Notes

A Culture Without Consequences? Redefining Purposeful Availment for Wrongful Online Conduct

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The Internet often seems like a place without consequences, where we can share our thoughts without much consideration of whether the things we share might cause harm. And even when Internet users knowingly cause harm to others, many escape civil suit because they are not subject to personal jurisdiction in the plaintiff's chosen forum. Often this is a result of courts' fear of creating nationwide jurisdiction in cases involving the Internet, and often the reason given for denying specific jurisdiction is that it was not reasonably foreseeable to the defendant that they might be haled into court in the plaintiff's chosen forum. But attempts to limit jurisdiction over wrongful online conduct to those forums in which suit was "reasonably foreseeable" have actually made it more difficult for defendants to know when and where they might be held liable, as cases with the same facts can come to opposite results depending on the test applied. This Note explores the current state of personal jurisdiction for intentional, wrongful acts conducted over the Internet, ultimately concluding that courts must create a better test for whether specific jurisdiction exists in these cases. Only when courts focus on the defendant's knowledge and intent with regard to the plaintiff can they create fair outcomes in individual cases and ensure that Internet users understand when and where they will be subject to suit.

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Introduction

The Internet often seems like a place without consequences. Gossip blogs and discussion forums purportedly shroud us in anonymity and then invite us to share our every thought—or, at least, our funniest and most biting comments—about other people. Google Image Search makes it easy to find and download photos, logos, and artistic works regardless of whether they are protected by trademark or copyright. And it is not just unintentionally harmful conduct that gets a pass: Even those who use

the Internet to knowingly harm others[1] often escape punishment. Many would-be defendants simply laugh off threats of defamation or infringement lawsuits, assuming they will come to nothing.[2] Often, this assumption is correct. While some questionable conduct is protected by parody, fair use, and other such defenses, many civil suits for wrongful online conduct[3] never reach consideration on the merits, as culpable actors escape suit because of difficulties in establishing jurisdiction over them.

Courts frequently conclude that they do not have specific personal jurisdiction over out-of-state defendants whose only contact with the forum state is the wrongful act they directed at the plaintiff via the Internet.[4] This state of affairs is the result of courts' fear that the ubiquitous nature of the Internet will create nationwide jurisdiction over all defendants in suits arising from online conduct. In assessing specific jurisdiction in these cases, courts often focus on aspects of the defendant's online activity that do not relate to her knowledge or intent with respect to the plaintiff.[5] As a result, plaintiffs are unable to pursue their claims on a theory of specific jurisdiction and instead must bring their suit in a forum in which the court can establish general jurisdiction over the defendant.[6] This is true even if similar conduct would have created specific jurisdiction over a defendant in a context other than the Internet.

The struggle to define the scope of specific jurisdiction arising from wrongful online conduct requires courts to balance competing ideas of fairness: Is it fairer for a defendant to be haled into a forum in which they might not have realized they had contacts, or is it fairer to prevent the plaintiff from bringing suit anywhere except where general jurisdiction can be established? In cases involving two private individuals, general jurisdiction may be limited to the defendant's home state, which could be across the country from the plaintiff. As far as many plaintiffs are concerned, then, fairness means that courts should have jurisdiction in

1. *See* Mattathias Schwartz, *Malwebolence*, N.Y. TIMES, Aug. 3, 2008, at A24 (discussing the popular practice of "trolling," or purposefully provoking others online for the sake of humor).

2. *See, e.g.*, Rich Kyanka, *Jones Soda vs. Something Awful*, SOMETHING AWFUL (Oct. 17, 2008), http://www.somethingawful.com/d/legal-threats/jones-soda-lawsuit.php (describing the parody website's response to a threatened trademark infringement suit).

3. In the context of this Note, "wrongful online conduct" refers to intentional conduct such as tortious acts and to acts, such as infringement, that are treated like torts for the purposes of determining whether the court may exercise personal jurisdiction over the defendants. *See, e.g.*, Mavrix Photo, Inc. v. Brand Techs, Inc., 647 F.3d 1218, 1228 (9th Cir. 2011) (applying the Ninth Circuit's personal jurisdiction analysis for cases involving tortious conduct in a copyright infringement case because copyright infringement is "tort-like"), *cert. denied*, 132 S. Ct. 1101 (2012).

4. The jurisdiction analysis discussed in this Note is used both by state courts and by federal courts deciding state law claims.

5. *See infra* Part II.

6. *See infra* Part II.A.

the broadest possible range of cases. Defendants, on the other hand, would prefer to limit the court's reach to those situations in which the prospect of suit was reasonably foreseeable—and would prefer to define "reasonably foreseeable" as narrowly as possible.

Courts tend to favor the latter position: The defendant's ability to reasonably foresee the possibility of suit in a specific forum is the most touted value in cases involving online conduct.[7] But this foundational fairness factor has suffered in the struggle. Because cases with the same facts have come to opposite results due to the application of conflicting tests for jurisdiction, it is very difficult for defendants to predict when and where they might be held liable.

A 2009 case from the District of Connecticut is illustrative.[8] That case concerned two Yale Law School students who were defamed by pseudonymous participants posting to a law school admissions discussion forum. The comments began in a thread entitled, "Stupid Bitch to Attend Yale Law," in which participants made sexually explicit, derogatory comments about one of the two women.[9] Similar threads followed.[10] When the website's administrator refused to delete the threads from the forum, the women filed suit against him and thirty-nine of the participants, alleging publicity given to private life, false light, libel, and intentional infliction of emotional distress.[11] One participant moved to dismiss the claims against him, arguing that his online comments alone did not constitute minimum contacts with the forum state of Connecticut because he did not anticipate that Connecticut residents would view them.[12] Nevertheless, the court held that it had jurisdiction over him because he had directed his online activities at Connecticut: "[A]t the time he wrote the messages he had 'a pretty good idea that some of [the other users of the website] actually were Yale law students.'"[13]

This conclusion stands in stark contrast to the one made by the Eastern District of Pennsylvania in a case that arose in the same year from those same forum comments. While the first suit was pending, the forum's administrator sued the two women, their lawyers, and the public relations agency the two women had hired to clean up their online reputations by removing the offending posts.[14] The administrator alleged

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7. *See infra* Part II.

8. Doe I v. Ciolli, 611 F. Supp. 2d 216, 217–18 (D. Conn. 2009).

9. David Margolick, *Slimed Online*, PORTFOLIO.COM (Feb. 11, 2009), http://www.portfolio.com/news-markets/national-news/portfolio/2009/02/11/Two-Lawyers-Fight-Cyber-Bullying.

10. *Id.*

11. *Doe I*, 611 F. Supp. 2d at 217–18.

12. *Id.* at 221.

13. *Id.* at 223–24 (alteration in original).

14. Ciolli v. Iravani, 651 F. Supp. 2d 356, 360–61 (E.D. Pa. 2009).

libel, slander, and false light arising out of the original suit against him by the women.[15] In dismissing the claims against an employee of the public relations agency, whom the plaintiff alleged had written and posted defamatory articles about the plaintiff on the agency's website, the court found that the employee had done no more than "make information available [on the website] to those who are interested," and therefore had not expressly aimed his conduct at Pennsylvania.[16]

Thus, because the two courts applied conflicting tests, two very different results arose from similar facts involving the same parties. It seems unfair that the website administrator was haled into an out-of-state forum as a defendant but could not rely on the same protections when he was the one who suffered harm. This result also seems inappropriate because the administrator was not directly responsible for the defamatory statements at issue, but the public relations employee was. Regardless of the relative culpability of these two defendants, conflicting outcomes like these make it difficult for Internet users to know when they might be held liable in a distant forum. As a result, users are not on notice as to what conduct will subject them to foreign jurisdiction.

This Note explores the causes of these conflicting outcomes and argues that existing tests are not ideal. This Note is divided into four parts. Part I discusses the underlying framework of specific jurisdiction in cases arising from wrongful online conduct. Part II explains the competing interpretations of existing tests for specific jurisdiction in these cases and how these interpretations lead to contradictory outcomes. Part III discusses the Supreme Court's most recent statement on specific jurisdiction and the effect that decision might have on cases involving the Internet. Finally, Part IV explores options for a better test that focuses on the defendant's knowledge and intent, thereby making it clearer to Internet users when and where they may be required to answer for their actions.

I. THE TRADITIONAL BOUNDARIES OF PERSONAL JURISDICTION ON THE INTERNET

Whether a state[17] may exercise personal jurisdiction over a nonresident civil defendant depends on the nature and quality of the defendant's contacts with the forum.[18] The Due Process Clause of the Fourteenth Amendment prohibits states from subjecting a defendant to

15. *Id.* at 361.

