

Note

Clarifying the Standards for Personal Jurisdiction in Light of Growing Transactions on the Internet: The *Zippo* Test and Pleading of Personal Jurisdiction

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When the United States Court of Appeals for the Second Circuit decided there was personal jurisdiction over the defendant in *Chloé v. Queen Bee of Beverly Hills, LLC* on August 5, 2010,¹ the decision set off alarm bells for businesses engaging in commercial transactions over the Internet. Simone Ubaldelli, a California resident and principal of an online retailer, had sent a fake Chloé handbag to a New York address, after which the famous fashion company that owned the trademark of the handbag sued Ubaldelli for trademark infringement and unfair competition in New York.² The court ruled that Ubaldelli's act of shipping a fake handbag into New York, when considered together with the online retailer's substantial business activity in the state, was sufficient to establish personal jurisdiction over Ubaldelli.³ The standard the court used in deciding whether or not personal jurisdiction was proper in this case is one of many different standards that have developed, which highlights the uncertainty concerning the analysis of personal jurisdiction in the context of the Internet.⁴ Furthering the uncertainty, there

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1. 616 F.3d 158, 161–62 (2d Cir. 2010).

2. *Id.* at 162–63. Specifically, plaintiffs-appellants Chloé and Chloé S.A. sued the defendant-appellee for violations of sections 32(1) and 43(a) of the Trademark Act of 1946 and New York General Business Law section 349 (McKinney 2004) and also for common law trademark infringement and unfair competition. *Id.* at 161.

3. *Id.* at 162.

4. See *Chloé v. Queen Bee of Beverly Hills, LLC*, 571 F. Supp. 2d 518,

is also little guidance about the standard and scope of jurisdictional discovery, which is discovery conducted to determine whether or not a court of the United States has personal or subject matter jurisdiction and which occurs before discovery on the merits.⁵

Currently, despite the vast and attractive Internet market,⁶ the Supreme Court has not ruled definitively on which test should govern personal jurisdiction—which concerns the power of courts to issue decisions that bind the parties of a lawsuit⁷—in cases involving transactions on the Internet.⁸ As a result, cases range from those finding that advertising on a website is sufficient for personal jurisdiction⁹ to those requiring that a defendant must have specifically directed activities to-

530 (S.D.N.Y. 2008) (holding that the court lacked specific jurisdiction since the online retailer, Queen Bee, “did not target New York residents specifically” even though it sold handbags through its website), *vacated*, 616 F.3d 158 (2d Cir. 2010); *see also* ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002) (inquiring into whether or not the defendant directed activities towards the forum state with the manifested intent to engage in business in the forum state); *Cybersell, Inc. v. Cybersell, Inc.* 130 F.3d 414, 419 (9th Cir. 1997) (using the *Zippo* test); *Am. Eyewear, Inc. v. Peeper’s Sunglasses & Accessories, Inc.*, 106 F. Supp. 2d 895, 900 (N.D. Tex. 2000) (using the *Zippo* test); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123–24 (W.D. Pa. 1997) (establishing the *Zippo* test); Robert W. Hamilton & Gregory A. Castanias, *Tangled Web: Personal Jurisdiction and the Internet*, 24 LITIG. 27, 27 (1998) (discussing the difficulty of crafting a rule for personal jurisdiction on the Internet). *See generally* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851, 2854 (2011) (explaining that general jurisdiction in the forum state is proper only if the defendant is “at home” there, which is true if the forum state is the defendant’s place of incorporation, principal place of business, or domicile).

5. S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE. L. REV. 489, 491 (2010). Jurisdictional discovery related to personal jurisdiction is also referred to as “personal jurisdiction discovery.” *See* Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 643–44 (2009) (stating that use of the proximate cause test to determine when a cause of action “arises from” or is “related to” a defendant’s activities in the forum state is parallel to using the plausibility standard for pleading jurisdiction).

6. *See* U.S. DEPT OF COMMERCE, U.S. CENSUS BUREAU NEWS: QUARTERLY RETAIL E-COMMERCE SALES 4TH QUARTER 2014, 1 (Feb. 17, 2015), available at http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

7. E. THOMAS SULLIVAN, C. DOUGLAS FLOYD, RICHARD D. FREER & BRADLEY G. CLARY, *COMPLEX LITIGATION* 1 (2d ed. 2014). *See generally* STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 5 (8th ed. 2012) (explaining that personal jurisdiction, subject matter jurisdiction, and venue determine where a suit can be brought).

8. *See* *Walden v. Fiore*, 134 S. Ct. 1115, 1125 n.9 (2014) (“We leave questions about virtual contacts for another day.”).

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

wards the forum state with the manifested intent to do business in the state.¹⁰ Rules for jurisdictional discovery are similarly unclear—one reason being the lack of consideration about how personal jurisdiction, jurisdictional discovery, and pleading standards are related.¹¹ Since jurisdictional discovery imposes burdens and costs on a defendant before the court decides it has jurisdiction, uncertainty in this area is especially troubling.¹²

In addition, the lack of clarity in the rules for personal jurisdiction and jurisdictional discovery creates problems for businesses and sellers who are uncertain about the kinds of activities that might subject them to jurisdiction in a particular state and the burdens that may follow.¹³ This uncertainty discourages businesses that are worried about the costs of litigation from using the Internet to share information and engage in business transactions, thus inhibiting their growth and ability to compete.¹⁴ Therefore, it is important to establish a clear and consistent test for analyzing personal jurisdiction concerning the Internet. Courts should use the *Zippo* test, described in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, and analyze personal jurisdiction on the Internet by considering the level of interactivity of the website and the nature and quality of commercial activity that occurs through the Internet.¹⁵ The *Zippo* test helps courts to focus on the objective nature and quality of a defendant's Internet activity when determining whether or not personal jurisdiction over the defendant is appropriate.¹⁶

10. See *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

11. See Strong, *supra* note 5, at 493.

12. *Id.* at 492.

13. Cf. Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189–90 (1998) (describing the minimum contacts test's lack of clarity).

14. Cf. Elliot E. Maxwell et al., *The Online Landscape*, in INTERNET LAW FOR THE BUSINESS LAWYER 3, 22–23 (David Reiter et al. eds., 2001) (specifying how the Internet helps businesses to attract consumers and improve their products and services).

15. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). *But see* Recent Case, *Personal Jurisdiction—Minimum Contacts Analysis—Ninth Circuit Holds That Single Sale on eBay Does Not Provide Sufficient Minimum Contacts with Buyer's State.*—*Boschetto v. Hansing*, 539 F.3d 1011 (9th Cir. 2008), 122 HARV. L. REV. 1014, 1021 (2009) (supporting the traditional minimum contacts test); Brian D. Boone, Comment, *Bullseye!: Why a "Targeting" Approach to Personal Jurisdiction in the E-Commerce Context Makes Sense Internationally*, 20 EMORY INT'L L. REV. 241, 257–58 (2006) (criticizing the *Zippo* test).

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

For jurisdictional discovery, which currently poses similar problems of uncertainty, scholars have suggested clarifying the pleading standards.¹⁷

This Note argues that courts should use the *Zippo* test for analyzing specific jurisdiction in cases involving commercial transactions on the Internet and should interpret the pleading standard for personal jurisdiction in accordance with the approach of the Eighth Circuit. Part I introduces the history of personal jurisdiction and the relationships among personal jurisdiction, jurisdictional discovery, and pleading standards. Part II discusses how the uncertainty caused by the lack of clear rules for personal jurisdiction and jurisdictional discovery restricts the sharing of information on the Internet, commerce, and competition. Part III supports use of the *Zippo* test by explaining the benefits of the *Zippo* test, which includes its focus on objective factors and objective manifestations of intent in analyzing personal jurisdiction, and why the *Zippo* test is better than alternative tests. Part III also proposes extending the plausibility standard that applies to Federal Rule of Civil Procedure 8(a)(2) to cover pleading of personal jurisdiction in Rule 8(a)(1), consistent with the Eighth Circuit's approach and in harmony with the use of the *Zippo* test. This would require the plaintiff to state in the complaint facts sufficient to support a reasonable inference that the defendant may be subject to personal jurisdiction. The solutions suggested in this Note aim to promote business transactions and the sharing of information on the Internet.

I. THE HISTORY OF PERSONAL JURISDICTION, JURISDICTIONAL DISCOVERY, AND PLEADING STANDARDS

This Part introduces the standards that courts currently use to analyze personal jurisdiction. Section A introduces the tests that courts and scholars have suggested for analyzing personal jurisdiction on the Internet, including the minimum contacts test, the *Zippo* test, the effects test, and the targeting-based approach. Section B discusses the relationships among personal jurisdiction, jurisdictional discovery, and pleadings standards.¹⁸

17. See Strong, *supra* note 5, at 570–71, 576; see also Ressler, *supra* note 5, at 644.

18. See FED. R. CIV. P. 8(a)(1) (“A pleading that states a claim for relief must contain . . . a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no

A. THE CONSTITUTION AND PERSONAL JURISDICTION

Judicial jurisdiction is a court's power to issue a binding decision that must be enforced by other courts and government agencies.¹⁹ To issue such a decision, a court must have power over a particular defendant in the form of personal jurisdiction,²⁰ a court must have power over a particular case in the form of subject matter jurisdiction,²¹ and the service of process must be fair so that a defendant has notice of the pending action and an opportunity to present objections.²² These requirements are closely related to the United States Constitution.²³ The Due Process Clauses in the Fifth Amendment and Section 1 of the Fourteenth Amendment prohibit courts in the United States from exercising jurisdiction over a defendant if it would deprive the defendant of "life, liberty, or property, without due process of law."²⁴ Subject matter jurisdiction must be proper because Section 2 of Article III limits federal judicial authority.²⁵ Also, the Full Faith and Credit Clause in Section 1 of Article IV requires a state to recognize and enforce another state's judgment if the deciding court had jurisdiction.²⁶

Thus, personal jurisdiction must comport with constitutional due process and comply with a valid enabling statute.²⁷

new jurisdictional support . . .").

