

ESTABLISHING PERSONAL JURISDICTION IN AN
INTERNET CONTEXT: RECONCILING THE
FOURTH CIRCUIT “TARGETING” TEST WITH
CALDER V. JONES USING AWARENESS

Erin Belfield

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2018.606
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program and is cosponsored by the University of Pittsburgh Press.

ESTABLISHING PERSONAL JURISDICTION IN AN INTERNET CONTEXT: RECONCILING THE FOURTH CIRCUIT “TARGETING” TEST WITH *CALDER V. JONES* USING AWARENESS

Erin Belfield*

I. INTRODUCTION

It is well understood that for a legal judgment to have force, the rendering court must have jurisdiction, with notice and an adequate opportunity to be heard by the parties to be bound by the judgment.¹ While the Supreme Court initially addressed issues of personal jurisdiction in *Pennoyer v. Neff*,² the doctrine has evolved significantly in the intervening years as travel and interstate commerce have increased.³ There has yet, however, to be a uniform test adopted to establish personal jurisdiction when injuries have been caused over the internet.⁴ Given the rapid proliferation of the internet, there remains a need to establish a test for personal jurisdiction specific to the online context. Additionally, this test should further policy goals of fairness and efficiency. Because of the nature of injuries that can occur involving the internet, and the variance in harm for different types of injuries, it is possible that different tests for jurisdiction will be best suited for different types of

* Candidate for J.D., 2019, University of Pittsburgh School of Law.

¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 104 (AM. LAW INST. 1988).

² *Pennoyer v. Neff*, 95 U.S. 714 (1878).

³ “The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in States where they were not subject to in personam actions under *Pennoyer*, required further moderation of the territorial limits on jurisdictional power.” *Shaffer v. Heitner*, 433 U.S. 186, 202 (1977).

⁴ See *Plixer Int’l Inc. v. Scrutinizer GmbH*, 293 F. Supp. 3d 232, 238–40 (D. Me. 2017) (summarizing current tests used for establishing personal jurisdiction for cases involving the internet in several Circuit Courts).

injuries.⁵ This Note pays particular attention to defamation cases involving the internet.

This Note proposes an alternative to the “targeting” test articulated in *Young v. New Haven Advocate*—a defamation case involving the internet.⁶ Part II of this Note defines personal jurisdiction, addressing both constitutional issues and public policy considerations in establishing jurisdiction over a party. Part III of this Note explores the state of the law with respect to personal jurisdiction and “minimum contacts” in the online context and for defamation cases. Part IV of this Note analyzes the “targeting” test used in *Young v. New Haven Advocate*⁷ and proposes a modified test incorporating awareness, which can serve as a uniform test for establishing personal jurisdiction in online defamation cases.

II. PERSONAL JURISDICTION DEFINED

In personam jurisdiction, or personal jurisdiction, refers to a court’s jurisdiction over a person.⁸ This section addresses the constitutional issues associated with establishing personal jurisdiction, beginning with *Pennoyer*, and tracking the evolution of the Due Process standard. Localization problems are also addressed, which have existed since interstate travel and commerce became routine. The Stream of Commerce is also explored inasmuch as it relates to the online context. Throughout this section, public policy issues in establishing personal jurisdiction are also addressed, with particular attention to the fairness aspects of asserting jurisdiction.

A. Evolution of the Due Process Standard

In order for a judgment to be enforceable, the rendering court must have jurisdiction over the parties that will be bound by the judgment.⁹ A judgment rendered in one United States court has full faith and credit in every court within the

⁵ Compare *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), with *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) (illustrating different approaches for online contacts in a trademark and defamation case, respectively).

⁶ *Young v. New Haven Advocate*, 315 F.3d 256, 264 (4th Cir. 2002).

⁷ *Id.*

⁸ *Jurisdiction*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 104 (AM. LAW INST. 1988).