16. *Id.* at 369–70. However, the court did find that it had jurisdiction over the public relations agency itself, based on the fact that the agency conducted business with the forum via its website. *Id.* at 366–67.

17. *See supra* note 4.

18. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

suit unless the defendant's contacts with the state are sufficient "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[19] These contacts, in turn, may be sufficient to support general jurisdiction, which allows state courts to "resolve both matters that originate within the State and those based on activities and events elsewhere,"[20] or they may support only specific jurisdiction, which allows state courts to resolve only those disputes that "arise out of or are connected with the activities within the state."[21] A state court has general personal jurisdiction over its citizens and those who are domiciled in the state, including corporations whose activities within the state are sufficiently systematic and continuous.[22]

A state court has specific personal jurisdiction over defendants located outside of the state and whose in-state activities do not rise to the level required for general jurisdiction[23] but do constitute the "minimum contacts" required by due process.[24] Minimum contacts exist where (1) the defendant purposefully availed herself of the forum state, (2) the plaintiff's injuries arose out of the defendant's forum-related activities, and (3) exercising jurisdiction does not offend "traditional notions of fair play and substantial justice."[25] This test, particularly the third prong, is based on the notion that personal jurisdiction is proper only where a defendant could reasonably foresee, on the basis of her relationships and obligations in the forum, that she might be haled into court in that forum in order to answer for her conduct.[26] Courts frequently note that jurisdiction is not reasonably foreseeable to a defendant whose contacts with the forum state are merely "random" or "fortuitous."[27]

In many cases alleging intentional, wrongful actions conducted over the Internet, plaintiffs must rely on specific jurisdiction because many such cases involve defendants who are located outside of the forum state and who are not otherwise subject to general jurisdiction there. In these cases, the defendant's only contacts with the forum state are the wrongful conduct and, if the conduct involved a website, the relationship between the forum and that website. But courts have difficulty applying the minimum contacts analysis in cases arising from online conduct because

19. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

20. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011) (plurality opinion).

21. *Int'l Shoe*, 326 U.S. at 319.

22. *Id.* at 317; *see also J. McIntyre*, 131 S. Ct. at 2787.

23. *J. McIntyre*, 131 S. Ct. at 2787.

24. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); *Int'l Shoe*, 326 U.S. at 316.

25. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472–74 (1985); *World-Wide Volkswagen*, 444 U.S. at 291–92; *Int'l Shoe*, 326 U.S. at 316.

26. *World-Wide Volkswagen*, 444 U.S. at 297.

27. *See, e.g.*, *id.* at 295 (holding that an Oklahoma court could not exercise personal jurisdiction over a nonresident corporation whose only contact with Oklahoma was one "fortuitous" event).

it is difficult to define purposeful availment in that context. Many early decisions found purposeful availment based on nothing more than the creation of a website that could be viewed in the forum state.[28] However, courts subsequently have realized that such a rule is too broad because it creates jurisdiction anywhere in the world that a website can be viewed.[29] Such a rule, these courts reason, places too high a burden on those who operate and maintain websites.[30] As a result, courts have adopted two more restrictive tests for jurisdiction resulting from online conduct: the *Zippo* "sliding scale" test and the *Calder* "effects" test.

A. THE *ZIPPO* SLIDING SCALE OF INTERACTIVITY

The sliding scale test for purposeful availment was created in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* in 1997 by the District Court for the Western District of Pennsylvania.[31] Ever since then, courts across the country have widely applied the *Zippo* test.[32]

The *Zippo* court concluded that due process permits specific personal jurisdiction in cases arising from online conduct based on a sliding scale of the nature and quality of the activity the defendant conducts over the Internet.[33] Specifically, the scale focuses on the website or other medium through which the defendant acted, rather than on the defendant's acts themselves. The court defined one end of the scale, where jurisdiction is clearly proper, as "knowing and repeated" transmission of files,[34] and the other end, where jurisdiction clearly is not proper, as simply posting information on a passive website.[35] In the

28. *E.g.*, Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) ("Clearly, CyberGold has obtained the website for the purpose of, and in anticipation that, internet users, searching the internet for websites, will access CyberGold's website and eventually sign up on CyberGold's mailing list. Although CyberGold characterizes its activity as merely maintaining a 'passive website,' its intent is to reach all internet users, regardless of geographic location."); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) ("The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut.").

29. *See, e.g.*, ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 712 (4th Cir. 2002).

30. *Id.*

31. 952 F. Supp. 1119, 1123–24 (W.D. Pa. 1997).

32. A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 80.

33. 952 F. Supp. at 1124.

34. *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1265 (6th Cir. 1996) (finding specific personal jurisdiction in a trademark dispute over a defendant whose sole contact with the forum state, Ohio, was the systematic, continuous transmission of software files to users throughout the country via the plaintiff's Ohio-based Internet service).

35. *Zippo*, 952 F. Supp. at 1124.

middle are interactive websites that allow some input from users.[36] In the case of such websites, whether personal jurisdiction is proper depends on the level of interactivity and the commercial nature of that activity.[37]

The facts of *Zippo* illustrate how the sliding scale may be applied. There, a Pennsylvania plaintiff brought a trademark infringement suit against a California defendant that did not have any offices, employees, or agents in Pennsylvania, but that did advertise to Pennsylvania residents via its website.[38] It is not clear whether that advertising was specifically targeted at or constructed for a Pennsylvania audience, or whether the website was merely viewable by Pennsylvania residents.[39] Additionally, two percent of the defendant's paying subscribers resided in Pennsylvania, and it had contracts with two Pennsylvania Internet-service providers to permit their subscribers to access its service.[40] Applying the sliding interactivity scale, the court determined that the defendant had done more than simply operate a website viewable in Pennsylvania or advertise in Pennsylvania via that website. By selling user subscriptions to Pennsylvania residents and contracting with Pennsylvania Internet-service providers, the court found that the defendant had purposefully availed itself of Pennsylvania law and could therefore reasonably foresee being haled into court there.[41] The court reasoned that the defendant's contacts with the state were not "fortuitous" because the defendant had actively processed applications from Pennsylvania subscribers and therefore knew that it would be transmitting information into the state.[42]

Determining where a specific case falls on the *Zippo* sliding scale is far from an exact science. Courts disagree on the very meaning of "passivity" and "interactivity." Though the *Zippo* court defined passive websites as those with which users cannot interact in any way,[43] and although most courts would place an online forum to which users can post comments closer to the "interactive" side of the scale, in one case the Eighth Circuit categorized such a forum as "merely passive" because "users may actually only post information" on a forum.[44] The content on the website in that case was almost entirely user-driven: The website's only purpose was to serve as a repository for consumer complaints

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 1126.
42. *Id.*
43. *Id.* at 1124.
44. Johnson v. Arden, 614 F.3d 785, 796 (8th Cir. 2010).

posted by visitors to the site.[45] By contrast, a federal district court in California determined that a company's website and Facebook page (used to advertise the sale of its products in states including California) together were sufficiently interactive to permit the exercise of specific jurisdiction over the company in California.[46] The content on the website and the Facebook page was generated almost entirely by the company rather than by visitors.[47] These two cases are far from the only example of the confusion surrounding the *Zippo* sliding scale's categories.

B. *CALDER*, *KEETON*, AND THE EFFECTS TEST

Many courts addressing jurisdiction over wrongful acts conducted on the Internet invoke the Supreme Court's "effects test" from *Calder v. Jones*[48] and *Keeton v. Hustler Magazine, Inc.*[49] in order to determine whether the defendant has purposefully availed herself of the forum state, even though the effects test was not created explicitly to address online conduct.[50] This test is usually referred to as the "*Calder* effects test" without mention of *Keeton*, though the facts of *Keeton* do affect application of the test, as will be discussed in more detail later in this Note.[51]

The *Calder* plaintiff, an actress famous for her role in the Partridge Family television show, sued the *National Enquirer* magazine, its president, and one of its reporters for libel after the magazine published an article claiming that she drank too heavily to fulfill her professional obligations.[52] The defendants argued that they did not have sufficient minimum contacts with California to support the state's exercise of jurisdiction.[53] The Court disagreed. The most important factor in this conclusion was that although the magazine had a national circulation, its largest circulation was in California.[54] The other relevant contacts were that the reporter who wrote the article lived in Florida but relied primarily on information gathered through telephone calls to sources in California,[55] and that the same reporter had called California to read a

45. *Id.*

46. Wine Grp. LLC v. Levitation Mgmt., LLC, No. 2:11-1704-WBS-JFM, 2011 WL 4738335, at * 6–7 (E.D. Cal. Oct. 6, 2011).

47. *Id.*

48. 465 U.S. 783 (1984).

49. 465 U.S. 770 (1984).

