WHY THE INTERNET ISN'T SPECIAL: RESTORING PREDICTABILITY TO PERSONAL JURISDICTION

Erin F. Norris*

Two decades ago, the advent of the Internet triggered an uproar in personal jurisdiction doctrine because of the difficulty of analyzing electronic contacts. Since that time, courts and commentators have struggled to devise a solution to the supposed problem of evaluating an electronic contact. Courts have developed an array of different approaches, and commentators have advocated for a variety of reforms. The result is a tangled web of analyses that actually undermines a key principle underlying personal jurisdiction: predictability. This Note attempts to restore predictability to the doctrine by clarifying why the Internet should not alter personal jurisdiction analysis. By classifying cases based on fact patterns, this Note illustrates that traditional personal jurisdiction analysis properly functions in actions involving the Internet. The taxonomy also pinpoints a narrow class of Internet cases where courts consistently do not find jurisdiction. This is not a sign that the doctrine is not working in these cases, but rather an indication that exercising jurisdiction in such instances does not comport with due process.

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* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2012. The Author would like to thank Professor David Marcus for his invaluable guidance.

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INTRODUCTION

The world changed dramatically between 1877, when the U.S. Supreme Court decided *Pennoyer v. Neff*,[1] and 1945, when the Court decided *International Shoe Co. v. Washington*.[2] The United States witnessed two world wars and the invention of both the AM radio and the airplane.[3] The automobile's proliferation had a particular significance for personal jurisdiction law in the United States.[4] The "technological progress" that accompanied the introduction of the automobile "increased the flow of commerce between [the] States"[5] and forced a change in personal jurisdiction doctrine. Physical presence no longer worked as a principle structuring the law of personal jurisdiction because technology made it possible to cause injury in a state yet avoid being subject to jurisdiction in that state.[6] Thus, after *International Shoe*, the doctrine shifted to permit a court to exercise its power over an individual so long as there were "certain minimum contacts . . . such that

1. 95 U.S. 714 (1877).
2. 326 U.S. 310 (1945).
3. *See Commemorating a Century of Wings – An Overview*, U.S. CENTENNIAL OF FLIGHT COMM'N, http://www.centennialofflight.gov/essay/Wright_Bros/WR_OV.htm (last visited Jan. 7, 2011); Carole E. Scott, *The History of the Radio Industry in the United States to 1940*, EH.NET (Feb. 1, 2010, 5:21 PM), http://eh.net/encyclopedia/article/scott.radio.industry.history.
4. *See* Independence Hall Ass'n, *The Age of the Automobile*, U.S. HIST.: PRE-COLUMBIAN TO THE NEW MILLENIUM, http://www.ushistory.org/us/46a.asp (last visited Jan. 7, 2011).
5. Hanson v. Denckla, 357 U.S. 235, 250–51 (1958).
6. *See infra* Part I.A.

the maintenance of the suit [did] not offend 'traditional notions of fair play and substantial justice.'"[7]

When the Internet diffused across the United States in the 1990s,[8] the legal community seemed poised for a similar upheaval in personal jurisdiction doctrine. After all, the Internet was changing commerce much like the automobile by making it easier to interact and communicate over great distances. The challenge for personal jurisdiction analysis was that much of this communication could take place without physical contact, minimum or otherwise, within any particular state. "[C]yberspace lack[ed] the territorial boundaries that form the backbone of traditional personal jurisdictional analyses," as one commentator put it,[9] and the jurisdictional significance of an electronic contact was unclear. Convinced that an *International Shoe*-type shift was needed, courts and commentators scrambled to devise a "solution."[10] This struggle has continued for almost two decades.[11]

The Internet's ubiquity spurred similar arguments for dramatic changes in other areas of legal doctrine. Unlike many others, however, Judge Frank Easterbrook was unconvinced by the idea that a change in technology must force a change in jurisprudence. In his article, *Cyberspace and the Law of the Horse*, Easterbrook argued that the law should be based in fundamental principles and not technology-specific characteristics.[12] He noted that "[b]eliefs lawyers hold about computers, and predictions they make about new technology, are highly likely to

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7. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

8. *A History of the Internet*, COMPUTER HISTORY MUSEUM, http://www.computerhistory.org/internet_history/internet_history_90s.html (last visited Oct. 23, 2010) (tracing the expansion of the Internet). A transition to a wider audience occurred in 1991, and in 1992, the Internet "bec[ame] such a part of the computing establishment" that a professional society known as the Internet Society "form[ed] to guide it on its way." *Id.*

9. Recent Case, Boschetto v. Hansing, *539 F.3d 1011 (9th Cir. 2008)*, 122 HARV. L. REV. 1014, 1017 (2009).

10. *See, e.g.*, Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (developing a "sliding scale" to analyze website interactivity); Todd D. Leitstein, Comment, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565, 585–90 (1999) (attempting to provide a solution for the dilemma caused by a lack of physical presence).

11. *See* ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002) (creating an Internet-specific test); Williams v. Adver. Sex LLC, No. 1:05CV51, 2009 WL 723168, at *1–10 (N.D. W. Va. Mar. 17, 2009) (applying the *ALS Scan* test), *rev'd*, 410 F. App'x 578 (4th Cir. 2011); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1332 (E.D. Mo. 1996) (stating that "the [I]nternet is an entirely new means of information exchange" that is not analogous to "mail [or the] telephone" for purposes of personal jurisdiction analysis). *See generally* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing that cyberspace requires an entirely new set of rules).

12. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207–08, 210.

be false. This should make us hesitate to prescribe legal adaptations for cyberspace. The blind are not good trailblazers."[13]

Most courts and commentators do not share Easterbrook's "Law of the Horse" idea in the context of the Internet and personal jurisdiction. Rather, the legal community has struggled for nearly 20 years to devise a technology-specific personal jurisdiction test to analyze electronic contacts.[14] This struggle has fostered an array of different approaches and analyses that vary widely from jurisdiction to jurisdiction.[15] In addition, some courts display confusion over the correct legal standard. Such variance and confusion seriously undermines predictability—a key purpose of the personal jurisdiction doctrine.[16]

But, amidst all the uproar over the Internet, commentators have failed to see that the traditional personal jurisdiction doctrine[17] functions—or could function if applied appropriately—in the vast majority of cases involving the Internet without the need for any special adaptation. This is because, in cases involving cyberspace and personal jurisdiction, the Internet presents no new legal question.

There is a definite pattern, however, in a very specific type of Internet case where courts consistently find that they cannot exercise personal jurisdiction.[18] This is not necessarily a sign that the doctrine is not working or that a new Internet-specific test must be created. Rather, it is a sign that current due process standards do not permit courts to exercise their power in those specific circumstances. (Whether this is a desired outcome, however, is beyond the scope of this Note.) Nevertheless, commentators should understand that this category of cases is narrow, and thus it should not drive arguments for a personal jurisdiction doctrine tailored to the Internet context. If courts heed this advice, predictability will return to the doctrine.

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13. *Id.* at 207.

14. *See, e.g.*, *Zippo*, 952 F. Supp. at 1124 (developing a "sliding scale" of website interactivity to analyze "the likelihood that personal jurisdiction can be constitutionally exercised"); Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction over Virtually Present Defendants*, 64 U. MIAMI L. REV. 133, 163–68 (2009) (arguing "that states [should] shorten their long-arm statutes to bring more certainty to the area of personal-jurisdiction jurisprudence," especially in the Internet context). Courts struggled with the Internet even before *Zippo* was decided. *See, e.g.*, Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 164–65 (D. Conn. 1996).

15. *See infra* Part I.B–C.

16. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) ("[The] 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . ." (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984))); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("The Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." (citation omitted)).

17. The traditional personal jurisdiction analysis to which this Note refers is the doctrine spawned by *International Shoe* and its progeny unmodified for the Internet context.

18. *See infra* Part II.C.

Part I of this Note explains how changes in technology influenced the development of the traditional personal jurisdiction doctrine. It goes on to explain the struggle surrounding the Internet and specific personal jurisdiction.[19] Part II classifies three categories of Internet-and-personal-jurisdiction cases based on recurring fact patterns:

A. *Incidental Internet*: cases where the Internet is ancillary to the personal jurisdiction analysis because non-Internet contacts already support jurisdiction.

B. *Mixed Internet*: cases where the Internet contacts are analogous to non-Internet technology or are in addition to non-Internet contacts that supplement the personal jurisdiction analysis.

