Part V: Intellectual Property, Technology, and the Internet

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Jurisdiction in the Information Age

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I. [16.1] INTRODUCTION

The Internet’s broad connectivity and the difficulty of locating users continue to cause much debate over how to apply jurisdictional limitations to cyberspace. Indeed, the borderless nature of the Internet can, in theory, lead to substantial overlap of laws and ambiguity in their application. So what laws should govern an Internet user? What jurisdiction should apply to disputes arising from the use of the Internet, particularly at a time when local, state, national, and foreign authorities are claiming more expansive roles and asserting broader reach across cyberspace? Despite the development of substantial caselaw on this issue since the early boom years of the Internet, these questions continue to be critically important when we consider that the protections afforded to intellectual property still vary among jurisdictions. With new technological tools such as software-as-a-service solutions, cloud computing, and mobile applications — and the relatively slow pace of digital rights management standards — the ease with which intellectual property rights are infringed or misappropriated, and the increasing stealthiness of infringers, give added urgency to answering these questions with more certainty than in the past. For U.S. industries most dependent on copyright protection, there is a lot at stake. According to a report prepared for the International Intellectual Property Alliance by Stephen E. Siwek of Economists Inc., these industries added $1.9 trillion in value to the U.S. economy in 2013 alone. See Copyright Industries in the U.S. Economy: The 2014 Report, p.2 (2014), www.riaa.com/wp-content/uploads/2015/09/2014_CopyrightIndustries_USReport.pdf (case sensitive).

In the United States, the basis of determining jurisdiction is tied to constitutional guarantees, state and federal law, and the application of specific facts about the conduct of the parties both on and off the Internet. Should a company that operates a passive website to describe its products or services be brought into a court of any jurisdiction merely because its website is accessible from any computer worldwide? Can a website owner preempt this problem by selecting a jurisdiction as part of its online terms and conditions? Can the website owner segment the web-based content in such a way as to reduce risks of liability in certain jurisdictions? These are but a few of the jurisdictional issues arising from the different levels of interactivity between parties on the Internet.

II. [16.2] TRADITIONAL CONCEPTS OF JURISDICTION

Early notions of jurisdiction were based on the idea that a sovereign has authority over everyone and everything found within its borders; a corollary to that, of course, was that a sovereign has no authority over anyone or anything outside its borders. In the United States, this understanding was reflected in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877), in which the court restricted a state’s assertion of personal jurisdiction over a nonconsenting noncitizen primarily to those situations in which the defendant was personally served with process in the forum, and in Foley Bros., Inc. v. Filardo, 336 U.S. 281, 93 L.Ed. 680, 69 S.Ct. 575 (1949), in which the court noted that acts of Congress are presumed to apply only to conduct undertaken in the United States.
Responding to the need for a broader understanding of the constitutional scope of state jurisdictional authority, the U.S. Supreme Court in 1945 decided *International Shoe Co. v. State of Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). Because the Full Faith and Credit Clause in Article IV, §1, of the U.S. Constitution compels every state to enforce the judgments of a sister state if the judgment comports with due process, it is not necessary to describe jurisdictional constraints based on the ability of the state rendering the judgment to enforce it — a basis for limiting jurisdiction to those situations in which a state has physical power over the defendant. Instead, due process requires a focus on fairness to the defendant, a focus the Court defined as the determination of whether the defendant had “minimum contacts” with the forum such that its assertion of jurisdiction did not offend “traditional notions of fair play and substantial justice.” 66 S.Ct. at 158, quoting *Milliken v. Meyer,* 311 U.S. 457, 85 L.Ed. 278, 61 S.Ct. 339, 343 (1940). The existence of such contacts, in turn, depends on the “quality and nature” of the defendant’s acts in the forum “in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.” 66 S.Ct. at 160.

The *International Shoe* Court envisioned jurisdiction based on the past presence of a defendant in the forum. In *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228, 1240 (1958), the Court formulated the inquiry as whether the defendant had “purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” Jurisdiction remained tied to geography. The choice of the defendant to enter and act within the territory and, by virtue of the defendant’s presence there, to be protected by its laws made it fair to insist that the defendant return to the territory to answer claims arising out of the defendant’s past presence. However, it is not always necessary that an individual be physically present in a state to invoke its laws, interact with its citizens, or cause effects within its territory. Whether actions undertaken outside the state may justify the assertion of jurisdiction by it has been addressed by courts, both before and after the explosion of new technologies.

Under *International Shoe*, supra, there are two ways to find the sufficient minimum contacts for jurisdiction. First, the nonresident defendant may have so many contacts with the forum jurisdiction that personal jurisdiction is allowed in general, known as “general jurisdiction.” See §16.3 below. More commonly, the nonresident defendant does not have enough contacts to warrant general jurisdiction for all matters but does have sufficient contacts related to the subject of the lawsuit so that jurisdiction over this specific matter is allowed, known as “specific jurisdiction.” See §16.4 below.

**A. [16.3] General Jurisdiction**

General jurisdiction exists when a defendant is domiciled in the forum state or his or her activities there are “substantial” or “continuous and systematic.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 80 L.Ed.2d 404, 104 S.Ct. 1868, 1872 – 1873 (1984). This type of jurisdiction requires that the defendant has actively and purposefully engaged in numerous and frequent transactions in the forum state. *Id.* The standard for general jurisdiction is very difficult, and the Supreme Court has upheld it only once. See *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413 (1952) (president of
Philippine mining company kept files in Ohio office, had Ohio bank accounts, and paid salaries from Ohio. No court has ever, to date, found general jurisdiction as a result of an Internet website or communication. See, e.g., *IDS Life Insurance Co. v. SunAmerica, Inc.*, 958 F.Supp. 1258 (N.D.Ill. 1997), aff’d in part, vacated in part on other grounds, 136 F.3d 537 (7th Cir. 1998); *McDonough v. Fallon McElligott, Inc.*, 40 U.S.P.Q.2d (BNA) 1826, 1996 WL 753991 (S.D.Cal. 1996).

**B. [16.4] Specific Jurisdiction**

The critical pre-Internet specific jurisdiction case is *Calder v. Jones*, 465 U.S. 783, 79 L.Ed.2d 804, 104 S.Ct. 1482 (1984), in which a California plaintiff brought a libel action against the author and editor of an article about her published by the National Enquirer. The corporation did not dispute jurisdiction; its papers were sold in the state. The individual defendants, however, argued that they had never been present in any jurisdictionally relevant way in California and that, therefore, the state could not constitutionally assert jurisdiction over them. The Court disagreed because the article for which they were responsible had targeted the plaintiff in California. She lived in the state, her career was based in the state, and the activities the article reported had allegedly occurred in the state.