19. YEAZELL, *supra* note 7, at 61.

20. *Id.* at 62–63.

21. *Id.*

22. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

23. YEAZELL, *supra* note 7, at 62.

24. U.S. CONST. amend. XIV, § 1 (governing the power of states); U.S. CONST. amend. V (governing the power of the federal government). *See generally* FED. R. CIV. P. 4(k)(1)(A) (stating that federal courts can exercise jurisdiction if the defendant is served and is "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1599–1606 (1992) (noting that Congress could give federal courts nationwide jurisdiction so that parties would be subject to suit in any federal district court if they have contacts with any place in the United States).

25. YEAZELL, *supra* note 7, at 62; *see* U.S. CONST. art. III, § 2.

26. YEAZELL, *supra* note 7, at 62–63; *see* U.S. CONST. art. IV, § 1.

27. *See generally, e.g.*, MINN. STAT. § 543.19 (2013) (applying when a foreign corporation or nonresident individual, in person or through an agent, "owns, uses, or possesses any real or personal property situated in this state;" or "transacts any business within the state;" or "commits any act in Minnesota causing injury or property damage;" or "commits any act outside Minnesota causing injury or property damage in Minnesota," unless Minnesota does not have a substantial interest in providing a forum or the burden on the defendant would violate fairness and substantial justice); 42 PA. CONS. STAT. ANN. § 5322(b) (West 2014) (stating that the power of Pennsylvania tribunals over

Supreme Court cases establish that personal jurisdiction is proper if the defendant is served while physically in the forum state,²⁸ consents to the jurisdiction,²⁹ or has minimum contacts with the forum state.³⁰ If minimum contacts exist, a court may seek to exercise either general or specific personal jurisdiction over a defendant.³¹ General jurisdiction allows a court to hear any and all claims against the defendant if the defendant's connections with the forum state are "continuous and systematic" so that the defendant is "essentially at home in the forum state."³² Specific jurisdiction allows a court in the forum state to adjudicate claims that arise from or are related to the defendant's contacts with the forum state.³³ The requirement of personal jurisdiction protects parties from having to defend cases in a remote forum to which they have little or no connection.³⁴ It is thus said to protect territorial limitations on the power of states,³⁵ federalism,³⁶ and an individual's liberty interest.³⁷ The

nonresidents extends "to the fullest extent allowed under the Constitution of the United States").

28. *Pennoyer v. Neff*, 95 U.S. 714, 724 (1877), *overruled on other grounds* by *Shaffer v. Heitner*, 433 U.S. 186 (1977).

29. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991) (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9–10 (1972)).

30. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

31. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

32. *Id.*

33. *Id.* (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966)). Scholars debate about when claims should be considered "related" to a defendant's activities. See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82 (requiring related activities to be those that would be included in a comparable domestic complaint because they are pertinent to the lawsuit's merits).

34. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

35. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); see *Shaffer v. Heitner*, 433 U.S. 186, 204 n.20 (1977) (discussing *Hanson v. Denckla*); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 383 (1985) (discussing the impact of personal jurisdiction rules upon territorial limitations of states).

36. Brilmayer, *supra* note 33, at 96. *But see* Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 513–14 (1987) (opposing the view that federalism is relevant to personal jurisdiction). See generally Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 501–02, 529–60 (2008) (differentiating between "vertical federalism," which concerns the relationship between the federal government and the states, and "horizontal federalism," which concerns the interactions and relationships among states, and further explaining how the United States Constitution addresses potential issues that may arise as states exercise their powers).

37. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S.

following sections describe the various tests that courts use to analyze personal jurisdiction.

1. The Minimum Contacts Test of *International Shoe Co. v. Washington*: An Objective or Subjective Test

Courts traditionally use the minimum contacts test from *International Shoe Co. v. Washington*³⁸ to analyze personal jurisdiction. In *International Shoe*, the Supreme Court ruled that personal jurisdiction over a defendant is proper when the defendant has certain “minimum contacts” with the forum state and the suit “does not offend ‘traditional notions of fair play and substantial justice.’”³⁹ In *International Shoe*, the Supreme Court found that a Delaware corporation with its principal place of business in Missouri conducted business in Washington through systematic solicitation of orders by its salesmen in the state, salesmen’s display of products in permanent display rooms in the state, and generation of a large volume of sales from supplying products in the state.⁴⁰ Applying the minimum contacts test, the Court held that the corporation was subject to suit in Washington for unpaid contributions to the state unemployment compensation fund.⁴¹

The Supreme Court has further defined the minimum contacts test. In *McGee v. International Life Insurance Co.*, the Supreme Court held that due process was satisfied if the suit was based on a contract that had “substantial connection with that State.”⁴² In *McGee*, the Court decided that a California court had personal jurisdiction over the defendant, an insurance company, where the insurance company had delivered a contract in California, received premiums sent from California, and where the insured was a resident of California at the time of death.⁴³ This landmark case stands for the proposition that a *single* contact can be sufficient to establish personal jurisdiction.⁴⁴ Furthermore, in *Hanson v. Denckla*, the Supreme Court

694, 702 (1982); *cf.* *Perdue*, *supra* note 36, at 479 (noting that the Supreme Court has not specifically defined what constitutes the liberty interest mentioned).

38. 326 U.S. 310, 316 (1945).

39. *Id.*

40. *Id.* at 314–15.

41. *Id.* at 320.

42. 355 U.S. 220, 223 (1957) (“[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.”).

43. *Id.* at 221–22.

44. *Id.* at 222–23.

ruled that to satisfy the requirement of minimum contacts with the forum state, there must “be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”⁴⁵

In *World-Wide Volkswagen Corp. v. Woodson*, the Supreme Court reaffirmed the use of the minimum contacts test.⁴⁶ Here, the Court found that sufficient minimum contacts did not exist with regards to the defendant, a vehicle retailer, since the defendant did not close sales, provide services in, or avail itself of the benefits of the forum state’s law and the “privileges of conducting activities” in the forum state.⁴⁷ The mere likelihood that a product sold in one state would find its way into the forum state did not satisfy minimum contacts; rather, the Court clarified that the foreseeability inquiry of the test asks whether “the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”⁴⁸ The Court also listed factors that courts should consider when deciding whether or not exercising personal jurisdiction is fair: “the burden on the defendant,” “the forum State’s interest in adjudicating the dispute,” “the plaintiff’s interest in obtaining convenient and effective relief,” “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and “the shared interests of the several States in furthering fundamental substantive social policies.”⁴⁹ Recently, in *Walden v. Fiore*, the Supreme Court revisited the issue of personal jurisdiction and emphasized that the defendant must create the contacts establishing personal jurisdiction.⁵⁰

Although the minimum contacts test is the dominant test, scholars have criticized it for its lack of clarity.⁵¹ For example,

45. 357 U.S. 235, 253 (1958).

46. 444 U.S. 286, 291–92 (1980).

47. *Id.* at 295–98.

48. *Id.* at 297.

49. *Id.* at 292.

50. 134 S. Ct. 1115, 1123 (2014).

51. See McMunigal, *supra* note 13, at 189 (describing the criteria of the minimum contacts test as “confused, its purposes perplexing, and its results often unpredictable”); see also *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 323, 325 (1945) (Black, J., concurring) (describing the majority’s approach as “vague” and “elastic”); Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 7 (1989) (explaining that while the Supreme Court refused to base the question of personal jurisdiction on the defendant’s consent in *International Shoe Co. v. Washington*, it has had difficulty defining when personal jurisdiction is consistent with “fair play and substantial justice”).

scholars such as Professor Kevin C. McMunigal have criticized the lack of guidance about whether the minimum contacts test is an objective or subjective test.⁵² Scholars have also criticized the Supreme Court's use of the word "purposeful" to describe the test; noting that although the word "purposeful" seems to require actual, subjective intent, the Supreme Court uses an objective mental state inquiry related to foreseeability in analyzing personal jurisdiction.⁵³ The Internet, which has no physical boundaries, further emphasizes the lack of clarity in the analysis for personal jurisdiction. With the growth of the Internet, courts face new challenges in analyzing personal jurisdiction.⁵⁴

2. Personal Jurisdiction on the Internet and the Development of the *Zippo* Test

The problem in the current analysis for personal jurisdiction on the Internet was highlighted in *Inset Systems Inc. v. Instruction Set, Inc.*⁵⁵ In *Inset Systems*, a Connecticut corporation brought suit in the District of Connecticut against a Massachusetts corporation, alleging trademark infringement for use of an Internet domain name.⁵⁶ The defendant operated a website that was accessible to residents in all states and not only residents in Connecticut.⁵⁷ The United States District Court for the District of Connecticut applied the minimum contacts test and held that personal jurisdiction was proper because advertising on the Internet constituted purposefully doing business in Connecticut.⁵⁸ The court further noted that an advertisement on the Internet is continuously available to its users, unlike an advertisement on the television and the radio.⁵⁹

52. See McMunigal, *supra* note 13, at 217.

53. *Id.* at 216; cf. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011) (plurality opinion) (agreeing with Justice O'Connor's plurality opinion in *Asahi*); *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 540 U.S. 102, 112 (1987) (plurality opinion) (listing examples of conduct that may show intent or purpose to direct activities towards the forum state). Scholars have proposed using an objective test based on "foreseeability," McMunigal, *supra* note 13, at 219, or based on "recklessness," C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 640 (2006).

54. See Boone, *supra* note 15, at 241.

55. 937 F. Supp. 161 (D. Conn. 1996).

56. *Id.* at 162–63.

57. *Id.* at 165.