50. In fact, the Supreme Court has never made a definitive statement on Internet jurisdiction. Spencer, *supra* note 32, at 73.

51. *See infra* Part II.A.

52. 465 U.S. at 784, 788 n.9.

53. *Id.* at 790.

54. *Id.* at 785.

55. *Id.*

draft of the article to the plaintiff's husband.[56] By contrast, the president of the magazine did not have any contacts with California except for having traveled there twice on vacation.[57] He reviewed, edited, and approved the article about the plaintiff while in Florida.[58]

In arriving at the conclusion that these contacts satisfied due process and supported the exercise of jurisdiction over all three defendants, the Court noted the story's particular contacts with California: It concerned the California activities of a California resident, focused on her California career, and was drawn from California sources.[59] Most important, the brunt of the harm resulting from the story's claims was felt in California—the harm being emotional distress and damage to the plaintiff's professional reputation.[60] The Court did not credit the reporter's and the president's argument that there should be no jurisdiction over them because they were not directly responsible for circulation or marketing in California (as they were mere employees without control over these things) and because they had no direct economic stake in the magazine's sales in California.[61] The Court instead focused on the fact that the reporter's and the president's harmful conduct was intentional, rather than negligent, and was "expressly aimed" at California.[62] They knew that their article would have a harmful effect on the plaintiff and that the brunt of that harm she suffered would be felt in California.[63] Therefore, the Court found, all three defendants could reasonably anticipate being haled into court there.[64]

The Court came to the same conclusion in *Keeton*, a companion case decided the same day as *Calder*.[65] In *Keeton*, the plaintiff sued *Hustler* magazine for libelous statements published in five separate issues.[66] Hustler, an Ohio corporation whose primary place of business was California, circulated 10,000 to 15,000 copies of its magazine in New Hampshire each month.[67] The Court concluded that the regular

56. *Id.* at 785–86.

57. *Id.* at 786.

58. *Id.*

59. *Id.* at 788–89.

60. *Id.* at 789–90 ("An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly caused the injury in California.").

61. *Id.* at 789.

62. *Id.* at 789–90.

63. *Id.* ("Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation.").

64. *Id.* at 790.

65. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n.13 (1984).

66. *Id.* at 772.

67. *Id.*

circulation of magazines in New Hampshire permitted the state to exercise personal jurisdiction over the defendants when the libel action was based on the magazine's contents.[68] Unlike in *Calder*, the bulk of the harm in *Keeton* did not occur in the forum state, because the plaintiff was not a resident of that state and herself had only minimal contacts with New Hampshire.[69] Nevertheless, the Court found that the magazine's circulation in New Hampshire was sufficient to constitute purposeful availment because the magazine had "continuously and deliberately" exploited the New Hampshire market and could reasonably anticipate being haled into court as a result.[70]

C. How the Two Tests Interact

Applying the *Zippo* test calls for a determination of whether the defendant's website was generally directed at the forum state through advertising, engaging in business in the forum, or otherwise knowingly interacting with residents of the forum.[71] The effects test is applied quite differently. Though the factors considered under *Zippo* may be relevant to the effects test, the latter test considers additional factors. Each circuit seems to have its own formulation of the effects test, but all of the tests take roughly the same form, asking whether (1) the out-of-state defendant committed an intentional act, (2) the act was expressly aimed at the forum state, and (3) the defendant knew that the brunt of the injury would be felt in the forum state.[72]

Both the *Zippo* sliding scale and the *Calder* effects tests turn on whether the defendant expressly aimed her conduct at the forum state. Despite this overlap, or perhaps because of it, courts disagree on how the two tests interact in determining whether the court may exercise specific jurisdiction. Some courts start by identifying the type of conduct at issue and then, if the cause of action is defamation or another intentional tort, apply *Calder*, but substitute the *Zippo* analysis for *Calder*'s express

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68. *Id.* at 773–74.

69. *Id.* at 772–73, 779.

70. *Id.* at 781.

71. *See, e.g.*, ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002) ("Thus, adopting and adapting the *Zippo* model, we conclude that a State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received."); *see also* Spencer, *supra* note 32, at 80–82.

72. *E.g.*, Johnson v. Arden, 614 F.3d 785, 796 (8th Cir. 2010); Tamburo v. Dworkin, 601 F.3d 693, 703 (7th Cir. 2010); Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1072 (10th Cir. 2008); Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199, 1206 (9th Cir. 2006); IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265–66 (3d Cir. 1998).

aiming prong.[73] Other courts apply both *Calder* and *Zippo* independently and then attempt to balance the results of both tests in coming to a conclusion.[74] Some courts apply only one test or the other.[75] Additionally, not all courts agree with the *Zippo* court that Internet jurisdiction requires its own test. In fact, some courts have explicitly stated that creating a separate test for Internet cases is inappropriate because existing principles are sufficient.[76] This confusion over the proper test is only the beginning of the problem: Courts also disagree as to how to apply the elements of each test.

II. Existing Tests: Conflicting Application and Confusing Results

Courts addressing personal jurisdiction for intentional, wrongful online conduct face three major questions. First, they struggle to define the scope of the conduct that is relevant to determining whether the defendant expressly aimed her actions at the forum state. Second, while most courts will not exercise jurisdiction unless the defendant was aware of the plaintiff's geographical location, an increasing number of cases have found jurisdiction where the defendant was unaware of the plaintiff's specific location but nevertheless knew that the brunt of the harm caused by her actions would be felt in a particular place. Finally, courts do not agree on how much harm must be felt in the forum state.

A. Should the Express Aiming Inquiry Consider Facts Beyond the Defendant's Wrongful Actions?

The scope of the express aiming inquiry is the most significant source of controversy in analyzing personal jurisdiction for wrongful online conduct. Courts disagree on whether and to what extent facts beyond the defendant's wrongful actions are relevant. The three most common issues are (1) whether to consider the aim of the website or

73. *E.g.*, *ALS Scan*, 293 F.3d at 714; Gorman v. Jacobs, 597 F. Supp. 2d 541, 547 (E.D. Pa. 2009) (citing Young v. New Haven Advocate, 315 F.3d 256, 262–63 (4th Cir. 2002)).

74. *E.g.*, Broadvoice, Inc. v. TP Innovations LLC, 733 F. Supp. 2d 219, 225–26 (D. Mass. 2010); Atkinson v. McLaughlin, 343 F. Supp. 2d 868, 874–78 (D.N.D. 2004).

75. *E.g.*, *Tamburo*, 601 F.3d at 703 n.7 (applying *Calder* and declining to apply *Zippo* in a defamation case); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419–20 (9th Cir. 1997) (applying *Zippo* and declining to apply *Calder* in a trademark infringement case).

76. *E.g.*, *Tamburo*, 601 F.3d at 703 n.7 ("[W]e hesitate to fashion a special jurisdictional test for Internet-based cases. *Calder* speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there can be applied to cases involving tortious conduct committed over the Internet."); *see* Catherine Ross Dunham, Zippo-*ing the Wrong Way: How the Internet Has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis*, 43 U.S.F. L. Rev. 559, 584 (2009) ("The *Zippo* sliding scale offers the most compelling example of why functional doctrine should not be supplanted to address the societal changes brought forth through technology.").

other online medium through which the defendant acted; (2) the effect of a website's national, rather than state-specific, aim; and (3) whether website users should be treated differently than website owners.

1. General vs. Specific Conduct

Most effects tests, as stated by various courts, seem to require only that the tortious or wrongful conduct itself is expressly aimed at the forum state,[77] but in applying this requirement, courts often consider—sometimes more carefully than any other factor—the forum-specific contacts of the website or other online medium chosen by the defendant.[78] Similarly, the *Zippo* analysis is limited to the online medium through which the defendant carries out her conduct and gives little attention to the wrongful conduct itself.[79] Though it might not be courts' intent, focusing on acts beyond the wrongful conduct at issue strongly favors defendants, because requiring express aiming of conduct besides the wrongful conduct makes the location or amount of harm suffered irrelevant or, at least, far less significant.[80] As a result, even when all of a plaintiff's harm occurs in the forum state, she might be unable to establish personal jurisdiction there, and because the effects test prevents specific jurisdiction in a forum unless it is the location of the brunt of the harm, such a plaintiff is left with only those forums in which the defendant is subject to general jurisdiction.

Interestingly, then, even though *Calder*, *Keeton*, and *Zippo* all resolved the jurisdiction issue in the plaintiffs' favor, the application of those cases to Internet cases increases the plaintiff's burden. The plaintiff's burden is higher in part because, although *Keeton* is rarely mentioned by courts applying the effects test to wrongful acts conducted over the Internet, *Keeton* silently influences their application of *Calder*. The *Keeton* reasoning depended almost entirely on the defendant magazine's circulation in the forum, as the harm felt in the forum was not likely to be significant.[81] But *Calder* depended at least as much on the location of the brunt of the harm as it did on the defendants' more general targeting of the forum state.[82] Courts that require more contact with the forum state than merely the tortious act appear to be focusing

77. *See supra* note 72 and accompanying text.