Specific jurisdiction is generally applied using a three-part test:

1. The nonresident defendant engaged in an activity or consummated a transaction with the forum by which the defendant purposefully availed itself of the privilege of conducting activities in that forum, thereby invoking the benefits and protections of its laws.

2. A claim must arise out of or result from the defendant’s forum-related activities.

3. The exercise of jurisdiction must be reasonable.

The U.S. Supreme Court affirmed the importance of specific personal jurisdiction by unanimously affirming the dismissal of a case in which the court’s jurisdiction was based on the defendant’s conduct. See *Walden v. Fiore*, ___ U.S. ___, 188 L.Ed.2d 12, 134 S.Ct. 1115, 1124 (2014) (finding Nevada court had no personal jurisdiction over police officer who seized plaintiff’s property in Georgia, even when officer knew that plaintiff was headed to Nevada).

**III. [16.5] EARLY INTERNET JURISDICTION CASES: APPLICATION OF TRADITIONAL JURISDICTIONAL CONCEPTS TO THE INTERNET**

The Supreme Court began to recognize how the effect of communications technology in modern commerce changed the old equations of jurisdiction in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 85 L.Ed.2d 528, 105 S.Ct. 2174, 2184 (1985):

[*It* is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines,*}
thus obviating the need for physical presence within a State in which business is conducted.

However, the courts were still not prepared for the sudden explosion of the Internet — not only the way that it changed the jurisdictional analysis, but also the incredible speed with which it did so. Thus, the first cases involving Internet-related jurisdiction relied quite heavily on analogies to earlier communications technologies.

The court in *Maritz, Inc. v. CyberGold, Inc.*, 947 F.Supp. 1328, 1332 (E.D.Mo. 1996), acknowledged the difficulties in applying analogies to mail and telephone cases to answer Internet jurisdiction questions yet used these types of cases anyway:

> **Because the internet is an entirely new means of information exchange, analogies to cases involving the use of mail and telephone are less than satisfactory in determining whether defendant has “purposefully availed” itself to this forum. Unlike use of the mail, the Internet, with its electronic mail, is a tremendously more efficient, quicker, and vast means of reaching a global audience. By simply setting up, and posting information at, a website in the form of an advertisement or solicitation, one has done everything necessary to reach the global internet audience.**

### A. [16.6] Purposeful Availment for in Personam Jurisdiction

The first specific jurisdiction requirement is purposeful availment, which ensures that nonresident defendants will not be hauled into court based on random or fortuitous contacts with the forum state. This requirement is satisfied if the defendant has taken some deliberate action toward the forum state, but a defendant is not required to be physically present in or have physical contacts with the forum, as long as such actions are purposefully directed toward forum residents.

The Sixth Circuit Court of Appeals found jurisdiction in *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). A Texas resident who had advertised his product via CompuServe, a computer information service located in Ohio, was subject to personal jurisdiction in Ohio because the Texas resident had taken direct actions that created a connection with Ohio. He subscribed to CompuServe, uploaded his software onto the CompuServe system for others to use, and advertised his software on the CompuServe system.

Another early case, this time dealing with a trademark dispute relating to “cybersquatting” (*i.e.*, registering a domain name similar to a name that is a registered trademark of another owner), was *Panavision International, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998). The plaintiff, Panavision International, a maker of cinematography that owns the trademark “Panavision,” attempted to register a website on the Internet with the domain name “Panavision.com” but discovered that it had already been taken as a website by Dennis Toeppen, perhaps the most infamous cybersquatter. Toeppen had suffered a number of early, quick court defeats for grabbing the website names for well-known companies because he had never actually used the names in a website. This time, however, he had a new trick up his sleeve: a site that
displayed a real-time video feed of the City of Pana, Illinois, (hence, “Pana – vision”) and so actually “used” the website name. When Panavision sent a cease-and-desist letter, Toeppen claimed that he had the right to use the domain name but would be willing to sell it to Panavision for $13,000. He also said that if Panavision agreed to his offer, he would not acquire additional Internet addresses alleged by Panavision Corporation to be its property.

The district court’s decision to exercise personal jurisdiction over Toeppen rested on its determination that the purposeful availment requirement was satisfied by the “effects doctrine” under California law, and the Ninth Circuit agreed. In tort cases, jurisdiction may attach if a defendant’s conduct is aimed at or has an effect in the forum state, the court reasoned, stating that under Calder v. Jones, 465 U.S. 783, 79 L.Ed.2d 804, 104 S.Ct. 1482 (1984), personal jurisdiction can be based on (1) intentional actions (2) expressly aimed at the forum state (3) causing the majority of the harm in the forum state. 141 F.3d at 1321. The Panavision court determined that because the trademark dilution case was akin to a tort case, the same principles applied. Therefore, Toeppen purposefully registered Panavision’s trademarks as his domain names on the Internet to force Panavision to pay him money. The brunt of the harm to Panavision was felt in California because its principal place of business was in California and the heart of the motion picture and television industry is located there. In addition, the court found that Toeppen had done something more to demonstrate that he directed his activity toward the forum state by engaging in a scheme to register Panavision’s trademarks as his domain names for the purpose of extorting money from Panavision. 141 F.3d at 1322.

Not all of the early Internet jurisdiction cases showed such careful consideration. In Inset Systems, Inc. v. Instruction Set, Inc., 937 F.Supp. 161 (D.Conn. 1996), the court found that a static website created jurisdiction in a trademark infringement claim against a Massachusetts corporation that had no other significant contacts in Connecticut. The court reasoned that the website was the deliberate solicitation of business under the Connecticut long-arm statute because it represented a permanent advertisement that could be viewed again and again through over 10,000 links in Connecticut (proof alone of how “early” this case was). The logic of the Inset Systems opinion would have subjected owners of websites to universal jurisdiction, which has been rejected numerous times by the U.S. Supreme Court. As a result, Inset Systems has been directly criticized in later cases. See, e.g., Fix My PC, L.L.C. v. N.F.N. Associates, Inc., 48 F.Supp.2d 640, 644 (N.D.Tex. 1999).

Another incongruous result can be found in Gary Scott International, Inc. v. Baroudi, 981 F.Supp. 714 (D.Mass. 1997). Like Inset Systems, this case involved trademark infringement and related claims, this time by a Massachusetts humidor manufacturing corporation against a California resident with his own small humidor business. Unlike Inset Systems, the website was not the only form of contact with the forum state, though those other contacts were relatively weak. Just like the Inset Systems court, however, the Gary Scott International court seemed to find that any form of website product advertising was sufficient to create jurisdiction virtually anywhere. Without proof of any customers actually solicited in Massachusetts by the site, the court held that the website was part of a “nationwide marketing” scheme that solicited customers within the forum state. 981 F.Supp. at 716.
§16.7 INTELLECTUAL PROPERTY LAW


Connecting the Internet activities to the complained-of conduct (i.e., “targeting”) is critical not only to assertions of personal jurisdiction but also to the authority of a forum to regulate conduct. The United States requires a reasonable connection between the forum and the conduct, a requirement that is met easily. The intent to cause substantial effects in the forum is sufficient. Physical presence in the forum is not required. Targeting, of course, satisfies that requirement.