C. *Pure Internet*: cases where the Internet is central to the personal jurisdiction analysis and there is a clear pattern of courts declining to exercise jurisdiction.

Part III explains the implications of this taxonomy by first showing that in the first two categories of cases, no Internet specific doctrine is needed. Part III goes on to explain the narrow class of Internet cases where courts consistently find that the exercise of jurisdiction is unconstitutional. Finally, Part III illustrates the significance of the Pure Internet category and what it means for the doctrine going forward.

I. THE INTERNET: AN UPHEAVAL IN PERSONAL JURISDICTION DOCTRINE

A. Traditional Personal Jurisdiction Doctrine

Under the *Pennoyer v. Neff* regime, physical presence was the foundation of personal jurisdiction; for approximately 70 years,[20] a court could only exercise its power over a defendant if he or she was physically present in the jurisdictional forum.[21] However, the world was enduring a dramatic, technology-driven transformation.[22] Contemporary personal jurisdiction analysis emerged from such technological stressors. *Pennoyer*'s principles "were appropriate for the age of the 'horse and buggy' or even for the age of the 'iron horse,'" as Philip Kurland

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19. This Note almost exclusively focuses on the exercise of specific, as opposed to general, jurisdiction.

20. This is the time span between *Pennoyer v. Neff*, 95 U.S. 714 (1877), and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

21. *See Pennoyer*, 95 U.S. at 722 ("The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory . . . and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.").

22. The telephone had just appeared on the scene, the AM radio was invented, and the automobile was proliferating throughout America. *See* Independence Hall Ass'n, *supra* note 4; Independence Hall Ass'n, *The Glamour of American Cities*, U.S. HIST.: PRE-COLUMBIAN TO THE NEW MILLENIUM, http://www.ushistory.org/us/38a.asp (last visited Jan. 7, 2011); Scott, *supra* note 3.

observed, "[but] could not serve the era of the airplane, the radio, and the telephone."[23]

Two forces in particular tested *Pennoyer*'s physical presence foundation: the proliferation of the automobile and the increase of interstate business. The automobile created a unique problem for courts seeking to exercise personal jurisdiction over individuals. As a court observed shortly after *International Shoe*, "The advent of the automobile and the rapid extension of its use . . . underscored the problem of the nonresident who enters the State, causes injuries, and withdraws to the relative sanctuary of his residence beyond the State's borders."[24] Because due process concepts under *Pennoyer* did not permit the exercise of jurisdiction over nonresident defendants, they operated to shield defendants, sometimes causing injustice to plaintiffs.[25]

In an attempt to resolve this unfairness and protect their residents, states enacted statutes that expanded their jurisdictional reach to out-of-state motorists—specifically, those motorists who caused injury while driving through the state.[26] It was unclear if these statutes would withstand constitutional scrutiny under existing due process standards. The Supreme Court, however, recognized the unique issue that this new form of technology presented.[27] Thus, the Court used a fiction to articulate why such statutes were constitutional notwithstanding a defendant's lack of physical presence within the forum[28]: the use of the state's highways amounted to implicit consent to service of process.[29]

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23. Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 573 (1958).

24. Nelson v. Miller, 143 N.E.2d 673, 677 (Ill. 1957).

25. *See id.* ("In many cases redress for the injury, obtainable only in a foreign court at considerable expense and under substantial handicaps, was a practical impossibility.").

26. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927) (concerning a Massachusetts statute that forced an out-of-state resident motorist driving through the state to implicitly consent to service of process within the state); Kane v. New Jersey, 242 U.S. 160, 164 (1916) (involving a New Jersey statute which, in part, required a nonresident automobile owner to appoint the secretary of state as agent to accept service of process). Though at first blush the statutes were directed at service of process, the statutes' real effects expanded the reach of personal jurisdiction; that is, the statutes enabled a plaintiff to hale an out-of-state defendant into the plaintiff's home forum without actual service in the state. *See Hess*, 274 U.S. at 356; *see also Subjecting the Non-Resident Motorist to Suit*, 43 HARV. L. REV. 949, 950–51 & n.12 (1930) (discussing the *Hess* decision and noting that it may provide an avenue for extending jurisdiction over another technological advancement: airplane travel).

27. *See Hess*, 274 U.S. at 356 ("Motor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property.").

28. *See* Olberding v. Ill. Cent. R.R., 346 U.S. 338, 340–41 (1953).

29. *See id.* (discussing the Court's prior use of fictional implied consent to develop the personal jurisdiction doctrine); *Hess*, 274 U.S. at 356–57 (upholding Massachusetts's statute).

Technological advancements punched yet another hole in *Pennoyer*'s physical presence requirement by making interstate business more viable. Like the automobile, multistate corporations posed a problem for individuals who were injured in a different state than the company's place of incorporation.[30] Thus, "[a]s the corporate form of business became more and more the common method of carrying on economic activity, it became incumbent on the courts to make provision for suits by and against such entities in foreign states."[31] Initially, courts used one of two fictions to support the exercise of jurisdiction: "The first was the 'consent' theory, which quickly prevailed in the Supreme Court. The second was a theory of 'presence,' which became necessary in order to fill the gaps which the 'consent' theory did not cover . . . ."[32] These two theories eventually merged into the idea that personal jurisdiction could properly be exercised if a corporation was found to be "doing business" within the state.[33]

Courts struggled, however, to articulate what constituted "doing business," and the result was numerous inconsistencies in case law.[34] Kurland described what resulted:

> With [the] doctrine in so bad a state of disrepair, the time had long since passed for the Supreme Court to acknowledge . . . that "[t]he Constitution is not to be satisfied with a fiction." *International Shoe Co. v. Washington* afforded the Court an opportunity to begin to set its house in order in this field.[35]

In *International Shoe*, the Court did not "overrul[e] the earlier precedents, but . . . substitut[ed] an appropriate rationale to demonstrate their consistency," a rationale more logically congruent with the realities of commerce and travel in the twentieth century.[36] The new approach, articulated by Chief Justice Stone, became what is now known as the "minimum contacts test."[37] The Court held that the defendant corporation's contacts with the state of Washington "were systematic and continuous," and thus the exercise of personal jurisdiction was "reasonable and just according to . . . traditional conception[s] of fair play and substantial justice."[38]

Some years later, the Supreme Court reflected on the transformation of the personal jurisdiction doctrine, attributing its evolution in part to the way technology has shaped the national landscape:

> Looking back[,] . . . a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign

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30. *See* Louis Paul Haffer, *Personal Jurisdiction over Foreign Corporations as Defendants in the United States Supreme Court*, 17 B.U. L. REV. 639, 639 (1937) (outlining the injustice caused by not being able to obtain jurisdiction over out-of-state corporations).
31. Kurland, *supra* note 23, at 578.
32. *Id.*
33. *Id.* at 578, 584–85.
34. *Id.* at 584–85.
35. *Id.* at 586 (third alteration in original) (citations omitted).
36. *See id.* at 589.
37. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
38. *Id.* at 320.

> corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[39]

Today, the specific personal jurisdiction doctrine typically takes the form of a three-part "minimum contacts" test which evaluates whether: (1) the defendant purposefully directed his activities at or purposefully availed himself of the forum state; (2) the claim arises out of the defendant's forum-related activities; and (3) the exercise of jurisdiction comports with notions of fair play and substantial justice.[40]

In addition, the Supreme Court further defined the purposeful direction requirement using the "effects test" in *Calder v. Jones*.[41] The effects test is applicable in the context of intentional torts and other similar claims.[42] In *Calder*, the Supreme Court put considerable emphasis on the "effects" of the out-of-state defendants' conduct within the forum state. The Court wrote that the defendant–petitioners "knew that the brunt of [the] injury would be felt by respondent in the State in which she live[d] and work[ed] and in which the *National Enquirer* has its largest circulation."[43] Thus, they had "knowingly cause[d] the injury" in the forum state.[44] Since *Calder*, the federal circuit courts have expounded three requirements for personal jurisdiction in intentional tort contexts: (1) intentional conduct, (2) expressly aimed at the forum state, (3) with the defendant's knowledge that the effects would be felt in the forum state.[45] Notably, the effects test has proved particularly important in the context of Internet cases.[46]

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39. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–23 (1957).

40. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787–88 (2011); Boschetto v. Hansing, 539 F.3d 1011, 1016 (9th Cir. 2008); Bird v. Parsons, 289 F.3d 865, 874–75 (6th Cir. 2002); Daniel J. Kiley, *Minimum E-Contacts: Personal Jurisdiction in the Internet Age*, ARIZ. ATT'Y, Nov. 2010, at 58, 62 (explaining the traditional jurisdiction doctrine).

