

December 2000

The Founders Go On-Line: An Original Intent Solution to a Jurisdictional Dilemma

Christine G. Heslinga

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Constitutional Law Commons](#)

Repository Citation

Christine G. Heslinga, *The Founders Go On-Line: An Original Intent Solution to a Jurisdictional Dilemma*, 9 Wm. & Mary Bill Rts. J. 247 (2000), <https://scholarship.law.wm.edu/wmborj/vol9/iss1/15>

THE FOUNDERS GO ON-LINE: AN ORIGINAL INTENT SOLUTION TO A JURISDICTIONAL DILEMMA*

The Internet has created a blossoming cyber-economy and a new way of conducting business. Unfortunately for those looking for jurisdictional certainty, however, cyberspace also effectively eliminates geographic boundaries. The unprecedented circumstances set by this new frontier have put federal courts in the unenviable position of deciding whether Internet-based cases meet diversity jurisdiction requirements. Examining the constitutional history and recent use of diversity, this Note argues that the Founders did not foresee an era where every contract or sales case would end up in federal court; rather, they intended diversity jurisdiction to be a rare and perhaps temporary proposition. The author argues that the potential of Internet-based contacts to throw a large number of cases into federal court could overburden the federal system. This Note suggests that the solution to this problem lies in courts following the Founder's intent.

* * *

INTRODUCTION

Every second, seven people around the globe log on to the Internet for the first time.¹ Car buying, auction bidding, stock trading and even prescription filling have moved on-line, and e-business appears poised to take over entire sectors of the economy. In 1998, cyber-economy generated \$301 billion in revenues, and Internet business-to-business transactions alone are predicted to climb to \$1.3 trillion by 2003.² Visa and American Express reported that the 1999 holiday season saw an increase in on-line sales by their cardholders of some 179 to 200 percent over the previous year's totals,³ revealing a massive migration of ordinary consumers into the realm of virtual shopping. Although a powerful and apparently benevolent force in the economy, cyberspace has created a legal tangle over which courts should hear disputes involving on-line transactions.

Given the Internet's lack of geographic boundaries, an increasing number of cases will be brought in diversity, with the potential to overburden the federal

* This Note is dedicated to the memory of Adolf Lewkowicz. I would like to thank Professor Mechele Dickerson for her invaluable comments on an earlier draft and my husband Joshua for his patience and support.

¹ See Mark Leibovich et al., *Internet's E-economy Gets Real: New Business Math Gains Solid Ground*, WASH. POST, June 20, 1999, at A1.

² See *id.*

³ See Saul Hansell, *Retailers Look Back and See Online Shopping Is Gaining*, N.Y. TIMES, Dec. 24, 1999, at A1.

courts. Diversity does not automatically create federal jurisdiction, however, and courts are struggling with the due process requirements for asserting jurisdiction over a non-resident defendant based on virtual contacts. Unfortunately, the circuits have provided little guidance on the issue. District courts have not followed what few decisions the appellate courts and other district courts in their circuits have offered, resulting in widespread uncertainty regarding where a plaintiff should bring suit. Many districts have dealt with the issue by twisting precedent into a weak and unpredictable rationale for dismissing suits based on Internet contacts. A similar result could be reached, however, with a simpler analysis. A careful analysis of the original purposes of diversity jurisdiction demonstrates that the application of traditional diversity principles to today's connected society far exceeds the intended scope of federal jurisdiction as envisioned by the Founding Fathers.

Part I discusses the history of diversity jurisdiction through an examination of its constitutional origins, statutory history, and recent judicial findings. Part II explores the short history of Internet jurisdiction with particular emphasis on relevant circuit court holdings. Part III examines recent district court decisions on the issue, including short summaries of some typical well-reasoned and poorly-reasoned decisions. Part IV analyzes Internet-related diversity jurisdiction in light of the Founders' original intent, and Part V suggests that district courts could reach the same conclusions on Internet jurisdiction by using original intent rather than by twisting and sometimes misusing the scant precedent other courts have offered.

I. THE HISTORY OF DIVERSITY JURISDICTION⁴

A. *The Beginning*

Like the history of the Article III courts themselves, the history of diversity jurisdiction began at the Constitutional Convention of 1787. Unlike the Article III courts, however, diversity jurisdiction did not arouse the passions of the Founding

⁴ See generally 13B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3601 (1984) (outlining the history of diversity jurisdiction from the Constitutional Convention through recent changes and reforms); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3 (1948) (suggesting theories for the Founders' inclusion of diversity); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928) (presenting a clear history of judicial power and a criticism of diversity); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928) (arguing that the Founders had no real basis for creating diversity jurisdiction); James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964) (offering a general history of diversity jurisdiction); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923) (exploring the Founders' intent and debates on the Article III courts, including diversity jurisdiction).

Fathers. Most scholars agree that the Convention records contain little mention of diversity jurisdiction at all, and an even smaller showing of support.⁵

Diversity jurisdiction had an inauspicious birth and an uneasy childhood. Far from an intuitive, fundamental principle, only one of the plans submitted to the Convention contained a provision for federal jurisdiction over disputes between citizens of different states.⁶ The Virginia Plan originally proposed that the federal judiciary have jurisdiction “to hear . . . cases in which foreigners or citizens of other States applying to such jurisdictions may be interested,”⁷ similar to the modern understanding of diversity.

Although the Virginia Plan’s language regarding diversity appeared strong and unambiguous, no one supported it with any vigor during the state debates on the proposed constitution. James Madison, the main author of the only plan suggesting diversity, prefaced his rather half-hearted defense of the concept with: “As to its cognizance of disputes between citizens of different states, I will not say it is a matter of much importance. Perhaps it might be left to the state courts.”⁸ Other strong proponents of the Virginia Plan mirrored Madison’s spiritlessness regarding diversity. John Marshall, a staunch supporter of a strong federal judiciary, stated: “Were I to contend that this was necessary in all cases, and that the government without it would be defective, I should not use my own judgment.”⁹ Even Edmund Randolph, who first introduced the diversity jurisdiction proposals to the Convention, commented that he did “not see any absolute necessity for vesting [the federal courts] with jurisdiction in these cases.”¹⁰

⁵ See, e.g., Frank, *supra* note 4, at 23 (noting that support for diversity jurisdiction was “tepid”); Friendly, *supra* note 4, at 487 (“The most astounding thing, however, is not the vigor of the attack but the apathy of the defense.”); Warren, *supra* note 4, at 81 (“There was no part of the Federal jurisdiction which had sustained so strong an attack from the Anti-Federalists, or which had received so weak a defense from the Federalists.”).

⁶ The New Jersey, Hamilton, Pinckney, and Blair Plans all contained provisions for the federal judiciary, but none proposed that federal courts hear disputes between parties of diverse citizenship. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 593 app. C (Max Farrand, ed., rev. ed. 1937) [hereinafter RECORDS] (the Virginia Plan); 3 RECORDS, *supra*, at 595 app. D (the Pinckney Plan); 3 RECORDS, *supra*, at 611 app. E (the New Jersey Plan); 3 RECORDS, *supra*, at 617 app. F (the Hamilton Plan); Moore & Weckstein, *supra* note 4, at 2 n.3 (noting the existence of the Blair Plan but the Convention’s lack of discussion regarding it).

⁷ 1 RECORDS, *supra* note 6, at 22.

⁸ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 533 (Jonathan Elliot, 2d ed., photo. reprint 1941) (1836) [hereinafter DEBATES].

⁹ *Id.* at 556.

¹⁰ *Id.* at 572.

The Virginia Plan's words on diversity lacked support in the Committee of the Whole, prompting Randolph and Madison to amend the Plan so that federal jurisdiction extended to cases "which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony."¹¹ This version, which included diversity jurisdiction only indirectly through the "national peace and harmony" clause, passed the Committee's scrutiny. The final amended version submitted to the Committee of Detail similarly failed to mention diversity jurisdiction in its text.¹² This does not indicate, however, that the supporters of the Virginia Plan had abandoned diversity jurisdiction. Several of the proposed drafts to the Committee of Detail included diversity,¹³ and the final version, embodied in the Constitution, provided that "[t]he judicial power shall extend . . . to controversies . . . between citizens of different States."¹⁴

The debate over diversity jurisdiction acquired more substance as it entered the public sphere. The topic appeared in both Federalist and Anti-Federalist materials as the states considered ratification of the proposed constitution. The Federalists, through Alexander Hamilton, argued that diversity jurisdiction was necessary in order to enforce the Privileges and Immunities Clause¹⁵ and to avoid the confusion and animosity that would be caused by thirteen different state courts reaching thirteen different conclusions on an issue, each refusing to recognize the other's judgments.¹⁶ The Federalists also argued that the federal courts were superior to state courts because of the life tenure of judges, jury pools from broader areas, judges' freedom to comment on evidence, the greater experience of federal judges, and similar arguments, and thus created a strong justification for channeling as many cases as possible into the federal system.¹⁷

The Anti-Federalists set forth their arguments with equal force and eloquence. Prominent orators such as Patrick Henry argued that diversity jurisdiction would undermine state courts or, in the extreme, totally destroy them: "I see arising out of that paper a tribunal that is to be recurred to in all cases, when the destruction of state judiciaries shall happen; and, from the extensive jurisdiction of these paramount courts, the state courts must soon be annihilated."¹⁸ Henry, along with George Mason, further argued that diversity would force citizens to try their cases in distant federal courts, increasing the cost of litigation and denying poor litigants access to justice. As Mason illustrated to the Virginia state convention: "What!

¹¹ 1 RECORDS, *supra* note 6, at 22.

¹² See 2 *id.* at 38-39.

¹³ See, e.g., *id.* at 147 (draft of Edmund Randolph); *id.* at 173 (draft of James Wilson).

¹⁴ U.S. CONST. art. III, § 2.

¹⁵ *Id.* art. IV, § 2.

¹⁶ See THE FEDERALIST NO. 80 (Alexander Hamilton).

¹⁷ See *id.* NO. 81 (Alexander Hamilton).