The court in Panavision International, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998), also tackled the second requirement for specific, personal jurisdiction, which is that the claim asserted in the litigation arises out of the defendant’s forum-related activities. The court stated that it “must determine if the plaintiff Panavision would not have been injured ‘but for’ the defendant Toeppen’s conduct directed toward Panavision in California.” 141 F.3d at 1322. This requirement was satisfied, the court said, by Toeppen’s registration of Panavision’s trademarks because, but for Toeppen’s conduct, this injury would not have occurred, and Panavision’s claims arose out of Toeppen’s California-related activities.

C. [16.8] Requirement of Reasonableness

In addition to the first two factors, due process requires that a nonresident defendant have minimum contacts so that the defendant could “reasonably anticipate being haled into court there.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 62 L.Ed.2d 490, 100 S.Ct. 559, 567 (1980). When a defendant who has purposefully directed its activities at forum residents seeks to defeat jurisdiction, the defendant must present a compelling case that the presence of other considerations would render jurisdiction unreasonable. The requirement of reasonableness is the weakest of the three legs of specific jurisdiction, and the Supreme Court has denied jurisdiction solely for lack of reasonableness in only one instance. Asahi Metal Industry Co. v. Superior Court of California, Solano County, 480 U.S. 102, 94 L.Ed.2d 92, 107 S.Ct. 1026 (1987).

Citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 85 L.Ed.2d 528, 105 S.Ct. 2174 (1985), the court in Panavision International, L.P. v. Toeppen, 141 F.3d 1316, 1323 (9th Cir. 1998), articulated seven factors to determine reasonableness:

1. the extent of a defendant’s purposeful interjection;

2. the burden on the defendant in defending in the forum;

3. the extent of conflict with the sovereignty of the defendant’s state;

4. the forum state’s interest in adjudicating the dispute;

5. the most efficient judicial resolution of the controversy;
6. the importance of the forum to the plaintiff’s interest in convenient and effective relief; and

7. the existence of an alternative forum.

These factors are equally weighed and must be considered together.

One rare case involving Internet jurisdiction in which a reasonableness argument was successful in defeating jurisdiction is *Expert Pages v. Buckalew*, No. C-97-2109-VRW, 1997 WL 488011 (N.D.Cal. Aug. 6, 1997). Expert Pages was a California business that posted consulting and expert witness information on the Internet. The pro se defendant, a Virginia resident, created a similar site, allegedly by copying the plaintiff’s database. The defendant also allegedly used the copied information to create a mailing list. The plaintiff brought copyright infringement, unfair trade practices, breach of contract, trespass, and misappropriation claims in California. While the court found that the defendant directed his activities toward California residents so that he should have anticipated being subject to jurisdiction there, the court nevertheless declined to exercise jurisdiction. The court believed that the burden for the defendant to defend himself in such a faraway jurisdiction would effectively deprive him of any defense. Moreover, the plaintiff possessed far greater resources than the defendant, and the burden on it to bring suit in Virginia would have been correspondingly much smaller.

D. [16.9] State Long-Arm Jurisdiction

Even if proper jurisdiction is found, in many cases, the state long-arm jurisdiction statute must still be considered. Many state long-arm statutes are more restrictive than the boundaries of federal due process. This was the case in Illinois until the 1989 adoption of 735 ILCS 5/2-209(c), which provides:

A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

In some states, however, the long-arm limitations still exist and may affect Internet-related jurisdiction cases. In *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y. 1996), aff’d, 126 F.3d 25 (2d Cir. 1997), the owner of a jazz club in Missouri named the Blue Note created a website hosted on a server located in Missouri. The website offered information on upcoming events and how to order tickets, which were mailed only to Missouri addresses. The plaintiff, owner of the registered trademark “The Blue Note,” under which name it operated a well-known establishment in New York, brought the trademark infringement action in New York and asserted that the jurisdiction was premised on the accessibility of the site to New York computer operators via the Internet, but the court held that the defendant had not purposefully availed himself of the benefits of New York. Creating a website that could be viewed by residents of the United States, including New York, was not sufficient to establish personal jurisdiction when the website was not intended to sell products to forum residents.
Long-arm jurisdiction can also serve to expand normal jurisdictional concepts. In *McRae’s, Inc. v. Hussain*, 105 F.Supp.2d 594 (S.D.Miss. 2000), a New Jersey cybersquatter grabbed the domain name www.carsonpiescocc.com and then tried to sell it for profit back to a Mississippi company that owned the Carson Pirie Scott department store trademark. The defendant had no other contact with Mississippi, and the domain name was not registered or maintained in Mississippi. The court found that under the Mississippi long-arm statute, the defendant had jurisdiction if the harm was committed partly or completely in-state. Normally, in trademark infringement cases jurisdiction occurs where the infringement occurs and not where the trademark owner is located, so jurisdiction would not have been proper in Mississippi. However, because of the intent to harm the trademark owner, the location of the injury determined jurisdiction, so jurisdiction in Mississippi was proper.

### IV. [16.10] SETTING THE STANDARDS IN INTERNET JURISDICTION CASES

*Panavision International, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998), *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y. 1996), aff’d, 126 F.3d 25 (2d Cir. 1997), *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), and the other cases mentioned in §§16.5 – 16.9 above all represent the early days of the Internet: cybersquatters, a lack of effective search engines, and only a few commercial sites (which, because of the limitations of Internet technology at the time, were little more than static sales brochures anyway). Courts largely relied on the effects test of *Calder v. Jones*, 465 U.S. 783, 79 L.Ed.2d 804, 104 S.Ct. 1482 (1984). It is important to note that some courts, despite the development of a more Internet-focused standard, still do rely primarily on *Calder*. See §16.14 below.

Two cases that began to formulate a standard for Internet jurisdiction apart from the effects test and that are still cited today are *CompuServe, supra*, and *Maritz, Inc. v. CyberGold, Inc.*, 947 F.Supp. 1328 (E.D.Mo. 1996).

