

**Offline Contacts Increasingly Analyzed Alongside Online Contacts:
While Many Aspects of Online Jurisdiction Appear to Be Near-Settled,
The Stream of Commerce Appears Muddy**

Gerard M. Stegmaier*

WILSON SONSINI GOODRICH & ROSATI, P.C.
RESTON, VA.

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Businesses and other organizations increasingly rely upon the Internet as a cornerstone of their sales, marketing, and operations efforts. Because the effects of these operations may be felt far and wide, the possibility exists that businesses may be haled into court to defend lawsuits far from their conventional places of business—so businesses must plan accordingly. Since the rise of e-commerce a decade ago, courts have repeatedly ruled that a company’s online activities, combined with its other activities, may subject that business to jurisdiction in what the business may view as an unreasonable or even unforeseen forum. Recent decisions suggest that much of the uncertainty surrounding whether U.S. courts will exercise jurisdiction based purely on Internet activities has waned. Courts increasingly appear to recognize that there is no separate or special test for evaluating Internet activities in the context of personal jurisdiction; instead, Internet-based jurisdictional analysis occupies a subset of traditional due process analysis. At the same time, other questions have yet to be fully resolved. As online and offline activities become increasingly integrated, and as distribution models become increasingly sophisticated, it is less clear how courts will analyze what it means for a business to place a product in the “stream of commerce” such that it “purposefully avails” itself of the benefits and protections of the laws of a given jurisdiction.

Supreme Court Personal Jurisdiction Jurisprudence

The U.S. Supreme Court’s long-settled jurisprudence dictates that a court may obtain personal jurisdiction over a defendant so long as it comports with due process. Due process requires that a defendant must have (1) “minimum contacts” with the forum state such that (2) maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*, 326 US 310, 316 (1945). A defendant need not be physically present within the state, but there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and the protections of the forum state’s laws. *Hanson v. Denckla*, 357 US 235, 254 (1958).

Personal jurisdiction may be of two types, specific or general. Under the “specific” personal jurisdiction concept, a court derives its authority because the plaintiff’s cause of action arises directly from the defendant’s activity purposefully directed towards the forum state. The court does not have jurisdiction to hear other claims against the same defendant which do not arise from the forum-directed activity. “General” personal jurisdiction, on the other hand, may be asserted over a defendant in any forum where the defendant’s activities in the forum state have been substantial, continuous, and systematic. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 US 408, 416-18 (1984). Where general personal jurisdiction is found, the court may adjudicate both forum-connected claims as well as claims that have no connection to the forum state.

The Supreme Court has also held that “a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state” may satisfy “minimum contacts.” See *World-Wide Volkswagen Corp. v. Woodson*, 444 US 286, 297-98 (1980). The Court’s most recent decision on the

* The author is an attorney with Wilson Sonsini Goodrich & Rosati, P.C. in Reston, Virginia. He also serves as an adjunct professor teaching various technology and intellectual property-related courses at George Mason University School of Law, and as a member of the Privacy Advisory Committee of the Virginia Legislature’s Joint Commission on Technology & Science. The author may be reached by e-mail at gstegmaier@wsgr.com. The views expressed herein are entirely the author’s and do not represent the views of any organization with which he may be affiliated.

nature and meaning of purposeful availment in the context of the stream of commerce came in *Asahi Metal Indus. Co. v. Superior Court*, 480 US 102 (1987).

Asahi involved the assertion of personal jurisdiction over a foreign corporation that manufactured a component of a product that ultimately ended up in the forum and caused injury there. Four members of the Court, led by Justice O'Connor, urged that more than a "mere act of placing the product into the stream of commerce" is required to satisfy the minimum contacts standard. What due process demands is "an act of the defendant purposefully directed toward the forum state." *Asahi*, 480 US at 112. Justice Brennan, on the other hand, joined by three other members of the Court, rejected this approach and argued that "additional conduct" is not required when the defendant places goods in the stream of commerce, defined as "the regular and anticipated flow of products from manufacture to distribution to retail sale." *Id.*

Whether entry into the stream of commerce *plus* purposeful conduct is required, or only the former, has been the subject of significant, unresolved debate. Given the maturation of e-commerce, and in light of the latest decisions (discussed below), it seems increasingly likely that courts, and perhaps the Supreme Court itself, may confront the outstanding issue left unresolved by *Asahi*.