¹⁸ 3 DEBATES, *supra* note 8, at 542.

Carry me a thousand miles from home—from my family and business . . . Perhaps I have a respectable witness who saw me pay the money; but I must carry him one thousand miles to prove it, or be compelled to pay it again.”¹⁹ Mason also noted that such a system could result in nuisance litigation: “Suppose I have your bond for a thousand pounds: if I have any wish to harass you, or if I be of a litigious disposition, I have only to assign it to a gentleman in Maryland. This assignment will involve you in trouble and expense.”²⁰

The Anti-Federalists also expressed concern that the doctrine would result in federal judges misapplying or creating state law.²¹ Because a federal court sitting in diversity over a state claim would not be bound by state decisions, it could interpret (or misapply) the state law however it saw fit. The more moderate Anti-Federalists argued that state courts were in a better position to apply state law accurately and efficiently.²² James Winthrop, writing as “Agrippa,” took this argument a step further. He argued that Congress, through the power given it by the Necessary and Proper Clause,²³ would make laws governing the federal courts, and if the federal courts were deciding state claims, Congress could legislate on what should be a state issue. By virtue of the Supremacy Clause,²⁴ any law of Congress had to be followed by the states, so the states would be forced to follow federally-made law on a state issue.²⁵

After all the debate, and regardless of the hesitancy of some of the Founders, the state conventions ratified the Constitution—including the clause granting federal courts diversity jurisdiction—on September 17, 1787.²⁶

B. *Statutory History*

Immediately following ratification and the first congressional elections, the new Congress began work codifying the specifics of the Article III courts, including the statutory requirements for diversity jurisdiction. The resulting legislation, the Judiciary Act of 1789, provided that federal courts would entertain diversity actions

¹⁹ *Id.* at 526. *See also id.* at 529, 551 (quoting George Mason of Virginia); 4 *id.* at 138-39 (quoting Judge Spencer of North Carolina).

²⁰ 3 *id.* at 526.

²¹ In more recent times, the *Erie* doctrine obviated some of this argument. The Court in *Erie* held that federal courts sitting in diversity must apply state common law and may not devise their own interpretation of state legislation. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 80 (1938).

²² *See, e.g.*, 3 DEBATES, *supra* note 8, at 521-22 (quoting George Mason at the Virginia Convention); 4 *id.* at 164 (quoting Judge Spencer at the North Carolina Convention).

²³ U.S. CONST. art. I, § 8.

²⁴ *Id.* art. VI.

²⁵ *See* Letter of “Agrippa” (James Winthrop), MASS. GAZETTE, Dec. 11, 1787.

²⁶ U.S. CONST. art. VII.

for suits between a citizen of the state where the suit commenced and a citizen of another state, where the amount in controversy exceeded \$500.²⁷ Although the Judiciary Act of 1801 attempted to lower the amount in controversy requirement to \$400, Congress repealed this revision the following year.²⁸

Congress' first attempt to legislate diversity jurisdiction stood unaltered for nearly eighty years. In the interim, the Supreme Court decided *Strawbridge v. Curtiss*,²⁹ the first judge-made limitation on the bounds of diversity jurisdiction. Chief Justice Marshall's opinion established the "complete diversity" rule, which provided that, in multi-party actions, federal diversity jurisdiction requires that no defendant be a citizen of the same state as any of the plaintiffs.³⁰

The Judiciary Act and *Strawbridge v. Curtiss* provided a strong backbone for diversity jurisdiction, and no judicial or legislative action attempted to change the status quo for sixty years. The post-Civil War era, by contrast, ushered in a flurry of alterations, most of which acted to increase the number of diversity cases heard in federal courts. The Separable Controversy Act of 1866 allowed defendants in multi-defendant state litigation to remove their case to a federal court if they were citizens of a different state than the plaintiff, so long as a judgment rendered in regards to them would not affect the remaining defendants' cases.³¹ The Act of 1867 allowed either a plaintiff or a defendant in a state court to remove to federal court if they satisfied the "complete diversity" rule and upon showing by affidavit that the party had reason to believe that he could not obtain justice in the state court because of prejudice or local influence.³²

Continuing the post-Civil War era's unprecedented expansion of diversity jurisdiction, the Act of 1875 provided that federal diversity jurisdiction would lie in any district in which the defendant was an inhabitant or could be found for service of process, opening the door for suits in any state in which a corporation did business through an agent or otherwise.³³ The Act also broadened the scope of diversity jurisdiction by allowing holders of promissory notes to sue in federal court regardless of the citizenship of the original assignor.³⁴ Although the Act mostly operated to expand federal jurisdiction, Congress did create a new limitation: improperly or collusively joined parties could not be used to create diversity.³⁵

It did not take long for Congress to realize that the result of these post-bellum expansions of federal jurisdiction was the overburdening of the Article III courts.

²⁷ See Judiciary Act of 1789, § 11, 1 Stat. 73 (1789).

²⁸ See Act of March 8, 1802, 2 Stat. 132 (1802).

²⁹ 3 U.S. (Cranch) 267 (1806).

³⁰ See *id.* at 267-68.

³¹ See Act of July 27, 1866, 14 Stat. 306 (1866), U.S. Comp. Stat. (1916) § 1018.

³² See Act of March 2, 1867, 14 Stat. 558 (1867).

³³ See Act of 1875, § 2, 18 Stat. 470 (1875), U.S. Comp. Stat. (1916) § 1010.

³⁴ See *id.*

³⁵ See *id.*

In response to this problem, the legislature passed the Judiciary Act of 1887-88,³⁶ which narrowed the scope of diversity jurisdiction. The Act increased the amount in controversy requirement to \$2,000, restricted "citizenship" to the state where a defendant was an "inhabitant" rather than where he "shall be found," forbade plaintiffs who initiated a suit in state court to remove to federal court, and returned to the original 1789 rule that suits for promissory notes could only be brought in courts where the assignor could have filed suit.³⁷ The Act achieved the desired result of calming the influx of federal diversity cases. With one minor exception,³⁸ Congress again bowed out of Article III diversity jurisdiction reform and remained silent on the issue for sixty years.

The year 1948 saw the most code-drafting on the federal judiciary the nation had seen since the original Judiciary Act. Congress essentially wiped out the old judiciary laws and started fresh, and the result was the Judicial Code of 1948³⁹—the basis of the current provisions. In simple terms, the Code provided that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and is between . . . Citizens of different States"⁴⁰ The revisions to the Judicial Code's diversity provisions have been minor. The 1956 amendments increased the amount in controversy requirement to \$10,000, clarified that a corporation is deemed a citizen of both its state of incorporation and the state of its principle place of business, and provided that the word "states" included Puerto Rico.⁴¹ Congress increased the amount in controversy requirement to \$50,000 in 1988,⁴² and then to its current level of \$75,000 in 1996.⁴³

Diversity jurisdiction has thus come almost full circle, statutorily speaking, from the 1789 Act granting federal jurisdiction to cases between citizens of different states, to the post-Civil War provisions expanding diversity and increasing the federal caseload, and back to the simplicity of its bare constitutional definition, as codified in the Judicial Code of 1948.

³⁶ Judiciary Act of 1887-88, §§ 1 and 3, 24 Stat. 552 (1887), U.S. Comp. Stat. (1916) §§ 991(1), 991(2), 1010, 1011, 1012, 1033, 1048.

³⁷ *See id.*

³⁸ *See* Act of 1911, §§ 24 and 28, 36 Stat. 1091 (1911), U.S. Comp. Stat. (1916) § 991(1). The 1911 Act raised the amount in controversy requirement to \$3,000, but otherwise effected no substantial change on federal diversity jurisdiction.

³⁹ 28 U.S.C.A. § 1332 (1948).

⁴⁰ *Id.*

⁴¹ *See* Act of July 26, 1956, 70 Stat. 658 (1956).

⁴² *See* Judicial Improvements and Access to Justice Act, Act of November 19, 1988, 102 Stat. 4642 (1988).

⁴³ *See* Federal Courts Improvement Act, Act of October 19, 1996, Pub. L. 104-317, § 205, 110 Stat. 3847, 3850 (1996).

C. Due Process Requirements

While Congress worked to define the statutory requirements for federal diversity jurisdiction, the Supreme Court attempted to define the doctrine's constitutional limitations. Beginning in 1945, the Court struggled to delineate when a court could exercise jurisdiction over a non-resident defendant without violating due process.⁴⁴ As is common with many due process issues, no clear rule developed. Although the majority in the first few cases worked conscientiously to set forth a clear test, the splintered pluralities of the more recent decisions have served only to muddy the waters.⁴⁵

The Court's current interpretation of due process as it relates to personal jurisdiction began with *International Shoe v. Washington*.⁴⁶ *International Shoe*, the starting point for every modern case on jurisdiction, established the "minimum contacts" test for exercising jurisdiction over a non-resident corporation. By a seven-to-one majority,⁴⁷ the Court held that the defendant must have minimum contacts with the forum such that the suit does not offend "traditional notions of fair play and substantial justice."⁴⁸ If the defendant corporation does not possess this level of contact with the forum, the court cannot exercise personal jurisdiction consistent with due process. Despite the Court's attempt to define due process requirements clearly, lower courts struggled with the question of exactly what type of contacts would suffice. *Hanson v. Denckla*,⁴⁹ decided thirteen years after *International Shoe*, attempted to deal with this problem and clarify the standard by setting forth a more concrete definition of minimum contacts: "It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . ."⁵⁰ During this period the Court also defined the least amount of contact due process would allow. In *McGee v. International Life Insurance Co.*,⁵¹ the Court held that a single insurance policy in the forum state satisfied minimum contacts, in part because the state had a strong interest in protecting its citizens by making a local forum available for suits against out-of-state corporations.⁵²

Other decisions sought to outline the differences between general and specific jurisdiction in light of the new constitutional requirements. *International Shoe*, *Hanson*, and *McGee* all involved specific jurisdiction: that is, the suit arose from

⁴⁴ See *infra* note 46.

⁴⁵ See *infra* notes 46-79 and accompanying text.