In *CompuServe*, the court of appeals affirmed an Ohio district court’s finding of jurisdiction over an online service user from Texas. The Texas user had subscribed to the online service, based in Ohio, and negotiated a contract to market his software through the service. The court found this level of targeting the forum state of Ohio, in that he reached out from Texas to Ohio and originated and maintained contacts in Ohio, sufficient to provide jurisdiction.

In *Maritz, supra*, a California company that operated a free e-mail service in exchange for answering surveys, found itself brought into Missouri court by a competitor, claiming trademark violation and unfair competition against a similar service that the plaintiff had first created. The defendant claimed that its site was merely passive, but the court rejected this, finding that the defendant had chosen to transmit advertising messages to all Internet users, including 131 e-mails to Missouri residents:

> Clearly, CyberGold has obtained the website for the purpose of, and in anticipation that, internet users, searching the internet for websites, will access CyberGold’s website and eventually sign up on CyberGold’s mailing list. 947 F.Supp. at 1333.
A. [16.11] The Zippo Test

The first case to establish an independent test for how the Internet affects personal jurisdiction was Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa. 1997). Zippo was one of the first cases to examine the new reality of e-commerce, in which companies can do more than just advertise, buying and selling products and services online from and to customers around the world.

The Zippo court found personal jurisdiction over the out-of-state defendant in a domain name dispute case, holding that electronic commerce it specifically transacted with Pennsylvania residents was sufficient to constitute doing business in Pennsylvania for purposes of the state’s long-arm statute. The defendant’s Internet news website had the infringing domain names “zippo.com,” “zipponet,” and “zipponews.com.” The defendant had 140,000 paying subscribers worldwide. About two percent of those subscribers lived in Pennsylvania. The defendant had entered into agreements with seven Internet access providers in Pennsylvania.

Most of the cases before this point took either an ad hoc approach or tried to ignore the nature of the Internet altogether, instead seeking, sometimes desperately, to find the proper pre-Internet form of communication to which an analogy could be drawn. This often led to inconsistent and incongruous results, such as Inset Systems, Inc. v. Instruction Set, Inc., 937 F.Supp. 161 (D.Conn. 1996), in which the holding could be justified to find universal jurisdiction over any website. The Zippo court resisted falling into these traps and instead articulated a standard by which the jurisdictional effect of e-commerce could be assessed:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.... At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction.... The middle ground is occupied by interactive Web sites 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 the commercial nature of the exchange of information that occurs on the Web site. [Citations omitted.] 952 F.Supp. at 1124.
Many of the cases coming after *Zippo* have adopted its sliding scale approach:

### Likelihood of Jurisdiction

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<th>Characterization of Website</th>
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<td><strong>Active</strong></td>
<td><strong>“Middle Ground”</strong></td>
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Thus, websites that are passive, being generally nothing more than advertising materials, are unlikely to create jurisdiction. In contrast, interactive e-commerce sites on which goods and services can be directly bought or sold on the Internet will very likely lead to jurisdiction being found. The main issues, post-*Zippo*, are in the middle ground. However, differing visions of what level of commercial activity is sufficient to be “active” has led to conflicting precedents.

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**PRACTICE POINTER**

The determination of what is sufficient to take Internet activity out of the middle ground and into either the “active”/jurisdiction or the “passive”/non-jurisdiction side of the scale is an intensely fact-driven matter. The number of communications from in-forum residents through or as a result of the site, the number of in-forum visitors to the site, and the number of any commercial transactions made through the site by in-forum residents are all often examined by the courts.

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**B. [16.12] The Impact of Zippo**


**1. [16.13] Courts Following Zippo**


Fifth Circuit: Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002); Mink v. AAAA Development LLC, 190 F.3d 333 (5th Cir. 1999).

Sixth Circuit: Bird v. Parsons, 289 F.3d 865 (6th Cir. 2002); Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883 (6th Cir. 2002).


Tenth Circuit: Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244 (10th Cir. 2000); Soma Medical International v. Standard Chartered Bank, 196 F.3d 1292 (10th Cir. 1999).


Those circuits that have not adopted the Zippo test at the circuit-wide level have still adopted the test either expressly or implicitly throughout many of their district courts. In the Seventh Circuit, it has been noted a number of times that the test was adopted by the Northern District of Illinois. See, e.g., Publications International, Ltd. v. Burke/Triolo, Inc., 121 F.Supp.2d 1178 (N.D.Ill. 2000). See also Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F.Supp.2d 1154 (W.D.Wis. 2004); Caterpillar Inc. v. Miskin Scraper Works, Inc., 256 F.Supp.2d 849 (C.D.Ill. 2003). However, three recent decisions discussed below have shown the Seventh Circuit’s reluctance to embrace the Zippo test. See State of Illinois v. Hemi Group LLC, 622 F.3d 754 (7th Cir. 2010); Tamburo v. Dworkin, 601 F.3d 693 (7th Cir. 2010); Jennings v. AC Hydraulic A/S, 383 F.3d 546 (7th Cir. 2004).

Many states have adopted the Zippo test as well:


2. [16.14] Courts Refusing To Follow or De-Emphasizing Zippo

It would be easy to believe that all courts have hailed Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa. 1997), as the end of the discussion in Internet jurisdiction issues. However, there are some courts that have, for various reasons, refused to employ the Zippo test as dispositive.

The First Circuit has expressed concern over the applicability of the Zippo test, without directly adopting or abandoning it. See Cossaboon v. Maine Medical Center, 600 F.3d 25, 36 (1st Cir. 2010) (dismissing case for lack of personal jurisdiction when defendant’s website was available to forum residents but not aimed at them). The court noted that the Zippo sliding scale is ill-suited to the general personal jurisdiction inquiry and that the Zippo inquiry was unhelpful when a website fell into the intermediate category. 600 F.3d at 36 n.5. However, the First Circuit’s rejection of the Zippo test is not complete; without explicitly adopting the test, the First Circuit did subsequently hold that “the mere availability of a passive website . . . cannot, standing alone . . . subject a defendant to personal jurisdiction in the forum.” [Footnote omitted.] A Corp. v. All American Plumbing, Inc., 812 F.3d 54, 61 (1st Cir. 2016). This language suggests that the interactivity of a website can still be a factor in the First Circuit’s analysis even if it is not dispositive.

Similarly, the Eleventh Circuit has found the Zippo test unnecessary when considering personal jurisdiction based on a website. Louis Vuitton Malletier, S.A. v. Mosseri, 736 F.3d 1339, 1355 n.10 (11th Cir. 2013) (recognizing existence of Zippo test but noting criticism of it and concluding “the traditional, three-prong test works just fine in this Internet case where the website was commercial and fully interactive”).

For the Seventh Circuit’s rejection of the Zippo test, see §16.18 below.