United States, provided it comports with the Constitution.¹⁰ One of the constitutional limits on rendering courts is the Fourteenth Amendment.¹¹

Due Process was first invoked as a standard for establishing personal jurisdiction in *Pennoyer v. Neff*, after the passage of the Fourteenth Amendment.¹² In *Pennoyer*, a judgment was rendered in Oregon against a non-resident, who was not served with notice of the cause of action.¹³ This judgment was held invalid due to a lack of personal jurisdiction.¹⁴ *Pennoyer* stands for the proposition that a state can exert jurisdiction over an individual within its territory and cannot exert jurisdiction over an individual outside of its territory.¹⁵ Courts were thus limited in that they could only bind persons to judgments if those individuals were within their territory. The Court further emphasized the importance of notice in exercising jurisdiction when it asserted that an individual must have notice of an action before they can be bound by the judgment.¹⁶ This holding was consistent with principles of sovereignty and reflected a time when there was little need for states to exercise jurisdiction over non-residents. This holding made it impossible for a court to exercise jurisdiction over a person who had caused an injury, but left the territory before suit could be filed. While this holding made sense for its time, subsequent technological advancement increased interstate travel and commerce. Thus, a need emerged for courts to be able to exercise jurisdiction over non-residents.¹⁷

Pennoyer governed personal jurisdiction for almost seventy years, until the Supreme Court expanded circumstances in which jurisdiction could be exercised in *International Shoe Co. v. Washington*.¹⁸ In *International Shoe*, jurisdiction was sought over the International Shoe Company, a Delaware corporation having its principal address in Missouri, and sales personnel operating in Washington.¹⁹ The

¹⁰ 28 U.S.C. § 1738 (2018).

¹¹ U.S. CONST. amend. XIV.

¹² *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878).

¹³ *Id.* at 719–20.

¹⁴ *Id.* at 722.

¹⁵ *Id.*

¹⁶ *Id.* at 730.

¹⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980).

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

¹⁹ *Id.* at 311–12.

Company was alleged to have violated the Washington Unemployment Compensation Act.²⁰ Since the Company had operations in Washington, the State alleged it was subject to the Act, while the Company argued it was not conducting business in the State, and therefore was not subject to the Act, or to personal jurisdiction in the State of Washington.²¹

The Court in *International Shoe* acknowledged that as the variety and effectiveness of forms of notice have increased, the requirement of a physical presence within a territory to exercise jurisdiction should be relaxed.²² The Court thus introduced the “minimum contacts” standard for establishing personal jurisdiction, a departure from the holding in *Pennoyer*.²³ The Court held that if a party is not present within the forum state, jurisdiction could still be exercised if that party had sufficient contact with the state in which jurisdiction was sought.²⁴ The Court suggested that the contacts considered should be such that exercising jurisdiction would not “offend ‘traditional notions of fair play and substantial justice.’”²⁵ The Court further held that the “contacts” themselves must be measured by the “quality and nature of the activity in relation to the fair and orderly administration of the laws.”²⁶ Together, these concerns suggest that the “contacts” evaluated must be considered both with respect to the volume of contacts the party had with the state and the relatedness of each contact to the claim.

Jurisdiction was established over the company in *International Shoe* by satisfying this “minimum contacts” standard.²⁷ The Court stated that when a corporation conducts activity in a state, it enjoys the benefits of the laws in said state, and thus should be equally subjected to jurisdiction therein.²⁸ Because the claim arose out of the sales activity within the state, the relatedness of the contacts was

²⁰ *Id.* at 311.

²¹ *Id.* at 312.

²² *Id.* at 316.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* (citation omitted).

²⁶ *Id.* at 319.

²⁷ *Id.* at 320.

²⁸ *Id.* at 319.

clearly established.²⁹ The ongoing nature of that activity satisfied the requirement that there be a sufficient volume of contacts to exercise jurisdiction.³⁰ The corporation would be unlikely to suffer undue hardship in defending a suit in the forum, and “fair play and substantial justice” would not be offended in the exercise of jurisdiction.³¹ This holding reflected a shift from basing jurisdiction solely on a party’s presence within the forum to evaluating whether or not exercising jurisdiction would be fair.