Rise of the Internet Creates Uncertainty

The notion of a business purposefully availing itself of the benefits and protections of a particular state's laws does not mesh easily with the notion of cyberspace, where geography is of limited relevance. Moreover, applying traditional jurisdictional concepts to new forms of commerce has not been without its challenges.¹ Over the past few years, U.S. courts have wrestled with the issue of what types of online activities might subject a defendant to the jurisdiction of a court in a remote forum. As recently as 1997, some federal district courts determined that simply maintaining a web site accessible within the forum state was sufficient to subject a defendant to the forum court's jurisdiction. *Superguide Corp. v. Kegan*, 1 ILR (P&F) 348, 987 F Supp 481 (WD NC 1997); *Inset Sys., Inc. v. Instruction Set, Inc.*, 1 ILR (P&F) 729, 937 F Supp 161 (D Conn 1996). With the introduction of new technology and new functionality, some U.S. courts went so far as to craft specific and distinct analytical frameworks for evaluating whether personal jurisdiction could be exercised in Internet cases, the most influential of which has been found in the *Zippo* case.² Today this framework remains relevant, but in and of itself is not determinative as to whether a defendant has purposefully availed itself of the benefits and protections of the forum so as to make itself amenable to the exercise of a court's jurisdiction.

The Zippo Sliding Scale

Zippo Mfg. Co. v. Zippo Dot Com, Inc. represents perhaps the best known and most frequently cited case addressing personal jurisdiction and the Internet. *Zippo* involved a trademark infringement claim filed against Zippo Dot Com, Inc. (ZDC), an Internet news service located in California. The Pennsylvania federal court ruled that it had specific personal jurisdiction over ZDC based on ZDC's forum contacts. The judge set forth a "sliding scale" test to evaluate the nature and quality of a defendant's Internet activity, a test which proved influential in subsequent cases:

At the one end of the spectrum are situations where a defendant clearly does business over the Internet. . . . At the opposite end are situations where a defendant has simply posted information on an Internet website which is accessible to users in foreign jurisdictions. . . . The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.

952 F Supp at 1124.

Reading *Zippo* in isolation (as some who seek to separate the "new economy" from the "old" might be tempted to do) could lead one to overemphasize online activities and neglect other important considerations. As Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has observed with regard to examining law and cyberspace, any inquiry that considers only cyberspace "is doomed to be shallow and to miss unifying principles."³ Several recent decisions dealing with the issue of jurisdiction and online activities confront this

¹ See, generally, *Kulko v. Superior Court*, 436 US 84, 92 (1978) (pointing out the difficulty of analyzing jurisdictional questions and noting that minimum contacts analysis generates few "black and white" answers).

² *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 2 ILR (P&F) 286, 952 F Supp 1119 (WD Pa 1997).

³ FRANK H. EASTERBROOK, CYBERSPACE AND THE LAW OF THE HORSE, U. Chi. Legal F. 207, 207 (1996).

concern head on and refocus the jurisdictional inquiry along traditional lines.⁴ One decision goes so far as to expressly adopt Judge Easterbrook's maxim and arguably suggests that analyzing Internet jurisdiction in isolation from the traditional tests may have about as much utility as becoming expert in "the law of the horse."⁵

In *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 15 ILR (P&F) 80, 297 F Supp 2d 1154, 1161 (WD Wis 2004), Chief Judge Crabb of the Western District of Wisconsin adopted Judge Easterbrook's thinking when she noted that "the best way to learn the law applicable to specialized endeavors is to study general rules." Judge Crabb further recognized that while some courts "have adopted specialized tests that attempt to place manageable limits on the state's reach over defendants that maintain websites . . . the rigid adherence to the *Zippo* test is likely to lead to erroneous results." *Id.* at 1159-60. Judge Crabb expressed further concern that the "Supreme Court has never held that courts should apply different standards for personal jurisdiction depending on the type of contact involved." *Id.*