41. 465 U.S. 783 (1984).

42. Tamburo v. Dworkin, 601 F.3d 693, 702–03 (7th Cir. 2010); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998) (noting that a trademark infringement action is analogous to an intentional tort claim); *see also Calder*, 465 U.S. at 788–90.

43. *Calder*, 465 U.S. at 789–90.

44. *Id.* at 790.

45. *See id.* at 788–90.

46. For a sampling of Internet cases involving the use of the effects test, see *Silver v. Brown*, 382 F. App'x 723, 728–30 (10th Cir. 2010), *Tamburo v. Dworkin*, 601 F.3d 693, 706 (7th Cir. 2010), *Licciardello v. Lovelady,* 544 F.3d 1280, 1287–88 (11th Cir. 2008), and *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002). Also, see *infra* text accompanying notes 104–18 discussing the various adaptations of the effects test involving the Internet context.

The value of the minimum contacts analysis—and the reason it has endured for over 60 years—is that it is flexible and designed to function in a variety of contexts.[47] Despite its endurance, the test has received its fair share of criticism. As one law professor put it: "Ambiguity and incoherence have plagued the minimum contacts test for the more than five decades during which it has served as a cornerstone of the Supreme Court's personal jurisdiction doctrine."[48] Indeed, the Supreme Court recently stepped in to clarify the "unclear" personal jurisdiction standards.[49] Nevertheless, the Court in *Nicastro* did not find it necessary to overhaul the minimum contacts test; rather, it kept the test intact and merely clarified its decision in *Asahi*.[50] Thus, the minimum contacts test remains resilient.

B. Early Years of the Internet

Like the telephone and the automobile, the Internet introduced a new technological stressor to personal jurisdiction. In the early years of the Internet's growth, case law and academic literature struggled to answer personal jurisdiction questions that stemmed from electronic contacts.[51] Courts and commentators had a field day devising new "tests" for when Internet contacts confer personal jurisdiction. Many of these widely varying analyses are premised on the idea that the Internet requires the same transformation in the personal jurisdiction doctrine as the automobile.

Initially, some courts endeavored to apply traditional personal jurisdiction doctrine unchanged to electronic contacts.[52] Another court explained that the Internet is not comparable to traditional forms of communication like the mail or telephone because of its speed and efficiency.[53]

A major shift occurred in 1997 after *Zippo Manufacturing Co. v. Zippo Dot Com, Inc*.[54] In *Zippo*, the defendant, a California company, objected to a

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47. *See* Hanson v. Denckla, 357 U.S. 235, 251 (1958) (calling the *International Shoe* standard "flexible"); Richard S. Zembek, Comment, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339, 351 (1996) ("There are virtues in the vagueness and uncertainty of *International Shoe* because it allows courts to make individual judgments of what is fair in ways that bright line rules do not. . . . Accordingly, *International Shoe*'s flexible standard permits a court to respond to technical and social change and better protect the forum state's residents from novel issues that arise from new media such as the [I]nternet.").

48. Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998).

49. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2782 (2011).

50. *See id.* at 2786.

51. *See, e.g.*, Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1330, 1331–34 (E.D. Mo. 1996) (explaining what the Internet is and stating that it cannot be analogized to the phone or mail, then exercising jurisdiction solely based on the existence of the defendant's website).

52. *See, e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262–69 (6th Cir. 1996); *Maritz*, 947 F. Supp. at 1331–35; Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 164–66 (D. Conn. 1996).

53. *Maritz*, 947 F. Supp. at 1332.

54. 952 F. Supp. 1119 (W.D. Pa. 1997).

Pennsylvania district court's exercise of personal jurisdiction in a trademark infringement suit. This action was based on the defendant's use of the word "Zippo" on its website and in its domain names.[55] The defendant's contacts with Pennsylvania had "occurred almost exclusively over the Internet."[56] The defendant's offices and employees were all located in California.[57] Its website, which offered a subscription to an Internet news service, was accessible to Pennsylvania residents via the Internet.[58] Only 2% of the defendant's worldwide subscribers were Pennsylvania residents.[59]

Judge McLaughlin began his personal jurisdiction analysis with an introduction to the Internet.[60] He then articulated a "sliding scale," which "reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."[61] At one end of the sliding scale "are situations where a defendant clearly does business over the Internet."[62] Here, personal jurisdiction is proper.[63] At the opposite end of the spectrum are "passive" websites "where a defendant has simply posted information on" a website.[64] Here, personal jurisdiction is never proper.[65] In the middle of the spectrum are "interactive" websites, and the "exercise of jurisdiction is determined by examining the level of interactivity."[66]

After noting that the defendant's website was on the "clearly do[ing] business over the Internet" end of the scale, the court conducted a traditional personal jurisdiction analysis.[67] First, the court found that the defendant purposefully availed itself to Pennsylvania by contracting with seven Internet providers and approximately 3000 individuals in the state.[68] The court discarded the defendant's argument that its contacts were fortuitous by observing that the defendant had "repeatedly and consciously chose[n] to process Pennsylvania residents' applications and to assign them passwords."[69] Next, the court established that the cause of action arose out of the defendant's forum-related conduct because "both a significant amount of the alleged infringement and dilution, and resulting injury . . . occurred in Pennsylvania."[70] Finally, the court

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55. *Id.* at 1121.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *See id.* at 1123–24 (explaining that the Internet is "a global super-network" that "makes it possible to conduct business throughout the world entirely from a desktop" (quoting Panavision Int'l, L.P. v. Toeppen, 938 F. Supp. 616, 618 (C.D. Cal. 1996))).
61. *See id.* at 1124.
62. *Id.*
63. *See id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 1124–27 (alteration in original).
68. *Id.* at 1126.
69. *Id.*
70. *Id.* at 1127.

determined that the reasonableness prong was satisfied because "Pennsylvania ha[d] a strong interest in adjudicating" this dispute and that the plaintiff's forum choice was entitled to weight.[71] Thus, under the three-pronged test established by *International Shoe* and its progeny, the court concluded it could properly exercise jurisdiction over the defendant. Notably, the Internet sliding scale overlay was unnecessary. The district court could have eschewed the application of the sliding scale and the analysis would have proceeded in the same manner.

C. Current Confusion over the Internet

The struggle to redefine the personal jurisdiction doctrine has continued into the present day. This struggle is premised on the notion that existing personal jurisdiction law is unworkable in cases involving electronic contacts. Courts continue to demonstrate confusion about the correct standard to apply.[72] They have repeatedly called upon the Supreme Court to step in and articulate a new, Internet-specific test.[73] And, a number of courts and commentators have created their own Internet-specific tests.[74] These varying approaches have left the doctrine in a tangled and unpredictable state. Only recently have some courts begun to appreciate that the traditional personal jurisdiction doctrine functions effectively when applied to Internet facts.[75]

1. Confusion over the Correct Standard to Apply

One source of confusion involves the proper personal jurisdiction standard to apply in cases involving the Internet. This confusion makes it difficult for litigants to persuade courts, and it makes it even harder for lawyers to form solid legal strategies and advise their clients on likely outcomes. One court, for example, applied three different tests to determine whether it had personal jurisdiction.[76] The court discussed "principles of purposeful availment," "the

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71. *Id.*

72. For example, in at least two cases, both the Eighth and Fifth Circuits applied the *Zippo* sliding scale and the *Calder* effects test before determining personal jurisdiction was invalid. *See, e.g.*, Johnson v. Arden, 614 F.3d 785, 796–97 (8th Cir. 2010); Revell v. Lidov, 317 F.3d 467, 470–72 (5th Cir. 2002).

73. *See, e.g.*, ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 713 (4th Cir. 2002) ("Until the due process concepts of personal jurisdiction are reconceived and rearticulated by the Supreme Court in light of advances in technology, we must develop, under existing principles, the more limited circumstances when it can be deemed that an out-of-state citizen, through electronic contacts, has conceptually 'entered' the State via the Internet for jurisdictional purposes."). Indeed, Justices Breyer and Alito have indicated that they, too, think that it is time for the Supreme Court to step in and clarify this area. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring).

74. *See infra* Part I.C.2.

75. *See infra* Part I.C.3.