B. Localization

International Shoe marked a landmark shift away from *Pennoyer*’s conception of sovereignty, and towards a jurisprudence based on reasonableness.³² This evolution continued in *World-Wide Volkswagen v. Woodson*, where the Court introduced reasonableness factors to be used in determining if personal jurisdiction could be exercised.³³ There were five factors introduced: the burden on the defendant to litigate in the forum; the forum state’s interest in litigation occurring therein; the plaintiff’s interest in litigation occurring in the forum; interstate efficiency; and the shared interest of the states.³⁴ While the Court did not apply the reasonableness factors it enumerated in *World-Wide Volkswagen* to the facts of that case, it did indicate that the reasonableness factors could not supplant “minimum contacts”; even if all of the reasonableness factors were satisfied, a court could not exercise jurisdiction without “minimum contacts.”³⁵ In *World-Wide Volkswagen*, personal jurisdiction was not exercised in Oklahoma over a New York-based dealership, or the regional Volkswagen subsidiary that supplied the dealership.³⁶ The dealership sold a car to a family who was involved in an accident in Oklahoma.³⁷ The dealership and the subsidiary had no contact with Oklahoma, because their businesses operated regionally; unilateral activity on the part of the plaintiffs to bring the product into the

²⁹ *Id.* at 320.

³⁰ *Id.*

³¹ *Id.* at 319–20.

³² Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617, 623 (2014).

³³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

³⁴ *Id.*

³⁵ *Id.* at 294.

³⁶ *Id.* at 298–99.

³⁷ *Id.* at 298.

forum state was not sufficient to establish the defendant's "minimum contacts" with the state.³⁸

World-Wide Volkswagen demonstrates issues of localization in establishing personal jurisdiction. There is no question the injury in that case occurred in Oklahoma; however, Oklahoma was not a state where the dealership operated, nor was it the state where the plaintiff was domiciled.³⁹ In fact, the plaintiffs were moving from New York to Arizona and, in the process of this move, their vehicle was struck by a drunk driver, causing severe injuries.⁴⁰ If one looks at the consequences of the injury, it is arguable that the *effects* of the injury are felt not only in Oklahoma, but also in Arizona, the new domicile of the Plaintiff, and in New York, where the product was sold.⁴¹ The reasonableness factors, though not applied in this case, reflect consideration of the interests of each of the territories affected by the injury, as well as the needs and desires of both the plaintiffs and defendants.⁴²

In holding that the dealership did not have minimum contacts with the forum state chosen by Plaintiffs, the Court rejected foreseeability as a basis for establishing "minimum contacts."⁴³ The Court was careful to point out that foreseeability is not irrelevant to the determination, but that it is only considered with respect to the activities of the defendant in relation to the forum state.⁴⁴ In *World-Wide Volkswagen*, the fact that the vehicle was designed to travel, and that the dealership and subsidiary were aware that the car was capable of interstate travel, was insufficient to establish contacts with other forums based on the unilateral activity of the purchaser of the vehicle.⁴⁵ The benchmark for establishing jurisdiction in cases of foreseeability was whether the defendant should "reasonably anticipate being

³⁸ *Id.*

³⁹ *Id.* at 287–88.

⁴⁰ JAY M. FEINMAN, LAW 101: EVERYTHING YOU NEED TO KNOW ABOUT THE AMERICAN LEGAL SYSTEM 92 (2000).

⁴¹ *Id.*

⁴² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

⁴³ *Id.* at 295–96.

⁴⁴ *Id.* at 297.

⁴⁵ *Id.* at 295–96.

haled into court” in the forum.⁴⁶ *World-Wide Volkswagen*, decided in 1980,⁴⁷ predates the internet, but it foreshadows the types of localization issues that can arise when an injury occurs in one location, but the effects are more widespread.

C. *Stream of Commerce*

The localization problem present in *World-Wide Volkswagen* is also present in *Asahi Metal Industry Co. v. Superior Court of California*.⁴⁸ In *Asahi*, the defendant, Cheng Shin Rubber Industrial Co., Ltd. (“Cheng Shin”), a Taiwanese corporation, sought jurisdiction over Asahi Metal Industry Co., Ltd. (“Asahi”), a Japanese corporation, in California as part of a cross-claim.⁴⁹ This cross-claim was an indemnity action in response to a suit against Cheng Shin for products liability, stemming from a motorcycle accident that occurred in California.⁵⁰ Asahi supplied the tube valve assembly used by Cheng Shin in the manufacture of its motorcycles.⁵¹ These facts demonstrate issues of localization; while the injury occurred in California, the ramifications of that injury extend as far as Taiwan and Japan. This case also occurred in the pre-internet era, yet still raises the issue of whether the California forum could exercise personal jurisdiction over Asahi, a Japanese corporation whose contact with the forum solely related to the tube valve assembly’s presence in motorcycles used in California.