Similarly, in *Shamsuddin v. Vitamin Research Prods.*, 2004 ILRWeb (P&F) 3035, 346 F Supp 2d 804 (D Md 2004), a Maryland district court emphasized in joining other courts that "[t]he construction of the information superhighway does not warrant a departure from the well-worn path of traditional personal jurisdiction analysis." The court further observed that "website interactivity may have some bearing on the jurisdictional analysis, but it does not control the outcome." *Id.* at 811. In discussing the analysis of online and offline conduct, the court emphasized that the "ultimate question remains the same, that is, whether the defendant's contacts with the state are of such a quality and nature such that it could reasonably expect to be haled into the courts of the forum state." *Id.* at 813 (citing *Hy Cite*, 297 F Supp 2d at 1161).

These and other decisions reflect the growing consensus that the question of how interactive the defendant's web site is—measured with the *Zippo* sliding scale test—often relates to the court's evaluation of whether the defendant knew that it was conducting business in the state and therefore could reasonably foresee being sued there. Even so, the jurisdictional battlefield is just heating up as courts wrestle with the realities of e-commerce coupled with global product distribution. Although recent cases recognize that purposeful availment remains the touchstone for determining minimum contacts,⁶ the cases recognize ambiguities resulting from the Supreme Court's decision in *Asahi*. Thus, the question of whether jurisdiction may be established by mere entry into the stream of electronic commerce, or whether that entry must be coupled with purposeful conduct, may be ripening for resolution.

Purposeful Availment: The Touchstone of Minimum Contacts

Cases analyzing Internet activity recognize that, in the United States at least, regardless of a web site's passivity or interactivity, the critical inquiry remains the same—did the defendant purposefully direct activity at the forum state? See, e.g., *Vinten v. Jeantot Marine Alliances, S.A.*, 2002 ILRWeb (P&F) 2225, 191 F Supp 2d 642, 647 (D SC 2002). Courts have expressly recognized that the Internet is merely a channel or mode by which transactions and contacts can occur, and it is the nature and quality of the underlying exchanges that will determine whether the assertion of personal jurisdiction comports with due process.

The U.S. Supreme Court chose not to hear, and thereby let stand, a decision of the Fourth Circuit holding that maintenance of a web site alone was not sufficient to confer personal jurisdiction over a defendant in a Maryland federal court. The decision remains a significant example of how some courts approach these questions. In *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 11 ILR (P&F) 135, 293 F3d 707 (4th Cir 2002), the federal appeals court concluded that because the defendant, an Internet service provider, had not directed its electronic activity specifically toward Maryland, and did not manifest an intent to engage in business or some other interaction in Maryland, the defendant's contacts were insufficient to support personal jurisdiction in Maryland. Other circuits have cited *ALS Scan* with approval and relied upon its reasoning in resolving personal jurisdiction issues where some of the alleged forum contacts were based on online activities.⁷

Before analyzing the defendant's contacts, the Fourth Circuit traced the historic limits on personal jurisdiction. It recognized that assertions of jurisdiction were originally rooted in the court's power over the actual person of the

⁴ *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 15 ILR (P&F) 80, 297 F Supp 2d 1154 (WD Wis 2004); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 11 ILR (P&F) 135, 293 F3d 707 (4th Cir 2002); *Revell v. Lidov*, 12 ILR (P&F) 629, 317 F3d 467 (5th Cir 2002).

⁵ *Hy Cite*, 297 F Supp 2d at 1161.

⁶ *Commissariat A L'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F3d 1315 (Fed Cir 2005); *Shamsuddin v. Vitamin Research Prods.*, 2004 ILR Web (P&F) 3035, 346 F Supp 2d 804 (D Md 2004).

⁷ *Jennings v. AC Hydraulic A/S*, 17 ILR (P&F) 348, 383 F3d 546 (7th Cir 2004).

defendant. The court recognized that changes wrought by technology might complicate jurisdictional inquiries, but that such changes could not supplant the fundamental principle that, regardless of the fact that business increasingly takes place in a world without boundaries, “a defendant may not be called upon [to defend a lawsuit in a state where he does not reside] unless he had the ‘minimal contacts’ with that State.” *Id.* at 711 (quoting *Hanson*, 357 US at 250-51).