76. *In re* Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 557 (M.D. Pa. 2009).

stream of commerce theory," and "the effects test."[77] The court ultimately concluded that it could not assert its authority over the defendants.[78]

In a 2003 decision, the Third Circuit Court of Appeals made a lengthy attempt to articulate "the standard for personal jurisdiction based upon a defendant's operation of a commercially interactive website."[79] There, the defendant, a Spanish company, operated a number of websites that allegedly infringed on the New Jersey plaintiff's U.S. trademark.[80] The defendant's contacts were composed of two merchandise sales to U.S. vendors and its president's yearly attendance at a New York trade fair.[81] In addition, after the plaintiff purchased some merchandise from the defendant—for which the plaintiff had to arrange for special shipping through a third party because the defendant did not ship directly to the United States—the parties exchanged e-mails, and the plaintiff received a copy of the defendant's electronic newsletter.[82]

In an effort to articulate the proper legal standard, the court delved into an explanation of "Personal Jurisdiction Based on the Operation of a Website."[83] First, the court explored "The 'Purposeful Availment' Requirement in Internet Cases."[84] The court explained that an interactive website's accessibility in the forum state was insufficient by itself to satisfy the purposeful availment prong; rather, the court noted, "there must be additional evidence" that "reflect[s] intentional interaction with the forum state."[85] To enunciate this requirement, the court reviewed the relevant Third Circuit authority and then cases from other federal circuit courts.[86] The court concluded that it was also proper to "consider the defendant's related non-Internet activities as part of the 'purposeful availment' calculus."[87]

The court's ultimate decision about the correct standard to apply in Internet cases yielded something that looked remarkably like the effects test from *Calder*. The court held that, to meet the purposeful availment requirement, the plaintiff must show that the defendant's website "directly target[ed]" the forum state or "knowingly interact[ed] with residents of the forum state."[88] In comparison, the *Calder* effects test requires: (1) intentional conduct, (2) expressly aimed at the forum state, (3) with the defendant's knowledge that the effects would be felt in the forum state.[89]

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77. *Id.* at 557–65.
78. *Id.*
79. Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 451–53 (3d Cir. 2003).
80. *Id.* at 448–51.
81. *Id.* at 450–51.
82. *Id.* at 452–53. This was the only evidence in the record of a sale to any individual in the United States. *Id.*
83. *Id.* at 451–56.
84. *Id.* at 451–53.
85. *Id.* at 451–52.
86. *Id.* at 452–53.
87. *Id.* at 453.
88. *Id.* at 454.
89. Calder v. Jones, 465 U.S. 783, 788–90 (1984).

In applying this standard, the court noted that the defendant's websites "d[id] not appear to have been designed or intended to reach customers in New Jersey."[90] The court said that there was no evidence that the defendant knowingly conducted business with residents of New Jersey and that the few U.S. sales were "fortuitous."[91] Finally, the court stated with little analysis that the electronic correspondence was insufficient for minimum contacts.[92] Thus, the court concluded that the plaintiff failed to satisfy the purposeful availment prong.

2. Internet-Specific Tests

Amidst the confusion, a number of courts have formulated their own unique approaches to dealing with electronic contacts. But these tests have done little to clarify the doctrine. If anything, these individual tests have only served to confuse matters further; the variance between jurisdictions makes it difficult to predict which actions or activities will subject the defendant to the power of another state's courts.

The sliding-scale approach articulated in *Zippo* is a prime example. After the decision came down, courts all over the country began applying the sliding-scale test but did not appear to consider how it enhanced the personal jurisdiction analysis. As Judge McLaughlin explained, the sliding scale only "reveals . . . the *likelihood* that personal jurisdiction can be constitutionally exercised."[93] Once a court determines where on the scale a defendant falls, it is still necessary to engage in a minimum contacts analysis, just as the *Zippo* court did.[94] Thus, the sliding scale does not provide a framework to resolve personal jurisdiction issues; it merely serves as a predictor.

However, this reality seems to have eluded a number of courts. For example, some courts view the sliding scale as an independent basis for finding jurisdiction.[95] Other courts apply the sliding scale as a replacement for the purposeful availment prong.[96] Still other courts continue to apply the sliding scale as if it were an essential part of the personal jurisdiction analysis. In *Revell v. Lidov*, for instance, the Fifth Circuit affirmed a lower court's holding that it did not have personal jurisdiction, but not before it explicitly disagreed with the lower

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90. *Toys "R" Us*, 318 F.3d at 454.

91. *Id.* at 454–55.

92. *Id.* at 455.

93. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (emphasis added).

94. *See id.* at 1124–27.

95. *See, e.g.*, Tamburo v. Dworkin, 601 F.3d 693, 703 n.7 (7th Cir. 2010) (referring to the sliding scale as "an alternative minimum-contacts test for Internet-based claims"); Caiazzo v. Am. Royal Arts Corp., No. 4D09–5152, 2011 WL 2135585, at *5 (Fla. Dist. Ct. App. June 1, 2011) (stating that "according to *Zippo*," a website on the clearly doing business over the Internet side of the spectrum "*ipso facto* leads to a finding of jurisdiction").

96. *See, e.g.*, *Toys "R" Us*, 318 F.3d at 452 ("In cases where the defendant is clearly doing business through its web site in the forum state, and where the claim relates to . . . use of the web site, . . . personal jurisdiction exists.").

court's conclusion that the defendant's website was "*Zippo*-passive."[97] There, the defendant had posted an allegedly defamatory article on an online bulletin board maintained by Columbia University's School of Journalism.[98] Noting that anyone could use the Internet to post information to the bulletin board and see what had been posted by others, the Fifth Circuit held that the bulletin board was on the interactive end of the sliding scale.[99] Therefore, the court examined the extent of the interactivity to determine whether it could properly exercise personal jurisdiction.[100] However, the court did not discuss the website's interactivity any further; rather, it went on to analyze the case under the *Calder* effects test and determined that, because the defendant had no specific knowledge of the particular forum in which the plaintiff felt the brunt of the harm, it could not exercise personal jurisdiction over the defendant.[101] Thus, the court's analysis under the sliding scale was superfluous. It had to analyze the issue under the traditional personal jurisdiction doctrine anyway.[102]

Nevertheless, *Zippo* has remained highly influential in many courts' quests to find the answer to the Internet problem.[103] A popular solution is to alter *Zippo*'s sliding scale and combine it with a targeting-based approach similar to the *Calder* effects test.[104] The targeting-based approach is sometimes referred to as a requirement that the defendant "purposefully direct" his conduct at the forum

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97. 317 F.3d 467, 469, 472, 476 (5th Cir. 2002).

98. *Id.* at 469. The defendant was not affiliated in any way with the University. *Id.*

99. *Id.* at 472.

100. *Id.* Notably, the court failed to discuss that the *Zippo* analysis was premised on the fact that the defendant owned and controlled the website in question. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1121, 1125–26 (W.D. Pa. 1997). In *Revell*, the defendant was not even affiliated with the website where he posted the allegedly defamatory article. 317 F.3d at 469. For additional discussion on the significance of this difference, see *infra* note 163 and its accompanying text.

101. *Revell*, 317 F.3d at 476. The court also emphasized that the article's geographic focus was not the plaintiff's home forum. *See id.* at 472–76.

102. For additional discussion of the confusion surrounding *Zippo*, see *Caiazzo v. Am. Royal Arts Corp.*, No. 4D09–5152, 2011 WL 2135585, at *6–7 (Fla. Dist. Ct. App. June 1, 2011) (rejecting *Zippo*'s sliding-scale test as too mechanical and potentially leading to erroneous results), Catherine Ross Dunham, Zippo-*ing the Wrong Way: How the Internet Has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis*, 43 U.S.F. L. REV. 559, 560, 570–81 (2009) (arguing, among other things, that *Zippo* "constituted a premature, non-functional, and destabilizing reaction to Internet-based contacts analysis"), and Kiley, *supra* note 40, at 60, 62 (noting the various criticisms of *Zippo*).

103. *See, e.g.*, Johnson v. Arden, 614 F.3d 785, 796 (8th Cir. 2010) (finding *Zippo* "instructive"); Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452–54 (3d Cir. 2003) (discussing and applying the sliding scale); *Revell*, 317 F.3d at 470–72 (discussing and applying the sliding scale); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 713–14 (4th Cir. 2002) (developing its own test based, in part, on the sliding scale); Leitstein, *supra* note 10, at 585 (arguing for a new Internet-specific personal jurisdiction test by revising the sliding scale and modifying the effects test).