While there are several plurality opinions in the *Asahi* decision, all of the Justices concluded that jurisdiction should not be exercised over Asahi.⁵² The Justices differed on how the “stream of commerce” test, previously used in other courts and mentioned in dicta in *World-Wide Volkswagen*,⁵³ should be applied when attempting to establish “minimum contacts.”⁵⁴ The difficulties with the “stream of commerce” doctrine are illustrated by the variety of treatments by the Justices, and

⁴⁶ *Id.* at 297.

⁴⁷ *Id.* at 286.

⁴⁸ *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987).

⁴⁹ *Id.* at 106.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 105, 116.

⁵³ Grossi, *supra* note 32, at 636–38.

⁵⁴ *Asahi Metal*, 480 U.S. at 116.

the subsequent difficulties in applying the doctrine.⁵⁵ A definition of “stream of commerce” is provided in *Burger King Corp. v. Rudzewicz*, which quotes dicta in *World-Wide Volkswagen*:

Thus “[the] forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State” and those products subsequently injure forum consumers.⁵⁶

The Court in *Burger King Corp.* was clear that “minimum contacts” with the forum state are still required, emphasizing that foreseeability of injury in the forum state is not sufficient to justify jurisdiction therein.⁵⁷ Applying this definition to the facts in *Asahi*, when Asahi sold its tube valve assembly to Cheng Shin, it was placing that component into the “stream of commerce.” The difficulty of *Asahi* rests not in this concept, but in how the placement in the “stream of commerce” should affect the analysis of personal jurisdiction.

Justice O’Connor opined that the placement of the tube valve assembly into the “stream of commerce” *alone* was not sufficient to establish “minimum contacts” because this act was not an act of the defendant directed towards the forum state.⁵⁸ Justice O’Connor would require more activity directed at the forum state on the part of the defendant to establish personal jurisdiction:

Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in

⁵⁵ See Frank Deale, J. McIntyre and the *Global Stream of Commerce*, 16 CUNY L. REV. 269 (2013) (analyzing the application of the stream-of-commerce in *J. McIntyre Machinery Ltd. v. Nicastro* and subsequent effects); Diane S. Kaplan, *Paddling Up the Wrong Stream: Why the Stream of Commerce Theory is Not Part of the Minimum Contacts Doctrine*, 55 BAYLOR L. REV. 503 (2003) (tracing the disparate treatment by the Justices in *Asahi* to stream-of-commerce origins in *Gray v. American Radiator & Standard Sanitary Corp.*); Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243 (1989) (arguing that the constitutional basis of the stream of commerce should be re-examined).

⁵⁶ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980)).

⁵⁷ *Id.* at 474.

⁵⁸ *Asahi Metal*, 480 U.S. at 112.

the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.⁵⁹

Because Asahi did not perform any of these activities, as the company only interacted with a Taiwanese corporation, the mere awareness that the final product may have ended up in California was not sufficient to establish minimum contacts.⁶⁰

Justice O'Connor also applied the reasonableness factors introduced in *World-Wide Volkswagen* and concluded that asserting jurisdiction over Asahi would be unreasonable.⁶¹ She concluded that asserting jurisdiction over Asahi, a foreign corporation, would be highly burdensome on the defendant, especially in light of the fact that the only remaining claim in the case was the indemnity claim between Asahi and Cheng Shin; the interest of the forum state in litigating this claim is relatively low when compared with the burden on the foreign corporations to litigate in another country.⁶² In sum, Justice O'Connor used both a "minimum contacts" analysis and reasonableness factors to deny personal jurisdiction over Asahi.

In contrast, Justice Brennan would have held that placing the tube valve assembly into the "stream of commerce" was sufficient to establish "minimum contacts," provided the actor was aware of where the "stream" lead.⁶³ Justice Brennan argued that the denial of jurisdiction should be based on the unreasonableness of the assertion, because asserting jurisdiction would violate notions of "fair play and substantial justice."⁶⁴ Justice Stevens did not address the "stream of commerce" question in this case, basing his decision only on the application of the reasonableness factors.⁶⁵ This created a plurality, rather than a majority, on the issue of the "stream of commerce" and its application in establishing "minimum contacts."