78. *E.g.*, Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, 166 (2d Cir. 2005) ("No single event or contact connecting defendant to the forum state need be demonstrated; rather, the *totality of all defendant's contacts* with the forum state must indicate that the exercise of jurisdiction would be proper." (quoting Cutco Indus., Inc. v. Naughton, 806 F.2d 361, 365 (2d Cir. 1986)).

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

80. *See* Spencer, *supra* note 32, at 100.

81. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780–81 (1984).

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

on the general circumstances, namely the extent of magazine circulation, without which the *Keeton* facts would not have created jurisdiction.

For example, the Third Circuit requires that "[t]he defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity."[83] However, in Internet cases the Third Circuit often focuses on all of the defendant's contacts with the forum. Indeed, because that court has ruled that "the mere allegation that the plaintiff feels the effect of the defendant's tortious conduct in the forum because the plaintiff is located there is insufficient to satisfy *Calder*,"[84] it is difficult, if not impossible, to find specific jurisdiction without looking to contacts beyond the wrongful conduct itself.

Plaintiffs bringing suit in district courts in the Third Circuit must provide other evidence that the defendant targeted the forum state.[85] *Marten v. Godwin* is illustrative.[86] There, the plaintiff took online courses offered by the defendant school but was expelled from the program because the school believed he had plagiarized multiple assignments.[87] The plaintiff sued the school in federal district court in Pennsylvania for defamation based on the plagiarism accusation.[88] The school's sole contacts with Pennsylvania were the emails the plaintiff received there from the school, notifying him of the plagiarism allegations and the expulsion.[89] The Third Circuit held that the defendants' knowledge that the plaintiff resided in Pennsylvania and the sending of emails to him in Pennsylvania were not sufficient to constitute express aiming.[90]

The *Marten* court did not elaborate as to what behavior would have constituted express aiming. However, it seems likely that nothing short of establishing more or greater business relationships in the state would have sufficed. Courts that require "something more" than mere knowledge that harm would be felt in the forum state often focus on whether the website advertised specifically to residents of the forum state, the percentage of website users residing in the forum state, or other indicators that the website itself was directed at the forum.[91]

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83. Marten v. Godwin, 499 F.3d 290, 297 (3d Cir. 2007) (quoting IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265–66 (3d Cir. 1998)).

84. IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 263 (3d Cir. 1998).

85. *Id.* at 265.

86. 499 F.3d 290.

87. *Id.* at 293–94.

88. *Id.* at 294.

89. *Id.* at 294, 298–99.

90. *Id.* at 298–99.

91. *See* Spencer, *supra* note 32, at 101–02.

2. Nationally vs. Locally Focused Websites

Treatment of nationally focused websites and of plaintiffs with national reputations is one of the most problematic aspects of the express aiming inquiry. The question is whether the defendant could be aware that her conduct would cause harm in the forum state, and many courts find such awareness lacking when the website's or the plaintiff's connection with that state is not obvious or when the site or plaintiff has a connection with multiple states. This Subpart discusses the issue of nationally focused websites, while Part II.B.1 discusses plaintiffs with national reputations.

A website might be considered nationally targeted due to its content, its advertising, or both. For example, many courts would hold that a site hosting a forum discussing a nationally relevant, state-nonspecific topic such as U.S. foreign policy is directed at a national audience rather than at any specific state. Such a conclusion is especially likely where all of the advertising on the site is nationally relevant, such as for products commonly available across the country. Another consideration is whether the website itself is advertised or marketed in a state-specific way.

All of these factors affected the outcome in *Gorman v. Jacobs*, where a federal district court in Pennsylvania determined that it did not have jurisdiction over defendants who had posted on a nationally aimed Internet forum.[92] In that case, a podiatrist sued three other podiatrists for comments they made on a podiatry news forum, PM News, in response to an article in which the plaintiff had commented about the rising costs of medical malpractice insurance.[93] The defendants posted comments about the article, contending that the plaintiff had served as an expert witness for plaintiffs in frivolous lawsuits and that he had given false testimony.[94] The plaintiff sued for defamation, false light, and intentional and negligent infliction of emotional distress.[95] The court applied both *Calder* and *Zippo* and noted that "*how* individuals use the web site is equally, if not more, important than the features of the web site itself. . . . [T]he defendant's Internet activity—whether it be web site operation or use—must evince an intent to interact with the forum to justify the exercise of personal jurisdiction."[96] The court determined that the PM News website was sufficiently interactive to make website users amenable to personal jurisdiction, but that jurisdiction was not proper because the website was not specifically aimed at Pennsylvania.[97] The

92. 597 F. Supp. 2d 541, 551 (E.D. Pa. 2009).
93. *Id.* at 543–45.
94. *Id.* at 544–45.
95. *Id.* at 545.
96. *Id.* at 546–48.
97. *Id.* at 549–51.

website did not inform users that comments would be directed into any specific state; therefore, using the website did not establish an intent to interact with Pennsylvania—or, presumably, any other state.[98]

The fact that the website's intended audience was the national podiatry community at large, rather than any specific state, was especially harmful to the plaintiff's case. Even though some of the comments mentioned Pennsylvania, the court determined that these "passing references" were made as part of arguments that actually addressed national issues and therefore did not establish that the comments were expressly aimed at Pennsylvania.[99]

3. Website Owners vs. Users

The distinction between the website's and the defendant's express aiming is especially problematic where the defendant is a user rather than the owner or operator of the website or other online medium in question. Courts contend that it does not matter whether the website targets the plaintiff's chosen forum if the defendant is unaware of the website's aim—and in many cases, that aim will be apparent only to the website's owner or operator. For instance, in *Gorman*, the court concluded that even if the plaintiff could prove that a substantial percentage of the website's users were from Pennsylvania, that would not create jurisdiction in Pennsylvania because information about users' locations would be available only to the website's owners but not to users such as the defendants.[100] Therefore, the court reasoned, the defendants would not have been aware that their comments were aimed at Pennsylvania.[101]

But a website's intended audience is much less relevant where the defendant is a website user rather than an owner. That users are often unaware of the location of a website's audience does not mean that they are unaware of their target's location. Additionally, whether the website is actually directed at a particular state might not be relevant to users. The fact that websites are viewable anywhere in the country might lead users to believe that their comments will reach their intended target.

Indeed, this assumption often appears to be the very motivation behind defendants' decisions to make defamatory statements on the Internet. In cases such as *Tamburo v. Dworkin*,[102] the defendants' statements would have served little purpose if they could not reach the plaintiff's state of residence. In that case, the plaintiff took data, which he

98. *Id.* at 549–50.
99. *Id.* at 550–51.
100. *Id.* at 550.
101. *Id.*
102. 601 F.3d 693 (7th Cir. 2010).

argued was in the public domain, from the defendants' websites and used it in his dog-breeding software.[103] In a subsequent defamation lawsuit, he alleged that the defendants "engaged in a concerted campaign of blast emails and postings on their websites accusing him of stealing their data and urging dog enthusiasts to boycott his products."[104] In finding that the federal district court in Illinois had jurisdiction over the defendants, the Seventh Circuit applied *Calder*—expressly declining to apply *Zippo*—and found that the defendants had expressly aimed their conduct at Illinois because they had purposefully targeted the plaintiff and his business in Illinois with the intent of harming his business and reputation there.[105] It did not matter to the court that the defendants' comments were available more widely on the Internet.[106] In fact, the opinion concluded that the defendants intended to harm the plaintiff's Illinois business by communicating with a wider audience.[107]

B. Must the Defendant Know Where the Plaintiff Was Located?

Even when the website in question is directed at a specific forum, the express aiming prong and the knowledge portion of the brunt-of-the-harm prong may not be satisfied. When the plaintiff has a national (or multistate) reputation or business, it may be difficult for the defendant to determine where the plaintiff resides or primarily does business and, therefore, to know that her actions will cause harm in that particular state. Alternatively, the defendant might be aware that the plaintiff resides or does business in only one forum but, thanks to the anonymity of the Internet, might be unable to determine which forum that is. Courts have declined to exercise specific jurisdiction in both of these scenarios, though some are willing to impute knowledge of the plaintiff's location to defendants in the latter scenario.

1. Plaintiffs with a National Reputation or Business

The national-reputation issue reared its head in *Dring v. Sullivan*, where the plaintiff alleged that comments made on a Taekwondo referees listserv[108] were intended to harm his chances in an election to the

103. *Id.* at 698.