The *ALS Scan* court then expressly adopted the *Zippo* model, concluding that a state may, consistent with due process, exercise judicial power over a person outside of the state if 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.

Id. at 714.

Under this model, “a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received.” *Id.* The court reached that conclusion in part because such conduct would not generally create a cause of action cognizable in courts located in the state. *Id.* Put in terms of *Zippo*, a “passive” web site, by itself, does not suffice to establish “minimum contacts.”

The Fourth Circuit further reasoned that the analysis of electronic media contacts was similar to the analysis under the “effects test” set forth by the Supreme Court in *Calder v. Jones*, 465 US 783 (1984). In *Calder*, the Court held that a court could permissibly exercise jurisdiction over an out-of-state defendant whose only material contact with the forum was the publication of a libelous story that was directed at a resident of the forum state and circulated in the forum state. The Court explained that jurisdiction was appropriate because “the injury would be felt by the resident in the State in which she lives and works.” *Id.* at 789-90. The *ALS Scan* court concluded that merely maintaining a web site accessible within the forum state did not rise to the level of the contacts found constitutionally sufficient in *Calder*.

The *Revell* Decision

Similarly, the Fifth Circuit held that a plaintiff’s residence in the forum and the suffering of harm there “will not alone support jurisdiction under *Calder*.” In *Revell v. Lidov*, 12 ILR (P&F) 629, 317 F3d 467 (5th Cir 2002), the court reviewed a decision dismissing claims for lack of personal jurisdiction. A former associate director of the FBI sued nonresidents—an assistant professor and a university—for defamation arising out of the professor’s authorship of an article that he posted on an Internet bulletin board hosted by the university. In examining the question of general personal jurisdiction, the court acknowledged that “[t]hrough maintenance of a website is, in a sense, a continuous presence everywhere in the world,” merely posting an article about a resident of the forum was not sufficient to assert personal jurisdiction over the out-of-state defendants.

In addition to relying upon the Fourth Circuit’s *ALS Scan* decision, the *Revell* court pointed to recent defamation decisions of the Fourth, Sixth, and Third Circuits, including *Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F3d 1110 (6th Cir 1994); *Remick v. Manfredy*, 8 ILR (P&F) 290, 238 F3d 248 (3d Cir 2001); and *Young v. New Haven Advocate*, 12 ILR (P&F) 379, 315 F3d 256 (4th Cir 2002). The Fifth Circuit’s treatment of defamation and purposeful availment departed from the Tenth Circuit’s view in *Burt v. Board of Regents of Univ. of Nebraska*, 757 F2d 242 (10th Cir 1985) (applying *Calder* to support personal jurisdiction in Colorado where a Nebraska university doctor had written unflattering and allegedly defamatory letters about the plaintiff in response to requests from Colorado hospitals, despite the fact that the content focused on the plaintiff’s activities in Nebraska, not Colorado).

According to the Fifth Circuit, *Calder* requires both that the harm be felt in the forum and that the forum be the focal point of the publication. *Revell*, 317 F3d at 474 n.48. Further, the Fifth Circuit cited with approval the statement in *ALS Scan* that “application of *Calder* in the Internet context requires proof that the out-of-state defendant’s internet activity is expressly directed at or directed to the forum state.” *Id.* at 475. Taken together, these cases indicate that a publication on the Internet directed at the whole world, as opposed to a specified forum, may not be enough to sustain personal jurisdiction under *Calder*.

In the context of online activities, “purposeful availment” perhaps is best described by the Supreme Court’s language in *Burger King Corp. v. Rudzewicz*, 471 US 462, 474 (1985). Under that decision, one cannot purposefully avail oneself of “some forum someplace”; rather, due process requires that “the defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.” *Id.* Thus, at least in some of the U.S. federal judicial circuits, “knowledge of the particular forum in which a potential

plaintiff will bear the brunt of the harm forms an essential part of the *Calder* test,” because such knowledge is essential to determining whether a defendant could reasonably anticipate being haled into court in that forum. *Revell*, 317 F3d at 475 (collecting authority).