104. *See supra* text accompanying notes 41–45.

state.[105] The Fourth Circuit developed such a test in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*[106] There, the court noted that the Internet required adaptation of the traditional personal jurisdiction doctrine "because the Internet is omnipresent."[107] The court cited the difficulties of trying to apply the minimum contacts analysis to electronic contacts and the potentially absurd results.[108] The court explained that "even under the limitations articulated in *International Shoe* . . . the argument still could be made that" each electronic signal counted as a contact, thereby eviscerating "notions of limited State sovereignty."[109] The *ALS Scan* court then "adopt[ed] and adapt[ed] the *Zippo* model," combined it with a targeting element, and held that a state may exercise judicial power over an out-of-state resident "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."[110]

The plaintiff in *ALS Scan*, a Maryland corporation, sued a Georgia-based Internet service provider ("ISP") and some of its customers.[111] The plaintiff alleged that the customer–defendants stole hundreds of its copyrighted photographs and placed them on their websites.[112] The plaintiff also alleged that the ISP enabled the copyright infringement by supplying the Internet service.[113] Only the ISP contested jurisdiction.[114] The ISP's only contact with Maryland was that its website was accessible in the state.[115]

In applying the court's newly developed standard to the facts, the court held that no part of the test was satisfied.[116] The court noted that the ISP's website was "passive," and thus the company did not direct any electronic activity into Maryland with the "manifested intent of engaging in business or other interactions within the State."[117] Furthermore, the ISP's website was unrelated to the lawsuit because none of the allegedly infringing photographs ever appeared on that website;[118] therefore, the third prong also remained unsatisfied.

Other commentators have suggested more radical solutions. Professor Allyson Haynes argues that courts could avoid the issue altogether if states

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105. *See* Silver v. Brown, 382 F. App'x 723, 728–29 (10th Cir. 2010) (discussing *Calder* and analyzing whether the defendant purposefully directed his conduct at the forum state).

106. 293 F.3d at 714.

107. *Id.* at 712.

108. *Id.* at 712–14.

109. *Id.* at 712–13.

110. *Id.* at 714. The court also noted its test's similarity to the *Calder* effects test. *Id.*

111. *Id.* at 709.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 709–10.

116. *Id.* at 714–15.

117. *Id.*

118. *Id.* at 715.

shortened their long-arm statutes.[119] Haynes argues that states should rewrite their long-arm statutes "to provide for less conferral of personal jurisdiction than the Constitution allows and to assert jurisdiction in more specific circumstances in which those states have a legitimate interest."[120] This proposal would only mean that courts would be able to exercise personal jurisdiction less often; it would do nothing to clarify how to apply the doctrine in specific cases.[121]

3. A Return to Traditional Personal Jurisdiction

Despite this persistent confusion, some courts have recognized that the traditional personal jurisdiction analysis functions in cases involving the Internet. In *Licciardello v. Lovelady*, the Eleventh Circuit applied the effects test in a trademark infringement action arising out of the defendant's allegedly unauthorized use of the plaintiff's name, photograph, and endorsement on a website.[122] There, the plaintiff, an established musician, had previously employed the defendant as his manager for a short time.[123] Several years after this employment relationship ended, the defendant created and posted a website that promoted himself as a manager for musicians.[124] The website used the plaintiff's name and photograph, and implied that the plaintiff endorsed the defendant.[125]

In applying the effects test, the court found that the defendant's actions—using the plaintiff's image and implying endorsement—were intentional.[126] In addition, because of the previous employment relationship, the defendant knew where the plaintiff lived and knew that the brunt of the harm would be felt in the plaintiff's home forum.[127] In concluding that it could properly exercise jurisdiction, the court explicitly stated that it did not "intend to establish any general rule for personal jurisdiction in the [I]nternet context."[128] By applying the effects test without delving into an Internet-specific analysis, the Eleventh Circuit

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119. *See* Haynes, *supra* note 14. Haynes proposes a short-arm statute that provides a definition of "Internet Business" and lists factors that indicate when the exercise of personal jurisdiction would be appropriate. *Id.* at 168–69. The factors include designing a website for a forum state, advertising in the state, and knowing and continuous sales to in-state residents; these are essentially the same factors that courts already consider in personal jurisdiction analysis. *See id.*

120. *Id.* at 162–66.

121. Haynes herself notes that once a court determines that it could exercise jurisdiction under the state statute, the court would still have to analyze the constitutional issue. *See id.* at 163.

122. 544 F.3d 1280, 1282, 1286–88 (11th Cir. 2008). This case would fall into the Mixed Internet category as discussed *infra* Part II.B.

123. *Licciardello*, 544 F.3d at 1282.

124. *Id.*

125. *Id.*

126. *Id.* at 1287–88.

127. *Id.* at 1288.

128. *Id.* at 1288 n.8 ("We hold only that where the [I]nternet is used as a vehicle for the deliberate, intentional misappropriation of a specific individual's trademarked name or likeness and that use is aimed at the victim's state of residence, the victim may hale the infringer into that state to obtain redress for the injury.").

understood that it is the cause of action that drives personal jurisdiction analysis, not the presence of Internet facts.[129]

Likewise, in *Boschetto v. Hansing*, the Ninth Circuit's analysis did not rely upon Internet facts to analyze jurisdiction.[130] There, the court applied a traditional minimum contacts test to a contract dispute and determined that "a one-time contract for the sale of a good" between a Wisconsin seller and a California buyer was an insufficient basis to exercise personal jurisdiction.[131] The fact that the contract was formed "via eBay," the court said, was "a distraction from the core issue."[132] The court went on to state that "[t]he use of eBay no doubt made it far easier to reach [the plaintiff], but the ease with which [the plaintiff] was contacted does not determine whether the nature and quality of the [d]efendant['s] contacts serve to support jurisdiction."[133] Thus, "the use of eBay as the conduit for that transaction [did] not have any dispositive effect on jurisdiction."[134]

The Florida District Court of Appeals has also recognized the viability of traditional personal jurisdiction analysis in Internet cases by explicitly rejecting *Zippo*.[135] In *Caiazzo v. American Royal Arts Corp.*, a third party asked the defendant—who bought, sold, and authenticated Beatles memorabilia through a website—to authenticate an autographed album the plaintiff was selling.[136] When he opined that the autographed album was a forgery, the plaintiff brought claims for unlawful restraint on trade and for violation of Florida's Deceptive and Unfair

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129. The Ninth Circuit agrees that, because a trademark infringement action is akin to an intentional tort, the effects test is the proper analytical framework. *See* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998) (noting that the effects test is the proper test in intentional tort cases and that "the present [trademark infringement] case is akin to a tort case"); Kiley, *supra* note 40, at 65 ("Greater clarity would result if courts recognized that the application of the 'effects' test is limited to intentional torts and analogous statutory claims for copyright infringement and the like.").

130. 539 F.3d 1011 (9th Cir. 2008). This case has almost identical facts to *Holland v. Hurley*, 212 P.3d 890 (Ariz. Ct. App. 2009) (depublished) (on file with *Arizona Law Review*), discussed *infra* notes 160–66, and would likewise fall into the Mixed Internet category evaluated *infra* Part II.B.

131. *Boschetto*, 539 F.3d at 1019.

132. *Id.*

133. *Id.* The court was also careful to note that it was not holding that "the use of eBay digs a virtual moat around the defendant, fending off jurisdiction in all cases." *Id.*

134. *Id.* The Ninth Circuit's straightforward approach in *Boschetto* has been praised. *See, e.g.*, Recent Case, *supra* note 9, at 1020 ("By contrast, the Ninth Circuit's panel opinion provide[s] a much clearer picture of what can be expected in jurisdictional disputes involving [I]nternet commercial transactions.").

135. Caiazzo v. Am. Royal Arts Corp., No. 4D09–5152, 2011 WL 2135585, at *7 (Fla. Dist. Ct. App. June 1, 2011). The court issued an opinion in this case despite the defendant's voluntary dismissal of his appeal "[b]ecause . . . [the] case involve[d] an issue of great public importance." *Id.* at *1. The court stated that "the role the [I]nternet plays in . . . jurisdiction analysis" was so important "because it involves a confusing area of the law that is mainly scattered across the federal courts." *Id.* The court further noted that "because of the ever-increasing role of technology and the [I]nternet in commerce[,] . . . issues relating to jurisdiction and the [I]nternet will only increase over time." *Id.*

136. *Id.* at *1.