⁴⁶ 326 U.S. 310 (1945).

⁴⁷ Justice Jackson did not take part in the decision.

⁴⁸ *Int'l Shoe*, 326 U.S. at 316.

⁴⁹ 357 U.S. 235 (1958).

⁵⁰ *Id.* at 253.

⁵¹ 355 U.S. 220 (1957).

⁵² See *id.* at 223.

the defendant's contacts with the host forum. In *Perkins v. Benguet Consolidated Mining Co.*,⁵³ the Court sought to answer the remaining question: what type of contacts were required for cases of general jurisdiction, where the suit did not arise from the defendant's in-state contacts. *Perkins* established that for a court to exercise general jurisdiction over a non-resident corporation, that defendant's contacts with the forum must be "continuous and systematic,"⁵⁴ such that jurisdiction comports with "general fairness to the corporation."⁵⁵ More than thirty years later, the Court elucidated this standard in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,⁵⁶ which affirmed the "continuous and systematic" rule of *Perkins* and held that mere purchases in the forum state, even if made regularly, are not sufficient contacts for general jurisdiction.⁵⁷

The due process requirements for personal jurisdiction seemed to be a settled area of law following the *Hanson-McGee-Perkins* trio of the 1950s. Thirty years later, the Court decided that the time had come to reconsider the issue, although it soon became clear that the modern Court lacked the cohesion of prior decades. The 1980s line of personal jurisdiction cases began with *World-Wide Volkswagen Corp. v. Woodson*.⁵⁸ The Court in *World-Wide Volkswagen* held that the mere fact that a defendant's products find their way into a forum does not create minimum contacts; rather, there must be some effort to market to the forum such that the defendant "should reasonably anticipate being haled into court there."⁵⁹ The dissenters, in contrast, argued that because the product in question was a car, the defendant knew that it would probably travel to distant fora, regardless of whether they marketed there.⁶⁰ Justice Brennan's dissent also noted that the plaintiffs brought the suit in the forum where they were injured, that they were still in the hospital in that state when they filed the claim, and that key witnesses and evidence were there, a combination that made jurisdiction more reasonable.⁶¹

The mid-1980s saw three important cases regarding personal jurisdiction. The first of these, *Calder v. Jones*,⁶² established a new standard for jurisdiction: the "effects test."⁶³ The Court in *Calder* held that a forum can assert personal jurisdiction over a non-resident defendant in a tort case if the defendant knew that

⁵³ 342 U.S. 437 (1952).

⁵⁴ *Id.* at 445.

⁵⁵ *Id.*

⁵⁶ 466 U.S. 408 (1984).

⁵⁷ *See id.* at 417.

⁵⁸ 444 U.S. 286 (1980).

⁵⁹ *Id.* at 297.

⁶⁰ *See id.* at 314-15 (Marshall, J., dissenting), 318 (Blackmun, J., dissenting).

⁶¹ *See id.* at 305-07 (Brennan, J., dissenting).

⁶² 465 U.S. 783 (1984).

⁶³ *See id.*

its actions were likely to cause harm within the forum.⁶⁴ In essence, if the defendant knew that the "brunt of the harm"⁶⁵ would be in the forum state, it should have "reasonably anticipate[d] being haled into court there" to answer for its actions.⁶⁶ The second major case from mid-decade, *Helicopteros*, involved minimum contacts for general jurisdiction, as discussed above.⁶⁷ *Burger King Corp. v. Rudzewicz*,⁶⁸ the third case, added more factors to the minimum contacts test. The Court held that a state can constitutionally exercise personal jurisdiction over a non-resident defendant based on the existence of a contract with an in-state plaintiff, although a contract alone does not automatically create jurisdiction.⁶⁹ While the Court noted that such a contract, particularly one with a choice-of-law provision, should be given great weight in the analysis, it also attached significance to other factors, such as prior negotiations and the fact that the defendant's long-standing relationship with a Florida corporation was a "deliberate affiliation with the forum State" that reinforced "the reasonable foreseeability of possible litigation there."⁷⁰ The dissenters, in contrast, believed that the contract here did not give the defendant adequate notice that it could be sued in the forum because the contract and other dealings had not taken place in that forum and because there was inequality of bargaining power.⁷¹

Arguably the most confusing decision of the 1980s jurisdiction cases was *Asahi Metal Industry Co. v. Superior Court*.⁷² *Asahi* arose when the plaintiff was injured while riding a motorcycle, the tire of which was allegedly defective. He sued the Taiwanese manufacturer of the tire tube, who impleaded Asahi, the Japanese manufacturer of the tiretube valve assembly. All parts of the suit settled except for the impleader action against Asahi.⁷³ Asahi sold more than one million assemblies to the third party plaintiff, who used them in its tires. Asahi knew that the finished products would end up in the United States and particularly California; however, it made no direct sales there, had no offices or agents in the country, and did not control the distribution system that ultimately placed its products in California.⁷⁴

Although all nine justices found that California could not exercise jurisdiction over Asahi consistent with due process, *Asahi's* precedential value remains questionable because the case produced only a splintered plurality holding. The

⁶⁴ See *id.* at 789.

⁶⁵ *Id.*

⁶⁶ *Id.* at 790.

⁶⁷ See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

⁶⁸ 471 U.S. 462 (1985).

⁶⁹ See *id.* at 478.

⁷⁰ *Id.* at 482.

⁷¹ See *id.* at 488-89 (Stevens, J., dissenting).

⁷² 480 U.S. 102 (1987).

⁷³ See *id.* at 106.

⁷⁴ See *id.* at 107.

main opinion, written by Justice O'Connor, held that Asahi lacked minimum contacts with California because it did not commit an action "purposefully directed toward the forum State."⁷⁵ O'Connor wrote that simply placing a product in the stream of commerce with knowledge that the product would be swept into a distant forum, without more, does not constitute such a purposeful act.⁷⁶ Only three justices signed this part of O'Connor's opinion. O'Connor then concluded that even if Asahi did have minimum contacts, jurisdiction over Asahi would not be reasonable because of California's weak interest in hearing a case between two foreign parties.⁷⁷ Seven justices subscribed to this part of the opinion. Four members of the court signed a concurrence, authored by Justice Brennan, that concluded that Asahi did have minimum contacts based on its knowledge that the final product would be sold in California and its economic benefits from those sales, but that the exercise of jurisdiction would be unreasonable.⁷⁸ Justice Stevens, writing for himself only, found that jurisdiction would be unreasonable and thus did not reach the minimum contacts issue.⁷⁹

Despite its early effort to create a simple "minimum contacts" test for personal jurisdiction due process requirements, the Court's decisions since *International Shoe* have only confused the issue. With every new case, the Court set forth new standards and catch phrases, befuddling the attorneys and judges who sought simplicity and consistency. By the late 1980s, the Court itself seemed confused and splintered on the issue, as demonstrated by the fragmented *Asahi* decision. It was against this rather unclear background that modern courts first faced a new and complex twist on jurisdiction, and one that was, in all probability, totally unforeseen by the Founding Fathers: the Internet.

II. THE SHORT, CONFUSED HISTORY OF INTERNET JURISDICTION⁸⁰

A. *The Circuits' View of an On-Line World*

The dawning of the cyberspace era in the mid-1990s presented courts with new

⁷⁵ *Id.* at 112 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

⁷⁶ *See id.*

⁷⁷ *See id.* at 114-15.

⁷⁸ *See id.* at 117 (Brennan, J., dissenting).

⁷⁹ *See id.* at 121 (Stevens, J., dissenting).

⁸⁰ *See generally* David Bender, *Personal Jurisdiction and Websites*, 547 PRAC. L. INST. 67 (1998); Joseph S. Pevsner and Gregory W. Curry, *Down the Block But Outside Jurisdiction: Personal Jurisdiction in a Modern World*, 29 TEX. TECH. L. REV. 977 (1998); Russell D. Shurtz, *www.international_shoe.com: Analyzing Weber v. Jolly Hotels' Paradigm for Personal Jurisdiction in Cyberspace*, 1998 B.Y.U. L. REV. 1663 (1998); Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More Is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925 (1998).

jurisdiction problems. Although courts have long recognized that physical presence is not required for personal jurisdiction,⁸¹ the Internet took this theory beyond its logical extreme. Electronic contacts know no physical boundaries at all, and once a company establishes an on-line presence, it is generally accessible by anyone with a modem—regardless of what market the company intends to reach. The “purposeful availment” standard thus became even less clear, as companies realized the difficulty of establishing electronic boundaries and the ease with which their web sites could reach distant fora.

By 1996, courts began to see parties arguing over whether electronic contacts could create jurisdiction. The circuits largely avoided dealing with the issue, reviewing only six cases on Internet jurisdiction between 1996 and 1999, and the Supreme Court has yet to grant certiorari on a case raising the issue. Despite the circuits’ efforts to create a simple standard that comported with the traditional minimum contacts due process analysis, the circuit decisions provide limited precedential value. In addition to changing the way courts look at jurisdiction, the Internet has also apparently changed the way courts look at each other, as the rule that emerged came not from a circuit court, but from a single judge in the Western District of Pennsylvania.

The Sixth Circuit decided the first circuit court case involving Internet jurisdiction. *CompuServe, Inc. v. Patterson*⁸² involved CompuServe, an Internet service provider incorporated in Ohio, and Richard Patterson, a citizen of Texas. Patterson entered into a standard agreement with CompuServe, allowing him to transmit files to CompuServe’s Ohio servers, which CompuServe’s subscribers could then download for use and purchase. Patterson claimed that CompuServe infringed his trademarks on these files, and demanded \$100,000 to settle all potential claims.⁸³ Relying on diversity jurisdiction, CompuServe sued in Ohio federal court for a declaratory judgment that it did not infringe Patterson’s trademarks, and Patterson moved to dismiss for lack of personal jurisdiction, arguing that his only contacts with Ohio were electronic.⁸⁴

The court found that jurisdiction did not violate due process. Citing *World-Wide Volkswagen* and *McGee*, the court noted that modern communication and transportation had resulted in a relaxation of due process requirements for defending in a distant forum: “Simply stated, there is less perceived need today for the federal constitution to protect defendants from ‘inconvenient litigation,’ because all but the most remote forums are easily accessible for the pursuit of both business

⁸¹ See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (“[j]urisdiction . . . may not be avoided merely because the defendant did not *physically* enter the forum State”); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75 (1984).