Recent Precedent Reaffirms the Significance of the Purposeful Availment Standard

The nature, quality, and extent of a defendant’s overall contacts with a state, and the connection between those contacts and the claims at issue, determine whether the exercise of *specific jurisdiction* over the defendant comports with due process. In this analysis, traditional and Internet-based contacts are aggregated. What ultimately matters are the traditional factors: the extent to which the defendant targets business within the state; the amount of revenue the defendant receives from the state; whether the defendant has agents, offices, bank accounts, or other property within the state; and the connection between the defendant’s in-state contacts and the lawsuit that was filed.

Recent *specific jurisdiction* cases dealing with online “contacts” with a forum elaborate on these basic rules in the evolving world of e-commerce. Recent *general jurisdiction* cases broke new ground because they suggest that defendants’ Internet contacts with a forum state could be potentially “substantial, continuous and systematic” enough to support the exercise of general jurisdiction.

Recent Specific Jurisdiction Cases

A recent pronouncement on personal jurisdiction based on online activities came in *Trintec Indus., Inc. v. Pedre Promo. Prods., Inc.*, 17 ILR (P&F) 374, 395 F3d 1275 (Fed Cir 2005). There, the Federal Circuit reversed a dismissal below for lack of personal jurisdiction and remanded for additional discovery. In *Trintec*, while defendant Pedre had no offices, facilities, employees, or representatives in the forum, the plaintiff argued that jurisdiction was proper by virtue of its interactive web site, which had allegedly been utilized to sell infringing products to customers in Washington, D.C. The Federal Circuit acknowledged that “the availability and use of a highly interactive, transaction-oriented website (as opposed to an ‘essentially passive’ website) by itself may support long-arm jurisdiction wherever the site is available to potential customers for the purpose of doing business.” *Id.* at 1281. But the court concluded that it was “unclear” from the “ambiguous” record how often the interactive features on Pedre’s web site were actually used, and whether any D.C. residents had purchased infringing products through Pedre’s web site. *Id.* The court remanded on these issues.

Trintec may have additional ongoing significance because of its dictum concerning the relationship between the defendant and third-party web sites which allegedly contained hyperlinks to the defendant’s web site and offered its products for sale in the forum. The Federal Circuit observed that the existence of the third-party web sites “would support jurisdiction only if [defendant] had some responsibility for the third party’s advertising of [its] products on non-[defendant] sites.” *Id.* at 1281-1282.

In *Jennings v. AC Hydraulic A/S*, 17 ILR (P&F) 348, 383 F3d 546, 550 (7th Cir 2004), the Seventh Circuit ruled that “a defendant’s maintenance of a passive website does not support the exercise of personal jurisdiction over that defendant in a particular forum just because the website can be accessed there.” Like the Fourth Circuit in *ALS Scan*, the Seventh Circuit feared that “without requiring some level of ‘interactivity’ between the defendant and consumers in the forum state,” the fact that such sites are globally accessible would “create almost universal personal jurisdiction.”

Jennings’s significance may rest in the fact that the court agreed with the defendant’s contention that it did not offer its products directly for sale to consumers in the forum. For this reason, the defendant, a Danish manufacturer, was not subject to jurisdiction in Indiana. While the Seventh Circuit acknowledged that the defendant’s web site provided contact information and descriptions of its products, the site did not actually allow online purchasing via the Internet, and the defendant therefore did not have sufficient contacts with Indiana to be haled into court there.

In *Toys “R” Us, Inc. v. Step Two, S.A.*, 12 ILR (P&F) 764, 318 F3d 446, 452 (3d Cir 2003), the Third Circuit held that “[i]f a defendant web site operator intentionally targets the site to the forum state, and/or knowingly conducts business with forum state residents via the site, then the ‘purposeful availment’ requirement is satisfied.” The panel added that “non-internet contacts such as serial business trips to the forum state, telephone and fax communications directed to the forum state, purchase contracts with forum state residents, contracts that apply the law of the forum state, and advertisements in local newspapers, may form part of the ‘something more’ needed to establish personal jurisdiction.” *Id.* at 453-54. The *Toys “R” Us* court, like the *Jennings* court, cited with approval the three-part test set forth by the Fourth Circuit in *ALS Scan*.