C. [16.15] Post-Zippo Cases

Since Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa. 1997), a larger number of courts have gained experience with jurisdictional issues relating to the Internet and e-commerce transactions. Consequently, many courts are less swayed by plaintiffs’ jurisdictional claims. For example, in Pebble Beach Co. v. Caddy, 453 F.3d 1151 (9th Cir. 2006), the plaintiff owned and operated a golf resort in California and discovered a passive website with the domain name www.pebblebeach-uk.com, registered by a United Kingdom-based owner of a bed and breakfast, whose property was located on England’s southern coast. The plaintiff sued the overseas defendant in the district court in California, claiming that the golf resort’s name had acquired distinctiveness. However, the defendant’s site only informed users of the accommodations and did not provide any interactive features, such as online reservations. Consequently, the circuit court affirmed the district court’s finding that the defendant had not performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum. Therefore, without more active conduct directed at California, the court could not exercise personal jurisdiction over the U.K. defendant. The plaintiff also tried to establish that jurisdiction was
proper in a U.S. federal district court by claiming that the owner intended to advertise in the United States by obtaining a “.com” top level domain and because its clientele was mainly American. The court disagreed, finding that the fact of obtaining a “.com” domain alone was not sufficient to establish that the defendant directed its activities at the United States.

In 2006, the Supreme Court of Utah in *Fenn v. Mleads Enterprises, Inc.*, 137 P.3d 706 (Utah 2006), held that courts in the state cannot exercise personal jurisdiction over a foreign defendant who sends only one e-mail to a state resident without knowing the residence or location of the e-mail’s recipient. In *Fenn*, defendant Mleads’ business activities focused on contracting with third-party marketing companies who advertised Mleads’ services to customers through e-mail solicitations. Mleads maintained an office solely in Arizona and conducted most of its business in Arizona. Although its business activity within Utah produced a very small portion of its revenue, Mleads was not licensed to conduct business in Utah, did not employ or recruit any Utah-based employees or agents, and did not advertise in any Utah newspapers, magazines, or other forms of Utah-based media. Its advertisement to residents of Utah was strictly through unsolicited e-mail over the Internet. Mleads had no bank accounts in Utah and was not subject to taxation in Utah.

However, in *Deutsche Bank Securities, Inc. v. Montana Board of Investments*, 7 N.Y.3d 65, 850 N.E.2d 1140, 1142, 818 N.Y.S.2d 164 (2006), the New York Court of Appeals held that “proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.” Quoting *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 522 N.E.2d 40, 43, 527 N.Y.S.2d 195 (1988).

The court recognized that “the growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it” and thereby could circumvent jurisdiction if the law were not sufficiently flexible. 850 N.E.2d at 1142 – 1143.

In *Grimbaldi v. Guinn*, 72 A.D.3d 37, 895 N.Y.S.2d 156 (2010), the Second Department of the Appellate Division of the New York Supreme Court supported *Zippo, supra*, as a basis for analyzing a party’s online presence and found that based solely on this test the defendant’s passive website alone was insufficient to provide a basis for asserting personal jurisdiction over him. However, the court focused on the totality of the circumstances, holding that “in light of the number, nature, and timing of all of the contacts involved, including the numerous telephone, fax, e-mail, and other written communications with the plaintiff in New York that Guinn initiated . . . as well as the manner in which Guinn employed his decidedly passive Web site for commercial access, Guinn must be deemed to have sufficient contacts with this state.” 72 A.D.3d at 51.

D. [16.16] In Rem Jurisdiction

As seen in *Panavision International, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998), cybersquatting became one of the most common abusive practices over the Internet. The problem has gotten worse, with typosquatting and other conduct using domain names identical or confusingly similar to those of legitimate trademark owners. This is exacerbated by the fact that
domain name registrations are relatively inexpensive and can be obtained by almost any online user across the globe, making it difficult for U.S. plaintiffs to locate such registrants.

In 1999, the Anticybersquatting Consumer Protection Act (ACPA), Pub.L. No. 106-113, Div. B, §1000(a)(9), 113 Stat. 1536 (1999), came into effect, providing plaintiffs with the ability to take legal action against the property rights in an offending domain name. The law specifically provides that trademark owners can file an in rem action against the disputed domain name “in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the disputed domain name is located.” 15 U.S.C. §1125(d)(2)(A). The action can be filed if the plaintiff “is not able to obtain in personam jurisdiction over a person who would have been a defendant” in a civil action. 15 U.S.C. §1125(d)(2)(A)(ii)(I). The plaintiff must also show that service of process was perfected under the notice requirements of the ACPA.

Since the law came into effect, a fairly large number of cases have been brought, many in the Eastern District of Virginia, where Verisign is located (Verisign acquired Network Solutions, the largest registrar in the United States). There have been many successful cases brought to date.

In Atlas Copco AB v. Atlascopcoiran.com, 533 F.Supp.2d 610 (E.D.Va. 2008), the plaintiff discovered that several domain names that incorporated its trademark were used in phishing scams. Atlas Copco tried unsuccessfully to locate the registrants of the domain names, who were likely somewhere in the Middle East or southern Asia. Furthermore, there were insufficient contacts to exercise jurisdiction based on the state’s long-arm statute. Therefore, the plaintiff filed an in rem action for relief under the ACPA in the jurisdiction in which the registries of the domain names were located, Virginia. After the defendants failed to respond to the complaint, the plaintiff moved for summary judgment, and the court granted the motion and ordered that the domain names be transferred to the plaintiff.

The Seventh Circuit has also found that allegations of cybersquatting justified specific personal jurisdiction over a defendant with a national business, even when the forum was not specifically targeted by the defendant. See uBid, Inc. v. GoDaddy Group, Inc., 623 F.3d 421, 427 – 429 (7th Cir. 2010).

Other uses of intellectual property online have similarly been used to subject a defendant to specific personal jurisdiction. See IPOX Schuster, LLC v. Nikko Asset Management Co., Case No. 15 C 9955, 2016 WL 3194445, *5 (N.D.Ill. June 9, 2016) (“As a matter of policy, the law ought not require a holder of intellectual property . . . in these circumstances to go to the home forum of one who has, in effect, reached into the holder's home forum to take its property.”), quoting Ariel Investments, LLC v. Ariel Capital Advisors LLC, No. 15 C 3717, slip op. at 5 (N.D.Ill. Oct. 29, 2015) (finding specific personal jurisdiction in Illinois when defendant allegedly violated trademark knowing it would harm reputation of Illinois company).

An additional benefit of the ACPA is that the in rem action is not exclusive but rather can occur in addition to any other jurisdiction that may exist in other civil actions relating to the same disputed domain.
For more information on substantive rights under the ACPA, see Chapter 8 of this handbook.