104. *Id.* at 697.

105. *Id.* at 697, 703 n.7.

106. *Id.* at 707.

107. The court likened their conduct to that in *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008), a case in which the Tenth Circuit found jurisdiction over a defendant based on communications with eBay in California intended to halt an online auction created by sellers located in Colorado. *See Tamburo*, 601 F.3d at 706–07. Though the communications were directed first at California, their ultimate aim was Colorado. *Dudnikov*, 514 F.3d at 1075.

108. A listserv is like a forum or bulletin board, but is conducted through email rather than on a website.

Board of Governors for USA Taekwondo ("USAT").[109] The plaintiff brought suit in Maryland, where he lived.[110] It is not clear whether the defendant had contacts with Maryland beyond his comments on the listserv; the court noted that the defendant might have performed work in Maryland as a Taekwondo referee but did not decide the issue.[111] Though the jurisdiction question was decided on state law rather than federal due process grounds because the requirements of the Maryland long-arm statute, which did not extend to the constitutional limits, were not met, the court nevertheless found that the defendant's contacts with the forum would not have satisfied federal due process.[112] The problem, in the court's view, was that the defendants' comments on the listserv focused on the plaintiff's national and international activities as part of USAT.[113] There was no evidence that USAT had any connections with Maryland other than having members there.[114] Thus, jurisdiction in Maryland based on the defendants' forum comments was not proper.[115]

The plaintiff's national reputation was also a problem in *Gorman*. There, one of the defendants contended that the plaintiff would "travel anywhere" in the country to serve as an expert witness, indicating to the court that it was the plaintiff's national, not local, reputation that would have been harmed.[116]

2. *Plaintiffs Whose Residence or Primary Place of Business is Unclear*

The defendant's awareness of the plaintiff's location can be dispositive. In *Tamburo*, for example, the Seventh Circuit held that the district court in Illinois did have jurisdiction over the defendants who made defamatory statements about the plaintiff via email and on their websites, but did not have jurisdiction over the owner of a listserv to which some users had reposted the comments.[117] The distinction was that the listserv's owner had no idea that the plaintiff lived in Illinois, while the other defendants clearly did: At least one defendant posted the plaintiff's business address on his website.[118]

In other cases where it is unclear that the defendant knows the plaintiff's geographic location, courts nevertheless find that jurisdiction

109. 423 F. Supp. 2d 540, 542–43 (D. Md. 2006).
110. *Id.* at 542.
111. *Id.* at 546.
112. *Id.* at 547, 549.
113. *Id.* at 548.
114. *Id.*
115. *Id.* at 549.
116. Gorman v. Jacobs, 597 F. Supp. 2d 541, 550 (E.D. Pa. 2009).
117. Tamburo v. Dworkin, 601 F.3d 693, 708 (7th Cir. 2010).
118. *Id.* at 706, 708.

over the defendant is proper.[119] These courts emphasize the difficulty in pinpointing someone's location when the parties' only contacts occur over the Internet and conclude that the defendant's intent to harm a specific person is more important than any intent to direct that harm at a known location. In a sense, knowledge of the plaintiff's location is imputed to these defendants because they intend to cause harm to a specific person and know that the resulting harm must therefore be felt in a specific place.

In some cases, the knowledge requirement is loosened in a technical but not necessarily substantive sense. One such case is *Jones v. Dirty World Entertainment Recordings, LLC*, in which visitors to an online forum made disparaging comments about the sexual history and reputation of a Cincinnati Bengals cheerleader and schoolteacher.[120] The website's owner personally responded to these postings and made some negative comments of his own.[121] The federal district court in Kentucky denied the website owner's motion to dismiss the plaintiff's defamation claim for lack of personal jurisdiction, stating:

> The defendants publish invidious and salacious posts by visitors to the web site, . . . they respond to those posts with their own comments, and they thereby encourage and generate further posts by readers. In effect, a dialogue is created. It is also a fair inference that the salacious posts will invite hits from residents of the region where the subject of the posts lives and/or works.[122]

In essence, the court concluded that targeting of the forum state is inevitable where the defendant directs "invidious and salacious" comments at a citizen of that forum—a conclusion that echoes *Keeton*. The court then found that the defendants "knew that the invidious statements they posted would cause distress and harm to the plaintiff where she lived and/or worked" because they knew the brunt of the harm to the plaintiff and her career would be felt in the state in which she lived.[123] The defendants argued that it was not reasonably foreseeable that the harm would be felt in Kentucky: They assumed that because the plaintiff was a cheerleader for a Cincinnati sports team, she must have lived in Ohio.[124] The court discredited this argument because the Greater

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119. *E.g.*, Verizon Online Servs., Inc. v. Ralsky, 203 F. Supp. 2d 601, 620 (E.D. Va. 2002) ("Defendants allegedly purposefully transmitted millions of UBE to Verizon's e-mail servers. They cannot seek to escape answering for these actions by simply pleading ignorance as to where these se[r]vers were physically located."); MaryCLE, LLC v. First Choice Internet, Inc., 890 A.2d 818, 834 (Md. Ct. Spec. App. 2006) ("First Choice cannot plead lack of purposeful availment because the 'nature' of the Internet does not allow it to know the geographic location of its email recipients.").

120. 766 F. Supp. 2d 828, 830 (E.D. Ky. 2011).

121. *Id.* at 831.

122. *Id.* at 833.

123. *Id.* at 835.

124. *Id.* at 833.

Cincinnati area included the Kentucky city in which the plaintiff lived.[125] Therefore, because it was reasonably foreseeable that the harm would be felt in the Greater Cincinnati area, it was reasonably foreseeable that it would be felt in the corresponding part of Kentucky.[126]

Dirty World might not have loosened the knowledge requirement as much as the court's language implies. The defendants arguably did know the specific location in which the plaintiff's harm would be felt and simply were incorrect about the geographic definition of that location. However, other courts have definitively stated that even when the defendant does not know in which geographic forum the plaintiff resides, jurisdiction may still be exercised so long as the defendant's conduct was aimed at that forum. This was the case in *Facebook, Inc. v. ConnectU LLC*,[127] where the plaintiffs sued the defendants in a federal district court in California for fraud and unfair competition, among other causes of action.[128] The suit alleged that the defendants created a program designed to falsify login information on Facebook, import profile and email account information from registered Facebook users, and send misleading emails using those email addresses.[129] The defendants argued that they were not subject to specific jurisdiction in California because they were not aware that Facebook resided in California, believing instead that the company operated out of Massachusetts.[130] The court disagreed and found that jurisdiction was proper:

> The mere fact that the Internet provided [the defendants] a tool by which they could carry out their conduct against Facebook without first making efforts to learn its geographic location is not a reason to excuse them from jurisdiction to which they would otherwise be subject. . . . Here, there is no dispute that [the defendants] were fully aware that Facebook existed, and that they specifically targeted their conduct against Facebook. That they were able to do so while remaining ignorant of Facebook's precise location may render this case factually distinct from prior precedents finding jurisdiction for acts of express aiming, but not in a manner that warrants a different result.[131]

The court did go on to note, however, that a defendant is not necessarily subject to jurisdiction in any forum in which the plaintiff is located merely because that defendant has used the Internet to "attack"

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125. *Id.*

126. *Id.* at 834.

127. No. 507-CV-01389-RS, 2007 WL 2326090 (N.D. Cal. Aug. 13, 2007).

128. Plaintiffs' [Proposed] Second Amended Complaint for Violation of California Penal Code § 502(C), California and Massachusetts Common Law Misappropriation/Unfair Competition, Violation of Massachusetts General Law 93a, 18 U.S.C. § 1030, and 15 U.S.C. §§ 7704 and 7705, at ¶¶ 46–75, *Facebook*, 2007 WL 4463731 (N.D. Cal. Aug. 13, 2007) (No. 507-CV-01389-RS).

129. *Id.* at *2.

130. *Id.* at *5.

