

# WILL THE *ZIPPO* SLIDING SCALE FOR INTERNET JURISDICTION SLIDE INTO OBLIVION?

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Though Internet communications seem to occur in a mystical electronic ether (which we once called cyberspace), authors of Internet messages can be held accountable for them in that very traditional physical place known as a courthouse. *But what courthouse, and where?* That has been a troubling issue ever since the Internet went commercial in the mid-1990s.

## WHERE DOES JURISDICTION LIE FOR AN INTERNET DISPUTE?

Many answers have been given over the last 20 years, and some of the weaker, less helpful answers are only slowly being supplanted by more reliable and realistic legal tests. Courts increasingly are abandoning some early simplistic precedents.

In the late 90s, Internet jurisdiction issues seemed to baffle many courts. One of the very first rulings, by a district court in Connecticut, took the bizarre position that anyone who posted an Internet site could be sued anywhere that site reached.<sup>1</sup> Other courts

struggled to apply jurisdictional precedents from the physical world into the ethereal new “cyberspace.”

In that atmosphere, a decision in 1997, with the classic Internet case name of *Zippo Manufacturing Company v. Zippo Dot Com, Incorporated*,<sup>2</sup> seemed to offer some relief. That decision divided Internet activities into three kinds: (1) active, (2) passive, and (3) interactive. An “active” defendant is one who deliberately makes extensive use of the Internet, such as where it enters into contracts with residents of a different jurisdiction, and these contracts call for repeated transmission of computer files over the Internet. In these cases, the defendant was susceptible to jurisdiction in the places it deliberately affected. A passive Web site, by contrast, was merely informational, and neither solicited nor expected activity in the places it reached; its operators could not be brought into court in those places.

The middle ground was the “interactive” Web site. In these cases, courts were instructed to examine “the level of interactivity and commercial nature of the exchange of information that occurs on the Web site,” to determine just how reasonable and expected it would be for the Web site creators to be sued in that place.

The *Zippo* test was clear and simple. It divided Internet Web sites into three categories and allowed the jurisdictional question to be decided based on where a Web site fell within those categories. The wonderfully simple *Zippo* legal test, however, ultimately brought to mind an aphorism of H.L. Mencklen: “For every complex problem, there is an answer that is clear, simple, and wrong.”

The *Zippo* test worked at the margins, on Web sites that were demonstratively highly active within a jurisdiction or totally passive and informational with no element of interactivity. But those simple cases were rare, and, at least by the late 90s, it had become clear how they were to be handled. The *Zippo* test, however, left almost all disputed cases in the murky land of “interactivity,” where courts were given no guidance except to analyze and weigh the levels of interactivity. As a legal test, it was a little like saying: Look at all the facts and go with your gut.

Even worse, the *Zippo* test followed a one-size-fits-all approach, for all Internet disputes. But Internet disputes come in many different sizes and shapes. It matters for jurisdictional purposes whether the dispute involves disparagement or breach of

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contract, privacy or publicity, hacking or misappropriation, copyright infringement or debt collection. The *Zippo* test, however, viewed all those cases equally and instructed courts to look simply at the level of Web site interactivity.

### BETTER APPROACHES HAVE BEEN POINTED OUT

Where business disputes are alleged, including disputes arising from e-commerce, traditional tests for commercial contracts often work better than the *Zippo* test. Indeed, the *Zippo* “active” example was derived from a case, *CompuServe Inc. v. Patterson*,<sup>3</sup> involving a business arrangement that had more in common with traditional contracts than with Internet activities. Such business arrangements often lead to findings of “general” jurisdiction—jurisdiction for all purposes.

In many cases, particularly involving one-time disputes that give rise to a “specific” jurisdiction (jurisdiction only for that case), it makes better sense to look at whether a Web site operator specifically targeted a particular person or jurisdiction. Particularly in defamation cases, the targeting test fits well, and is consistent with pre-Internet precedents, such as *Calder v. Jones*,<sup>4</sup> in which the Supreme Court allowed suit against a newspaper to be brought in the plaintiff’s home state when the newspaper actively had visited that state, conducted research there, and published its report knowing that its effects would be greatest there. In targeting cases, the key focus of the *Zippo* test, the level of “interactivity” of a Web site, often is irrelevant.

