).

145. *Id.* at 759.

Internet.”¹⁴⁶ Under the sliding scale requirement that interactivity must be analyzed as to the “nature and quality of commercial activity conducted by an entity over the Internet in the forum state,”¹⁴⁷ this one statement should be a strong blow against asserting personal jurisdiction based on the Drudge Web site.

The court in *Blumenthal* stated that defendant had developed a “list of regular readers or subscribers to whom he e-mailed each new edition of the Drudge Report.”¹⁴⁸ Not analyzed nor even commented on was whether the e-mail list was compiled personally by Matt Drudge or whether the Web site funneled subscription requests into a listserv that automatically sent the latest edition of the Drudge Report to subscribers. While not dispositive on the issue of personal jurisdiction, use of a listserv, at least intuitively, diminishes the *mens rea* of purposeful availment. A publisher who installs the software to set up a listserv might be reckless as to contacts with a forum (i.e., awareness of and a disregard for the possibility of forum contacts), but mere awareness has not been the standard used by the Supreme Court.¹⁴⁹ Regardless of whether the subscription list was set up to run automatically or whether it was personally controlled by Matt Drudge, e-mail contacts must still be analyzed to determine whether geographical information was also registered about each subscriber. Absent registration of geographical information and assuming that Drudge personally controlled the sending of e-mail, the jurisdictional analysis should turn on the server locations for concentrations of e-mail subscribers. Although no facts were presented in the case, AOL is the largest commercial Internet service provider, and it is likely that a large concentration of subscribers had “@aol.com” at the end of their e-mail addresses. Although AOL maintains multiple mail servers, at least one mail server is located in Virginia, the location of the main server and corporate headquarters for AOL—a location just across the Potomac River from the District of Columbia.

One commercial contact that the court failed to thoroughly analyze was the publishing contract with AOL. The court in *Blumenthal* noted that Drudge received a “royalty payment,” defendant’s only income, of \$3,000 a month from AOL and that Drudge transmitted each edition of the Drudge Report to AOL by e-mail.¹⁵⁰ Under the sliding scale

146. 992 F. Supp. at 47.

147. *Brown*, 69 F. Supp. 2d at 778 (quoting *ESAB Group, Inc.*, 34 F. Supp. 2d at 330).

148. 992 F. Supp. at 47.

149. *Asahi*, 480 U.S. at 116-17 (Brennan, J., concurring in part and concurring in the judgment).

150. 992 F. Supp. at 47.

standard, the court possessed all of the elements to establish personal jurisdiction for a commercial transmission of a file over the Internet.¹⁵¹ Any defamation was complete as soon as Drudge transmitted the allegedly defamatory article to AOL and personal jurisdiction was proper—in Virginia. As Drudge had no other source of income, it is likely that the district court in Virginia could even establish general jurisdiction over Drudge for non-Web site activity.

Under this analysis the plaintiff in *Blumenthal* was not without a forum in which to seek damages, and a suitable forum did not require plaintiff to cross the country to California, defendant's domicile. The assertion of personal jurisdiction, most likely even general personal jurisdiction, was proper in the district court of Virginia.

VII. CONCLUSION

While the sliding scale standard is a good step toward proper categorization of Internet-based contacts, more careful analysis of contacts is necessary before Internet contacts reach the level of certainty currently attained by other types of extraterritorial activities. Until such time as the Court propounds a standard, the inconsistent results reached by district courts threaten noncommercial publishers using the Internet as a giant platform from which they may express their views. Although the Court has held that First Amendment concerns need not be factored into personal jurisdiction analysis,¹⁵² that holding was made at a time when traditional personal jurisdiction was, if not precise, at least extensively analyzed.

The advent of Internet-based contacts undermines the degree of certainty once afforded extraterritorial activities and requires that courts either employ a much more precise analysis of Internet-based contacts or afford a heightened scrutiny of personal jurisdiction in cases concerning First Amendment issues. Courts opting to more precisely analyze Internet-based contacts must understand the nature of the Internet more thoroughly and decide whether such technological features, such as automatic listservs, should establish the requisite *mens rea* necessary to establish personal jurisdiction. When e-mail forms a substantial basis for the assertion of personal jurisdiction, such contacts must be analyzed to determine whether there has been a registration of traditional geographical information. In situations when such informa-

151. *Zippo*, 952 F. Supp. at 1124-27. Citing *CompuServe* extensively, the court found that personal jurisdiction is proper if "a defendant clearly does business over the Internet [by] enter[ing] into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet." *Id.* at 1124.

152. *Calder v. Jones*, 465 U.S. 783, 790.

tion has not been registered, courts should look no further than any concentration of server addresses for suitable courts in which to assert personal jurisdiction.

Finally, courts must be cognizant of the multiple layers of the Internet and analyze which layer of the Web site is blamed for the injury. All Web sites are both commercial and passive in nature, and each contact must be scrutinized to determine which level is responsible for and available to the assertion of personal jurisdiction.

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