58. *Id.*

59. *Id.*

However, the United States District Court for the Southern District of New York reached a different conclusion based on a similar website in *Bensusan Restaurant Corp. v. King*.⁶⁰ In *Bensusan*, an operator of a New York jazz club sued an operator of a Missouri jazz club, alleging trademark infringement.⁶¹ The court noted that the website at issue, which contained information about the club, events, and tickets, was not interactive because a user had to visit the ticket booth and pick up the tickets at the club on the night of the event to attend the club.⁶² The court rejected the argument that personal jurisdiction was proper based on the website.⁶³

Recognizing the differences among court decisions, the United States District Court for the Western District of Pennsylvania established the famous *Zippo* test in 1997.⁶⁴ In *Zippo*, the defendant Zippo Dot Com, Inc. (Dot Com), a California corporation which operated a website and Internet news service, obtained the exclusive right to use the domain names “zip-po.com,” “zippo.net,” and “zipponews.com.”⁶⁵ The plaintiff, a manufacturer of “Zippo” tobacco lighters based in Pennsylvania, sued for trademark dilution, infringement, and false designation.⁶⁶

The court applied a “sliding scale” test, now known as the *Zippo* test, ruling that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”⁶⁷ The court explained that one end of the sliding scale involves situations where a defendant “clearly does business over the Internet” and is subject to jurisdiction.⁶⁸ The opposite end of the sliding scale involves situations where a defendant simply posts information on a “passive” website that is accessible by users in other jurisdictions.⁶⁹ The court

60. 937 F. Supp. 295 (S.D.N.Y. 1996).

61. *Id.* at 297.

62. *Id.* at 297, 299.

63. *Id.* at 301.

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

65. *Id.* at 1121.

66. *Id.*

67. *Id.* at 1124.

68. *Id.* (referring to *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1260–61, 1264–66 (6th Cir. 1996), where the defendant knowingly entered into contracts with a resident of the forum state and facilitated repeated transmissions of computer files).

69. *Id.*

ruled that use of a passive website that “does little more than make information available to those who are interested” cannot form the basis for personal jurisdiction.⁷⁰ The middle of the sliding scale involves a defendant’s use of an “interactive” website, where users can “exchange information with the host computer.”⁷¹ Personal jurisdiction based on such an interactive website depends on the “level of interactivity” of the website and the nature and quality of commercial activity or exchange of information that occurs on the Internet.⁷² The court in *Zippo* concluded that personal jurisdiction was proper because Dot Com repeatedly and consciously chose to accept Pennsylvania residents’ applications, assign passwords, and knew that the contracts would be sent to Pennsylvania.⁷³ Also, the transmission was within the defendant’s control; if the defendant decided that the risk of being subject to jurisdiction was too high, it could have discontinued connections with the state.⁷⁴

3. Manifest Intent and the Effects Test

Some courts have taken a slightly different approach and expressly require a defendant’s intent in addition to the elements of the *Zippo* test for personal jurisdiction.⁷⁵ For example, in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, the court considered the interactivity of a website, which displayed the plaintiff’s copyrighted photographs.⁷⁶ However, the court rejected the argument that specific jurisdiction over the defendant was proper because the defendant did not knowingly transmit the photographs to Maryland with the “manifested intent” of engaging in business in Maryland.⁷⁷

The requirement of intent in *ALS Scan, Inc.* is similar to the elements of the *Calder* test, also known as the effects test, because both approaches focus on a defendant’s subjective intent.⁷⁸ The effects test arose in *Calder v. Jones*, a defamation case in which the Supreme Court held that personal jurisdiction over the defendants in California was proper because the

70. *Id.*; see *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336–37 (5th Cir. 1999) (applying the *Zippo* test and finding a lack of personal jurisdiction).

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

72. *Id.*

73. *Id.* at 1126.

74. *Id.*

75. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714–15 (4th Cir. 2002).

76. *Id.* at 709–10.

77. *Id.* at 714–15.

78. *Calder v. Jones*, 465 U.S. 783, 789–90 (1984).

defendants' "intentional, and allegedly tortious actions were expressly aimed at California" and the defendants "knew that the brunt of [the] injury would be felt" in the forum state.⁷⁹ The effects test is often used to analyze personal jurisdiction in intentional tort cases such as defamation,⁸⁰ but courts have also used it in cases involving commercial transactions on the Internet.⁸¹

4. The Targeting-Based Approach

Another alternative to the *Zippo* test is the targeting-based approach.⁸² Proponents of this test explain the difference between the effects test and the targeting-based approach⁸³ by stating that the effects test focuses on whether or not a defendant could have foreseen the effects that his or her activities would have in the forum state,⁸⁴ while the targeting-based approach focuses on and requires that a defendant "specifically aim[ed]" his or her online activities at a forum state for personal jurisdiction to be proper.⁸⁵ The targeting-based approach thus focuses on determining a defendant's intentions and "deliberate" attempts to enter or avoid the forum state.⁸⁶ However, the targeting-based approach seems to conflict with the view of scholars who claim that analysis of personal jurisdiction should

79. *Id.*

80. See Floyd & Baradaran-Robison, *supra* note 53, at 610; see also *Calder*, 465 U.S. at 789–90; *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1074–76 (10th Cir. 2008) (finding personal jurisdiction based on the fact that the defendant intentionally sent notice of claimed infringement to eBay that was designed to cancel the plaintiff's auction in the forum state). Compare *Griffis v. Luban*, 646 N.W.2d 527, 535–36 (Minn. 2002) (denying that personal jurisdiction over the defendant existed even though the defendant directed the allegedly defamatory statements towards the plaintiff with knowledge that the plaintiff was a citizen of the forum state because the statements were not expressly aimed towards the forum state and there was no evidence that others in the forum state had read the statements), with *Abiomed, Inc. v. Turnbull*, 379 F. Supp. 2d 90, 92, 94–96 (D. Mass. 2005) (holding that personal jurisdiction was proper when the defendant posted defamatory statements on the Internet accessed by residents in the forum state). But see *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 250–51 (2d Cir. 2007) (holding that without more, posting defamatory statements on a website that is accessible in New York does not constitute transacting business in New York).

81. See *Dudnikov*, 514 F.3d at 1072, 1074–76.

82. Boone, *supra* note 15, at 265–66.

83. *Id.*

84. *Id.*

85. *Id.* at 263–66 (quoting *Millennium Enterprises, Inc. v. Millenium Music, LP*, 33 F. Supp. 2d 907, 921 (D. Or. 1999)).

86. *Id.* at 263, 265.

be based on an objective mental state inquiry regarding foreseeability and the possibility of being subject to suit in the forum state.⁸⁷

Thus, courts have a number of different tests to choose from when deciding which test to use for analyzing specific jurisdiction in cases involving commercial transactions on the Internet: the minimum contacts test, the *Zippo* test with or without an express intent element, the effects test, and the targeting-based approach. Currently, online retail sales amount to hundreds of billions of dollars and are forecast to grow even more, both in the amount of sales and in the percentage of total retail sales.⁸⁸ The growing use of the Internet emphasizes the importance of resolving the uncertainty in the analysis for personal jurisdiction. The resolution should also be accompanied by consideration of jurisdictional discovery and pleadings standards, which are closely related to the analysis for personal jurisdiction.

B. THE RELATIONSHIPS AMONG PERSONAL JURISDICTION, JURISDICTIONAL DISCOVERY, AND PLEADING STANDARDS

When a defendant is served with process and receives a copy of the complaint and the summons, the defendant may file a motion to dismiss—for example, under Rule 12(b)(1) for lack of subject matter jurisdiction or under Rule 12(b)(2) for lack of personal jurisdiction.⁸⁹ Afterwards, the plaintiff may request information through jurisdictional discovery, and a court may order jurisdictional discovery.⁹⁰ A court usually orders jurisdictional discovery under Rule 26(d)(1) since jurisdictional discovery occurs before the Rule 26(f) conference related to discovery that is followed by the due date for the mandatory disclosure required under Rule 26(a)(1) and the Rule 16(b) scheduling conference.⁹¹ Since a court may not have jurisdiction, care must be

87. See *supra* Part I.A.1.

88. See *U.S. E-Commerce Sales, 2014-2018*, INTERNETRETAILER, <https://www.internetretailer.com/trends/sales/us-e-commerce-sales-2013-2017/> (last visited Apr. 21, 2015) (reporting that both eMarketer and Forester Research estimate continued growth in e-commerce sales).

89. See generally FED. R. CIV. P. 12(b) (listing defenses a party may assert in a required responsive pleading or by motion); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.32 (2004) (“The pleadings may disclose issues of law that can be resolved by a motion to dismiss, to strike, or for judgment on the pleadings. . . . If the court considers evidence in connection with such a motion, the motion must be treated as one for summary judgment.”).

90. Strong, *supra* note 5, at 491–92.

91. See FED. R. CIV. P. 16(b), 26(a),(d)(1), (f).

taken to prevent imposing undue burdens on the defendant at this point.⁹² This Section describes how personal jurisdiction, jurisdictional discovery, and pleading standards are related.

1. Jurisdictional Discovery in Case Law and in the Federal Rules of Civil Procedure

The Supreme Court discussed jurisdictional discovery in *Oppenheimer Fund, Inc. v. Sanders*, where it stated, “[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.”⁹³ The Supreme Court further stated, “[D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case”⁹⁴ Although scholars question the significance of *Oppenheimer* as precedent due to its facts,⁹⁵ the Federal Rules of Civil Procedure support jurisdictional discovery.⁹⁶

The scope of discovery as stated in Rule 26(b)(1), despite the 2000 amendment to the rules⁹⁷ and the limitation in Rule 26(b)(2)(C),⁹⁸ is very broad: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.”⁹⁹ If a defendant believes that he or she is not subject to jurisdiction after receiving a complaint and summons from a court, the defendant may do one of the following: ignore the complaint and summons and challenge

92. Strong, *supra* note 5, at 492.

93. 437 U.S. 340, 351 n.13 (1978).

94. *Id.* at 351 (citation omitted).

95. Strong, *supra* note 5, at 500.

96. The Supreme Court promulgates the Federal Rules of Civil Procedure under the Rules Enabling Act. *See* 28 U.S.C. § 2072(a) (2012).

97. FED. R. CIV. P. 26 cmt. 2000 amend.

98. FED. R. CIV. P. 26(b)(2)(C) (explaining that a court may limit a discovery request when it is “unreasonably cumulative or duplicative,” when there has already been “ample opportunity to obtain the information by discovery in the action,” or when “the burden or expense of the proposed discovery outweighs its likely benefit”).