For example, in *Carlson v. Fidelity Motor Group LLC*,<sup>5</sup> the Wisconsin Court of Appeals applied a targeting analysis rather than a *Zippo* sliding scale analysis in determining jurisdiction with respect to an Illinois company from which a Wisconsin resident purchased a car. The plaintiff had argued that he was misled by the auto seller’s Web site advertisements, but the court relied on reasoning from an analogous Wisconsin federal court case, which gave weight to Internet advertisements only when the defendant was expressly targeting residents of the forum state.<sup>6</sup> The *Carlson* court also followed this precedent in rejecting use of the *Zippo* analysis, noting that the jurisdictional analysis was best conducted based on

general principles rather than “a separate test where Internet websites are involved.”<sup>7</sup> Moreover, it found “mechanical” tests for jurisdiction, such as the *Zippo* test, contrary to the Supreme Court’s *Burger King Corp. v. Rudzewicz*,<sup>8</sup> precedent.<sup>9</sup>

Other courts similarly have questioned the need for the special Internet test.<sup>10</sup>

*Zippo*’s focus on the “activeness” and “interactivity” of a Web site can at times divert the court’s eye from the jurisdictional ball. As the court pointed out in *Kindig It Design, Inc. v. Creative Controls, Inc.*,<sup>11</sup> a Web site may be highly active yet not affect the forum state in a sufficiently meaningful way to support jurisdiction. Finding no evidence in that case of “any specific instances of [Defendant’s] physical or digital contacts” with Utah, the court concluded that it had no jurisdiction, and it noted that *Zippo*’s “primary defect” was that it “effectively removes geographical limitations on personal jurisdiction over entities that have interactive websites.”<sup>12</sup> The court in *Kindig It Design* pronounced *Zippo* not only wrong but troublesome in its potential effects:

The weakness of the *Zippo* approach becomes ever more apparent in today’s digital age. The ability to create and maintain an interactive website is no longer the sole domain of technologically sophisticated corporations. Virtually all websites, even those created with only minimal expense, are now interactive in nature. It is an extraordinarily rare website that does not allow users to do at least some of the following: place orders, share content, “like” content, “retweet,” submit feedback, contact representatives, send messages, “follow,” receive notifications, subscribe to content, or post comments. And those are only interactions immediately visible to the user. In fact, most websites also interact with the user “behind the scenes” through the use of “cookies.” Thus, even a website that appears “passive” in nature may actually be interacting with the user’s data and custom-tailoring the content based on the user’s identity, demographics, browsing history, and personal preferences. In addition, there is an ever-increasing amount of internet contact that is done through the use of “mobile apps” that bypass the traditional website altogether. This

increase in mobile computing allows entirely new interactions. These applications routinely send notifications, are location based, and share data with other applications.

Furthermore, maintaining an interactive website is no longer the sole purview of corporations. In fact, with the invention of social media, many individuals, to say nothing of organizations, maintain an interactive website. In a matter of minutes, an individual can create a Facebook account and upload content to his or her own “Facebook page.” That page may allow all other Facebook users to interact with it. It is difficult to envision a website that is more interactive than the average Facebook page. Indeed, a principal purpose of social media is to facilitate interactions between users. The level of interactivity on even the most basic Facebook page arguably exceeds that of even the most interactive website in 1997 when *Zippo* was decided.

Given the exponential growth in the number of interactive websites, the *Zippo* approach—which would remove personal jurisdiction’s geographical limitations based on the mere existence of those websites—is particularly troubling. And the problem would grow more acute every year as more individuals and businesses create interactive websites.<sup>13</sup>