⁸² 89 F.3d 1257 (6th Cir. 1996).

⁸³ See *id.* at 1261.

⁸⁴ See *id.*

and litigation.”⁸⁵ The decision also declared that Patterson should have “reasonably anticipate[d] being haled into court” in Ohio because he “purposefully availed himself” of the Ohio market by sending his files to CompuServe’s servers and by placing them on the network for sale; in effect, Patterson used CompuServe as his “distribution center.”⁸⁶ The Sixth Circuit further noted as significant that Patterson clicked the “I agree” button on CompuServe’s on-line contract, which included a clause specifying Ohio law as controlling. While noting that neither placing a product in commerce nor signing a contract would independently constitute minimum contacts,⁸⁷ the court held that the combination of both actions made Patterson amenable to suit in Ohio consonant with due process.⁸⁸

Far from settling the issue, *CompuServe* provided only a thin precedential rationale for exercising jurisdiction via electronic contacts, and soon other circuits began creating their own standards for minimum on-line contacts. *Bensusan Restaurant Corp. v. King*,⁸⁹ for example, held that the defendant’s on-line contacts were not sufficient to confer jurisdiction. *Bensusan* involved a dispute between two restaurants, both of which used the name “The Blue Note.” The New York restaurant owner (Bensusan) sued the Missouri restaurant owner (King) for trademark infringement stemming from the Missouri restaurant’s web site. The allegedly infringing site contained a disclaimer that it should not be confused with “one of the world’s finest jazz club [sic] Blue Note, located in the heart of New York’s Greenwich Village.”⁹⁰ This text was hyperlinked to Bensusan’s web page.

The Second Circuit found that New York did not have jurisdiction over King under the state’s long-arm statute, and thus did not reach the due process issue.⁹¹ New York’s long-arm statute allowed for jurisdiction over non-residents who, in person or through agents, committed tortious acts in New York.⁹² King’s allegedly tortious act was committed via the Internet, rather than in person, so the court held that New York could not exercise jurisdiction over King.⁹³ Although often cited as an example of insufficient on-line contacts, *Bensusan* has little precedential value because the holding rests on the state long-arm statute rather than on due process grounds.

Cybersell v. Cybersell,⁹⁴ by contrast, is the most frequently cited circuit court

⁸⁵ *Id.* at 1262.

⁸⁶ *Id.* at 1263.

⁸⁷ *See id.* at 1265 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) and *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987)).

⁸⁸ *See id.*

⁸⁹ 126 F.3d 25 (2d Cir. 1997).

⁹⁰ *Id.* at 27.

⁹¹ *See id.* at 29.

⁹² *See id.* at 28.

⁹³ *See id.* at 29.

⁹⁴ 130 F.3d 414 (9th Cir. 1997).

decision on Internet jurisdiction. In this case, Cybersell, an Arizona corporation, sued Cybersell, a Florida corporation, for allegedly infringing the former's federally-registered service mark. The basis for the suit was the defendant's maintenance of a web site that contained a logo incorporating the word "Cybersell" and large letters proclaiming "Welcome to Cybersell."⁹⁵ Because Arizona's long-arm statute granted jurisdiction to the full extent of due process, the court performed a due process analysis.⁹⁶ After citing *CompuServe* and *Bensusan* as examples of the two opposite extremes, the court proceeded to rely on a district court opinion (*Zippo Manufacturing*, discussed *infra*) as the basis of analysis.⁹⁷ The court ultimately held that it could not exercise jurisdiction over the defendant because the defendant's web site was "passive" in nature and because there was no evidence that the defendant directed its activities toward Arizona or ever conducted business there.⁹⁸

CompuServe, *Bensusan*, and *Cybersell* seemed to indicate a trend of looking first to the state's long-arm statute and then conducting a traditional due process analysis based on the nature of the on-line contacts. *Panavision International v. Toeppen*,⁹⁹ in contrast, took a different approach. *Panavision* involved a dispute over an Internet domain name.¹⁰⁰ *Panavision*, a Delaware corporation with its principle place of business in California, held the federal trademarks for its name as well as the names of several of its products. When it tried to register its company name as a domain name, however, it could not do so because Dennis Toeppen, a resident of Illinois, had already registered it for himself.¹⁰¹ When *Panavision* informed Toeppen that he was violating federal trademark law, Toeppen offered to sell the domain name for \$13,000. When *Panavision* refused, Toeppen registered *Panavision*'s other federal trademark, "panaflex," as a domain name. *Panavision* then sued Toeppen in the Central District of California, arguing that Toeppen was a "cyber pirate" who made money by registering various trademarked names as domain names and offering the trademark owners the opportunity to "buy" them.¹⁰²

⁹⁵ See *id.* at 415.

⁹⁶ See *id.* at 416.

⁹⁷ See *id.* at 417-18.

⁹⁸ See *id.* at 419.

⁹⁹ 141 F.3d 1316 (9th Cir. 1998).

¹⁰⁰ A "domain name" is a location identifier for a web site, consisting of a word followed by ".com" for commercial users, ".edu" for education, ".org" for organizations, ".gov" for government, or ".net" for networks. Companies frequently register their names as their domain name (i.e., "panavision.com") because this makes finding their site fairly intuitive for their customers.

¹⁰¹ See *Panavision*, 141 F.3d at 1319.

¹⁰² See *id.* Toeppen also owned the domain names for Delta Airlines, Neiman Marcus, Eddie Bauer, American Standard, and others, and had been sued several times as a result. See, e.g., *Intermatic Inc. v. Toeppen*, 947 F. Supp. 1227 (N.D. Ill. 1996).

The Ninth Circuit held that it could constitutionally exercise jurisdiction over Toeppen.¹⁰³ The court summarized *CompuServe* and *Cybersell*, but declined to follow the reasoning of either decision, arguing instead that its prior decision in *Cybersell* was actually alluding to the “effects doctrine” of *Calder v. Jones*.¹⁰⁴ It then held that jurisdiction over Toeppen was proper because Toeppen knew that Panavision would feel the brunt of his tortious act in California, the location of Panavision’s principal place of business.¹⁰⁵ The opinion noted that merely registering someone else’s name would not be sufficient to confer jurisdiction, but that Toeppen’s “scheme” of registering companies’ names was the “something more” required for jurisdiction under *Cybersell*.¹⁰⁶ After finding sufficient contacts, the court examined the *Burger King* reasonableness factors and held in favor of Panavision because Toeppen’s acts were aimed at California, because California had a strong interest in protecting its citizens’ trademarks, and because the burden on Toeppen of litigating in California was “significant, but the inconvenience is not so great as to deprive him of due process.”¹⁰⁷

Although the Ninth Circuit clearly tried to square *Panavision* with *Cybersell*, other circuits recognized that the decisions were contradictory. The Third Circuit took such a stance in *Imo Industries v. Kiekert*,¹⁰⁸ a case that did not even involve on-line contacts. *Imo* resulted when Imo, a Delaware corporation with its principle place of business in New Jersey, put shares of a wholly-owned subsidiary up for sale and Kiekert, a German company, placed a bid. Several unfriendly business actions and threats took place, culminating in Imo’s suit against Kiekert for tortious activity resulting in damages.¹⁰⁹ Using a *Calder* analysis, the court held that it could not exercise jurisdiction consistent with due process.¹¹⁰ The opinion cited to *Cybersell* as support for the dismissal,¹¹¹ and noted *Panavision* as contrary authority,¹¹² despite the Ninth Circuit’s implication in *Panavision*¹¹³ that the two cases were consistent. Although *Imo* did not involve on-line contacts, many district courts have cited it as authority for the proposition that *Calder* should be read conservatively when applied to business torts.¹¹⁴ *Imo* thus has led to the dismissal

¹⁰³ *Id.* at 1327.

¹⁰⁴ 465 U.S. 783 (1984); *see supra* notes 60-63 and accompanying text.

¹⁰⁵ *See Panavision*, 141 F.3d at 1321.

¹⁰⁶ *See id.* at 1322 (citing *Cybersell v. Cybersell*, 130 F.3d 414, 418 (9th Cir. 1997)).

¹⁰⁷ *Id.* at 1323 (quoting district court opinion, *Panavision Int’l v. Toeppen*, 938 F. Supp. 616, 622 (C.D. Cal. 1996)).

¹⁰⁸ 155 F.3d 254 (3d Cir. 1998).

¹⁰⁹ *See id.* at 257-58.

¹¹⁰ *See id.* at 265.

¹¹¹ *See id.* at 264.

¹¹² *See id.* at 264, n.7.

¹¹³ *See Panavision*, 141 F.3d at 1322.

¹¹⁴ *See, e.g., Eagle Computer Assoc. v. Chesapeake Software Serv., Inc.*, No. 99-CV-2583, 1999 WL 1030441 (E.D. Pa. Nov. 12, 1999); *Wempe v. Sunrise Med. HHG, Inc.*, 61

of cases where the plaintiff relied on the "effects test" for Internet jurisdiction.¹¹⁵

CompuServe, *Bensusan*, *Cybersell*, and *Panavision* all attempted to create a standard for determining when due process permits a court to exercise jurisdiction over a defendant whose contacts with the forum were virtual. The most recent circuit court decisions on the issue, however, have shown that these cases were unsuccessful in their efforts. *Mink v. AAAA Development*¹¹⁶ did not cite to any of these cases in its analysis of Internet jurisdiction. The case involved David Mink, a Texas resident, who developed a computer program and applied for both patent and copyright registration. Richard Stark approached Mink and asked if he would be interested in marketing his software in conjunction with Stark's products at a seminar. Mink, considering the offer, gave Stark a demonstration of his program.¹¹⁷ Mink claimed that Stark then conspired with two companies, including the defendant Vermont corporation, to copy Mink's program. Mink filed suit in the Southern District of Texas.¹¹⁸

Texas' long-arm statute extended to the full limit of due process, so the court performed a minimum contacts analysis for general jurisdiction (Mink did not show any contacts related to the harm, so the court did not consider specific jurisdiction). In a fairly short analysis, the Fifth Circuit held that "the reasoning of *Zippo* [*Manufacturing v. Zippo Dot Com*, *infra*] is persuasive"¹¹⁹ and adopted that court's "sliding scale" as the rule for the Fifth Circuit. Using the *Zippo* analysis, the court held that the defendant's web site, which contained a downloadable mail-in order form, phone numbers, and e-mail addresses, was "passive" and therefore not grounds for exercising personal jurisdiction.¹²⁰ The court relied exclusively on the Western District of Pennsylvania's rule from *Zippo*, and did not attempt to use any of the standards set forth by other circuits or by district courts within its own circuit.