99. FED. R. CIV. P. 26(b)(1). Although there is a “good cause” portion to this rule that allows the court to order discovery for matters that are relevant to the subject matter in the case for good cause, *id.*, there have been recent proposals to amend Rule 26, *see* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., AGENDA E-19, MEMORANDUM FROM JUDGE DAVID G. CAMPBELL TO JUDGE JEFFREY SUTTON app., at B-4, B-31 (Sept. 2014), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf>.

the default judgment through collateral attack; make a special appearance in court for the limited purpose of challenging the court's jurisdiction; or waive lack of personal jurisdiction.¹⁰⁰ A court may order the defendant to respond to discovery requests related to the motion to dismiss for lack of personal jurisdiction, and if the defendant does not respond properly, the court may impose sanctions.¹⁰¹

2. The Pleading Standard Concerning Jurisdiction

The party requesting discovery bears the burden of showing that it is proper.¹⁰² Apart from the question of whether jurisdiction exists or not, this raises the question about what a party requesting discovery must show to convince a court that discovery is necessary.¹⁰³ Rule 8(a)(1) states that a pleading must contain “a short and plain statement of the grounds for the court's jurisdiction.”¹⁰⁴ This language of Rule 8(a)(1) is similar to the language of Rule 8(a)(2), which requires a “short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁰⁵ In *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, the Supreme Court ruled that a plaintiff must state claims for relief that are plausible on their face¹⁰⁶ so that a court may reasonably infer that a defendant is liable for the alleged misconduct.¹⁰⁷

Courts generally hold that the “plausibility standard” that applies to Rule 8(a)(2) through *Twombly* and *Iqbal*¹⁰⁸ does not extend to Rule 8(a)(1), and thus the complaint under Rule 8(a)(1) need not state facts concerning personal jurisdiction.¹⁰⁹

100. *Ellis v. Fortune Seas, Ltd.*, 175 F.R.D. 308, 311 (S.D. Ind. 1997).

101. *See* FED. R. CIV. P. 37.

102. *Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 440 (S.D.N.Y. 2008).

103. Strong, *supra* note 5, at 525.

104. FED. R. CIV. P. 8(a)(1).

105. FED. R. CIV. P. 8(a)(2).

106. *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007).

107. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Not all state courts use the plausibility standard of *Twombly* and *Iqbal*. *See, e.g.*, *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014) (rejecting the plausibility standard of *Twombly* and *Iqbal* and holding that a claim is sufficient if the claim is “possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded”).

108. *See Ashcroft, v. Iqbal*, 556 U.S. at 677–78.

109. *See* Strong, *supra* note 5, at 571. *Compare* *Stirling Homex Corp. v. Homasote Co.*, 437 F.2d 87, 88 (2d Cir. 1971) (per curiam) (explaining that Rule 8(a) is only concerned about subject matter jurisdiction and not personal jurisdiction), *and Hagen v. U-Haul Co. of Tenn.*, 613 F. Supp. 2d 986, 1002 (W.D. Tenn. 2009) (positing that a complaint need not “allege facts supporting

However, in *Dever v. Hentzen Coatings, Inc.*, the Eighth Circuit took a contrary position and required the plaintiff to state sufficient facts in the complaint from which a court could reasonably infer that a defendant could be subject to jurisdiction in the state.¹¹⁰

Some courts do not require a prima facie showing of jurisdiction before permitting jurisdictional discovery,¹¹¹ reasoning that discovery should be granted liberally.¹¹² Other courts require the plaintiff to establish a prima facie case of jurisdiction over the defendant before permitting jurisdictional discovery.¹¹³ However, courts are not clear about what constitutes a prima facie or less than a prima facie showing and are also unclear about the scope of jurisdictional discovery.¹¹⁴ Thus, trial judges have significant discretion in the area of jurisdictional discovery.¹¹⁵ While courts agree that vague or general discovery requests should be denied and jurisdictional discovery should be “limited,” scholars continue to debate what constitutes limited discovery.¹¹⁶

personal jurisdiction” under Rule 8(a)), *with Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004) (requiring the complaint to allege sufficient facts for personal jurisdiction).

110. 380 F.3d at 1072–73 (“When a defendant raises through affidavits, documents, or testimony [a] meritorious challenge to personal jurisdiction, the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents” (citing *Jet Charter Serv., Inc. v. W. Koeck*, 907 F.2d 1110, 1112 (11th Cir. 1990))).

111. *See Strong, supra* note 5, at 526 (discussing the liberal approaches toward jurisdictional discovery of the Fifth Circuit, the Eleventh Circuit, and the D.C. Circuit).

112. *See Blair v. City of Worcester*, 522 F.3d 105, 111 (1st Cir. 2008).

113. *See Mother Doe I v. Al Maktoum*, 632 F. Supp. 2d 1130, 1145 (S.D. Fla. 2007) (discussing the Second and Seventh Circuits’ requirement of a “prima facie case of jurisdiction over the defendant” before allowing jurisdictional discovery).

114. *Strong, supra* note 5, at 527, 532.

115. *Id.* at 530; *see* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (“Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.”).

116. *Strong, supra* note 5, at 532–33; *see* FED. R. CIV. P. 26(b)(2)(C)(i)–(iii) (listing situations where a court must limit discovery, including when the burden or expense of discovery would exceed the likely benefits).

II. PROBLEMS CREATED BY THE CURRENT ANALYSES FOR PERSONAL JURISDICTION ON THE INTERNET AND JURISDICTIONAL DISCOVERY

This Part discusses concerns about the current analyses for personal jurisdiction and jurisdictional discovery due to a lack of clarity in the rules. Section A emphasizes how businesses and sellers face uncertainty due to different tests and inconsistent results concerning personal jurisdiction across jurisdictions and why applying the minimum contacts test, the effects test, or the targeting-based approach creates problems. Section B explains how the lack of guidance about jurisdictional discovery adds to the defendant's burdens and raises litigation costs.

A. INCONSISTENT RESULTS AND DIFFERENT TESTS ACROSS JURISDICTIONS CREATE UNCERTAINTY FOR BUSINESSES AND SELLERS

The inconsistent court decisions¹¹⁷ demonstrate that the minimum contacts test creates uncertainty in the personal jurisdiction analysis in the context of the Internet. For example, the court in *Inset* held that simply posting information on a website was sufficient to establish minimum contacts.¹¹⁸ Since the advertisement was accessible in all states, the reasoning in *Inset* poses the danger of subjecting a defendant to personal jurisdiction in every state for posting information on a website. Such a decision is troubling because it can have a negative, chilling effect on the sharing of information on the Internet and the development of commerce and competition for businesses.

1. Uncertainty Discourages Sharing of Information

Businesses and sellers may refrain from advertising or posting information on the Internet because they are worried about being subject to jurisdiction.¹¹⁹ This is problematic because society benefits from the active use of the Internet by businesses and sellers. First, consumers can conveniently compare different prices and consider alternative products or ser-

117. *Compare* *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996) (concluding that the defendant had sufficient minimum contacts because it had "directed its advertising activities via the Internet and its toll-free number" toward the state of Connecticut), *with* *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 297 (S.D.N.Y. 1996) (concluding that the existence of a website that simply posts information, without anything more, is insufficient to establish personal jurisdiction).

118. *Inset*, 937 F. Supp. at 165.

119. See Keith H. Beyler, *Personal Jurisdiction Based on Advertising: The First Amendment and Federal Liberty Issues*, 61 MO. L. REV. 61, 61–62 (1996).

vices listed on the Internet; consumers can make informed purchasing decisions by searching through Internet postings containing pictures or product descriptions rather than by moving physically from store to store.¹²⁰ Second, consumers' access to information may encourage businesses and sellers to set reasonable prices.¹²¹ Third, if consumers exchange opinions and write reviews on a website, businesses can take those opinions and comments into account to improve their products and services.¹²² For example, many small, medium-sized, and large businesses use software that help manufacturers, retailers, and other companies to collect and display reviews that consumers have generated online.¹²³ The software collects the information from commercial websites and helps businesses to recognize and accommodate consumers' interests.¹²⁴

Also, businesses may use interactive websites so that consumers can place orders and engage in business transactions on the Internet. Businesses may also use websites mainly to advertise and attract customers. For example, a restaurant may have a website with information about its menus and customer reviews for advertisement. Amusements parks and hotels may use similar advertising.¹²⁵ Operators of such websites, which help consumers to make informed purchasing decisions

120. Maxwell et al., *supra* note 14, at 23; see also Fred Galves, *Virtual Justice As Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, 2009 U. ILL. J.L. TECH. & POL'Y 1, 2.

121. Cf. Maxwell et al., *supra* note 14, at 23 (reporting that it is easy and inexpensive to change prices and look at a customer's stored data). *But see* Hal R. Varian, *Economic Scene: When Commerce Moves Online, Competition Can Work in Strange Ways*, N.Y. TIMES, Aug. 24, 2000, at C2 (explaining that because businesses can also research the prices their competitors charge, they may potentially charge higher prices).

122. See Maxwell et al., *supra* note 14, at 22–23 (reporting that some websites encourage customers to rate their experience shopping online and provide information to other shoppers, and that other websites place cookies to track the online activities of the web user); AMAZON, <http://www.amazon.com> (last visited Apr. 21, 2015) (allowing customers to rate products out of five stars and write their opinions about the price, quality, and delivery of products). *But cf.* Arthur R. Miller, Remarks, *The Emerging Law of the Internet*, 38 GA. L. REV. 991, 1003–05 (2004) (raising potential privacy concerns related to online data collection and dissemination).

123. *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, 2014 WL 203966, at *2 (N.D. Cal. Jan. 8, 2014).

124. *Id.* at *6.