V. CASES IN ILLINOIS AND THE SEVENTH CIRCUIT


The Seventh Circuit has announced that “[w]e have been clear that maintaining a public website is not sufficient, by itself, to establish general jurisdiction.” Kipp v. Ski Enterprises Corporation of Wisconsin, Inc., 783 F.3d 695, 699 (7th Cir. 2015), citing Tamburo v. Dworkin, 601 F.3d 693, 701 (7th Cir. 2010). The court did say that “[t]here is nothing wrong with taking the website into account,” but held that the act of maintaining a website, without more, lacks the continuous and systematic contacts with a state that are necessary for a court to exercise general jurisdiction. 783 F.3d at 699 (denying general jurisdiction based on website available in Illinois that advertised ski lift tickets). See also Snodgrass v. Berklee College of Music, 559 Fed.Appx. 541, 543 (7th Cir.) (finding no general personal jurisdiction in Illinois for music school in Massachusetts whose students had thousands of “online contacts” each day without further reason to tie those contacts to forum state), reh’g denied (May 1, 2014), cert. denied, 135 S.Ct. 451 (2014), reh’g denied, 135 S.Ct. 1035 (2015).

Most general jurisdiction cases in the Seventh Circuit continue to follow this line and deny general jurisdiction claims when the operation of a website is providing the main grounds for the claim of general jurisdiction. See, e.g., Industrial Models, Inc. v. SNF, Inc., Case No. 14 C 8340, 2015 WL 2399089, *4 (N.D.Ill. May 18, 2015) (finding no general jurisdiction when defendant’s website directed consumers to dealers in Illinois, even when defendant’s revenues from Illinois market approached $80 million); Shrum v. Big Lots Stores, Inc., Case No. 3:14-cv-03135-CSB-DGB, 2014 WL 6888446, *8 (C.D.Ill. Dec. 8, 2014) (finding no general personal jurisdiction for website “primarily designed to provide information”).


Vitro, Sociedad Anonima, 85 F.Supp.2d 857, 862 (N.D.Ill. 2000), involving a passive website, the court cited with favor the defendant’s statement that

_ no court has ever found general jurisdiction based on the operation of a web site that does not provide for direct sales._ [Emphasis in original.]

Even an interactive website is unlikely to result in a favorable finding for the plaintiff. For example, _InfoSys Inc. v. Billingnetwork.com, Inc._, No. 03 C 3047, 2003 WL 22012687 (N.D.Ill. Aug. 27, 2003), involved a patent infringement declaratory judgment action between two companies with Internet-based medical billing systems. Such Internet-based systems would appear to be a prime example of a defendant clearly doing business over the Internet that would create jurisdiction under _Zippo Manufacturing Co. v. Zippo Dot Com, Inc._, 952 F.Supp. 1119 (W.D.Pa. 1997). Despite this, the court gave short shrift to the plaintiff’s jurisdictional arguments:

> [T]here is no case where general jurisdiction was conferred on the basis of an interactive website in the absence of non-website factors evidencing intent for a defendant’s product or website to reach a particular state. 2003 WL 22012687 at *4.

Due to the lack of such non-website factors, the court dismissed the matter for lack of personal jurisdiction.

The first case in the Seventh Circuit to deal with a claim of general jurisdiction in this context, _IDS Life Insurance Co. v. SunAmerica, Inc._, 958 F.Supp. 1258 (N.D.Ill. 1997), _aff’d in part, vacated in part on other grounds_, 136 F.3d 537 (7th Cir. 1998), was an action alleging that the defendants were wrongfully inducing the plaintiffs’ sales agents to switch to the defendants’ products. The principal defendant was incorporated in Maryland, with its principal place of business in California. The plaintiffs argued that the defendants’ aggressive national advertising, toll-free number, and Internet site created not specific jurisdiction, but general jurisdiction. The court most definitely disagreed:

_Plaintiffs ask this court to hold that any defendant who advertises nationally or on the Internet is subject to its jurisdiction. It cannot plausibly be argued that any defendant who advertises nationally could expect to be haled into court in any state, for a cause of action that does not relate to the advertisements. Such general advertising is not the type of “purposeful activity related to the forum that would make the exercise of jurisdiction fair, just or reasonable.”_ 958 F.Supp. at 1268, quoting _Rush v. Savchuk_, 444 U.S. 320, 62 L.Ed.2d 516, 100 S.Ct. 571, 577 (1980).

One rare example of a finding supporting general jurisdiction in this context is _Publications International, Ltd. v. Burke/Triolo, Inc._, 121 F.Supp.2d 1178 (N.D.Ill. 2000). In this breach-of-contract and unfair-competition case involving misuse of cookbook photographs, the court found that catalogs sent to Illinois in combination with the hiring of a Chicago sales representative were sufficient intentional and continuous contacts to create general jurisdiction.
B. Specific Jurisdiction Cases

1. [16.18] Cases Concerning Website Operators

Very few courts have expressly rejected the Zippo test discussed in §16.11 above. Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.Pa. 1997). However, the Seventh Circuit has expressed deep concerns about the Zippo test and does not apply it in its jurisdiction jurisdiction.

A 2010 case, Tamburo v. Dworkin, 601 F.3d 693 (7th Cir. 2010), provided insight into the Seventh Circuit’s weighing of Zippo, supra, and Calder v. Jones, 465 U.S. 783, 79 L.Ed.2d 804, 104 S.Ct. 1482 (1984), when an Illinois software developer sought a declaratory judgment that he did not misappropriate dog pedigree information from free, publicly available websites and claimed the foreign website owners had retaliated and harmed his reputation. The court acknowledged that other circuits had followed Zippo in connection with contacts over the Internet, but it stated:

We have not specifically done so, although we have considered a website’s degree of interactivity in at least one personal-jurisdiction case. 601 F.3d at 703 n.7, citing Jennings v. AC Hydraulic A/S, 383 F.3d 546, 549 – 550 (7th Cir. 2004).

Furthermore, the court was reluctant to “fashion a special jurisdictional test for Internet-based cases,” favoring the application of Calder, supra, at least as it relates to intentional tort cases. Id. The court held that “the whole of the injury was suffered in Illinois, and the individual defendants knew that would be the case.” 601 F.3d at 706 n.9.