The Eighth Circuit Court of Appeals, home to another first-wave Internet jurisdiction district court decision that took a *Zippo*-like approach, *Maritz, Inc. v. Cybergold, Inc.*,<sup>14</sup> has suggested that the *Zippo* test can lead to an incorrect ruling if used to analyze general jurisdiction, and even for specific jurisdiction analysis, the *Zippo* test identifies only some of the relevant factors that should be considered. In *Lakin v. Prudential Securities, Inc.*,<sup>15</sup> the Eighth Circuit held that it would apply *Zippo* in specific jurisdiction situations only. For purposes of determining general jurisdiction, the court noted that “[u]nder the *Zippo* test, it is possible for a Web site to be very interactive, but to have no quantity of contacts. In other words, the contacts would be continuous, but not *substantial*.”<sup>16</sup> Thus, the court held that while “a consideration of the ‘nature and quality’ of a Web

site and a determination of whether it is ‘interactive’, ‘does business’, or is merely ‘passive’ is an important factor in our analysis, we consider a variety of factors—depending on the circumstance—in a personal jurisdiction analysis.”<sup>17</sup>

Another problem with *Zippo*’s “sliding scale,” from passive to interactive to active, is that it may falsely describe the nature of Internet and computer-related communications. The various activities it tries to align on a single continuum actually are quite different. Rather than points along a continuous ski jump, you might better think of active situations as the town’s stock exchange, passive situations as the town’s billboards, and interactive situations in the middle as boutique shops on Main Street—each of which operates differently and requires its own jurisdictional analysis.<sup>18</sup>

Finally, *Zippo*, written in the early days of the World Wide Web, may have assumed that all key Internet disputes will arise from Web sites. But our Internet legal concerns have widened considerably since the late 90s, with infringement, hacking, privacy, and statutory violations arising in ways that often have nothing to do with any Web site. Today’s digital world involves social media, mobile apps, and many other non-Web site communications. Disputes may arise from computer, cloud, or mobile device operations or communications whether they are passive, active, or interactive, and whether or not they involve a Web site.

## INTERNET JURISDICTION BEYOND WEB SITE USE

The more dissimilar challenged activities are to ordinary Web site use, the less useful the *Zippo* test becomes. For example, *Zippo* does not work well in situations involving third-party Web sites. In *Metcalf v. Lawson*,<sup>19</sup> involving a sale on eBay, the New Hampshire Supreme Court considered, and rejected, the *Zippo* test because “it is not particularly helpful in this case” in that “the majority of cases using it are based upon a defendant’s conduct over its own website ... Unlike those cases, the transaction in this case was conducted through an Internet auction site.”<sup>20</sup>

Similarly, a federal district court in Arkansas pronounced the *Zippo* test ill-suited for resolving modern Internet jurisdiction issues. The case, *Sioux Transportation v. XPO Logistics*,<sup>21</sup> involved alleged

defamation on two online posts following a disputed transaction between the two companies. Following basic and traditional jurisdictional principles, the court found that Sioux's limited acts in Arkansas, XPO's home state, couldn't support jurisdiction there.

XPO then pulled out the *Zippo* precedent, and argued that Sioux's online posts, responding to XPO's posts, counted as deliberate contacts with Arkansas that would support jurisdiction. Rather than defer to *Zippo*, however, the court critically examined *Zippo* and found it inadequate for today's Internet:

The internet has undergone tremendous change since *Zippo* was decided in 1997 . . . . Cloud computing has eliminated the need for downloading files in many situations, location-based technology has made online interactions that formerly existed only in cyberspace more closely tied to specific geographic locations, and the level of user interaction with websites has exploded with social media. All of this calls into question the modern usefulness of the *Zippo* test's simplistic tri-partite framework: The transmission of computer files over the internet is perhaps no longer an accurate measurement of a website's contact to a forum state.

Defamation cases in particular don't fit well with the *Zippo* test, for multiple reasons, the court noted. If *Zippo* is to be applied to defamation cases at all, the court stated that it must be significantly modified to focus on the defamatory content, however it was written and transmitted—not the defendant's Web site. The better solution, the court concluded, was “to scrap the *Zippo* test” altogether, at least in the context of Internet defamation.