125. See *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 253–55 (2d Cir. 2007) (finding no personal jurisdiction over the defendant where a nonprofit Internet website provided information about household movers, accepted donations, and allegedly posted false and defamatory statements because the website activity did not amount to transacting business in New York); *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 299–301 (S.D.N.Y. 1996).

and alert businesses to the demands of consumers, would be concerned by the holding in *Inset*, which the court in *Zippo* described as representing the “outer limits of the exercise of personal jurisdiction based on the Internet.”¹²⁶

In addition, Professor Keith H. Beyler has suggested that the uncertainty in the current analysis for personal jurisdiction may threaten values protected by the First Amendment.¹²⁷ A business may advertise products or services that are illegal where advertised but legal where sold.¹²⁸ In such a case, the possibility of being subject to personal jurisdiction in a foreign state based on an advertisement and having that state’s law determine liability will have the practical effect of banning some advertising.¹²⁹ Professor Beyler acknowledges that the argument regarding the First Amendment might not be directly applicable because personal jurisdiction is different from traditional regulation of commercial speech.¹³⁰ Nevertheless, Professor Beyler asserts that concerns related to the First Amendment still weigh in favor of not basing personal jurisdiction solely on advertisement.¹³¹ In *Calder*, the Supreme Court refrained from considering the First Amendment when analyzing personal jurisdiction in “libel and defamation actions” because the substantive law of the suits takes into account the First Amendment.¹³² However, Professor Beyler suggests that such reasoning does not apply to non-defamation and non-libel cases

126. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125 (W.D. Pa. 1997). If advertisements on websites become a potential basis for specific jurisdiction, parties may argue about the level of causation that applies when analyzing whether or not the claim arises from or is related to the defendant’s contact or website activity.

127. See Beyler, *supra* note 119, at 116–17 (highlighting how the First Amendment may be relevant to the personal jurisdiction analysis by discussing advertising, abortion providers, and parental involvement statutes). See generally U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

128. Beyler, *supra* note 119, at 62.

129. *Id.* (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)).

130. *Id.* at 109.

131. *Id.* at 117. Free speech and sharing of information have been historically valued for helping people to arrive at the truth by finding potential weaknesses or errors in the current reasoning or way of thinking. JOHN STUART MILL, ON LIBERTY 75–78 (1859). It also promotes individuals’ autonomy by providing information about different options from which to choose, Saul Levmore & Martha C. Nussbaum, *Introduction*, in THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION 1, 8 (Saul Levmore & Martha C. Nussbaum eds., 2010), and protects open debate critical in democracy, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948).

132. *Calder v. Jones*, 465 U.S. 783, 790 (1984).

involving businesses and their advertising.¹³³ The need to encourage exchange of information on the Internet shows the urgency of adopting a clear personal jurisdiction analysis for the Internet, preferably one that will not subject a defendant to personal jurisdiction in the forum state for advertisement alone.

2. Uncertainty Restricts Businesses from Using the Internet To Grow and Inhibits Commerce and Competition

The Internet, by connecting millions of users online, presents businesses with new markets and opportunities to grow.¹³⁴ For example, a small or growing company may not be able to maintain physical stores in various states, but it may be able to attract consumers to its stores, goods, and services through a website. Society wants to encourage the growth of businesses with attractive and creative products or efficient production capabilities.¹³⁵

However, the possibility of being subject to personal jurisdiction in multiple jurisdictions may be prohibitively costly.¹³⁶ If businesses are subject to suit in a jurisdiction on the grounds that people can view the contents of their websites in the forum state, businesses may face laws and obligations from different states that are in conflict.¹³⁷ The result would mean that only large corporations that are profitable or “heavily capitalized entrepreneurs” would be able to pursue new opportunities for growth and ventures on the Internet.¹³⁸

133. Beyler, *supra* note 119, at 117.

134. See generally Mark Grossman & Joann Nesta Burnett, *Web Development Agreements*, in INTERNET LAW FOR THE BUSINESS LAWYER 121 (David Reiter et al. eds., 2001) (citing Rinaldo Del Gallo, III, *Who Owns the Web Site? The Ultimate Question When a Hiring Party Has a Falling-Out with the Web Site Designer*, 16 J. MARSHALL J. COMPUTER INFO. L. 857, 862 (1998)) (stating that the cost of creating a website ranges from one hundred dollars for a single electronic flyer to millions of dollars for a complex site).

135. See, e.g., ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 41 (2d ed. 2008).

136. A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles To Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 113.

137. See Andrea M. Matwyshyn, *Of Nodes and Power Laws: A Network Theory Approach to Internet Jurisdiction Through Data Privacy*, 98 NW. U. L. REV. 493, 508 n.78 (2004).

138. Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3, para. 60 (1997). See generally Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. (forthcoming 2015), available at http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2507798 (suggesting that courts should be able to order parties to submit and follow a litigation budget that describes

However, the presence of many sellers and buyers is a characteristic of a competitive market.¹³⁹ Society values competition because it is associated with allocative efficiency, production efficiency, and consumption efficiency that benefit consumers.¹⁴⁰ Allocative efficiency reduces deadweight loss that results when businesses or sellers reduce sales in exchange for raising prices and consumers are deprived of purchases they value at above the production costs.¹⁴¹ Production efficiency arises when the producers are businesses with the ability to produce goods or services at the lowest cost,¹⁴² and consumption efficiency means that the buyers are consumers who most value the goods.¹⁴³ Therefore, society has a high incentive to reduce uncertainty and promote competition among businesses by setting a clear standard for personal jurisdiction on the Internet. A clear standard will help businesses to weigh the risks and benefits of doing business in foreign states, and businesses can consult with lawyers about the costs and likelihood of potential lawsuits.¹⁴⁴

B. UNCLEAR RULES FOR JURISDICTIONAL DISCOVERY ARE BURDENSOME FOR THE DEFENDANT AND RAISE LITIGATION COSTS

Scholars have recognized that uncertainty in the standard and scope of jurisdictional discovery is related to the uncertainty in the analysis for personal jurisdiction.¹⁴⁵ First, plaintiffs are more likely to request broad discovery to ensure that they do not miss information that may be useful.¹⁴⁶ This is especially true since courts are not clear or consistent about how they will evaluate personal jurisdiction.¹⁴⁷ The need to provide potentially large amounts of information is burdensome for the defend-

the expected litigation costs).

139. GAVIL ET AL., *supra* note 135, at 23–41.

140. *Id.* at 28–30.

141. *Id.*

142. *Id.* at 30.

143. *Id.*

144. See Jeffrey M. Jensen, *Personal Jurisdiction in Federal Courts over International E-Commerce Cases*, 40 LOY. L.A. L. REV. 1507, 1541–43 (2007).

145. See Strong, *supra* note 5, at 535.

146. *Id.* at 524; see Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 637 n.12, 638, 643–44 (1989) (stating that discovery requests may impose costs on the responding party that are greater than the social value of the information, but also noting some of the benefits of non-abusive discovery requests that help parties to agree on settlement terms before trial).

147. Strong, *supra* note 5, at 535.

ant.¹⁴⁸ For example, in addition to requests for depositions,¹⁴⁹ a plaintiff may seek discovery of documents both in print and stored electronically.¹⁵⁰ Broad discovery requests may seek all documents related to the advertisement and sale of the product at issue to any person or entity in the United States and all documents related to the discussions, negotiations, inquiries, or communications about the product.¹⁵¹ Other jurisdictional discovery requests may ask for information about the physical presence of a defendant or a defendant's employees or agents in the forum state, offices in the forum state, assets or corporate affiliates in the forum state, and information about "customers based in the forum who logged onto the defendant's website."¹⁵² Jurisdictional discovery requests may even ask for all documents related to the issue of jurisdiction.¹⁵³

Second, some issues related to jurisdiction are also related to the merits of a defendant's liability.¹⁵⁴ These situations arise when a plaintiff asserts jurisdiction based on a long-arm statute and on principles of agency or corporate law; for example, a plaintiff may argue that a parent company is subject to jurisdiction in the forum state based on the activities of a wholly owned subsidiary.¹⁵⁵ As a result, a defendant must carefully consider arguments concerning the merits of a case even before the issue of jurisdiction has been decided and has less time to

148. *Id.* at 502–03.

149. For an example of a list of topics for which a plaintiff may request depositions, see *id.* at 541.

150. For an example of a list of requests for documents, see *id.* at 542–44. For an example of a list of requests for documents and witnesses concerning personal jurisdiction, see *id.* at 548–52. See generally Jake Vandelist, Note, *Status Update: Adapting the Stored Communications Act to a Modern World*, 98 MINN. L. REV. 1536, 1557–63 (2014) (proposing that legislators should update the Stored Communications Act by incorporating a civil discovery provision that uses a broad statutory definition of "network service provider," codifies an exception to the Stored Communications Act for civil discovery requests served on an Internet service provider's user, and includes a cost-shifting civil discovery exception).

151. See Strong, *supra* note 5, at 548–51.

152. *Id.* at 552; see *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984).

153. See Defendant AmTRAN's Motion To Compel Jurisdictional Discovery at 5, *Sony Corp. v. AmTRAN Tech. Co.*, No. 5:08-cv-05706-JF-HRL (N.D. Cal. June 23, 2009), 2009 WL 2625703.

154. Strong, *supra* note 5, at 538.

155. *Id.*; see *Anderson v. Dassault Aviation*, 361 F.3d 449, 452–55 (8th Cir. 2004).

prepare responses in interrogatories and depositions, which may later be used in trial as important pieces of evidence.¹⁵⁶

Overly-broad discovery requests are burdensome for both large and small businesses. Large businesses may have extensive information related to even one product line or website. Litigation costs businesses time, money, and resources because businesses must find and produce information and documents as required while making sure not to disclose confidential information. In addition, depositions of directors or managers of a business may disrupt business activities.¹⁵⁷ Smaller businesses may not have constant access to legal counsel to advise on the organization of information in preparation for potential lawsuits and discovery requests. Although jurisdictional discovery seeks to increase access to courts and prevent frivolous lawsuits, the proceeding currently lacks clear and practical limits.