The Seventh Circuit has been consistent in its disapproval of Zippo. See State of Illinois v. Hemi Group LLC, 622 F.3d 754, 759 (7th Cir. 2010) (declining to apply Zippo test because “Zippo’s sliding scale was always just short-hand for determining whether a defendant had established sufficient minimum contacts” and “the traditional due process inquiry . . . is not so difficult to apply to cases involving Internet contacts”). In 2014, the Seventh Circuit reaffirmed this and stated: “The interactivity of a website is . . . a poor proxy for adequate in-state contacts.” Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc., 751 F.3d 796, 803 (7th Cir. 2014) (finding no specific personal jurisdiction over defendant operating website accused of trademark infringement). The court noted that the term “interactive website” “hardly rules out anything in 2014” and would thus subject defendant website operators to personal jurisdiction anywhere. Id. “[I]n resolving questions about personal jurisdiction involving online contacts[, courts should] ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum state, even if it is interactive.” Id., quoting be2 LLC v. Ivanov, 642 F.3d 555, 558 (7th Cir. 2011).

However, not all Illinois courts have followed the Seventh Circuit’s disapproval of the Zippo test, and interactivity is still considered in some decisions on personal jurisdiction over website operators. See Dolemba v. Citizens Information Associates, LLC, No. 13 C 6939, 2014 WL 1646942, **2 – 3 (N.D. Ill. Apr. 24, 2014). The court in Dolemba stated:
Courts in this district have adopted a “sliding scale” approach that divides Internet activities into three categories: (1) those in which the defendant clearly transacts business in foreign jurisdictions over the Internet; (2) those in which a defendant has posted information on the internet, but has no further communication with potential customers via the Internet; and (3) those in which the defendant operates an interactive website that allows defendant and potential customers in foreign jurisdictions to communicate regarding defendant’s goods or services. Id. (collecting cases).

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Applying this test, the court in *Dolemba* found that operating a website from which Illinois residents could purchase mugshots provided sufficient minimum contacts with the State of Illinois for the Illinois court to exercise specific personal jurisdiction over the defendant. The court noted that the defendant had originally obtained the plaintiff’s mugshot from law enforcement officials in Illinois, as well.

Instead of the *Zippo* test’s focus on interactivity, the Seventh Circuit looks to whether the website operator’s conduct targets the forum. “If the defendant merely operates a website, even a ‘highly interactive’ website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution.” *be2 LLC*, supra, 642 F.3d at 559. See also *Timberstone Management LLC v. Idaho Golf Partners, Inc.*, No. 2014-CV-5502, 2014 WL 5821720, **5 – 6** (N.D.Ill. Nov. 6, 2014) (“The mere fact that [defendant] operated an interactive website that could be accessed by Illinois customers is not enough for the Court to exercise jurisdiction over [defendant]. [Plaintiff] has not established that [defendant] purposefully directed its activities towards Illinois.”).

Thus, it seems clear that operating a website that makes no attempt to target or do business with Illinois users does not subject the operator to specific personal jurisdiction in Illinois. See *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A.*, 623 F.3d 440, 446 (7th Cir. 2010) (existence of website that allegedly infringed plaintiff’s trademark, but was aimed only at Texas residents rather than forum state, was not sufficient to support specific personal jurisdiction).

What showing must be made to show that a defendant targeted a forum with its website is unclear, however. Some courts seem to say that having a purely national focus, without making special efforts to reach out to Illinois, is not sufficient for specific personal jurisdiction. For instance, in *Gullen v. Facebook.com, Inc.*, No. 15 C 7681, 2016 WL 245910 (N.D.Ill. Jan. 21, 2016), the plaintiff attempted to sue Facebook on the basis that its facial recognition software violated an Illinois law prohibiting the for-profit collection of certain biometric information. The court noted that its research had “not found a case analyzing specific jurisdiction over a social media website” but dismissed for lack of jurisdiction because Facebook’s conduct occurred
toward all users, not just Illinois users, and that the plaintiff could not allege that Facebook knew Illinois users would use its product. 2016 WL 245910 at **2 – 3.

Similarly, merely having customers in Illinois is not usually sufficient to subject a defendant website operator to specific personal jurisdiction. For instance, in Industrial Models, Inc. v. SNF, Inc., Case No. 14 C 8340, 2015 WL 2399089, *4 (N.D.Ill. May 18, 2015), the plaintiff based its claim of jurisdiction on allegations that the defendant’s website directed website users to dealers in Illinois and that the defendant had one percent of its customers in Illinois, but, given the defendant’s annual revenues of $80 million, the substantial revenue earned in Illinois was sufficient to create minimum contacts. The court found this did not indicate any attempt by the defendant to “purposefully exploit” the Illinois market. Id., citing Advanced Tactical, supra, 751 F.3d at 803. In addition, the court found that the claims, which were based in antitrust and tortious business interference, did not arise out of the contacts of the website customers with the defendant’s website. Id.

However, a number of courts have held that having the option to ship goods to Illinois — even if the user also has the option to ship to the other 49 states as well and Illinois is not singled out — is sufficient for specific personal jurisdiction. See Illinois v. Hemi Group, LLC, 622 F.3d 754, 758 (7th Cir.2010) (finding Illinois had specific personal jurisdiction over defendant who operated website selling cigarettes to all 50 states because defendant “stood ready and willing to do business with Illinois residents”); uBID, Inc. v. GoDaddy Group, Inc., 623 F.3d 421, 428 (7th Cir. 2010) (finding specific personal jurisdiction in cybersquatting case because “it is easy to infer that GoDaddy’s national marketing campaign is intended to reach as large an audience as possible, including the 13 million potential customers in the nation’s fifth most populous state [(Illinois)]”); Monster Energy Co. v. Wensheng, 136 F.Supp.3d 897, 904 – 909 (N.D.Ill. 2015) (finding that operator of website selling “Monster Energy” drinks to Illinois residents in violation of plaintiff’s trademark was subject to specific personal jurisdiction in Illinois because operator shipped the products to Illinois and because Illinois had an interest in protecting its citizens from counterfeit products).

Advertising or linking to a third-party website has been found not to subject the advertiser or linker to personal jurisdiction. The Seventh Circuit found a chain of causation too attenuated to support specific personal jurisdiction when a hotel in Spain was being sued in Illinois for injuries that occurred during the plaintiff’s stay in Spain, based only on the fact that the plaintiff had made the reservation through a third-party website (the travel site Orbitz). See Noboa v. Barceló Corporación Empresarial, SA, 812 F.3d 571, 572 (7th Cir. 2016) (Easterbrook, J.).