The most recent circuit court decision on the issue, *Soma Medical International v. Standard Chartered Bank*,¹²¹ similarly relied on *Zippo*. The *Soma* court found that a passive web site soliciting business was insufficient to subject the defendant to general jurisdiction in Utah. Although the opinion did not cite exclusively to

F. Supp. 2d 1165 (D. Kan. 1999); *Clearclad Coatings, Inc. v. Xontal Ltd.*, No. 98-C-7199, 1999 WL 652030 (N.D. Ill. Aug. 20, 1999); *Banner Promotions, Inc. v. Maldonado*, 56 F. Supp. 2d 552 (E.D. Pa. 1999); *Waimberg v. Med. Trans. of Am., Inc.*, 52 F. Supp. 2d 511 (E.D. Pa. 1999); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999).

¹¹⁵ See, e.g., *Eagle*, 1999 WL 1030441, at *4; *Banner*, 56 F. Supp. 2d at 554; *Barrett*, 44 F. Supp. 2d at 730; *Armstrong World Indus., Inc. v. Allibert*, No. CIV.A. 97-3914, 1998 WL 966017 (E.D. Pa. Nov. 19, 1998).

¹¹⁶ 190 F.3d 333 (5th Cir. 1999).

¹¹⁷ See *id.* at 335.

¹¹⁸ See *id.*

¹¹⁹ *Id.* at 336.

¹²⁰ See *id.*

¹²¹ 196 F.3d 1292 (10th Cir. 1999).

Zippo, the other cases mentioned included a Utah district court case (quoting *Zippo*), *Mink* (adopting *Zippo*), *Cybersell* (citing *Zippo* with approval and quoting *Zippo*), and a District of Kansas case (using a *Zippo* analysis).¹²²

The Third Circuit's observation in *Imo* that the Ninth Circuit's decisions were incongruous, as well as the *Mink* court's failure to cite to any circuit decisions as authority and the *Soma* court's exclusive reliance on cases citing a district court case, demonstrate that no clear rule emerged from the circuit courts' Internet jurisdiction cases. In fact, the cases contain little consistency at all, except for the apparent urge to rely on the only decision that did state a clear rule, the district court ruling in *Zippo Manufacturing*.

B. *A District in Circuit Court Clothing*

Despite the circuits' attempts to make a simple rule to be followed by the district courts, it is clear that the districts, as well as at least one circuit court, have declined to follow what little guidance they have offered. The district courts facing Internet jurisdiction problems generally cite to the circuit decisions as examples, but not as the basis, for analysis. This is not to say, however, that the districts lack consistency. All districts, as well as the Fifth Circuit in *Mink*, the Ninth Circuit in *Cybersell*, and the Tenth Circuit in *Soma*, consistently rely upon a single authority: *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,¹²³ a district court case.

Zippo arose when Zippo Manufacturing, a Pennsylvania corporation and makers of the familiar Zippo lighters, sued Zippo Dot Com, a California corporation offering a web-based news service, in the Western District of Pennsylvania for federal trademark violations. Zippo Dot Com had registered the domain names "zippo.com," "zippo.net," and "zipponews.com," and when the company sent messages or news, the word "Zippo" appeared as the sender. Although Zippo Dot Com maintained no offices or agents in Pennsylvania, its news service was available to anyone with an Internet connection and a credit card.¹²⁴

The district court held that it could constitutionally exercise jurisdiction over Zippo Dot Com because the company's web site reached out to Pennsylvania and invited its citizens to do business with it. The judge in *Zippo* proposed a "sliding scale" for minimum contacts on the Internet, coining the often-quoted rule that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."¹²⁵ *Zippo* suggested a three-category sliding scale for

¹²² *Id.* at 1296.

¹²³ 952 F. Supp. 1119 (W.D. Pa. 1997).

¹²⁴ *See id.* at 1121.

¹²⁵ *Id.* at 1124.

the "nature and quality" of Internet contacts.¹²⁶ "Passive" web sites, such as the one in *Bensusan*, were analogized to magazine advertisements, and were found to be insufficient to establish jurisdiction.¹²⁷ "Active" web sites, where the defendant clearly does business or allows others to enter into contracts over the Internet, involve knowing and repeated transmissions to the forum state and therefore should confer jurisdiction.¹²⁸ "Interactive" sites, where a user can exchange information with the host computer but cannot conduct business, pose more of a problem.¹²⁹ These sites, according to the court, require courts to analyze the level of interactivity and commercial nature of the Internet contacts in accordance with traditional due process and minimum contacts requirements.¹³⁰ The court found that Zippo Dot Com's site was "active" because customers could order and pay for the service on-line, and that the company thus had minimum contacts with Pennsylvania.¹³¹

III. DISTRICT COURT DECISIONS: THE GOOD, THE BAD, AND THE COMPLETELY CONFUSED

A. *A General Statistical Analysis*

Since Internet-based federal jurisdiction emerged as an issue in 1996, at least sixty-two district court cases have considered the question.¹³² A careful analysis of these decisions reveals not only the district courts' confusion, but also the structural and procedural difficulties that lie ahead.

The most notable commonality among the Internet jurisdiction cases is their use of precedent. Beginning in March 1997,¹³³ only two months after the Western District of Pennsylvania laid down the *Zippo* opinion, every district court examining on-line contacts cited to *Zippo*, even though *CompuServe* offered a valid circuit court decision on the issue. District courts continued to cite to *Zippo* throughout

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *See id.* at 1125.

¹³² This number is derived from my own survey of cases decided between 1996 and 1999, including cases brought both under diversity jurisdiction and under the Lanham Act of 1946, 15 U.S.C. §§ 1051-1127. Although, technically, suits brought under the Lanham Act have federal question jurisdiction, the Act does not provide national service of process, so the due process/jurisdictional analysis asks the same questions and uses the same principles as diversity jurisdiction cases. For a complete list of the sixty-two cases contained in this statistical analysis, *see infra* app. A.

¹³³ *See Resuscitation Tech., Inc. v. Cont'l Health Care Corp.*, No. IP 96-1457-C-M/S, 1997 WL 148567 (S.D. Ind. Mar. 24, 1997).

1998 and 1999, despite the fact that by the end of 1999, six circuit court decisions from five different circuits had issued relevant opinions. Highlighting this structural problem is the fact that the districts did not cite *Zippo* as a mere example: most relied almost exclusively on that case as the basis of their analysis and by early 1998 only cited the circuit decisions as mere sample fact patterns to illustrate the logic of *Zippo*.¹³⁴

The district court cases based on *Zippo* seem to favor dismissal. Of the fifty-six Internet jurisdiction cases since *Zippo*, thirty-four found that the court lacked jurisdiction,¹³⁵ although it is not at all clear that *Zippo* or the circuit decisions compel such a result. This trend may not be of national significance, however, because the results between districts vary so wildly. For example, compare the two districts that have decided the largest number of Internet jurisdiction cases in 1999. The Eastern District of Pennsylvania dismissed all seven of the on-line contacts cases it heard in 1999 for lack of jurisdiction,¹³⁶ while the Northern District of Illinois found jurisdiction to be proper for four of the five cases it heard in the same year.¹³⁷ Such disparate results demonstrate the lack of a clear standard for establishing jurisdiction based on virtual contacts, in addition to the obvious structural danger of using a lower court decision, rather than a circuit court opinion, as the seminal case.

¹³⁴ See, e.g., *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738, 742-43 (W.D. Tex. 1998) ("In a recent opinion from the Western District of Pennsylvania, the court discussed the 'sliding scale' . . . At one end are situations where a defendant clearly does business over the Internet . . . See *CompuServe, Inc. v. Patterson* [citations omitted]. At the other end are passive Web site situations . . . See *Bensusan Restaurant Corp. v. King* [citations omitted].").

¹³⁵ For a list of cases, see *infra* app. A.

¹³⁶ See *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537 (E.D. Pa. 1999); *Molnlycke Health Care AB v. Dumex Med. Surgical Prod. Ltd.*, 64 F. Supp. 2d 448 (E.D. Pa. 1999); *Hurley v. Cancun Playa Oasis Int'l Hotels*, No. 99-574, 1999 U.S. Dist. LEXIS 13716 (E.D. Pa. Aug. 31, 1999); *Resnick v. Manfredy*, 52 F. Supp. 2d 462 (E.D. Pa. 1999); *Remick v. Manfredy*, 52 F. Supp. 2d 452 (E.D. Pa. 1999); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999); *Desktop Tech., Inc. v. Colorworks Reprod. & Design, Inc.*, No. 98-5029, 1999 U.S. Dist. LEXIS 1934 (E.D. Pa. Feb. 24, 1999).