III. USING THE *ZIPPO* TEST FOR ANALYZING PERSONAL JURISDICTION AND THE PLAUSIBILITY STANDARD FOR PLEADING PERSONAL JURISDICTION

Having considered the uncertainty and problems concerning the current rules for personal jurisdiction and jurisdictional discovery, this Part proposes a number of solutions. Section A first suggests that courts should use the *Zippo* test to analyze specific jurisdiction in cases involving commercial transactions on the Internet. Section A also identifies the benefits of using the *Zippo* test and addresses concerns that have been raised about its use. Section B discusses the factors that courts consider when analyzing the interactivity mentioned in the *Zippo* test. Section C finally proposes that a plausibility standard should apply to pleading personal jurisdiction, which would work smoothly with the use of the *Zippo* test.

A. WHY COURTS SHOULD USE THE *ZIPPO* TEST

This Section specifies the benefits of using the *Zippo* test to explain why courts should use the *Zippo* test for analyzing specific jurisdiction in cases involving commercial transactions on the Internet. This Section also addresses the concerns that have been raised about the *Zippo* test¹⁵⁸ and explains why the *Zippo* test is better than alternative tests.

156. Strong, *supra* note 5, at 538 & n.243.

157. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) (“The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.”).

158. Eric C. Hawkins, Note, *General Jurisdiction and Internet Contacts*:

1. Consistency with the Minimum Contacts Test and Consistency Across Jurisdictions: Interpreting “Purposeful Direction” and Focusing on Objective Factors and Objective Manifestations of Intent

The *Zippo* test, consistent with the traditional minimum contacts analysis,¹⁵⁹ analyzes interactive websites in the middle of the sliding scale by focusing on the nature and quality of commercial activities conducted on the Internet.¹⁶⁰ This approach continues to respect the territorial limitation on state power,¹⁶¹ federalism,¹⁶² and individual liberty¹⁶³ that the Supreme Court stated as protected by the requirement of minimum contacts. These protections are relevant because the litigation, though maybe not the commercial activity, takes place in the real world and not the virtual world—and thus the burdens of litigating in a forum state that the defendant does not have minimum contacts with still exist.¹⁶⁴ Therefore, one benefit of using the *Zippo* test is that courts may look to traditional principles and cases when analyzing future cases involving the Internet and applying the *Zippo* test.¹⁶⁵ Also, courts have responded favorably to the *Zippo* test, either adopting the test directly or supplementing the test with other requirements.¹⁶⁶ The Second Circuit,¹⁶⁷ Third Circuit,¹⁶⁸ Fourth Circuit,¹⁶⁹ Fifth

What Role, If Any, Should the Zippo Sliding Scale Test Play in the Analysis?, 74 *FORDHAM L. REV.* 2371, 2387–88 (2006) (discussing the vagueness of the *Zippo* sliding scale test).

159. Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 *BERKELEY TECH. L.J.* 1345, 1371–72 (2001).

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

161. *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958).

162. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980).

163. *See Perdue*, *supra* note 36, at 511–18.

164. *See Geist*, *supra* note 159, at 1371 (stating that the court in *Zippo* made it clear that local law applies to the Internet).

165. *Id.* *But see Hawkins*, *supra* note 158, at 2386.

166. *See ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002). *See generally* *Boschetto v. Hansing*, 539 F.3d 1011, 1018 (9th Cir. 2008) (noting that although the *Zippo* test was not directly applicable because the seller was not the operator of the website eBay, the *Zippo* test provides a useful framework).

167. *See Best Van Lines, Inc., v. Walker*, 490 F.3d 239, 251–52 (2d Cir. 2007) (noting that although the *Zippo* test may not be a “separate framework” for analyzing personal jurisdiction on the Internet, the “sliding scale of interactivity” was helpful in measuring whether the defendant transacted any business within the meaning of the applicable statute governing personal jurisdiction).

168. *See Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir.

Circuit,¹⁷⁰ Sixth Circuit,¹⁷¹ Ninth Circuit,¹⁷² and Tenth Circuit¹⁷³ have endorsed the application of the *Zippo* test in deciding commercial cases involving the Internet, building precedent for using the test.

Consistent with the traditional minimum contacts test, the *Zippo* test focuses on the objective nature and quality of the commercial activity that the defendant conducted over the Internet rather than on the defendant's subjective intent.¹⁷⁴ The *Zippo* test notes that specific jurisdiction is proper when the defendant intentionally reaches out to conduct business with residents of the forum state.¹⁷⁵ However, by not requiring proof of the defendant's subjective intent, and rather focusing on *objective manifestations of the intent*, the *Zippo* test reduces unnecessary litigation costs and saves time. For example, courts will not have to spend time determining whose subjective intent would control since constructive knowledge can be enough to support jurisdiction.¹⁷⁶ This is efficient, especially since decisions in a business or corporation are often made by a number of people, such as the board and managers, and it can be difficult to pinpoint who should be held responsible for purposeful direction.¹⁷⁷

Some scholars have pointed out that the *Zippo* test is not always applicable to all of the various activities on the Internet, which range from defamation cases¹⁷⁸ to cases where the party

2003) (stating that the *Zippo* test has become "a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site").

169. See *ALS Scan, Inc.*, 293 F.3d at 714 (4th Cir. 2002) (stating that it was "adopting and adapting" the *Zippo* test); see also *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 399 (4th Cir. 2003).

170. See *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999).

171. See *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264–66 (6th Cir. 1996) (holding that since the commercial website's interactivity indicated specific intent to interact with the forum state's residents, personal jurisdiction was proper).

172. See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997).

173. See *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999).

174. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1127 (W.D. Pa. 1997).

175. *Id.* at 1124.

176. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982) (noting that a subjective inquiry involves special costs).

177. See *Food Scis. Corp. v. Nagler*, No. 09-1798 (JBS), 2010 WL 1186203, at *4 (D.N.J. Mar. 22, 2010) (holding that the defendant had constructive knowledge and that a business cannot insulate itself from personal jurisdiction by maintaining a separation between the proprietor and the employees).

178. See *Calder v. Jones*, 465 U.S. 783, 790 (1984) (establishing the effects

conducting transactions over the Internet is not the website operator.¹⁷⁹ One response to this concern is that the *Zippo* test may be applied to all Internet cases, including defamation cases. One lower court applied the *Zippo* test and found that a blog entry website allegedly containing defamatory statements was passive and rejected the argument that personal jurisdiction was proper.¹⁸⁰ Alternatively, scholars have also pointed out that a uniform test for *all* Internet cases regardless of the type of claim at issue is not required for the many different activities that occur on the Internet, including intentional torts such as defamation, business torts such as trademark and copyright infringement, and breach of contract.¹⁸¹ Even if different tests exist, such as the effects test for defamation and the *Zippo* test for e-commerce, businesses and their lawyers could consult the correct body of case law when deciding whether to do or not do business in the forum state. However, the uncertainty about which test will be used even when parties know that they are dealing with a case involving commercial transactions must be resolved. The *Zippo* test, with its focus on objective factors and objective manifestations of intent to do business in a forum state, provides the best solution.

2. Promoting the Use of the Internet

The court in *Zippo* stated that a passive website that simply makes information available should not be the basis for exercising personal jurisdiction.¹⁸² This encourages businesses to make use of websites to advertise products or services. Consumers can compare prices online and make more informed purchasing decisions.¹⁸³ Increased certainty in the analysis for

test for personal jurisdiction in defamation cases).

179. See *Boschetto v. Hansing*, 539 F.3d 1011 (9th Cir. 2008).

180. See *Miller v. Kelly*, No. 10-cv-02132-CMA-KLM, 2010 WL 4684029, at *3–4, *6 (D. Colo. Nov. 12, 2010) (using the *Zippo* test to analyze interactivity and characterizing the website at issue as “passive” in an alleged online defamation and libel case). See generally Neil M. Rosenbaum, *Pick a Court, Any Court: Forum Shopping Defamation Claims in the Internet Age*, 14 J. INTERNET L. 18, 21–22 (2011), available at <http://www.fvldlaw.com/system/documents/22/original/june2011.pdf?1374975891> (explaining that defamation cases raise concerns about forum shopping).

181. Dennis T. Yokoyama, *You Can't Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1166–67 (2005) (asserting that a search for a uniform test designed to address all Internet jurisdiction issues is ultimately misguided because the Internet encompasses many different activities).

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

183. See *supra* Part II.A.1.

personal jurisdiction thus promotes circulation of information. Also, the Internet provides small and large businesses with opportunities to grow. Society benefits from the growth of businesses that produce and offer good products efficiently and also benefits from the increase in competition among businesses.¹⁸⁴ The use of the *Zippo* test would thus provide society with access to better products at lower prices.

3. Focusing on the Nature and Quality of the Transaction and Encouraging Businesses To Be Responsible

The *Zippo* test also holds a defendant responsible for his or her business activities. If a defendant's actions created minimum contacts, the defendant should reasonably have anticipated being subject to jurisdiction in the forum state. If the defendant benefited or profited from connections with the forum state, the lack of personal knowledge or subjective intent to do business in the forum state should not be a complete defense to personal jurisdiction. Holding otherwise creates an unwelcome incentive for businesses and sellers to disregard or ignore information about the states that they are selling to or have connections with.¹⁸⁵

In addition, the court in *Zippo* referred to the Supreme Court's decision in *McGee*, which stated that even a single contact with the forum state may support specific jurisdiction.¹⁸⁶ The court emphasized that the minimum contacts test has always focused on the "nature and quality" of the contacts and not on the quantity, although quantity is an important factor.¹⁸⁷ A single contact can be enough to support specific jurisdiction, and the fact that the defendant's contact with the forum state resulted only in a small portion of its total sales nationwide will not be a defense as long as other factors support sufficient contacts.¹⁸⁸

184. See *supra* Part II.A.2.

185. For arguments defendants may make in a similar situation, see *Food Scis. Corp. v. Nagler*, No. 09-1798 (JBS), 2010 WL 1186203, at *4 (D.N.J. Mar. 22, 2010).

186. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1127 (W.D. Pa. 1997).