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 113–14.

⁶² *Id.* at 114.

⁶³ *Id.* at 121 (Brennan, J., concurring).

⁶⁴ *Id.* at 116.

⁶⁵ *Id.* at 121–22 (Stevens, J., concurring).

In a subsequent opinion, *J. McIntyre Machinery Ltd. v. Nicastro*, a plurality rejected the “stream of commerce” as a mechanism for establishing “minimum contacts.”⁶⁶ In that case, a plaintiff bringing a products-liability action in the State of New Jersey sought jurisdiction over a corporation based in England.⁶⁷ Justice Kennedy’s plurality opinion emphasized that while a defendant could be subject to jurisdiction without entering the forum state in some cases, the principal inquiry is whether the defendant has “manifest[ed] an intention to submit to the power of a sovereign.”⁶⁸ This conception of “purposeful availment” was the impetus for Justice O’Connor’s plurality opinion in *Asahi*; a defendant must do more than merely anticipate that its product may end up in the forum state to be subject to jurisdiction therein.⁶⁹ In *J. McIntyre Machinery Ltd.*, it was held that the defendant’s activities did not manifest an intent to subject itself to jurisdiction in the forum state.⁷⁰ Justice Kennedy rejected the “stream of commerce” because it could not supersede the limits imposed by the Due Process Clause.⁷¹ He further opined that whatever strong interest may have existed for the plaintiff to litigate in the forum state, it could not outweigh these considerations.⁷²

The concurrence offered by Justice Breyer took a more fact-specific approach to the “stream of commerce” and avoided a broad holding about the application of the “stream of commerce.”⁷³ Justice Breyer focused on the lack of “regular” sales or flow of commerce into the forum state in order to justify denying personal jurisdiction.⁷⁴ Further, he explicitly rejected the proposed standard from several amici: that jurisdiction should be exercised if the party “knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.”⁷⁵ He argued that

⁶⁶ *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877–78 (2011).

⁶⁷ *Id.* at 878.

⁶⁸ *Id.* at 882.

⁶⁹ *Asahi Metal*, 480 U.S. at 112.

⁷⁰ *J. McIntyre*, 564 U.S. at 886–87.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 889–90 (Breyer, J., concurring).

⁷⁴ *Id.* at 889.

⁷⁵ *Id.* at 890–91.

the focus on the inquiry should be the relationship between the defendant and the forum, and rejected the use of an absolute rule in resolving the question of personal jurisdiction.⁷⁶

The dissent, authored by Justice Ginsburg, would have exercised personal jurisdiction on the basis of fairness, and the fact that by engaging a subsidiary to sell their product in the United States, the requirements of “purposeful availment” were satisfied.⁷⁷ Justice Ginsburg believed that the “stream of commerce” doctrine should not apply in this case, because the defendant deliberately sought to enter the United States market, unlike Asahi, and that Asahi was merely manufacturing a component part, rather than a whole product.⁷⁸ Justice Ginsburg was particularly focused on fairness considerations, and the potential burden on a United States party in cases involving foreign defendants.⁷⁹ Because of this, Justice Ginsburg would have held that personal jurisdiction could be exercised in the state where the injury occurred.⁸⁰

The cases addressing the “stream of commerce” are important to the issue of establishing minimum contacts in internet cases because the “stream of commerce” serves as an analogy to how the internet operates in practice. By placing a product in the “stream of commerce” the actor has a reasonable expectation of where that product may be sold or used, but the possibility exists that the product will travel in unforeseen ways due to the activity of the end user. Similarly, by posting something on the internet, the user will have a reasonable expectation of where and how that information may be accessed, but the information can spread in a viral manner unanticipated by the poster. This means that the rationales applied by the Justices to the “stream of commerce” are potentially applicable to internet cases. This will be discussed further in Part III, where the current state of the law with respect to establishing personal jurisdiction in the internet context will be analyzed.

III. STATE OF THE LAW: PERSONAL JURISDICTION IN ONLINE DEFAMATION CASES

The Court has not yet announced a definitive test to address personal jurisdiction in cases involving the internet. The Court has put forth a test for

⁷⁶ *Id.* at 891–92.