In *Toys “R” Us*, the plaintiff filed suit in New Jersey against Step Two, a Spanish toy company, alleging that Step Two had cybersquatted on the Toys “R” Us web site and misappropriated Toys “R” Us’s trademarks. Step Two did not operate any stores, maintain any offices or bank accounts, or have any employees anywhere in the

United States. Nor did it pay taxes to the federal government or to any state. *Id.* at 449. Although four of Step Two's five Spanish-language web sites were interactive and allowed customers to purchase goods online, there was conflicting evidence as to whether Step Two had sold any products to New Jersey consumers or targeted New Jersey consumers as part of its business operation. *Id.* at 450-51. Accordingly, the court remanded for jurisdictional discovery "on the limited issue of Step Two's business activities in the United States, including business plans, marketing strategies, sales, and other commercial interactions." *Id.* at 458.

The Sixth Circuit's views on the interplay between the law of personal jurisdiction and Internet activities may be found in *Neogen Corp. v. Neo Gen Screening, Inc.*, 10 ILR (P&F) 355, 282 F3d 883, 890 (6th Cir 2002). Relying on *Zippo*, the court held that the purposeful availment requirement may be satisfied "if the web site is interactive to a degree that reveals specifically intended interaction with residents of the state." In *Neogen*, specific jurisdiction was deemed proper because, not only did defendant NGS maintain an interactive web site, but NGS also responded to business inquiries from Michigan residents, mailed completed blood test results to Michigan customers, and accepted payment by mail from these customers. *Id.* Given these contacts, "the absolute amount of business conducted by NGS in Michigan represents something more than 'random, fortuitous, or attenuated contacts' with the state." *Id.* at 892 (quoting *Burger King*, 471 US at 476).

Recent General Jurisdiction Cases

In *Lakin v. Prudential Sec., Inc.*, 14 ILR (P&F) 885, 348 F3d 704 (8th Cir 2003), the Eighth Circuit had to decide whether Prudential Savings Bank could be sued in Missouri for breach of fiduciary and contractual duties. The court first determined that specific jurisdiction did not exist, because the cause of action concerned events that occurred exclusively in Tennessee. Although Prudential maintained no offices, employees, or registered agents in Missouri, the court noted that, considering that it had made \$10 million in loans to Missouri residents, "Prudential Security will have liens on hundreds to thousands of pieces of real property in Missouri and the power to use Missouri courts to enforce them." The court then analyzed whether Prudential's Internet contacts, when added to the \$10 million in loans, sufficed to establish general jurisdiction. "Certainly, we believe that a consideration of the 'nature and quality' of a Web site and a determination of whether it is 'interactive,' 'does business,' or is merely 'passive' is an important factor in our analysis. However, we have long held that the 'nature and quality' of contacts is only one factor to consider." *Id.* at 711 (quoting *Zippo*, 952 F Supp at 1124).

The court explained that the three primary factors for determining the existence of general jurisdiction, which apply both to traditional sets of contacts and Internet-based contacts, are the *nature* of the contacts, the *quality* of the contacts, and the *quantity* of the contacts. The two secondary factors are the interests of the forum state and the convenience of the parties. *Id.* at 711-12. The court cited *Revell*, 317 F3d at 471, for the statement that the *Zippo* sliding-scale test regarding interactivity "is not well adapted to the general jurisdiction inquiry, because even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction." *Lakin*, 348 F3d at 712.

Even so, the court looked to the *Zippo* framework for guidance, and found that the Prudential web site "falls under the middle category of *Zippo*—a sophisticated, interactive Web site in which a user can exchange information with the host computer." *Id.* at 712. The interactive web site, together with the \$10 million in loans going to Missouri, was insufficient to establish general jurisdiction without additional detailed fact finding. Accordingly, the court remanded for a determination of "the number of times that Missouri consumers have accessed the Web site; the number of Missouri consumers that have requested further information about Prudential Savings' services; the number of Missouri consumers that have utilized the online loan-application services; the number of times that a Prudential Savings representative has responded to Missouri residents after they have applied for a loan; the number and amounts of home-equity or other loans that resulted from online-application submission by Missouri consumers, or which are secured by Missouri property." *Id.* at 712-713.