Trade Practice Act.[137] The court held that the defendant had sufficient minimum contacts with Florida because his overall sales to the state were $100,000, or roughly 4% of his total sales.[138] According to this holding, a court may consider the *Zippo* sliding scale if it "finds it helpful," but that the traditional personal jurisdiction doctrine is the correct test.[139]

Despite these approaches, many courts continue to struggle with personal jurisdiction questions when electronic contacts are analyzed. Some courts are confused about the correct legal standard for personal jurisdiction; still others are entangled in Internet-specific tests. This confusion in the legal community seriously undermines one of the main purposes of personal jurisdiction: predictability.[140] Furthermore, courts and commentators have made few attempts to discern what a genuine Internet jurisdiction case is. In many so-called Internet cases, the Internet is only incidental to the personal jurisdiction analysis. Identifying a true Internet jurisdiction case is essential to understanding whether a new test is actually necessary, or whether Easterbrook's "Law of the Horse" intuition was correct.

II. TAXONOMY

Two decades have elapsed since the Internet began confounding personal jurisdiction analysis. The time has come to reassess how Internet contacts affect this analysis. To determine the Internet's effects on personal jurisdiction, this Note groups Internet cases in a taxonomy based on the impact the Internet has on jurisdictional analysis. This ordering helps distill whether the particular features of the Internet require a tailored personal jurisdiction approach. The taxonomy is as follows:

A. *Incidental Internet*: the Internet is incidental to the personal jurisdiction analysis because the Internet facts are additional to non-Internet contacts that already support jurisdiction.

B. *Mixed Internet*: the Internet facts are essential to the personal jurisdiction analysis, but the traditional personal jurisdiction doctrine functions just as well as in non-Internet cases. This is because the Internet facts are analogous to non-Internet technology or because there are additional non-Internet contacts that expand upon the personal jurisdiction analysis.

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137. *Id.* at *2.

138. *Id.* at *9.

139. *Id.* at *7.

140. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) ("[The] 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . ." (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984))); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("The Due Process clause by ensuring the 'orderly administration of the laws' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." (citations omitted)).

C. *Pure Internet*: the Internet is central to the personal jurisdiction analysis and a clear pattern exists where courts decline to exercise jurisdiction.

A word of caution is needed here: the taxonomy is not intended to be used in any way as a test to determine when personal jurisdiction can be exercised. It is also not intended as a predictive tool. Rather, the taxonomy only illustrates how easily the Internet facts can be separated, ignored, or analogized. The taxonomy's purposes are: (1) to highlight that the presence of Internet facts should not confuse the discussion; and (2) to demonstrate how the traditional personal jurisdiction analysis can be utilized effectively in such cases.

A. Incidental Internet

In many so-called Internet jurisdiction cases, the Internet is only incidental to the personal jurisdiction analysis. In these instances, the Internet facts are additional to non-Internet contacts that already support jurisdiction. Thus, these cases are Internet-in-name-only because personal jurisdiction is not affected by the presence of some Internet facts. In these cases, any discussion focused specifically on the Internet is superfluous.

Heroes, Inc. v. Heroes Foundation is illustrative.[141] In this case, the District of Columbia plaintiff sued the New York defendant for trademark infringement in the plaintiff's home forum.[142] The defendant, a charitable organization, used the trademark in an advertisement placed in the forum's local newspaper and also on the homepage of its website.[143] The newspaper advertisement alone subjected the defendant to personal jurisdiction in the District of Columbia.[144] It was irrelevant to the personal jurisdiction analysis that the defendant also used the infringing trademark on its website; thus, the electronic contact was merely incidental to the personal jurisdiction analysis. Although the newspaper advertisement clearly conferred jurisdiction, the court in *Heroes* went on to devote more than a page to analyzing whether the defendant's website could also support jurisdiction.[145]

In *Publications International Ltd. v. Burke/Triolo, Inc.*, the court also engaged in a superfluous discussion of the Internet facts.[146] There, the California defendant had allegedly breached a contract by distributing a number of CD-ROM catalogs in Illinois containing copyrighted photographs; this fact alone provided the Illinois district court specific jurisdiction over the out-of-state defendant.[147] Therefore, the fact that the defendant displayed the same photographs on its website was incidental to the personal jurisdiction analysis.

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141. 958 F. Supp. 1 (D.D.C. 1996).
142. *Id.* at 1–2.
143. *Id.* at 3.
144. *Id.* at 3–4.
145. *Id.* at 4–5.
146. *See* 121 F. Supp. 2d 1178, 1181–82 (N.D. Ill. 2000).
147. *Id.*

Nevertheless, the *Burke/Triolo* court held that the defendant's website was a satisfactory basis to confer *general* jurisdiction.[148] The defendant's website advertised its CD-ROM catalogs and provided an online catalog request form.[149] The court first noted that the website belonged in the middle, "interactive," category of the *Zippo* sliding-scale.[150] The court then held that the website was "an intentional and continuous business contact" that made the exercise of general jurisdiction proper.[151] Even if the court thought it was necessary to analyze whether there was general jurisdiction after it had found specific jurisdiction, there was an entirely separate basis to do so: the defendant also employed a representative in Chicago.[152] Therefore, there was no need for the court to analyze the defendant's electronic contacts.

In *Burke/Triolo*, as in *Heroes, Inc.*, the Internet facts were incidental to the analysis because the non-Internet contacts were already sufficient to support jurisdiction. In these Incidental Internet cases, any discussion that is focused specifically on the Internet only adds to the confusion of the doctrine; it creates an issue where there is none. In these cases, courts should focus on resolving the issue at hand and not delve into unnecessary dicta.

B. Mixed Internet

In the mixed category of Internet jurisdiction cases, the Internet facts cannot be removed from the analysis; however, the Internet facts do not pose a unique jurisdictional problem. Often in such cases, the Internet is readily analogized to non-Internet technology. For example, the Internet often serves as the distribution mechanism of the harm-causing agent and is comparable to traditional forms of contacting the forum. In other cases, the Internet technology is not analogous to other forms of communication, but there are additional non-Internet contacts that supplement the personal jurisdiction analysis. Thus, in the Mixed Internet category, it is impossible to strip the Internet facts from the personal jurisdiction inquiry; nevertheless, the traditional personal jurisdiction analysis functions equally well in this class of cases.

In many cases, the use of the Internet in the Mixed Internet group is readily analogized to the mail, the telephone, and other traditional means of communication.[153] For instance, information sent through e-mail should subject a defendant to personal jurisdiction in the same manner as letters sent through U.S. mail.[154] In *Tamburo v. Dworkin*, e-mails were one distribution mechanism for

148. *See id.* at 1182–83.
149. *Id.* at 1181–82.
150. *Id.* at 1182.
151. *Id.* at 1182–83.
152. *Id.* at 1183.
153. *See, e.g.*, Caiazzo v. Am. Royal Arts Corp., No. 4D09–5152, 2011 WL 2135585, at *6 (Fla. Dist. Ct. App. June 1, 2011) (comparing the Internet to the mail and the telephone).
154. *See, e.g.*, Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1088–89 (9th Cir. 2000) (finding that the defendant's single cease-and-desist letter, which was intended to wrongfully interfere with the plaintiff's use of its intellectual property, was sufficient to confer jurisdiction under the effects test); HTL Sp. Z O.O. v. Nissho Corp., 538

defamatory remarks.[155] There, the Canadian defendant e-mailed the plaintiff, who lived and operated a business out of Illinois, and directly accused him of stealing information for his software.[156] After he demanded the removal of the stolen data and the plaintiff failed to comply, the defendant e-mailed a number of other individuals; he not only claimed that the plaintiff had stolen this information, but also suggested action against the plaintiff.[157] Using the *Calder* effects test in its analysis, the Seventh Circuit had no difficulty concluding that the defendant's intentional conduct of sending the e-mails was sufficient to confer personal jurisdiction in Illinois.[158]

Even where the Internet is not analogous to traditional forms of communication, such as the online auction website eBay,[159] it can be compared to nonelectronic means of contacting the forum. For example, in *Holland v. Hurley*, the plaintiff, an Arizona resident, purchased a 1976 Cadillac from the Michigan defendant through eBay.[160] The plaintiff made the arrangements to have the car shipped to Tucson, but when the car arrived, he determined that its condition did not match the defendant's representations in the eBay listing.[161] The plaintiff brought suit in Arizona state court, and the case was subsequently dismissed for lack of personal jurisdiction.[162] The defendant's only non-Internet contacts with the state were the actual sale and several phone calls between the parties.[163] The

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S.E.2d 525, 527 (Ga. Ct. App. 2000) (noting that "standing alone, a nonresident's telephone or mail contact . . . is generally insufficient to show the minimum contacts with the State necessary to establish personal jurisdiction" (citations omitted)).