¹³⁷ See *McMaster-Carr Supply Co. v. Supply Depot, Inc.*, No. 98-C-1903, 1999 U.S. Dist. LEXIS 9559 (N.D. Ill. June 14, 1999) (jurisdiction); *Coolsavings.com, Inc. v. IQ.Commerce Corp.*, 53 F. Supp. 2d 1000 (N.D. Ill. 1999) (jurisdiction); *Int'l Star Registry v. Bowman-Haight Ventures, Inc.*, No. 98-C-6823, 1999 U.S. Dist. LEXIS 7009 (N.D. Ill. May 4, 1999) (jurisdiction); *Pheasant Run, Inc. v. Moyse*, No. 98-C-4202, 1999 U.S. Dist. LEXIS 1087 (N.D. Ill. Feb. 2, 1999) (no jurisdiction); *LFG, LLC v. Zapata Corp.*, No. 98-C-5096, 1999 U.S. Dist. LEXIS 10074 (N.D. Ill. Jan. 13, 1999) (jurisdiction). Note, however, that comparisons of general results analyzed by district courts present problems because of the varying nature of the contacts involved in each case. In the instant example, several of the Pennsylvania cases involved claims of general jurisdiction, which is necessarily more difficult to establish than specific jurisdiction.

B. *Individual Analyses*

While overall district statistics show confusion between districts, individual cases show confusion within districts as well. Although all the recent opinions chose to cite to *Zippo* as authority, some courts fail to distinguish the facts of the cases before them, resulting in opinions that avoid mentioning circuit decisions in favor of citing to a district court decision that arguably does not support their analysis.

*Molnlycke Health Care AB v. Dumex Medical Surgical Products Ltd.*¹³⁸ presents an example of a court whose reluctance to explore the novel issues inherent in the jurisdictional problem led to an inadequate opinion. The plaintiff argued that the defendant's two web sites conferred general jurisdiction. One of the sites allowed users to place their names on mailing lists for product information; both sites advertised the defendant's products and offered direct ordering simply by clicking on a product.¹³⁹ In its presentation of applicable law, the *Molnlycke* court simply inserted a lengthy near-quote from the *Zippo* opinion, citing directly to *Zippo* and indirectly to two other decisions from its district that used the *Zippo* analysis.¹⁴⁰ The court acknowledged that *Zippo*'s sliding scale has been properly applied to general jurisdiction but then proceeded to hold, without any citation of authority, that web sites (even those that sell products) cannot establish general jurisdiction.¹⁴¹ Although it is understandable that the court would be reluctant to expose all companies whose web sites sell products to general jurisdiction wherever the site is accessible, it could have reached the same conclusion by analyzing precedent rather than by avoiding it. The opinion then strayed even farther from *Zippo*, citing state cases unrelated to Internet law for the proposition that the defendant's web sites "are akin to . . . a general advertising campaign"¹⁴² and thus did not target Pennsylvania regardless of actual sales there. After holding that general jurisdiction does not exist—and indeed, cannot exist—for web sites, the court denied the plaintiff's motion for discovery on the jurisdictional issue, relying on the defendant's uncontested affidavit regarding its Pennsylvania contacts.¹⁴³ This response, combined with the court's ultimate decision to transfer the case, seems designed to purge the case from its docket, especially given that jurisdictional discovery requests should be freely granted¹⁴⁴ and that it would be difficult for the plaintiff to contest the defendant's affidavit without such information.

¹³⁸ 64 F. Supp. 2d 448 (E.D. Pa. 1999).

¹³⁹ See *id.* at 451.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² *Id.* at 452.

¹⁴³ See *id.*

¹⁴⁴ See *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 283-84 (3rd Cir. 1994).

*Millennium Enterprises, Inc. v. Millennium Music*¹⁴⁵ also failed to utilize precedent properly. The court quickly discounted the plaintiff's assertion of general jurisdiction, noting that no case had ever asserted general jurisdiction based on a web site.¹⁴⁶ The limited amount of contacts present in this case probably justified the result as well as the court's dismissive tone.

Millennium's specific jurisdiction issue, however, presented more complex problems, and the court's analysis of them is considerably more suspect. Although the defendant's web site had on-line sales capability (making the site "active" under the *Zippo* analysis), the court took the unusual viewpoint that doing business over the Internet only conferred specific jurisdiction when the company conducted a "significant portion of their business through ongoing Internet relationships."¹⁴⁷ The opinion cited to *Zippo* as support for this proposition, quoting that court's statement that jurisdiction would be valid where the company entered "into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet."¹⁴⁸ This excerpt accurately quotes the words of the *Zippo* court; however, *Millennium* takes them out of context. The selection quoted was merely an example of the type of activity that would confer jurisdiction and was preceded in *Zippo* by the sentence: "At one end of the spectrum are situations where a defendant clearly does business over the Internet."¹⁴⁹ Read together, *Zippo* intended that defendants doing business over the Internet with a foreign jurisdiction, such as where there are repeated file transfers, should be susceptible to jurisdiction there—the interpretation most courts accept. Indeed, the *Millennium* court acknowledged that its decision conflicted with precedent: "The court recognizes that its reasoning is at odds with some cases addressing this new issue."¹⁵⁰

After incorrectly citing *Zippo* as support for its main holding, *Millennium* went on to misuse *Zippo's* fairly straightforward "sliding scale." Even though the defendants clearly did business over the Internet and had one of the most "active" web sites one could imagine, the *Millennium* court found that the defendants had "done nothing more than publish an interactive Web site" that "[fell] into the middle category [of the sliding scale], requiring further inquiry into the 'level of interactivity and commercial nature of the exchange of information'"¹⁵¹ Following this flawed determination of the web site's proper category, the court broadly stated that "[t]he existence of a Web site, whether passive or interactive,

¹⁴⁵ 33 F. Supp. 2d 907 (D. Or. 1999).

¹⁴⁶ *See id.* at 910.

¹⁴⁷ *Id.* at 920.

¹⁴⁸ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), quoted in *Millennium*, 33 F. Supp. 2d at 920.

¹⁴⁹ *Zippo*, 952 F. Supp. at 1124.

¹⁵⁰ *Millennium*, 33 F. Supp. 2d at 922.

¹⁵¹ *Id.* at 920.

does not rise to the requisite level of conduct,"¹⁵² rendering the entire analysis of the site's category a useless exercise. Although the dismissal of the case for lack of jurisdiction was the correct decision (the defendant's only sale in the jurisdiction was one manufactured by the plaintiff), the *Millennium* court's reliance on *Zippo* for a holding that the precedent did not support reveals the problems with the circuits' failure to supply a clear rule.

In the void left by the circuits, many other districts have also fallen prey to inadequate analysis or misuse of precedent. *Fishel v. BASF Group*,¹⁵³ for example, glossed over the Internet contacts issue in a paragraph. The *Fishel* court had before it five corporate defendants, each of which maintained a web site in addition to other contacts with the forum. In analyzing the first defendant's web site, the court stated that the site was "passive" under *Smith v. Hobby Lobby Stores, Inc.*¹⁵⁴ and cited to a section of that case that was actually a lengthy quote from *Zippo*.¹⁵⁵ The *Fishel* court offered no detail or analysis of the web site; it merely stated that the web site was passive and that passive sites alone do not establish minimum contacts, citing again to *Smith*.¹⁵⁶ The court made no effort to analyze whether the web site, when added to the other contacts, created jurisdiction. For three of the other four defendants, the court added a one-sentence paragraph stating that the issue of passive web sites was addressed previously, again offering no justification for why the sites were categorized as passive.¹⁵⁷ The fifth defendant's web site, though noted in the facts of the case, is not mentioned in the court's analysis at all.¹⁵⁸

The jurisdictional analyses (or lack thereof) in *Molnlycke*, *Millennium*, and *Fishel* reveal the district courts' discomfort with on-line contacts as a basis for jurisdiction, as well as the contradictory but predictable result of the lack of a clear standard set by a mid- or upper-level appellate court. Both general statistics and individual opinions demonstrate that the passive/active distinction has become either an excuse for quickly dismissing cases whose technology-oriented issues make the courts uncomfortable or, perhaps more likely, a convenient way to clear their dockets.

C. *On a Happier Note*

This is not to say, however, that all courts have fallen prey to shallow analysis or unjustified dismissal. The court in *International Star Registry of Illinois v.*

¹⁵² *Id.* at 922.

¹⁵³ No. 4-96-CV-10449, 1998 U.S. Dist. LEXIS 21230 (S.D. Iowa Mar. 11, 1998).

¹⁵⁴ 968 F. Supp. 1356 (W.D. Ark. 1997).

¹⁵⁵ *See id.* at 1365.

¹⁵⁶ *See Fishel*, 1998 U.S. Dist. LEXIS 21230, at *14.

¹⁵⁷ *See id.* at *16, *18.

¹⁵⁸ *See id.* at *19.

*Bowman-Haight Ventures, Inc.*¹⁵⁹ found Internet-based contacts sufficient to establish jurisdiction. The defendant's contacts with the forum state in *International Star Registry* were entirely electronic—all of its advertising and most of its sales in Illinois arose from its web site, which was not targeted at any one geographic area.¹⁶⁰ Unlike *Millennium*, which noted that the defendant conducted sales in the forum but not a sufficient amount to support jurisdiction, the court in *International Star Registry* found jurisdiction proper even though only sixty-five of the defendant's 1,637 sales transactions (less than four percent of its total revenue) involved Illinois residents.¹⁶¹ The court's analysis properly began with the state long-arm statute and then extended to the Supreme Court's minimum contacts and due process requirements.¹⁶² After pointedly noting that the Seventh Circuit had yet to issue an opinion regarding on-line contacts, the court commenced an extensive exploration of the existing case law. Rather than citing exclusively to *Zippo*, the court noted the sliding scale framework and cited to cases from its own district adopting the *Zippo* analysis.¹⁶³ *International Star Registry* thoroughly examined the online contacts issue, citing to nineteen district court cases and three of the four circuit decisions available at the time, with parentheticals explaining each holding. The court took note of *Millennium*'s argument that the Internet is not directed at any one state, but ultimately reached the logical conclusion that the defendant repeatedly secured economic benefit from Illinois residents and that it thus "purposefully availed itself of the privilege of conducting activities within Illinois."¹⁶⁴ Despite *International Star Registry*'s apparent nonconformity with other districts, the court acted more faithfully to precedent and to its duty to thoroughly research and analyze the issue than many of its contemporaries.