187. *Id.* (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

188. See *Zippo Mfg. Co.*, 952 F. Supp. at 1127 (rejecting the defendant's argument that contacts were insufficient because only two percent of its subscribers were residents of the forum state because significant infringement and injury occurred in the forum state); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996) (ruling that contacts were sufficient because they were "deliberate and repeated" even if they resulted in little revenue); *Tefal, S.A. v. Prods. Int'l Co.*, 529 F.2d 495, 496 (3d Cir. 1976).

Thus, a court may find under the *Zippo* test that a single act is sufficient to establish personal jurisdiction over the defendant in the forum state.¹⁸⁹ This question—whether a defendant’s single act may give rise to personal jurisdiction in the forum state—was left open in *Chloé v. Queen Bee of Beverly Hills, LLC*, where Ubaldelli sent a fake Chloé handbag to a New York address.¹⁹⁰ The court in *Chloé* noted that a single act of shipping a counterfeit handbag may be sufficient by itself to subject a defendant to personal jurisdiction, but the court stated that it did not have to decide that question because the defendant engaged in fifty-two other transactions with residents of New York, and under the totality of the circumstances, contacts were sufficient.¹⁹¹

Apparently, use of the *Zippo* test does not prevent, and is not inconsistent with, a court’s consideration of non-Internet activities in the forum state that are relevant to the claim at issue along with the Internet activities that give rise to the claim. However, even when a defendant’s contacts with the forum state are based solely or mainly on contacts through the Internet, the *Zippo* test allows a court to find specific jurisdiction and provides a clearer method for analyzing personal jurisdiction.¹⁹² Under the *Zippo* test, courts categorize situations into those where a defendant uses a passive website, those where a defendant uses an interactive website, and those where a defendant clearly conducts business activity over the Internet.¹⁹³ Then, for analyzing interactive websites, courts focus on the nature and quality of the commercial activity conducted or information exchanged.¹⁹⁴ The need to focus on a transaction’s quality to determine when exercise of specific jurisdiction is proper has grown even more important after the Supreme Court’s decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown* since courts will not easily exercise general jurisdiction over a corporation unless the corporation’s connections with the state are “continuous and systematic” enough to render the corporation “essentially at home.”¹⁹⁵ Under the *Zippo*

189. *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 161–62 (2d Cir. 2010).

190. *Id.*

191. *Id.* at 170–71; *see also* *Chloé v. Queen Bee of Beverly Hills, LLC*, 571 F. Supp. 2d 518, 530 (S.D.N.Y. 2008), *vacated*, 616 F.3d at 161–62.

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

193. *Id.*

194. *Id.*

195. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846,

test for specific jurisdiction, courts could analyze a website and commercial activity at issue and find specific jurisdiction even based on a few—or perhaps even one—transaction.¹⁹⁶

The *Zippo* test also encourages businesses to be responsible and proactive. The possibility of being subject to specific jurisdiction even over a few transactions will motivate businesses and sellers to carefully weigh the costs and benefits of doing business in other states. In commercial transactions, a seller usually accepts subscriptions, orders, or money from customers and delivers products to residents in the forum state. If a seller traveled to a forum state, sold a product there, and flew back home, the seller would be subject to jurisdiction for a claim arising from that sales transaction in the forum state. The increased convenience for businesses and sellers in conducting transactions and making profit due to the Internet should not change the result of the analysis for personal jurisdiction when the essential transaction is of the same nature.

Also, businesses may take steps to limit jurisdiction through mandatory forum selection clauses, which require a party to bring suit in a particular forum.¹⁹⁷ A website's click-wrap or browse wrap often carry such clauses.¹⁹⁸ Therefore, the *Zippo* test will encourage businesses and sellers to be more responsible when making decisions to enter and expand their market into a foreign state and take active steps to limit jurisdiction.

4. Arguments Against Use of the Effects Test or the Targeting-Based Approach

One reason the effects test is unsuitable for commercial transaction cases on the Internet is the difficulty of assessing where a large multi-forum corporation is “harmed.”¹⁹⁹ Courts may decide a website affects all places where it can be accessed,

2851 (2011); see *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction only in a forum state where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.”).

196. Courts should not confuse analysis of specific jurisdiction with analysis of general jurisdiction, even in cases involving transactions conducted over the Internet.

197. Jensen, *supra* note 144, at 1544; see also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (stating that courts will usually uphold forum selection clauses unless it would be “so gravely difficult and inconvenient” so that a party “will for all practical purposes be deprived of his day in court”).

198. Jensen, *supra* note 144, at 1544.

199. Boone, *supra* note 15, at 261.

raising a concern similar to that raised by *Inset*²⁰⁰ and chilling online information dissemination and competition.²⁰¹ Furthermore, the use of the effects test is problematic because many litigated Internet cases concern alleged violations of trademarks and copyright, referred to as business or commercial tort. For both trademark and copyright infringement, the elements of the tort do not require intent to cause injury.²⁰² However, scholars have noted that since specific intent to cause injury is an element in the effects test, application of the effects test to trademark and copyright cases has resulted in inconsistent decisions among courts.²⁰³ Another problem is that under the effects test, the harm from an Internet website posting can arguably be felt in any state.²⁰⁴

The use of the targeting-based approach is also problematic. The targeting-based approach requires the finding that a defendant specifically aimed its online activities at a forum state for a court's exercise of jurisdiction over the defendant to be constitutional.²⁰⁵ The targeting-based approach thus suggests that courts should engage in a detailed inquiry into purposeful availment, which may draw a court's attentions away from focusing on the level of minimum contacts.²⁰⁶ However, while the Internet is borderless, actual litigation takes place physically in the real world.²⁰⁷ Thus, the time, costs, and burdens related to litigation in another state court are still relevant. The burdens include litigating in a less convenient place or before less sym-

200. *Id.*

201. For a discussion of concerns raised by the decision in *Inset* and the uncertainty in the current personal jurisdiction analysis, see Part II of this Note. Defamation cases on the Internet, usually analyzed under the effects test, are also susceptible to forum shopping because substantive laws for defamation in various states differ. Rosenbaum, *supra* note 180, at 21–22.

202. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:106 (4th ed. 2002); see also *Sabinsa Corp. v. Creative Compounds, LLC* 609 F.3d 175, 187 (3d Cir. 2010) (“Evidence of a defendant’s intent is not a prerequisite for finding a Lanham Act violation; such evidence, however, weighs heavily in favor of finding a likelihood of confusion.”).

203. Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601, 639 (2003) (dividing different applications into the “strict effects test” and the “soft effects test” and stating that the Ninth Circuit’s decision in *Columbia Pictures* to use the “soft effects test” was a “misstatement of *Calder*” because it did not mention that the effects test required specific targeting).

204. Boone, *supra* note 15, at 261.

205. *Id.* at 266.

206. *Id.*

207. *Cf.* Galves, *supra* note 120, at 3–6 (proposing that the best way to resolve e-commerce disputes is through an Online Dispute Resolution, or ODR system).

pathetic juries²⁰⁸ and the possibility of the court applying its conflict of law rules and substantive law.²⁰⁹ A court in the forum state may find that a business activity is illegal even if the activity would have been legal in the state where the business is located.²¹⁰ Thus, a continued emphasis on minimum contacts with the forum state can prevent unreasonable burdens on the defendant.²¹¹

Also, the targeting-based approach currently does not state the criteria for evaluating whether or not a defendant has targeted a forum.²¹² While supporters of the targeting-based approach distinguish it from the effects test, the targeting approach would also require inquiry into the subjective intent of the defendant to do business in the state.²¹³ However, proving subjective intent may be difficult and unnecessary if it is possible to objectively and clearly infer from the business's activities that it was purposefully directing activities in the forum state.

An objective test would address the Supreme Court's concerns about defendants taking the benefit of conducting commercial activity in the forum state without accepting the responsibility and obligations.²¹⁴ Focusing on the quality of the transaction is in accordance with the *Zippo* test and would avoid the costs,²¹⁵ time, and difficulty of assessing and proving a person's subjective mental state.²¹⁶ This approach also comports with Federal Rule of Civil Procedure 1, which advocates the

208. Beyler, *supra* note 119, at 61 n.2 (suggesting that any out-of-state business can be disadvantaged by the broad power of juries in their roles as fact-finders on liability and damages issues, and that controversial out-of-state businesses like abortion providers are especially threatened).

209. *Id.* at 61–62.

210. *Id.* at 62–79 (discussing how a rule treating an advertisement as a basis of personal jurisdiction would affect abortion providers).

211. *Id.*

212. Boone, *supra* note 15, at 270.

213. *Id.* at 266.

214. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295–98 (1980).

215. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982) (explaining that because there are special costs to subjective inquiries, analyzing the objective reasonableness of a defendant's conduct should permit the resolution of many insubstantial claims on summary judgment).

216. McMunigal, *supra* note 13, at 219–20. See generally Michael J. Kaufman & John M. Wunderlich, *Messy Mental Markers: Inferring Scier from Core Operations in Securities Fraud Litigation*, 73 OHIO ST. L. J. 507, 536 (2012) (arguing that inference of scier is possible when senior management makes misleading statements about material core operations of a company).

“just, speedy, and inexpensive determination of every action and proceeding.”²¹⁷

B. CLARIFICATIONS CONCERNING THE *ZIPPO* TEST

The *Zippo* test creates a sliding scale for analyzing the constitutionality of specific jurisdiction on the Internet.²¹⁸ It clarifies that use of a passive website alone is insufficient to support specific jurisdiction while use of an interactive website supports a finding of specific jurisdiction if there is sufficient commercial activity.²¹⁹ However, critics of the *Zippo* test state that more guidance is needed about how to analyze interactive websites situated at the middle of the sliding scale.²²⁰ While fairness is an inherently flexible concept and a bright line rule for analyzing due process is unnecessary,²²¹ this section explains the factors that courts have considered when analyzing a website’s interactivity and the courts’ application of the *Zippo* test.