155. 601 F.3d 693, 697 (7th Cir. 2010).

156. *Id.* at 698.

157. *Id.*

158. *Id.* at 706, 709–10.

159. The website eBay allows users to list items for sale and purchase items through an online auction. *See What Is eBay?*, EBAY, http://pages.ebay.com/help/account/questions/about-ebay.html (last visited Nov. 13, 2010).

160. 212 P.3d 890, 893 (Ariz. Ct. App. 2009) (depublished) (on file with *Arizona Law Review*).

161. *Id.*

162. *Id.*

163. The Internet contacts also included e-mails between the parties. *Id.* at 897–98. The court distinguished the facts from other Internet-jurisdiction cases on the ground that neither party owned or controlled the website in question. *Id.* at 897. The court said that "where the Internet site actually belongs to and is operated by the defendant, the nature of the website has jurisdictional significance because the website allows the defendant to maintain some ongoing contact with the forum state." *Id.* (quoting Boschetto v. Hansing, 539 F.3d 1011, 1018 (9th Cir. 2008)). The nature of eBay transactions also presents a unique jurisdictional issue because the seller has limited control over who the buyer is or where the buyer resides. *See* Winfield Collection, Ltd. v. McCauley, 105 F. Supp. 2d 746, 749 (E.D. Mich. 2000) ("The court takes judicial notice that the function of an auction is to permit the highest bidder to purchase the property offered for sale, and the choice of that highest bidder is therefore beyond the control of the seller."); *Can I Retract or Cancel My Bid?*, EBAY, http://pages.ebay.com/help/buy/questions/retract-bid.html (last visited Nov. 13, 2010) ("A bid on eBay is considered a contract . . . ."); *Your User Agreement*, EBAY, http://pages.ebay.com/help/policies/user-agreement.html (last visited Nov. 13, 2010) (providing that eBay users must not "fail to deliver items purchased"). However, eBay does permit sellers to geographically restrict buyers by state, territory, or country. *Selecting*

court noted that jurisdiction could not be established based on "a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser happened to reside."[164] While eBay is not readily analogized to other more traditional communication media, the court did not entangle itself in the Internet facts.[165] Instead, it focused on applying the minimum contacts analysis to a case that involved a commercial transaction.[166]

The defendant–seller in *Holland* is comparable to the vehicle wholesaler in *World-Wide Volkswagen Corp. v. Woodson*.[167] There, the New York automobile wholesaler sold a car to a New York retailer, who in turn sold the car to a family.[168] The family later moved to Arizona, and while they drove across the country to reach their new home, the car was struck by another automobile in Oklahoma, causing a fire which severely burned the family.[169] The family brought suit against the wholesaler and other defendants in Oklahoma, but the Court found that the state could not exercise jurisdiction over the wholesaler because the defendant lacked minimum contacts with Oklahoma.[170] The Court held that it was not enough that it was "foreseeable" that the car would end up in Oklahoma, because "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State."[171] Instead, what matters "is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[172]

In *Holland*, the defendant likewise placed his vehicle into the stream of commerce through eBay's platform. Once the online auction was complete and the plaintiff deemed the highest bidder, the defendant surely knew that his vehicle would end up in Arizona; however, "it is not enough that the defendant might have predicted that its goods will reach the forum State."[173] Simply because the entire transaction occurred over the Internet does not change a minimum contacts analysis that could proceed entirely according to the *World-Wide Volkswagen* framework.

Like eBay, various forms of social networking are not readily comparable to traditional communication media. For example, weblogs, more commonly

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Buyer Requirements, EBAY, http://pages.ebay.com/help/sell/buyer-requirements.html (last visited Nov. 13, 2010) (explaining step-by-step how to block buyers in geographic areas).

164. *Holland*, 212 P.3d at 897 (quoting *Boschetto*, 539 F.3d at 1019). In *Boschetto*, the Ninth Circuit came to the same conclusion on almost identical facts. 539 F.3d at 1014–15, 1017–19.

165. The court did briefly analyze the case under the *Zippo* sliding-scale test but in the context of addressing defendant's argument. *Holland*, 212 P.3d at 896. The court noted that the sliding scale was inapplicable because the defendant did not own the website in question (eBay) and had no control over its interactivity. *Id.* at 896–97.

166. *See id.* at 897–900.

167. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288 (1980).

168. *Id.*

169. *Id.*

170. *Id.* at 295–96.

171. *Id.* at 297.

172. *Id.* (citations omitted).

173. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011).

known as blogs, are websites "that contain[] an online personal journal with reflections, comments, and often hyperlinks provided by the writer."[174] Because blogs are accessible from anywhere, and because they are often not directed at any particular geographical location, they are unlike any non-Internet form of communication. Potentially, injurious content posted on a blog could present a unique jurisdictional question. But, when combined with other, non-Internet contacts, the issue can be analyzed using traditional personal jurisdiction doctrine.

In *Silver v. Brown*, for example, a New Mexico plaintiff alleged that two Florida defendants created a blog solely to defame him.[175] However, the blog was not the defendants' only contact with the forum state; the defendants knew the plaintiff, knew where he resided, and knew what he did for a living.[176] Using the *Calder* effects test, the court found that the defendants' knowledge was a key fact that enabled the court to exercise personal jurisdiction.[177]

Indeed, the facts of *Silver* are analogous to the facts of *Calder*. In *Calder*, the Court dismissed the argument that the defendants were accused of "untargeted negligence."[178] Rather, the *National Enquirer* defendants knew where the celebrity plaintiff lived and worked, and they knew that the brunt of the injury would be felt in the forum state.[179] This knowledge meant it was reasonable for the defendants to be haled into court in the forum where the injury occurred.[180] Although the blog in *Silver* certainly did not boast the same circulation numbers as the *National Enquirer*, the defendants knew where the plaintiff lived and worked, and where the blog would cause potential injury. Thus, in *Silver*, the fact that the defamation was caused by an electronic contact made no difference to the analysis.

C. Pure Internet

In the third category of Internet jurisdiction cases, Pure Internet cases, the Internet is central to the personal jurisdiction analysis. Here, the jurisdictional facts involve use of the Internet that is not easily analogized to other methods of contacting the forum. Interestingly, courts consistently find that they cannot exercise jurisdiction in this category.

Pure Internet issues arise frequently in trademark infringement actions where the plaintiff is suing over trademark use on a defendant's website.[181] In the Fourth Circuit case, *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, for example, an Illinois defendant company was not subject to personal

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174. *Blog*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/blog (last visited Nov. 20, 2010).

175. 382 F. App'x 723, 724–27 (10th Cir. 2010).

176. *Id.* The defendants created the blog after a business deal with the plaintiff fell through. *Id.* at 724–25.

177. *Id.* at 728–30.

178. Calder v. Jones, 465 U.S. 783, 789 (1984).

179. *Id.* at 788–90.

180. *Id.* at 789–90.

181. *See, e.g.*, Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390 (4th Cir. 2003); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996).

jurisdiction in Maryland despite the defendant's use of an allegedly infringing trademark on its website and in its domain name.[182] While the defendant's website solicited donations over the Internet, only one donation came from a Maryland resident;[183] furthermore, the defendant's website had a strong local character.[184] Thus, personal jurisdiction was not proper despite the fact that the website could be viewed in Maryland.[185]

In Pure Internet cases, accessibility is often the only contact. Courts are virtually unanimous in the belief that universal access—i.e., the fact that a website is accessible all over the world—does not by itself provide an adequate basis to assert personal jurisdiction.[186] For example, in *Revell v. Lidov*, a Texas plaintiff sued a Massachusetts professor for defamation arising from a news article.[187] The article appeared on a portion of Columbia University's School of Journalism's website that allowed users to post their own works.[188] The plaintiff filed suit against the University and the professor in the Northern District of Texas.[189] In refusing to exercise personal jurisdiction over either the professor or the University, the district court noted that Texas was not the focal point of the article;[190] although the article identified the plaintiff by name, the article did not refer to Texas nor did it refer to the Texas activities of the plaintiff.[191] Additionally, the article was not directed at a Texas audience.[192]

The key difference between *Revell* and *Silver* is that in *Silver* there was a clear attempt to target a specific person.[193] Conversely, in *Revell*, as the court noted, the article had no specific geographic focus, except for perhaps Washington,

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182. 334 F.3d at 394–95, 402.