In *Gator.com Corp. v. L.L. Bean, Inc.*, 14 ILR (P&F) 544, 341 F3d 1072 (9th Cir 2003), the Ninth Circuit broke new ground by finding the assertion of general jurisdiction to be proper even though defendant L.L. Bean's sole contacts with California arose from its web site sales operation, which accounted for six percent of its total sales. The general jurisdiction analysis turned on whether the defendant's contacts with the forum state were "continuous and systematic." "Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there." *Id.* at 1076-77. The court's recognition that general jurisdiction over L.L. Bean existed in California was based on its finding that L.L. Bean received "millions of dollars in sales [in California], driven by an extensive, ongoing, and sophisticated sales effort involving very large numbers of direct email solicitations and millions of catalog sales." *Id.* at 1080. "Admittedly, L.L. Bean has few of the factors traditionally associated with physical presence, such as an official agent or incorporation," the court conceded. "Nevertheless, we find that there

is general jurisdiction in light of L.L. Bean's extensive marketing and sales in California, its extensive contacts with California vendors, and the fact that, as alleged by Gator, its website is clearly and deliberately structured to operate as a sophisticated virtual store in California." *Id.* at 1078.⁸

**Implications: Traditional Principles Still Reign,
But Uncertainty in Individual "Stream of Commerce" Cases Exists**

The Supreme Court's decision not to review *ALS Scan*, coupled with decisions such as *Revell* and others discussed above, suggest the following:

- 1) In the United States, except for perhaps defamation or similar claims, a defendant's *passive* web site, accessible in the forum, will not be sufficient by itself to establish personal jurisdiction in the forum state.
- 2) Nor will the mere fact that a web site is *interactive* be enough to establish jurisdiction. Instead, courts will use a traditional analysis of the nature and quality of the interactive (and traditional) contacts to determine whether the "purposeful availment" requirement has been met.
- 3) Courts will analyze Internet and other contacts in the *aggregate* to determine whether a defendant has purposefully availed himself of the benefits and protections of the forum state, even though the precise process of aggregation still needs to be refined in light of the conflicting opinions expressed in the Supreme Court's *Asahi* decision.
- 4) *New technology* does not and should not change the way in which the due process implications of asserting personal jurisdiction are analyzed.
- 5) Due process is not served where jurisdictional analysis based on online activities renders *unpredictable* whether a defendant will be found subject to personal jurisdiction based on the defendant's primary conduct.

As the *Gator* and *Lakin* cases suggest, two themes appear to be emerging in jurisdictional cases involving online activities. First, where plaintiffs are able to establish conclusively that the e-commerce-related activities of an online business demonstrate an intent to service a market *and* a forum, minimum contacts sufficient to satisfy due process may exist. Second, the seemingly arbitrary line drawn between online activities and the brick and mortar world, which a literal reading of *Zippo* would dictate, is beginning to fade. Correspondingly, traditional jurisdictional analysis has been reinvigorated in the Internet context.

As a result of these developments, it seems likely that courts faced with analyzing the interplay between online and offline activities will increasingly test the boundaries of the Supreme Court's *Asahi* decision.

The Federal Circuit recently confronted *Asahi*, although not in the context of online activities. See *Commissariat A L'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F3d 1315 (Fed Cir 2005). While not an e-commerce case *per se*, the *Chi Mei* case is nevertheless instructive for online jurisdiction cases because it raises the specter of future challenges based on the particulars of increasingly complex online distribution systems and mechanisms in which a potential defendant may supply only a virtual component of a product or service which allegedly causes injury within a given forum.

Chi Mei overturned a district court decision dismissing a case for lack of jurisdiction and remanded the case for limited jurisdictional discovery. The trial court heard evidence that the defendant had not "transacted business itself, nor performed any type of work in" the forum and had no operations, employees, licenses, or property of any kind in the forum. The court also examined evidence that the defendant sold over \$1 billion dollars in products worldwide, that North America accounted for approximately 30% of the market for the products of the type sold by the defendant, and that the defendant had approximately a 12% share of this market. Defendants maintained that the mere introduction of their products into the "stream of commerce" was insufficient to confer jurisdiction. *Id.* at 1317-18.