Like all types of cases, on-line contacts cases have good decisions and bad decisions; however, a clear trend has emerged. First, district courts appear eager to dismiss these cases and have done so in more than sixty percent of the relevant cases that have come before them.¹⁶⁵ Second, the courts all cite to *Zippo* for support of their decisions, regardless of which decision is reached. Third, only a small minority cite to the circuit decisions—even to their own circuit—and even fewer use the circuit decisions as a basis of analysis. Finally, none of the cases inquire into the original intent of diversity jurisdiction, despite the fact that such an analysis could achieve the same results without torturing precedent.

¹⁵⁹ No. 98-C-6823, 1999 U.S. Dist. LEXIS 7009 (N.D. Ill. May 4, 1999).

¹⁶⁰ *See id.* at *5.

¹⁶¹ *See id.* at *6.

¹⁶² *See id.* at *7-*10.

¹⁶³ *See id.* at *11-*12.

¹⁶⁴ *Id.* at *17.

¹⁶⁵ *See infra*, app. A.

V. AN ORIGINAL INTENT PROBLEM

Whether based on a reluctance to explore new issues, a fear of the modern technologies involved, a desire to clear their dockets quickly, or simply an honest belief that minimum contacts do not exist, district courts seem intent on twisting precedent in order to justify the ultimate dismissal of cases involving Internet jurisdiction. Similar results could be reached with a less painful analysis, however, by looking to the original intent of federal diversity jurisdiction.

As noted in Part I, e-business is booming.¹⁶⁶ Although apparently beneficial for the economy, commerce seemingly without boundaries poses a serious problem for courts, particularly for federal courts in search of a clear rule for diversity jurisdiction. Because of the Internet's lack of geographic limitations, the emergence of on-line business threatens to increase the number of cases brought into the federal system exponentially. For example, in 1999 district courts heard six times the number of Internet jurisdiction cases they had heard just four years earlier,¹⁶⁷ and the influx will only worsen as on-line contracts and purchases become more common.

Such a result could hardly be farther from the original intent. The Founders reluctantly created federal diversity jurisdiction in response to concerns regarding state court prejudice and the inability of fledgling state courts to handle complex, multi-party litigation.¹⁶⁸ Because of life tenure of federal judges, broader jury pools, increased judicial freedom, and more experienced judges, the federal courts were originally considered more accomplished and elite, thus providing a justification for moving as many cases as possible into the federal system.¹⁶⁹ It is unlikely, however, that the Founders intended to channel cases into the federal system permanently. Once the state courts became more stable and proficient, Hamilton's elitist justification for removing cases to the federal system disappeared. Even James Madison, who authored the only Plan suggesting diversity,¹⁷⁰ intended that much of the power given federal courts would be returned to state courts once they were more firmly established.¹⁷¹

¹⁶⁶ See *supra* notes 1-3 and accompanying text.

¹⁶⁷ To illustrate, in 1996 federal district courts heard five cases involving on-line contacts. In 1997, this number more than doubled, with federal courts hearing eleven such cases. Sixteen cases were heard in 1998, and by 1999, the district courts decided more than thirty Internet jurisdiction cases. For a list of citations, see *infra* app. A.

¹⁶⁸ See *supra* notes 6-26 and accompanying text.

¹⁶⁹ See THE FEDERALIST NO. 81 (Alexander Hamilton).

¹⁷⁰ See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 593 app. C (Max Farrand, ed., rev. ed. 1937) (the Virginia Plan); see also *supra* notes 6-14 and accompanying text.

¹⁷¹ See Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 522 (1928) (quoting Madison as saying that Congress will return judicial power to the state courts "when they find the tribunals of the states

The Founders' general lack of enthusiasm for federal diversity jurisdiction¹⁷² demonstrates that they could not have intended for many diversity cases to end up in the federal system. As noted in Part IIA, only one of the four plans submitted to the Convention mentioned diversity jurisdiction,¹⁷³ and the supporters of the Virginia Plan showed little interest in defending the provision: "The most astounding thing . . . is not the vigor of the attack but the apathy of the defense."¹⁷⁴ Had the Founders intended that federal courts sitting in diversity would hear the number of cases the Internet now threatens to put before them, diversity jurisdiction surely would have sparked more debate during both the Federal Constitutional Convention of 1787 and the later state debates on ratification.

Other arguments also support the contention that diversity jurisdiction should not be used for ordinary sales or contracts cases stemming from the Internet. First, in creating diversity jurisdiction, the Founders could not have anticipated the Internet or its impact on commerce and the courts. Today's world of instant communications and fast travel was not a reality in 1787, and sales to distant fora were uncommon.¹⁷⁵ Of the 539 cases brought in colonial and state courts from 1658 to 1787, only fifty-five involved parties of diverse origin,¹⁷⁶ indicating little likelihood that diversity jurisdiction would overburden the federal system.

Second, the early implementation of diversity jurisdiction gave the Founders no reason to reconsider this position, because few cases were brought in diversity. From 1790 to 1800, the first decade of the new federal system of government, only twenty-three of the 368 cases heard by the federal circuit courts involved diversity jurisdiction.¹⁷⁷ Further buttressing this point is the fact that, of the few diversity cases that arose, most involved disputes of international admiralty law, not interstate tort or business claims.¹⁷⁸ Given such statistics, the Founders hardly could have anticipated that, more than 200 years later, an instantaneous communications mechanism called the Internet would have the capability to draw nearly every mundane sales dispute into federal court.

established on good footing").

¹⁷² See *supra* note 5 (discussing scholarly agreement that the Founders lacked enthusiasm for diversity jurisdiction).

¹⁷³ See *supra* notes 6-7 and accompanying text.

¹⁷⁴ Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 487 (1928); see also *supra* note 5 and accompanying text (noting the lack of interest in diversity jurisdiction during the federal convention); *supra* notes 8-10 and accompanying text (discussing the lack of debate on diversity jurisdiction during the state debates).

¹⁷⁵ See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 24 (1948) ("There was too little significant interstate business litigation to give room for serious actual abrasion.").

¹⁷⁶ See *id.* at 25.

¹⁷⁷ See *id.* at 17.

¹⁷⁸ See *id.* at 18.

Third and finally, many prominent scholars of the twentieth century have argued for the abolishment or strict limitation of diversity jurisdiction, for varying reasons. Felix Frankfurter reminded the legal world that diversity is constitutionally permissible, not constitutionally mandated, and that Congress can (and should) do away with diversity jurisdiction because of a lack of public policy supporting it.¹⁷⁹ Henry Friendly agreed, writing that the fears of state court prejudice were speculative in 1787, and even less a reality today.¹⁸⁰ John Frank argued that the Founders' motives for establishing diversity jurisdiction stemmed from their fear, as wealthy land speculators, that state courts may harm their financial interests, and that diversity thus has no overarching logical purpose.¹⁸¹ More recently, the American Law Institute advocated a severe curtailment of diversity jurisdiction,¹⁸² and Congress entertained several bills to either minimize or abolish the doctrine.¹⁸³ At least two federal circuit court judges have also advocated the abolition of diversity jurisdiction.¹⁸⁴ It seems unlikely that such prominent and learned legal scholars would argue against diversity jurisdiction if to curtail or abolish it would seriously impair the efficacy of the court system. Both historical and modern theoretical arguments are contrary to extending federal diversity jurisdiction to the increasingly large number of Internet cases that could potentially qualify.

CONCLUSION

“‘[C]yberspace’ is not a ‘space’ at all. At least not in the way we understand space. It’s not located anywhere; it has no boundaries; you can’t ‘go’ there. At the bottom, the Internet is really more idea than entity.”¹⁸⁵

¹⁷⁹ See Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 514, 521 (1928).

¹⁸⁰ See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928).

¹⁸¹ See Frank, *supra* note 175 at 19-21.

¹⁸² See The American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, Official Draft, 1969.

¹⁸³ See, e.g., Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (increasing the amount in controversy requirement to \$75,000); Judicial Improvements and Access to Justice Act of 1988, 102 Stat. 4642 (increasing the amount in controversy requirement to \$50,000 and limiting the exercise of alienage jurisdiction); H.R. 9622, 95th Cong. (1978) (proposing abolishment of diversity jurisdiction).

¹⁸⁴ See Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992) (arguing that diversity jurisdiction is incompatible with basic principles of federalism); Wilfred Feinberg, *Is Diversity Jurisdiction an Idea Whose Time Has Passed?*, N.Y. ST. B.J., July 1989, at 14 (arguing that diversity jurisdiction cases clog federal dockets and noting that courts spend more time analyzing the jurisdictional question than the underlying legal issues of the cases).

¹⁸⁵ *Blumenthal v. Drudge*, 992 F. Supp. 44, 48 (D.D.C. 1998) (quoting Bruce W. Sanford

Perhaps this explains, more than any minimum contacts analysis, why judges seem so inclined to dismiss cases involving Internet contacts. The concepts are unfamiliar, the rules are non-existent, and the implications are great. As one judge wrote:

To impose traditional territorial concepts on the commercial uses of the Internet has dramatic implications, opening the Web user up to inconsistent regulations throughout fifty states, indeed, throughout the globe. It also raises the possibility of dramatically chilling what may well be "the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen."¹⁸⁶

No judge wants to be responsible for destroying the world's new free speech forum or for restricting the technology that has boosted the American economy to unprecedented levels. Similarly, no judge wants to be responsible for opening the floodgate to Internet cases brought under federal diversity jurisdiction.

Because many Internet disputes fit the literal requirements of diversity, courts have looked to minimum contacts due process requirements to provide a rationale for dismissing such cases. This method, however understandable, is inadequate and unnecessarily complicated. Despite the fact that these courts have relied on the same handful of relevant opinions to justify their decisions, the resulting inconsistent holdings between, and even within, districts have caused widespread uncertainty as to where a defendant really does have minimum contacts. Rather than twisting precedents to reach the desired holding, judges should look to the original intent of diversity jurisdiction. The Founders, though unaware that future technology would create such legal dilemmas, clearly did not intend for federal courts to handle every sales or contract dispute. If courts would look to the original principles and ideas behind the Constitution, they would find a simple solution to the jurisdictional quandary of the twenty-first century: the Internet.