131. *Facebook*, 2007 WL 4463731, at *5–6.

the plaintiff.[132] Jurisdiction might not be proper where the plaintiff actively concealed their location or claimed to be present in more than one forum "based on a wide-flung network of servers," or where the defendant had no reason to believe that the plaintiff was located outside the defendant's forum.[133]

Though courts are increasingly willing to impute some knowledge of the plaintiff's location to defendants in wrongful online conduct cases, there is a limit to how far courts will go. The defendant must have some actual knowledge of the plaintiff's identity, as illustrated by the California Supreme Court's opinion in *Pavlovich v. Superior Court*.[134] There, the plaintiff, a nonprofit trade association formed by the DVD industry, was the sole licensee of a system used to encrypt copyrighted material on DVDs.[135] The defendant, a computer engineering student, created a program that could be used to circumvent this encryption system and freely distributed his program's source code via a website.[136] The plaintiff contended that the defendant had sufficient knowledge to foresee that his actions would cause harm in California. The argument was twofold: First, it was foreseeable that the program would be used to pirate copyrighted material, which would cause harm to the entertainment industries centered in California.[137] And second, it was foreseeable that distribution of the source code would cause harm to any licensees of the encryption system, which the defendant should have known were located in California due to the prevalence of computer and electronics companies there.[138]

The court disagreed with both prongs of this argument. First, even if the defendant did foresee that third parties might use his source code to pirate copyrighted material and thereby harm copyright holders, this awareness would not satisfy the express aiming requirement because the defendant did nothing to encourage third parties to engage in piracy.[139] In other words, the court refused to hold the defendant liable for the actions of third parties absent some sort of activity encouraging them to take those actions. Second, and more important for purposes of this Note, the defendant did not have sufficient knowledge of the licensee's presence in California because the prevalence of computer companies in that state was not enough to overcome the fact that the defendant had no information about the identify of any specific license holder.[140]

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132. *Id.* at *6 n.4.
133. *Id.*
134. 58 P.3d 2 (Cal. 2002).
135. *Id.* at 5.
136. *Id.*
137. *Id.* at 11.
138. *Id.*
139. *Id.* at 11–12.
140. *Id.* at 12.

The key difference between *Facebook* and *Pavlovich* is that the *Facebook* defendants knew exactly who their actions would harm: the Facebook corporation. The *Pavlovich* defendant, on the other hand, knew that his actions would cause harm to someone but had no idea who specifically that would be.

Not all courts will find the defendant's awareness of the plaintiff's identity but not location sufficient to satisfy the express aiming prong. In fact, some courts have declined to exercise jurisdiction where the defendant was aware of both the plaintiff's identity and location.[141] Though courts generally may be relaxing the knowledge requirement, this aspect of specific jurisdiction in cases involving wrongful online conduct is far from settled.

C. How Much Harm Is Enough?

Courts applying the effects test agree that the defendant must be aware that the brunt of the harm will be felt in the forum state. There is less agreement as to how much harm is required to satisfy this prong. Difficulty applying this prong stems from the conflicting facts of *Calder* and *Keeton*. In *Calder*, it was clear that the plaintiff felt the brunt of the harm in the forum state, while in *Keeton* the Supreme Court seemed concerned with finding a forum for the plaintiff even though the brunt of the harm was felt elsewhere. The problem in *Keeton* was that the plaintiff could not turn to any other forum if jurisdiction could not be established in New Hampshire: The statute of limitations barred her libel claim in Ohio, where the magazine was published, and her invasion of privacy claim in New York, where she resided and probably felt the brunt of her injury.[142] Thus, the Court noted, "It is undoubtedly true that the bulk of the harm done to petitioner occurred outside New Hampshire. But that will be true in almost every libel action brought somewhere other than the plaintiff's domicile."[143] The Court went on to say that libel claims should not be limited to a plaintiff's home forum and that the amount of harm suffered by the plaintiff in New Hampshire was sufficient to satisfy due process.[144]

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141. *See, e.g.*, Johnson v. Arden, 614 F.3d 785, 796–97 (8th Cir. 2010) ("The Johnsons allege that Heineman stated on www.ComplaintBoards.com that Sue Johnson and Cozy Kittens operated from Unionville, Missouri . . . . Although we accept this allegation as true, alone, it fails to show that Heineman uniquely or expressly aimed her statements at Missouri. The statements were aimed at the Johnsons; the inclusion of 'Missouri' in the posting was incidental and not performed for the very purpose of having their consequences felt in Missouri. There is no evidence that the www.Complaints Board.com website specifically targets Missouri, or that the content of Heineman's alleged postings specifically targeted Missouri." (citations and internal quotation marks omitted)).

142. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 772 n.1 (1984).

143. *Id.* at 780.

144. *Id.*

Keeton thus stands for the notion that the "brunt" of the harm does not mean the majority of the harm. The Ninth Circuit relied on *Keeton* in *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme* when it concluded, "If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state."[145] In that case, Yahoo!, a Delaware corporation doing business principally in California, provided a variety of Internet services to its users, including the ability to post items for auction.[146] These services were provided in multiple countries.[147] Problems arose when some users created online auctions for Nazi memorabilia, which it is illegal to sell in France.[148] When a French organization sued Yahoo! in the Tribunal de Grande Instance de Paris, that court issued an order requiring Yahoo! to "take all necessary measures to dissuade and render impossible any access" to these auctions in French territory.[149] Yahoo! did not appeal but instead filed suit in federal district court in California, seeking a declaratory judgment that the French orders were not enforceable in the United States.[150] The Ninth Circuit held that jurisdiction over the French organization responsible for the French suit was proper in California because Yahoo! had experienced a jurisdictionally significant amount of harm there.[151] The court even stated that jurisdiction may be proper where the bulk of the harm occurs outside of the forum.[152] Here, the court likely believed that Yahoo! felt the most harm in France because the French court's orders primarily concerned Yahoo!'s French websites, but nevertheless held that a California court could exercise personal jurisdiction in the case.

In contrast, other courts do define "brunt" to mean "majority."[153] Some decisions imply this requirement but do not directly state it. For instance, although the *Tamburo* court stated in a footnote that it was not addressing the question of how much harm must be felt in the forum state, the outcome depended on the fact that "the whole of the injury was suffered in Illinois, and the individual defendants knew that would be the case."[154] Reading "brunt" as "majority of the harm" allows courts to

145. 433 F.3d 1199, 1207 (9th Cir. 2006).
146. *Id.* at 1201.
147. *Id.* at 1202.
148. *Id.*
149. *Id.* (emphasis removed).
150. *Id.* at 1204.
151. *Id.* at 1207.
152. *Id.*
153. *Cf.* IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 263 (3d Cir. 1998) ("Moreover, *Calder* requires that the 'brunt' of the harm be felt in the forum. . . . [Other] cases cast doubt on the assertion that a company will feel the 'brunt' of a tort injury at its principal place of business when that injury is based on damage to contracts or property not centered in the forum.").
154. Tamburo v. Dworkin, 601 F.3d 693, 706 n.9 (7th Cir. 2010).

focus solely on the defendant's actions and ignore the question of whether the website itself was directed at the forum state. In this way, the brunt-of-the-harm prong offers a solution to many of the problems that arise where websites have a national reach or plaintiffs have a national reputation.[155]

III. THE IMPACT OF *J. MCINTYRE MACHINERY, LTD. V. NICASTRO*

In 2011, the Supreme Court handed down its first significant rulings on personal jurisdiction in over twenty years.[156] As both cases concerned conduct that was at most negligent, and both focused on sale of goods and the impact of the "stream of commerce" on personal jurisdiction,[157] neither is directly applicable to the type of wrongful conduct at issue in this Note.[158] However, one of the two, *J. McIntyre Machinery, Ltd. v. Nicastro*, concerned specific jurisdiction,[159] and as such the general policy principles expressed by the Court in that case are relevant to this discussion.

The issue in *J. McIntyre* was whether a British manufacturer of industrial machinery could be required to defend a products liability suit in New Jersey state court when one of its machines injured a New Jersey resident.[160] Six Justices believed that permitting the New Jersey court to exercise specific jurisdiction over the manufacturer would violate due process but were divided on the reasons why. Three Justices joined Justice Kennedy's plurality opinion,[161] while another joined Justice Breyer's concurrence.[162]

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155. *See infra* Part IV.B.

156. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (plurality opinion). The Court's last significant ruling on personal jurisdiction came in *Asahi Metal Co. v. Superior Court*, 480 U.S. 102 (1987).

157. *J. McIntyre* was a products liability case, and thus would have concerned either negligence or strict liability. 131 S. Ct. at 2785. *Goodyear* was a wrongful death suit predicated on allegations of negligence. 131 S. Ct. at 2850.

158. Though the *Zippo* test is used by some courts in every case involving the Internet, regardless of the cause of action, *see, e.g.*, Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419–20 (9th Cir. 1997), the effects test is usually reserved for cases involving tortious or otherwise wrongful conduct. The effects test and stream of commerce branches of personal jurisdiction jurisprudence are separate: where one applies, the other does not. *Cf. J. McIntyre*, 131 S. Ct. at 2785 ("As a general rule, the exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' There may be exceptions, say, for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called 'stream-of-commerce' doctrine cannot displace it." (citations omitted)); *see also id.* at 2787 (distinguishing intentional tort cases from cases governed by the general rules of purposeful availment).

159. 131 S. Ct. 2780.

160. *Id.* at 2786.

161. *Id.* at 2785.