The Federal Circuit concluded that evidence of North American market share and worldwide market share was "sufficient to demonstrate that [defendant] sells a very large volume of [its products] to companies which incorporate these displays into their final product and that these products are likely sold in Delaware in substantial quantities." *Id.* at 1320. More importantly, the Federal Circuit recognized that it was a difficult question under existing case law whether the defendant's large revenues from selling products in Delaware justified a finding of personal jurisdiction in that state where the purchases themselves were foreseeable, but there were no additional

⁸ The *Gator* decision will not control necessarily because after agreeing to re-hear the decision *en banc*, the case was subsequently settled and the appeal mooted. *Gator.com Corp. v. L.L. Bean, Inc.*, 17 ILR (P&F) 352, 398 F3d 1125 (9th Cir 2005).

contacts such as advertising or marketing to reflect the defendant's intent to serve the Delaware market in particular. *Id.* at 1321-22. Compare *Soo Line R.R. Co. v. Hawker Siddeley Canada, Inc.*, 950 F2d 526, 529 (8th Cir 1991). “[M]inimum contact analysis does not permit contact with a market to substitute for contact with a forum.”

After reviewing well-established traditional jurisdictional precedent, the Federal Circuit confronted *Asahi*. The Federal Circuit concluded that on the record before it, the test as set forth by Justice Brennan had been satisfied but that evidence had not yet been presented that would satisfy the stream of commerce plus purposeful conduct standard endorsed by the O'Connor four. Accordingly, the Federal Circuit concluded that the case presented a factual scenario that “would require us to determine whether or not additional conduct, beyond a showing of use of established distribution channels, is required to meet the demands of due process under the stream of commerce theory of personal jurisdiction.” *Chi Mei*, 395 F3d at 1322. In a footnote, the Federal Circuit sidestepped resolving the *Asahi* controversy by noting that it had “yet to decide whether Justice Brennan's standard is sufficient to satisfy due process, because we have yet to be presented with facts that do not meet the more rigorous standard adopted by Justice O'Connor.” *Id.* at 1322 n.7. Rather, the court concluded that it need not do so in *Chi Mei* because of the “inadequate record.” *Id.* at 1322.

In putting off the question for another day, the Federal Circuit acknowledged competing circuit authority on the proper interpretation of *Asahi* and opined that there was “substantial uncertainty” concerning the proper interpretation of the Due Process Clause under the stream-of-commerce doctrine. *Id.* at 1322.

While the Federal Circuit avoided deciding the question, at least one court has chosen to embrace and decide the question in the context of e-commerce. The *Shamsuddin* court confronted the *Asahi* plurality and addressed the issue head on. There, the defendant's choice to sell its products over the Internet—a sort of global “distributor”—was similar to placing its products into the stream of commerce with the knowledge that the stream “may or will sweep the product[s] into the forum State.” Although the defendant, unlike *Asahi*, created and controlled the “distribution system,” *i.e.*, its web site, it engaged in no other actions demonstrating “an intent or purpose to serve the market” in Maryland. Insofar as the defendant targeted no particular forum and would sell to whoever wished to buy, its placement of its products for sale through its web site was no more purposeful than placing products for sale on an Internet auction site, the court concluded. Going further, the court observed “the fact that consumers can purchase VRP's products over the Internet fails to demonstrate that VRP has taken actions purposefully directed at Maryland.” *Shamsuddin*, 346 F Supp 2d at 816-817.

Given the nature and number of cases involving evaluation of Internet-related “contacts” and the continuing introduction of new business products and technologies, the need for clarity relating to the true meaning of *Asahi* seems especially relevant.

Conclusion

As global content distribution matures, with many businesses utilizing both online and offline forum contacts (and potentially deriving large benefits from the forums as in *L.L. Bean*), it seems likely that, sooner rather than later, a case may come up requiring the Supreme Court to resolve its internal difference of opinion in *Asahi*. In the interim, uncertainty may reign, and the outcome in close cases may be difficult to predict. Purposeful availment questions will continue as our understanding of the nature and meaning of the stream of commerce matures, but going forward, it appears that traditional modes of analyzing the issues will remain the starting point.

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