CHRISTINE G. HESLINGA

and Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1139-43 (1996)).

¹⁸⁶ Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 463 (D. Mass. 1997) (quoting ACLU v. Reno, 929 F. Supp. 824, 881 (E.D. Pa. 1996)).

Appendix A

Recent District Court Decisions on Internet Jurisdiction (1996-1999)

1. Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (jurisdiction).
2. McDonough v. Fallon McElligott, Inc., No. CIV. 95-4037, 1996 WL 753991 (S.D. Cal. Aug. 5, 1996) (no jurisdiction).
3. Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996) (jurisdiction).
4. Edias Software Int'l, LLC v. Basis Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996) (jurisdiction).
5. Heroes, Inc. v. Heroes Found., Inc., 958 F. Supp. 1 (D.D.C. 1996) (jurisdiction).
6. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (jurisdiction).
7. Hearst Corp. v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. 1997) (no jurisdiction).
8. Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456 (D. Mass. 1997) (jurisdiction).
9. Resuscitation Tech., Inc. v. Cont'l Health Care Corp., No. IP 96-1457-C-M/S, 1997 WL 148567 (S.D. Ind. Mar. 24, 1997) (jurisdiction).
10. Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356 (W.D. Ark. 1997) (no jurisdiction).
11. Weber v. Jolly Hotels, 977 F. Supp. 327 (D.N.J. 1997) (no jurisdiction).
12. Telco Communications Group, Inc. v. An Apple a Day, Inc., 977 F. Supp. 404 (E.D. Va. 1997) (jurisdiction).
13. Hasbro, Inc. v. Clue Computing, Inc., 994 F. Supp. 34 (D. Mass. 1997) (jurisdiction).
14. Transcraft Corp. v. Doonan Trailer Corp., No. 97-C-4943, 1997 U.S. Dist. LEXIS 18687 (N.D. Ill. Nov. 12, 1997) (no jurisdiction).
15. SF Hotel Co. v. Energy Inv., Inc., 985 F. Supp. 1032 (D. Kan. 1997) (no jurisdiction).
16. Quality Solutions, Inc. v. Zupanc, 993 F. Supp. 621 (N.D. Ohio 1997) (jurisdiction).
17. Fishel v. BASF Group, No. 4-96-CV-10449, 1998 U.S. Dist. LEXIS 21230 (S.D. Iowa Mar. 11, 1998) (no jurisdiction).
18. Mieczkowski v. Masco Corp., 997 F. Supp. 782 (E.D. Tex. 1998) (jurisdiction).
19. Thompson v. Handa-Lopez, 998 F. Supp. 738 (W.D. Tex. 1998) (jurisdiction).
20. Tel. Audio Prod., Inc. v. Smith, No. 3:97-CV-0863-P, 1998 U.S. Dist. LEXIS 4101 (N.D. Tex. Mar. 26, 1998) (jurisdiction).

21. *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (jurisdiction).
22. *Vitullo v. Velocity Powerboats, Inc.*, No. 97-C-8745, 1998 U.S. Dist. LEXIS 7120 (N.D. Ill. Apr. 24, 1998) (jurisdiction).
23. *Scherr v. Abrahams*, No. 97-C-5453, 1998 U.S. Dist. LEXIS 8531 (N.D. Ill. May 29, 1998) (no jurisdiction).
24. *CFOs 2 Go v. CFO 2 Go*, No. C-97-4676SI, 1998 U.S. Dist. LEXIS 8886 (N.D. Cal. June 5, 1998) (no jurisdiction).
25. *Edberg v. Neogen Corp.*, 17 F. Supp. 2d 104 (D. Conn. 1998) (no jurisdiction).
26. *Patriot Sys., Inc. v. C-Cubed Corp.*, 21 F. Supp. 2d 1318 (D. Utah 1998) (no jurisdiction).
27. *GTE New Media Serv. v. Ameritech Corp.*, 21 F. Supp. 2d 27 (D.D.C. 1998) (jurisdiction).
28. *Advanced Software, Inc. v. Datapharm, Inc.*, No. CV-98-5943, 1998 U.S. Dist. LEXIS 22091 (C.D. Cal. Nov. 3, 1998) (no jurisdiction).
29. *Atlantech Distrib., Inc. v. Credit Gen. Ins. Co.*, 30 F. Supp. 2d 534 (D. Md. 1998) (no jurisdiction).
30. *K.C.P.L., Inc. v. Nash*, No. 98 Civ. 3773, 1998 U.S. Dist. LEXIS 18464 (S.D.N.Y. Nov. 24, 1998) (no jurisdiction).
31. *Grutkowski v. Steamboat Lake Guides & Outfitters, Inc.*, No. 98-1453, 1998 U.S. Dist. LEXIS 20255 (E.D. Pa. Dec. 21, 1998) (no jurisdiction).
32. *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 45 F. Supp. 2d 777 (N.D. Cal. 1998) (no jurisdiction).
33. *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907 (D. Or. 1999) (no jurisdiction).
34. *LFG, LLC v. Zapata Corp.*, 78 F. Supp. 2d 731 (N.D. Ill. 1999) (jurisdiction).
35. *ESAB Group, Inc. v. Centricut, LLC*, 34 F. Supp. 2d 323 (D.S.C. 1999) (no jurisdiction).
36. *Pheasant Run, Inc. v. Moyse*, No. 98-C-4202, 1999 U.S. Dist. LEXIS 1087 (N.D. Ill. Feb. 2, 1999) (no jurisdiction).
37. *Origin Instruments Corp. v. Adaptive Computer Sys., Inc.*, No. 3:97-CV-2595-L, 1999 U.S. Dist. LEXIS 1451 (N.D. Tex. Feb. 3, 1999) (no jurisdiction).
38. *Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest, Inc.*, 35 F. Supp. 2d 507 (E.D. La. 1999) (no jurisdiction).
39. *Desktop Tech., Inc. v. Colorworks Reprod. & Design, Inc.*, No. 98-5029, 1999 U.S. Dist. LEXIS 1934 (E.D. Pa. Feb. 24, 1999) (no jurisdiction).
40. *Purco Fleet Serv., Inc. v. Towers*, 38 F. Supp. 2d 1320 (D. Utah 1999) (jurisdiction).
41. *Fix My PC, L.L.C. v. N.F.N. Assoc., Inc.*, 48 F. Supp. 2d 640 (N.D. Tex. 1999) (no jurisdiction).
42. *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999) (no jurisdiction).

43. *Remick v. Manfredy*, 52 F. Supp. 2d 452 (E.D. Pa. 1999) (no jurisdiction).
44. *Resnick v. Manfredy*, 52 F. Supp. 2d 462 (E.D. Pa. 1999) (no jurisdiction).
45. *Int'l Star Registry of Ill. v. Bowman-Haight Ventures, Inc.*, No. 98-C-6823, 1999 U.S. Dist. LEXIS 7009 (N.D. Ill. May 4, 1999) (jurisdiction).
46. *Decker v. Circus Circus Hotel*, 49 F. Supp. 2d 743 (D.N.J. 1999) (no jurisdiction).
47. *Bochan v. La Fontaine*, 68 F. Supp. 2d 692 (E.D. Va. 1999) (jurisdiction).
48. *Coolsavings.com, Inc. v. IQ.Commerce Corp.*, 53 F. Supp. 2d 1000 (N.D. Ill. 1999) (jurisdiction).
49. *McMaster-Carr Supply Co. v. Supply Depot, Inc.*, No. 98-C-1903, 1999 U.S. Dist. LEXIS 9559 (N.D. Ill. June 14, 1999) (jurisdiction).
50. *Rannoch, Inc. v. Rannoch Corp.*, 52 F. Supp. 2d 681 (E.D. Va. 1999) (no jurisdiction).
51. *Coastal Video Communications Corp. v. Staywell Corp.*, 59 F. Supp. 2d 562 (E.D. Va. 1999) (no jurisdiction).
52. *Am. Bio Medica Corp. v. Peninsula Drug Analysis Co.*, No. 99-218-SLR, 1999 U.S. Dist. LEXIS 12455 (D. Del. Aug. 3, 1999) (jurisdiction).
53. *Stern's Dep't Stores, Inc. v. Herbert Mines Assoc., Inc.*, No. C-1-98-844, 1999 U.S. Dist. LEXIS 10805 (S.D. Ohio July 8, 1999) (no jurisdiction).
54. *Broussard v. Deauville Hotel Resorts, Inc.*, No. 98-3157, 1999 U.S. Dist. LEXIS 12716 (E.D. La. Aug. 12, 1999) (no jurisdiction).
55. *Hurley v. Cancun Playa Oasis Int'l Hotels*, No. 99-574, 1999 U.S. Dist. LEXIS 13716 (E.D. Pa. Aug. 31, 1999) (no jurisdiction).
56. *Molnlycke Health Care AB v. Dumex Med. Surgical Prod. Ltd.*, No. 99-1725, 1999 U.S. Dist. LEXIS 13678 (E.D. Pa. Sept. 7, 1999) (no jurisdiction).
57. *Wise v. Lindamood*, 89 F. Supp. 2d 1187 (D. Colo. 1999) (jurisdiction).
58. *CIVIX-DDI, LLC v. Microsoft Corp.*, No. 99-B-172, 1999 U.S. Dist. LEXIS 15230 (D. Colo. Sept. 30, 1999) (no jurisdiction).
59. *Kim v. Keenan*, 71 F. Supp. 2d 1228 (M.D. Fla. 1999) (jurisdiction).
60. *Loudon Plastics, Inc. v. Brenner Tool & Die, Inc.*, 74 F. Supp. 2d 182 (N.D.N.Y. 1999) (jurisdiction).
61. *Bellino v. Simon*, No. Civ. A. 99-2208, 1999 WL 1059753 (E.D. La. Nov. 22, 1999) (jurisdiction).
62. *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 537 (E.D. Pa. 1999) (no jurisdiction).