162. *Id.* at 2791 (Breyer, J., concurring).

Justice Kennedy's opinion focused on the defendant's actions, not his intentions or what might have been foreseeable to him.[163] In contrast with the Court's previous opinions on jurisdiction, the *J. McIntyre* plurality minimized the relevance of foreseeability: "The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."[164] For Justice Kennedy, the fact J. McIntyre had no contacts with New Jersey beyond the sale of one machine "reveal[ed] an intent to serve the U.S. market," not the New Jersey market.[165] Thus, New Jersey courts could not exercise personal jurisdiction over the defendant because the defendant had never engaged in any activities there "that reveal[ed] an intent to invoke or benefit from the protection of its laws."[166]

Justice Breyer's concurrence also centered on the defendant's actions and minimized foreseeability, albeit indirectly, but did not require a showing that the defendant intended to submit to the forum state's jurisdiction. Instead, he focused on the defendant's sales and marketing efforts in the state, basing his conclusion that jurisdiction in New Jersey was not proper on the fact that there was no "regular flow" of sales by the defendant in the state, nor was there "something more" beyond sales, such as state-specific advertising.[167] Thus, it could not be said that the defendant had made any "specific effort" to sell in New Jersey.[168] Of particular relevance to the discussion in this Note is Justice Breyer's concern that the plurality's rules—that the defendant must "inten[d] to submit to the power of the forum" and must "target the forum"—might be too narrow to adequately address the range of sales techniques made possible by the Internet: "[W]hat do those standards mean when a company targets the world by selling products from its Web site? . . . And what if the company markets its products through popup advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case."[169]

In her dissent, Justice Ginsburg strongly criticized the idea that a manufacturer may escape specific personal jurisdiction in any state by targeting a national market for its products rather than a state-specific

163. *Id.* at 2789 (plurality opinion).
164. *Id.* at 2788.
165. *Id.* at 2790.
166. *Id.* at 2791.
167. *Id.* at 2792 (Breyer, J., concurring).
168. *Id.*
169. *Id.* at 2793.

market.[170] She took particular issue with the plurality's focus on what was fair to the defendant rather than what might be fair to the plaintiff and noted that requiring this particular defendant to appear in court in New Jersey would be "a reasonable cost of transacting business internationally."[171] She would have held that by engaging a subsidiary to sell its products throughout the United States, the defendant had purposefully availed itself of the U.S. market nationwide and "thereby availed itself of the market of all States in which its products were sold by its exclusive distributor."[172] After all, "[h]ow could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?"[173]

The impact of *J. McIntyre* on the specific jurisdiction analysis is not yet clear. For one thing, courts will differ over whether to apply Justice Kennedy's opinion, Justice Breyer's concurrence, or neither.[174] And even when courts decide which to follow, it is not at all obvious how to apply the standards enunciated in either opinion. The pre-*J. McIntyre* status quo likely will prevail in many courts,[175] while others might believe the case to be a radical departure from past precedent. Indeed, one court applying Justice Breyer's concurrence has already concluded that "*McIntyre* clearly rejects foreseeability as the standard for personal jurisdiction."[176] Despite this conclusion, the most *J. McIntyre* has made clear so far is that "[s]ome regular and substantial number of sales needs to occur in the forum" in order to support a finding of specific jurisdiction based solely on sales.[177]

Whether *J. McIntyre* will cause any court will change its analysis of specific jurisdiction in cases involving wrongful online conduct remains to be seen. Thus far, none have done so. The Ninth Circuit has explicitly stated, and the Supreme Court has implied, that *J. McIntyre* does not

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170. *Id.* at 2801 (Ginsburg, J., dissenting).

171. *Id.* at 2800–01.

172. *Id.* at 2801.

173. *Id.* (citing Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 813–815 (1988)).

174. *See* Megan M. La Belle, *The Future of Internet-Related Personal Jurisdiction After* Goodyear Dunlap Tires v. Brown *and* J. McIntyre v. Nicastro, 15 J. INTERNET L. 3, 8 (2012) (explaining that some courts will rely on earlier opinions because there was no majority opinion in *J. McIntyre*, some will follow Justice Breyer's concurrence based on the principle that the narrowest concurrence governs where there is no majority, and some will follow Justice Kennedy's opinion, believing it to be a majority opinion).

175. *Id.*

176. Windsor v. Spinner Indus. Co., No. JKB-10-114, 2011 WL 5005199, at *5 (D. Md. Oct. 20, 2011).

177. *See* Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1265 (2011).

apply to cases sounding in tort.[178] But even if *J. McIntyre* is not applied directly to Internet cases, the debate between Justices Kennedy and Ginsburg over the sufficiency of targeting a national, rather than state, market has great significance. As has been discussed, the question of national versus state targeting is often dispositive in cases involving wrongful online conduct.[179] Courts that have already expressed a preference for one argument or the other surely will cite to *J. McIntyre* for support in future cases. And Justice Breyer's focus on the plurality's potential impact on online commerce likely will attract the eye of courts that are on the fence on the national-targeting issue or that have not yet had the opportunity to address it.

IV. Creating a Better Test

Courts have attempted to prevent nationwide jurisdiction over Internet users by narrowly defining express aiming and reasonable foreseeability. However, the tests currently used to accomplish this purpose have actually made it more difficult for defendants to determine when and where they may be subject to suit. In order to ensure true foreseeability and uniform treatment, courts should rethink their tests for specific jurisdiction over online conduct.

Tests for specific jurisdiction in wrongful online conduct cases can avoid the problems described in this Note by applying the following principles: (1) the interactivity and aim of the website or other medium through which the defendant harmed the plaintiff should not be considered as a separate factor; (2) that the plaintiff might have a national reputation or businesses does not automatically mean she has suffered the same amount of harm in every potential forum; and (3) the defendant need not know where the plaintiff is located in order to intend to cause her harm in that location. The *Facebook* court's succinct explanation of this third principle is offered in Part II.B.2 of this Note, but the first two principles will be explained further in this Part.

A. Website Aim and Interactivity Should Be Considered in the Correct Context

First, courts should stop fixating on the aim and interactivity of websites. This fixation leads to a number of problems: inadequate consideration of the effort the defendant has expended to harm the plaintiff, ignorance of the difference between website users and owners, and overestimations of the level of effort required to overcome the Internet's lack of physical boundaries to target specific people and

178. Mavrix Photo, Inc. v. Brand Techs., Inc., 647 F.3d 1218, 1228–29 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1101 (2012).

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

places. These problems will be alleviated—and perhaps solved entirely—if the aim and interactivity of websites is no longer treated as a separate factor in the specific jurisdiction analysis. The question should be whether the defendant has expressly taken aim at the forum state, not whether the medium through which the defendant acts has done so. Thus, while interactivity and aim may be relevant to the express aiming inquiry, they should be used as evidence of the defendant's knowledge and intent regarding the plaintiff rather than as a hurdle that must be cleared before the defendant can even be considered to have such knowledge or intent.

The first step is to do away with the *Zippo* sliding scale, which leads to counterintuitive results in cases of intentional, wrongful conduct.[180] Instead of asking whether the site is interactive or not, courts should ask how much effort the defendant put into using the site to harm the plaintiff. For example, a defendant who posts a block of defamatory text on her passive website arguably has worked harder to harm the plaintiff than has the defendant who posts a defamatory comment on Facebook, Twitter, an online forum, or any other, more interactive type of website. The former defendant must register a domain name and construct an entire website in order to share her statements; the latter defendant merely writes a comment on an existing website to which she might have no lasting connection and to which she might give little thought.[181]

Likewise, courts should not make the website's general audience their primary focus, especially not when the defendant is a website user rather than owner and thus has no control over the website's reach. Questions about a website's general audience come from *Calder* and *Keeton*, which are most easily analogized with websites delivering news

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180. This Note is hardly the first to propose doing away with the *Zippo* test. The *Zippo* sliding scale has faced harsh criticism from courts and commentators alike since it was first adopted. *See, e.g.*, Howard v. Mo. Bone & Joint Ctr., Inc., 869 N.E.2d 207, 212 (Ill. App. Ct. 2007) ("We disagree with the arbitrary 'sliding scale' approach adopted by *Zippo* . . . ."); Dagesse v. Plant Hotel N.V., 113 F. Supp. 2d. 211, 222 (D.N.H. 2000); Borchers, *supra* note 177, at 479 ("At a technical level, there are good reasons to doubt whether the *Zippo* framework really makes much sense."); Dunham, *supra* note 76, at 583; Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH L.J. 1345, 1377 (2001) ("The problems with the *Zippo* test are not limited to inconsistent and often undesirable outcomes. The test also encourages a perverse behavior that runs contrary to public policy related to the Internet and e-commerce."); Spencer, *supra* note 32, at 74 ("[T]he prevailing analysis embodied in contemporary *Zippo*-based approaches is fundamentally unsound.").