In Neomedia Technologies, Inc. v. AirClic, Inc., No. 04 C 566, 2004 WL 848181 (N.D.Ill. Apr. 16, 2004), after quickly disposing of general jurisdiction claims, the court examined specific jurisdiction claims in a patent infringement action between three makers of Internet-based bar code scanning systems. The court found that listing information on the website of the first defendant (AirClic) was not a sufficient level of commercial activity to support jurisdiction. The site of the second defendant (Scanbuy) presented a more difficult question. The plaintiff claimed that Scanbuy’s site was a “portal” similar to the one at issue in LFG, LLC v. Zapata Corp., 78 F.Supp.2d 731 (N.D.Ill. 1999), because, while it did not allow for the purchase of products over
the site, it linked to a site that did. 2004 WL 848181 at *5. The court distinguished *LFG* because the site at issue was not meant to make money as a stand-alone venture. The court also distinguished the non-Internet contacts in *LFG* from the lack of such contacts by Scanbuy. Finally, the court was concerned about the potentially overbroad effect of finding Scanbuy’s site to be sufficiently interactive to create jurisdiction:

> [l]f we were to confer personal jurisdiction based on Scanbuy’s hyperlink to a non-forum “active” website, it would establish as precedent that any website owner who hyperlinks to a website that conducts business online would be susceptible to personal jurisdiction in every state and district. 2004 WL 848181 at *6.

Consequently, the court granted both defendants’ motions to dismiss.

2. [16.19] Internet Cases Other than Website Operators

The Seventh Circuit has approached sending emails to a party in-state using the same minimum contacts analysis as it would for a party sending letters to an in-state party. *See Felland v. Clifton*, 682 F.3d 665, 675 – 676 (7th Cir. 2012) (holding that e-mails sent to victim of fraud in forum state were relevant in finding specific personal jurisdiction over defendant). However, the Seventh Circuit has held that maintaining an e-mail list that compiles user’s e-mail addresses does not subject the defendant to specific personal jurisdiction. *See Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014). The court depended partly on the fact that “email does not exist in any location at all” because it “bounces from one server to another” and “winds up wherever the recipient happens to be at that instant.” *Id.* The court did note that the analysis might be different “if there were evidence that a defendant in some way targeted residents of a specific state, perhaps through geographically-restricted online ads.” *Id.*

Circulating allegedly libelous statements over the Internet about a company headquartered in Illinois was found insufficient to subject the speaker to specific personal jurisdiction in Illinois. *See United Airlines, Inc. v. Zaman*, 152 F.Supp.3d 1041, 1051 (N.D.Ill. 2015) (noting that statements themselves did not mention forum state and that defendant was not alleged to have taken actions singling out forum state). *See also Bittman v. Fox*, No. 14 C 08191, 2016 WL 2851566, **5 – 8 (N.D.Ill. May 16, 2016) (finding no personal jurisdiction based on allegations of publishing hyperlinks to offending blog posts on websites with large readership in forum state, noting that “the interactive nature of online communication — which by its nature can be pursued from almost any location at any time — diminishes the jurisdictional import of these communications.”).

VI. [16.20] TRANSNATIONAL ISSUES FACING U.S. BUSINESSES

The transnational characteristics of the Internet add to the complexity of determining applicable jurisdictional limitations. This has been a particularly important issue for companies attempting to protect their intellectual property rights from online piracy and counterfeiting of digital media, the perpetrators of which have been active in jurisdictions with limited legal protections. In addition, the illegal manufacture and distribution of pirated music and video have become considerably easier in recent years due to advances in computer technology, the low cost of duplicating materials and equipment, and the insufficient availability of sophisticated antipiracy measures, such as advanced encryption systems. The cost of all forms of digital piracy is staggering. There have been, for example, more than an estimated $63.4 billion in losses from pirated software (see Ninth Annual BSA 2011 Global Software Piracy Study, http://globalstudy.bsa.org/2011/#) and $12.5 billion in annual losses from illegally downloaded music (see Stephen E. Siwek, Institute for Policy Innovation, The True Cost of Sound Recording Piracy to the U.S. Economy (Aug. 21, 2007), www.ipi.org/doclib/20120515_soundrecordingpiracy.pdf.

Fortunately, international collaboration is on the increase. The European Union and several countries in South America and Asia have enacted tougher and more innovative laws allowing more effective enforcement of civil and criminal liability for those trading in pirated digital media, much of which takes place via the Internet. In mid-2012, Japan passed controversial new legislation increasing the criminal sanctions for the illegal downloading of copyrighted material. In 2009, France enacted the so-called HADOPI law (Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet), which provides for a graduated response to alleged online copyright infringers that may lead to the individual being banned from Internet access as well as other penalties. In late 2011, Spain enacted the Sinde Law (Ley Sinde), which provides a fast-track legal procedure to shut down websites trading in pirated content. These actions are also in line with bilateral agreements between the United States and other countries in which intellectual property protections and antipiracy action form important elements. The end effect is to create a more transparent and collaborative approach to antipiracy measures regionally and globally and remove some of the jurisdictional obstacles that have so far allowed illicit trade to flourish.

Courts in the United States are exercising jurisdiction over foreign defendants in more creative ways to provide relief to U.S. plaintiffs who might be unfairly burdened by litigating in foreign courts. In Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063 (10th Cir. 2008), an online retailer brought a declaratory judgment action against a British copyright owner. The plaintiffs were eBay members who used the Internet auction site to sell various fabrics from their home in Colorado. This case arose from two of the plaintiffs’ prints that are inspired by famous images by the artist Erté, the image rights of which were owned by the defendants. The defendants provided eBay in California with a notice of claimed infringement (NOCI), as provided under the Digital Millennium Copyright Act, Pub.L. No. 105-304, 112 Stat. 2860 (1998), which led to the suspension of the plaintiffs from the auction site. Via e-mail, the defendants also threatened the plaintiffs with a copyright infringement lawsuit, but before the defendants could carry out that threat, the plaintiffs filed suit in federal district court in Colorado seeking a declaratory judgment that their images did not infringe the copyrights. The defendants
responded with a motion to dismiss based on lack of personal jurisdiction over them, to which the district court agreed. However, the Tenth Circuit disagreed, holding that the plaintiffs’ lawsuit arose from, and was an effort to reverse, the consequences of the NOCI that the plaintiffs incurred in Colorado and that the defendants must have known that the plaintiffs’ business was located in Colorado.

One issue currently being litigated is the scope of the government’s power to compel a domestic party to produce data accessible in cloud storage on the Internet but physically housed on servers in other countries. The Second Circuit has ruled that the government cannot compel the production of such information with a warrant issued under 18 U.S.C. §2703, added by the Stored Communications Act, Pub.L. No. 99-508, Title II, §201[a], 100 Stat. 1860 (1986). See In re Warrant to Search Certain E-mail Account Controlled & Maintained by Microsoft Corp., 829 F.3d 197 (2d Cir. 2016). The decision has attracted much attention in the press, and a concurring opinion explicitly called for legislation to address the issue. 829 F.3d at 222 (Lynch, J., concurring in judgment). The landscape for international criminal jurisdiction over Internet data may thus change in the near future.