In many cases decided so far, courts have often considered the following factors when applying the *Zippo* test: whether or not orders or purchases can be made through the Internet,²²² website hits from forum residents, cookie placement, LISTSERV participant numbers from the forum state, forum participants in a newsgroup operated by the defendant, acceptance or processing of payments from forum residents, and existence of hyperlinks to websites within the forum state.²²³

217. FED. R. CIV. P. 1.

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

219. *Id.*

220. See Boone, *supra* note 15, at 257–59; Hawkins, *supra* note 158, at 2387–88; Stephen Higdon, Comment, *If It Wasn’t on Purpose, Can a Court Take It Personally?: Untangling Asahi’s Mess that J. McIntyre Did Not*, 45 TEX. TECH L. REV. 463, 493 (2013) (suggesting movement away from the focus on interactivity and towards analyzing the use of geolocation technology in the discovery process, noting this would require “precise definitions of online marketing tools such as geographic targeting”).

221. There is still debate whether personal jurisdiction protects substantive or procedural due process. Perdue, *supra* note 37, at 508 n.183.

222. *Compare Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. Aug. 6, 1999) (using the *Zippo* test and finding that personal jurisdiction was constitutional because NeatO’s online sales constituted doing business over the Internet), *with Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336–37 (5th Cir. 1999) (denying personal jurisdiction despite AAAA’s website which posted information about products and services, provided users with a printable mail-in order form, toll-free telephone number, mailing address and e-mail address because there was no evidence that AAAA conducted business through the Internet).

223. Stephen J. Newman, *Proof of Personal Jurisdiction in the Internet Age*, 59 AM. JUR. PROOF OF FACTS 3d 1, 15–21 (2000).

Other factors may include who initiated the transaction and the price of the product or service.²²⁴ A large profit or benefit from the forum state should also signal to a defendant that he or she could be subject to suits in the state. The court in *Zippo* also considered whether or not the website accepted applications from residents of the forum state or assigned passwords to the website.²²⁵ Scholars have also suggested that courts could consider as a factor whether or not a business tried to block connections with the forum state²²⁶ through the use of technology.²²⁷ For example, businesses can require users to register for a user account to identify the customer's location²²⁸ or use geolocation software to block users from certain states, and the use of the technology could be a factor in analyzing personal jurisdiction.²²⁹ However, the use or non-use of such technology would only be a factor in the analysis of personal jurisdiction, and the fact that a defendant used geolocation technology in an attempt to block customers from the forum state should not preclude a finding of personal jurisdiction if a defendant did in fact conduct sufficient commercial activity.²³⁰

Cases like *Bensusan* suggest that situations where a website advertises but where the main products or services do not enter the forum state fall under the "low end" of the *Zippo* sliding scale and do not support a finding of specific jurisdiction.²³¹ On the other hand, courts' use of the *Zippo* test and the factors listed above to analyze specific jurisdiction suggests that if a website is interactive, courts will focus on objective factors and objective manifestations of intent to do business in the forum state. A court is likely to find that personal jurisdiction exists

224. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

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

226. *But see Twentieth Century Fox Film Corp. v. iCraveTV*, 53 U.S.P.Q.2d (BNA) 1831 (W.D. Pa. Feb. 8, 2000).

227. Jensen, *supra* note 144, at 1541–44.

228. *Id. But see Twentieth Century Fox Film Corp. v. iCraveTV*, 53 U.S.P.Q.2d (BNA) 1831 (W.D. Pa. Feb. 8, 2000) (finding jurisdiction over a Canadian website even though the website required users to enter their area codes, acknowledge presence in Canada through a click-wrap agreement, and agree to a final click-wrap agreement).

229. Jensen, *supra* note 144, at 1542 (acknowledging that such software might not always work).

230. See *Twentieth Century Fox Film Corp. v. iCraveTV*, 53 U.S.P.Q.2d (BNA) 1831 (W.D. Pa. Feb. 8, 2000).

231. See *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 297–301 (S.D.N.Y. 1996); Jensen *supra* note 144, at 1541–44 (stating that a hotel website where users must travel to the hotel's location to use the services despite being able to reserve and pay for rooms online falls under this category).

when the main transaction occurs on the Internet, and when a defendant can control the delivery of the product and services and the receipt of payment. This argument is consistent with the view that businesses should be responsible and accountable for transactions that they had the privilege of conducting in the forum state under the protection of the forum state's laws.²³² In addition, businesses may weigh the risks and benefits of doing business in the forum state and can take steps to limit jurisdiction through forum selection clauses.

C. A PLAUSIBILITY STANDARD FOR PLEADING PERSONAL JURISDICTION

Complementing the use of the *Zippo* test, rules for pleading jurisdiction can be clarified as well. Professor S.I. Strong has suggested various potential solutions,²³³ including incorporating a list into the Federal Rules and limiting discovery to the listed facts that are the most persuasive to the determination at issue, preferably in the order of persuasiveness.²³⁴ On the other hand, the Eighth Circuit has suggested that jurisdictional discovery should be limited by having a plausibility standard apply to pleading personal jurisdiction under Rule 8(a)(1) and motions to dismiss for lack of jurisdiction under Rule 12(b)(1) and Rule 12(b)(2).²³⁵ While the usual approach does not require facts related to personal jurisdiction to be pleaded under Rule 8(a)(1), the Eighth Circuit has required the plaintiff to allege in the complaint facts that give rise to a reasonable inference that the defendant can be subject to personal jurisdiction in the state.²³⁶

The approach of the Eighth Circuit is consistent with and complements the use of the *Zippo* test. The plausibility standard shifts some of the burden of jurisdictional fact-finding to the plaintiff.²³⁷ The *Zippo* test's focus on the objective nature and quality of the defendant's activity makes the shifting of burdens easier because the plaintiff will likely have enough information to meet the pleading standards suggested by the Eighth Circuit.

232. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295–98 (1980).

233. *See* Strong, *supra* note 5, at 583–87.

234. *Id.* at 576.

235. *See* *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004); Strong, *supra* note 5, at 570.

236. *Dever*, 380 F.3d at 1072.

237. *See* Strong, *supra* note 5, at 572.

For example, an important factor in the *Zippo* test for determining whether or not personal jurisdiction exists in the forum state is the number of the defendant's contacts with the forum state involving the products, services, or actions that gives rise to the plaintiff's claim. Where specific jurisdiction is at issue, the plaintiff will be familiar with the products, services, or actions at issue.²³⁸ Other factors that the *Zippo* test considers include the dollar amount of the transactions related to the forum state, the assignment of passwords, the number of views from members of the forum state, and the amount of information exchanged over the Internet.²³⁹

Information about some of the factors above is likely to be accessible to the plaintiff without jurisdictional discovery from the plaintiff's personal experience with using the defendant's products, services, or website. Although the information may not be as complete as it would be if it were obtained through jurisdictional discovery, the plaintiff has access to information about factors that are relevant to personal jurisdiction under the *Zippo* test. A plaintiff may need jurisdictional discovery to uncover detailed information about a defendant's advertising and sales efforts made towards the forum state, but the lack of information about those factors would not prevent a reasonable inference of jurisdiction as long as the complaint sufficiently states information about other relevant factors that may subject the defendant to personal jurisdiction. Information about such factors, especially objective factors under the *Zippo* test, should be available from the plaintiff's experience with using the defendant's products, services, or website.

Therefore, information asymmetry is less of a concern when the issue concerns the existence of personal jurisdiction than when the issue involves assessing the merits of a case.²⁴⁰

238. If the plaintiff asks for more information concerning the defendant's products or services that are sold or marketed in the forum state that give rise to the claim at issue, the plaintiff may be contemplating arguing that a court has general jurisdiction over the defendant. In this situation, courts should be wary about granting the request since it may be very broad. Courts may want to limit discovery in such a situation to factors that will be highly determinative in imposing general jurisdiction over the defendant, including the state of incorporation, the location of the headquarters, and the state where the business conducts substantial business activities.

239. See Part III.B.

240. See generally Arthur R. Miller, *Simplified Pleadings, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 340 (2013) (noting that *Twombly* and *Iqbal* raise concerns about information asymmetry, where the plaintiff does not have access to what may be critical information).

Thus, use of the *Zippo* test and the application of the plausibility standard²⁴¹ to pleading of personal jurisdiction²⁴² protect defendants from discovery requests that are too broad while maintaining a pleading standard that is achievable for the plaintiff without too much difficulty.

CONCLUSION

The lack of clarity about which test should govern the analysis of personal jurisdiction in cases involving the Internet creates uncertainty for businesses. Inconsistent court opinions between jurisdictions indicate that the traditional minimum contacts test alone is insufficient in the context of the Internet to clarify the analysis for personal jurisdiction. In addition, jurisdictional discovery requests grow broader as parties are unsure about which factors will be important in a court's analysis of personal jurisdiction, imposing increasing burdens and costs on the defendant even before the court determines it has jurisdiction. The uncertainty may thus cause businesses and sellers to refrain from using the Internet to share information, to grow, and to compete.

Courts should use the *Zippo* test to analyze specific jurisdiction for commercial transactions on the Internet. The *Zippo* test focuses on the nature and quality of a defendant's commercial activity on the Internet and creates a sliding scale to analyze situations where a defendant uses a passive website, an interactive website, or where a defendant clearly conducts business activity over the Internet. The *Zippo* test thus reduces the risk of a defendant being subject to jurisdiction anywhere in the world for simply advertising online. Also, the *Zippo* test is consistent with the traditional minimum contacts test and clarifies that analysis of personal jurisdiction should focus on objective factors and objective manifestations of intent to do business in the forum state. Use of the *Zippo* test also comports with applying a plausibility standard for pleading personal jurisdiction as suggested by the Eighth Circuit. The solutions suggested in this Note maintain flexibility so plaintiffs can argue that personal jurisdiction and jurisdictional discovery requests are proper, while offering defendants more predictability. Therefore, the solutions in this Note will encourage

241. See generally Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 536–37 (2009) (listing factors that influence when it is reasonable to infer that a claim is plausible).

242. Strong, *supra* note 5, at 578–80.

businesses to use the Internet to share information and to grow, and society will benefit through competition among businesses and access to better products and prices.