## CONCLUSION

*Zippo* continues to have its advocates. Many courts and commentators believe that *Zippo* works well on the far ends of the sliding scale spectrum.<sup>22</sup> Given its acceptance by numerous circuit courts of appeal—whether as the entire jurisdictional analysis or as one of several jurisdictional factors—for now, the *Zippo* test will continue to be addressed in most Internet jurisdictional analyses.<sup>23</sup>

Ultimately *Zippo*'s real problem is that its test was crafted for a snippet of what was happening in the digital world in 1997, which isn't representative of all of the many ways in which our current digital world is affecting life and commerce. Courts (and lawyers, and many others) often see new technologies as unprecedented, and upsetting of all that has gone before. The Internet may have appeared that way in 1997, when the court in *Zippo* grappled with a Web site jurisdiction issue and little in the way of precedents. It viewed the Internet as so unique and different that it needed a special test. Another court noted at that time, “To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps ‘no there there,’ the ‘there’ is everywhere where there is Internet access.”<sup>24</sup>

But as we have learned over the last 20 years that Internet issues are as multifold as those in the brick-and-mortar world, it has become clearer that we don't so much need special tests, as wisdom and care in applying settled basic legal tests to the new situations of the digital world. As the court in *Kindig It Design* noted, “The traditional tests are readily adaptable to the digital age, just as they were to technological advances like the telegraph, radio, television, and telephone.”<sup>25</sup>

Though the *Zippo* test remains an easy refuge for a judge or law clerk looking for a simple rule, its influence is waning. In the last 18 years, *Zippo* has been cited more than 5,000 times. You might call it a highly interactive precedent. But one that may be headed for passivity and retirement.

## NOTES

1. See *Inset Systems, Inc. v. Instruction Set, Inc.* 937 F.Supp. 161 (D. Conn. 1996).
2. *Zippo Mfg Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).
3. *CompuServe Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).
4. *Calder v. Jones*, 465 U.S. 783 (1984).
5. *Carlson v. Fidelity Motor Group LLC*, 860 N.W.2d 299 (Wis. Ct. App. 2015).
6. *Id.* at 304-305 (quoting *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 297 F. Supp. 2d 1154 (W.D. Wis. 2004)).
7. *Id.* at 305 n.4.
8. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).
9. *Carlson*, 860 N.W.2d at 305 n.4.
10. *Illinois v. Hemi Group LLC*, 622 F.3d 754 (7th Cir. 2010) (“[W]e think that the traditional due process inquiry . . . is not so difficult to apply to cases involving Internet contacts that courts need some sort of easier-to-apply categorical test.”); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252 (2d Cir. 2007); *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746 (E.D. Mich. 2000).

11. *Kindig It Design, Inc. v. Creative Controls, Inc.*, 2016 WL 247574 (D. Utah 2016).
12. *Id.* at \*5.
13. *Id.* at \*5-6 (footnotes omitted).
14. *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).
15. *Lakin v. Prudential Securities, Inc.*, 348 F.3d 704 (8th Cir. 2003).
16. *Id.* at 712 (emphasis original).
17. *Id.* at 711.
18. *Howard v. Missouri Bone & Joint Ctr., Inc.*, 373 Ill. App. 3d 738, 743, 869 N.E.2d 207, 212 (Ill. App. Ct. 2007) (“the web page’s level of interactivity is irrelevant. . . . An ad on the Internet is no different than an ad in any other medium that provides a telephone number or other means to contact a potential defendant. It is mere advertisement or solicitation of business.”).
19. *Metcalf v. Lawson*, 148 N.H. 35, 802 A.2d 1221 (N.H. 2002).
20. *Id.* at 1226. See also *Foley v. Yacht Mgmt. Grp., Inc.*, 2009 WL 2020776, at \*3 (N.D. Ill. 2009) (“the Zippo test is not particularly helpful and thus should not be applied in the context of a public internet auction site”).
21. 2015 WL 9412930 (W.D. Ark. Dec. 22, 2015).
22. See, e.g., 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, 1164-1166 (2005).
23. See, e.g., Alan M. Trammel and Derek Bambauer, “Personal Jurisdiction and the ‘Interwebs,’” 100 *Cornell L. Rev.* 1129, 1150, Figure. 1 (2015) (Treatment of *Zippo* Test by Circuit).
24. *Digital Equipment Corp. v. Altavista Technology, Inc.*, 960 F.Supp. 456, 462 (D. Mass 1997).
25. *Kindig It Design*, at \*6.