183. *Id.* at 395. This donation was made by the plaintiff's lawyer. *Id.*

184. *Id.*

185. *Id.*

186. This reflects the more modern view. *See, e.g.*, ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707 (4th Cir. 2002) (finding no personal jurisdiction where the defendant's only contact with the forum state was a website that could be accessed there); *accord* Kiley, *supra* note 40, at 60 (noting that "'the majority of courts have rejected' the conclusion that 'the mere presence of a website, without more, was enough to subject a defendant to personal jurisdiction in the forum where the website could be accessed'" (quoting Vinten v. Jeantot Marine Alliances, S.A., 191 F. Supp. 2d 642, 647 n.10 (D.S.C. 2002))). *But see, e.g.*, Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333–34 (E.D. Mo. 1996) (holding that the maintenance of a website, without more, constituted purposeful availment and personal jurisdiction was proper).

187. 317 F.3d 467, 469 (5th Cir. 2002).

188. *Id.* at 469. The defendant professor was in no way affiliated with the University. *See id.*

189. *Id.*

190. Rather, the court noted that if the article had any geographic focus it was Washington, D.C. because the article alleged that the plaintiff was complicit in a conspiracy and cover-up among members of the Reagan administration. *Id.* at 469, 473, 476. In fact, the defendant was unaware that the plaintiff lived in Texas when he posted the article. *Id.* at 475.

191. *Id.* at 473.

192. *Id.*

193. *See* Silver v. Brown, 382 F. App'x 723, 724–27 (10th Cir. 2010).

D.C.[194] Because there was no targeting element, the defendant professor had no contact with the state of Texas except for the fact that the article he wrote could be accessed in the state. As courts have repeatedly held, the fact that the Internet made it possible for anyone in the forum state to read the article was insufficient for the court to exert its power over the out-of-state defendants.[195]

The Pure Internet category of cases is quite narrow, because a single, non-Internet fact makes the case fall under the Mixed Internet category. For example, in *Licciardello v. Lovelady*,[196] the plaintiff sued over the defendant's allegedly unauthorized use of plaintiff's name, photograph, and endorsement on a website.[197] However, the key difference was that the defendant knew the plaintiff and knew where he lived.[198] Knowledge is a nonelectronic contact that pushes *Licciardello* into the Mixed Internet category.[199] Thus, only a narrow class of cases qualify as Pure Internet.

III. LESSONS OF THE TAXONOMY

This taxonomy demonstrates that the traditional personal jurisdiction doctrine may be effectively applied in the Incidental Internet and Mixed Internet categories. The Pure Internet category, however, presents a problem for plaintiffs seeking jurisdiction in their chosen forums. If a plaintiff is injured by a defamatory or infringing post on a website, and that is the defendant's only point of contact with the forum, the plaintiff may have no choice but to litigate in the defendant's home forum. This is a concern that has driven many courts and academic commentators to argue for a new Internet-specific test[200] that would potentially subject more defendants to personal jurisdiction in a plaintiff's chosen forum.

Nevertheless, the fact that personal jurisdiction is not found in Pure Internet cases does not necessarily indicate a flaw in the traditional personal jurisdiction doctrine. Arguably, exercising jurisdiction in these cases simply does not comport with due process. For example, a company that uses a website to target and serve only Chicago-area residents has done nothing to purposefully avail itself of the protections of Maryland's laws.[201] Jurisdiction in such instances

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194. *See Revell*, 317 F.3d at 473, 475–76.

195. *See id.*

196. 544 F.3d 1280 (11th Cir. 2008). For additional discussion regarding *Licciardello*, see *supra* notes 122–29 and accompanying text.

197. *Licciardello*, 544 F.3d at 1282–83.

198. The plaintiff had previously employed the defendant. *See id.* at 1282.

199. It also appeared to be a major reason that the court found it proper to exercise personal jurisdiction. While the court did not explicitly cite knowledge as a key factor, it was an underlying assumption throughout the analysis. *See id.* at 1287–88 (noting that the defendant "individually targeted" the plaintiff).

200. *See, e.g.*, ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 713 (4th Cir. 2002) (creating a new test for determining when an out-of-state citizen, "through electronic contacts, has conceptually 'entered' the State via the Internet for jurisdictional purposes"); Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1380 (2001) (arguing for a targeting-based approach to analyzing jurisdiction over Internet contacts).

201. Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 394–95, 402 (4th Cir. 2003).

would not be in accord with traditional notions of fair play and substantial justice.[202] Thus, when a Maryland court determines that it cannot exercise personal jurisdiction over the company, it appears that the traditional personal jurisdiction analysis is working despite the existence of the Internet.[203]

Unless courts or commentators see a fundamental issue with not exercising jurisdiction in such cases, then there is no reason to change the law; there is no problem to fix. Nevertheless, as a policy matter, courts should minimize the category of cases where personal jurisdiction is consistently denied by applying the doctrine in light of the taxonomy. By directing focus away from the Internet problem and paying attention to the existing contacts, courts can avoid getting bogged down by complex and unfamiliar technology. If courts recognize in each individual case whether (1) the Internet is merely incidental to the personal jurisdiction analysis, (2) the electronic contact is analogous to non-Internet contacts, or (3) jurisdictionally significant non-Internet facts are present, then courts can focus on applying traditional personal jurisdiction analysis. If the case truly belongs in the Pure Internet category, then after the court applies the traditional doctrine, the court likely cannot exercise personal jurisdiction. In either case, litigants will be able to better predict the result.

In addition to identifying and clarifying the characteristics of a true Internet case, the taxonomy also highlights the traditional personal jurisdiction doctrine's virtue. A major development in personal jurisdiction doctrine occurred when the court moved from *Pennoyer*'s physical presence analysis to *International Shoe*'s minimum contacts standard, and courts made the shift explicitly in response to technological stressors.[204] Despite some of the criticisms of the traditional personal jurisdiction doctrine,[205] the *International Shoe* Court was pragmatic to develop a test that was based in fundamental principles, yet also flexible enough to deal with decades of future developments. And, as the taxonomy illustrates, the doctrine appears to be well-equipped to handle stresses that Internet cases pose.

CONCLUSION

The automobile was a significant technological development that forced substantial change in personal jurisdiction doctrine. However, just because one technological advancement forced a dramatic shift in the doctrine does not mean

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202. *Id.*

203. The *Carefirst* court did not use a traditional personal jurisdiction analysis, but rather the *ALS Scan* test. *Id.* at 399–402. However, the effects test could have been applied to reach the same result. *See* Am. Info. Corp. v. Am. Infometrics, Inc., 139 F. Supp. 2d 696, 699–701 (D. Md. 2001) (finding no personal jurisdiction on similar facts). In *American Information Corp.*, for example, the court noted:

> If mere use of a protected mark on a Web site can create jurisdiction, where the Web site itself would not otherwise constitute minimum contacts, "every complaint arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located."

Id. at 701 (citations omitted).

204. *See supra* Part I.A.

205. *See supra* notes 49–50.

that all significant technological progress mandate a similar change. The confusion surrounding how to analyze electronic contacts has greatly muddled personal jurisdiction. But as the taxonomy shows, so-called "Internet cases" present no unique legal question; the traditional doctrine functions in these circumstances despite the existence of Internet facts. The taxonomy also demonstrates that in Pure Internet cases, there is an interesting trend where courts consistently fail to find personal jurisdiction. However, this does not necessarily mean the doctrine is useless or that new law must be developed to deal with the issue. It simply means that existing due process standards do not permit foreign courts to exert power in such cases.

In *Cyberspace and the Law of the Horse*, Judge Frank Easterbrook acknowledged that his familiarity with cyberspace was limited and that what little he did know would quickly become outdated.[206] This is an important recognition when dealing with the Internet and personal jurisdiction. Easterbrook said, "Let us not struggle to match an imperfect legal system to an evolving world that we understand poorly. Let us instead do what is essential to permit the participants in this evolving world to make their own decisions."[207] If courts and commentators would heed the taxonomy and focus on applying traditional personal jurisdiction law, even in the presence of Internet facts, predictability would return to the doctrine.

206. Easterbrook, *supra* note 12, at 208.
207. *Id.* at 215–16.