181. For example, consider the Westboro Baptist Church. Its website is entirely passive under the *Zippo* sliding scale, but the comments that church members make on the website are intended to inflame readers and have resulted in multiple defamation suits. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1213–14 (2011); *see also* Borchers, *supra* note 177, at 480 ("To say that jurisdiction exists when the publication is in the physical form and not over the Internet would be to attribute constitutional significance to the difference between making the information appear in printed form versus on a computer screen.").

of some kind or with services that are necessarily location dependent. Courts analyzing the intended reach of a website do so because they want to adequately address the defendant's knowledge and intent,[182] but by focusing more attention on the website than on the wrongful conduct, they actually accomplish the opposite. If the defendant has control over a website's reach and has attempted to limit that reach in some way, then those efforts are relevant in determining the defendant's intent. But where the defendant is a website user, the website's intended audience is much less relevant. If the website does not indicate an audience, then the court should look to other evidence to determine what the defendant actually knew or thought about where her comments might reach.

Instead, by focusing on the website's aim, courts impute the intent of the website's owners to all of the website's users without taking into account the users' perceptions of the website's audience or purpose. In *Gorman*, for example, at least one of the defendants knew where the plaintiff lived.[183] When that defendant made defamatory comments about the plaintiff's business, he surely must have anticipated that any resulting harm to the business would occur where the plaintiff lived. One wonders if the defendant even thought about the website's audience at all before commenting. Like many Internet users, he might have assumed the comments could and would be read anywhere in the United States. Making information available throughout the country is a common purpose of websites, especially those, such as the one used in *Gorman*, that serve a nationwide organization.

B. Nationwide Jurisdiction Can Be Avoided in Most Cases but Sometimes May Be Desirable

The second principle courts should keep in mind in these cases is that the brunt-of-the-harm prong of the express aiming inquiry can limit the number of potential forums, even for plaintiffs with national reputations or businesses. The *Marten* plaintiff, for example, likely could not have satisfied this prong outside of either his home state or the state in which the school's business operations were centered. The harm suffered in that case related to the plaintiff's ability to attend classes at the defendant school, a harm that would not have been felt in the other states with which the school might have had online contact because the plaintiff had no connection to those states.

Even in cases like *Gorman* or *Dring*, where the statements at issue concerned a national issue or reputation and therefore could have caused

182. *See, e.g.*, IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 264 (3d Cir. 1998) (explaining that focusing solely on the geographical location of harm fails to give sufficient weight to the defendant's knowledge and intent in causing that harm).

183. *See* Gorman v. Jacobs, 597 F. Supp. 2d 541, 551 (E.D. Pa. 2009).

harm to the plaintiffs in many states, nationwide jurisdiction need not be the inevitable result. After all, the *Calder* plaintiff was famous across the country due to her participation in the Partridge Family, but the Supreme Court found that California was the primary location of her injuries because the defamatory statements involved her ability to perform her professional obligations, most of which originated in and were carried out in California. Similar lines could be drawn in *Gorman* and *Dring* based on the state in which each plaintiff did the bulk of his business, created the relationships about which the statements at issue were concerned, or carried out the majority of his relevant obligations.

On the other hand, nationwide jurisdiction may be acceptable in some cases—and is in keeping with the *Keeton* Court's rationale. In that case, the plaintiff's only contact with New Hampshire was the harm she suffered when the magazine's defamatory issues were circulated there. Presumably, then, jurisdiction would have been proper in any and every state in which the magazine circulated. Therefore, perhaps courts should accept that jurisdiction in multiple (even many) forums is an acceptable result in some cases.

Though *Keeton* and *J. McIntyre* may seem in conflict, a more careful reading reveals that they are complementary. Justice Kennedy's comments about national versus state-specific targeting and about the limits of foreseeability should be read together. Where one targets a national market (or, as in some of the cases discussed in this Note, a plaintiff with a national reputation), mere foreseeability about where harm will be caused is not enough. This was true in *Pavlovich*, where the defendant could only guess that distributing his source code would cause harm in California. In such cases, as in *J. McIntyre*, limits on jurisdiction make sense. "Reasonable foreseeability" does not mean conjecture. On the other hand, in cases like *Dring*, defendants are certain (or should be) that their actions will cause harm in a particular place. Their knowledge and intent with regard to the plaintiff are the "something more" that Justice Breyer was looking for in *J. McIntyre*. Indeed, Justice Breyer's pointed questions about online sellers like Amazon.com in his *J. McIntyre* concurrence[184] hint at continuing acceptance of widespread jurisdiction over certain types of cases. And because the harm they cause is more than foreseeable—it is certain—it should not offend the principles underlying Justice Kennedy's *J. McIntyre* opinion to exercise jurisdiction over these defendants in any number of forums.

At least one court has concluded that express aiming may still be defined broadly post-*J. McIntyre.* In *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, an Ohio-based corporation alleged that a Florida-

184. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2793 (2011) (Breyer, J., concurring).

based corporation had committed copyright infringement by posting the plaintiff's copyrighted celebrity photographs on the defendant's celebrity gossip website.[185] The Ninth Circuit held that California courts could exercise specific jurisdiction over the defendant even though the state was neither party's primary place of business.[186] Though the website targeted a national market and not specifically California, the court found that the defendant had "continuously and deliberately exploited the California market."[187] The defendant "operated a very popular website with a specific focus on the California-centered celebrity and entertainment industries" and, as a result, "anticipated, desired, and achieved a substantial California viewer base," which was "an integral component of [its] business model and its profitability."[188] Thus, the court concluded that "[a]s in *Keeton*, it does not violate due process to hold [the defendant] answerable in a California court for the contents of a website whose economic value turns, in significant measure, on its appeal to Californians."[189] The court noted that if the defendant had been an individual or an "unpaid blogger," the result probably would have been different because such a person cannot be as certain that their website will be widely viewed.[190] In other words, the national reach of the defendant's website favored, rather than opposed, a finding of specific jurisdiction. This national reach was what ensured that the defendant's action would cause harm in a distant state. Finally, the court acknowledged "the burden that our conclusion may impose on some popular commercial websites. But we note that the alternative . . . would substantially undermine the 'interests . . . of the plaintiff in proceeding with the cause in the plaintiff's forum of choice.'"[191]

Regardless of the extent to which they draw from *J. McIntyre*, courts facing wrongful online conduct cases should focus on the defendant's specific knowledge and intent with regard to the plaintiff. Only by focusing on the defendant's subjective beliefs can the court adequately determine her knowledge and intent with regard to where she expressly aimed her actions. And only when courts focus on these factors can they define purposeful availment in the Internet context in a way that allows defendants to accurately predict when and where they will be subject to suit.

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185. 647 F.3d 1218, 1221–23 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1101 (2012). The Ninth Circuit concluded that J. McIntyre was not directly applicable to the facts of *Mavrix* because the case involved tortious conduct. *Id.* at 1228.

186. *Id.* at 1221.

187. *Id.* at 1230.

188. *Id.*

189. *Id.*

190. *Id.* at 1231.

191. *Id.* (quoting Kulko v. Superior Court of Cal., 436 U.S. 84, 92 (1978)).

CONCLUSION

Just as the Internet facilitates the spread of information, so too does it enable users to direct hurtful statements and actions at others, even when the target's physical location is unknown or unclear. Courts have struggled to redress the resulting harms without creating nationwide jurisdiction over every person who uses a website. This struggle has led to conflicting tests and results for determining where jurisdiction may properly be exercised, making it more difficult for Internet users to determine when and where they might be haled into court. Current approaches to defining specific jurisdiction for wrongful online conduct threaten to turn users' perceptions that the Internet is a place without consequences into a reality.

Reasonable foreseeability is a touchstone of personal jurisdiction. In deciding what is reasonably foreseeable, courts must look at more than just the facts of the case at hand. They must also recognize the effect of precedent on shaping reasonable foreseeability, especially in an area as confused as this one. Only by focusing on the defendant's specific knowledge and intent can courts avoid creating jurisdiction for contacts that are random or fortuitous and ensure jurisdiction in cases where the defendant knowingly intended to cause specific and serious harm to the plaintiff. A website's level of interactivity and intended audience are only two factors to consider and should have only minimal weight in most cases involving website users rather than owners. Furthermore, courts should not allow users to hide behind ignorance (willful or otherwise) of a plaintiff's geographic location. Finally, courts should accept that some online conduct will lead to jurisdiction in multiple forums and, in accepting this outcome, consider the Supreme Court's desire to find a forum for the victims of intentional, wrongful conduct.