⁷⁷ *Id.* at 903–05 (Ginsburg, J., concurring).

⁷⁸ *Id.* at 908.

⁷⁹ *Id.* at 906, 909.

⁸⁰ *Id.* at 910.

defamation cases involving published tabloids,⁸¹ which can inform the analysis of defamation that occurs using the internet. Several circuit and district courts have examined cases involving the internet and have promulgated different standards for evaluating personal jurisdiction.⁸² This section explores the standard for non-internet defamation, as well as the *Zippo* “sliding scale,”⁸³ an early internet case discussing personal jurisdiction.

A. *Calder* “Effects Test”

Calder v. Jones is not itself an online case,⁸⁴ but has implications for defamation cases occurring over the internet. *Calder* is illustrative of how the Supreme Court views the impacts of an injury and the role that those impacts play in asserting jurisdiction. In *Calder*, the plaintiff brought an action in California for libel.⁸⁵ The alleged libelous article had been written and edited in Florida, and was published in a national magazine, the *National Enquirer*, having a large circulation in California.⁸⁶ The petitioners in *Calder* were two Florida residents, the *Enquirer*’s president and editor, and one of the *Enquirer*’s reporters, whose byline appeared on the alleged libelous article.⁸⁷ These individuals had little to no other relevant contact with the forum.⁸⁸ Each of the petitioner’s “contacts” were assessed individually, and

⁸¹ *Calder v. Jones*, 465 U.S. 783, 784 (1984).

⁸² See *Plixer Int’l Inc. v. Scrutinizer GmbH*, 293 F. Supp. 3d 232, 238–40 (D. Me. 2017) (summarizing Circuit Court tests for establishing personal jurisdiction in cases involving the internet).

⁸³ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

⁸⁴ *Calder*, 465 U.S. at 784.

⁸⁵ *Id.*

⁸⁶ *Id.* at 784–85 (“The *Enquirer* is a Florida corporation with its principal place of business in Florida. It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California.”).

⁸⁷ *Id.* at 785–86.

⁸⁸ *Id.* (“Petitioner South is a reporter employed by the *Enquirer*. He is a resident of Florida, though he frequently travels to California on business. South wrote the first draft of the challenged article, and his byline appeared on it. He did most of his research in Florida, relying on phone calls to sources in California for the information contained in the article. Shortly before publication, South called respondent’s home and read to her husband a draft of the article so as to elicit his comments upon it. Aside from his frequent trips and phone calls, South has no other relevant contacts with California. Petitioner *Calder* is also a Florida resident. He has been to California only twice—once, on a pleasure trip, prior to the publication of the article and once after to testify in an unrelated trial. *Calder* is president and editor of the *Enquirer*. He [oversees] just about every function of the *Enquirer*.’ He reviewed and approved the initial evaluation

it was held that for both individuals sufficient contact with California existed for the proper exercise of jurisdiction.⁸⁹ This finding was largely based on the “effects” of the article:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the “effects” of their Florida conduct in California.⁹⁰

Some lower courts have interpreted *Calder* as crafting a three-factor “effects” test for personal jurisdiction in cases that involve intentional torts.⁹¹ These factors can be represented as follows:

(1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum, such that the forum can be said to be the focal point of the harm; and (3) the 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.⁹²

It has been posited that instead of viewing this test as specific to intentional tort doctrine, it should be viewed as harmonious with minimum contacts analysis.⁹³ Since the Court cited *International Shoe*, *World-Wide Volkswagen*, and another personal jurisdiction case, *Shaffer v. Heitner*, this suggests that the Court intended *Calder* to be consistent with existing personal jurisdiction jurisprudence.⁹⁴ This view comports

of the subject of the article and edited it in its final form. He also declined to print a retraction requested by respondent. *Calder* has no other relevant contacts with California.”) (citations omitted).

⁸⁹ *Id.* at 790.

⁹⁰ *Id.* at 788–89 (citations omitted).

⁹¹ Sarah Ludington, *Aiming at the Wrong Target: The “Audience Targeting” Test for Personal Jurisdiction in Internet Defamation Cases*, 73 OHIO ST. L.J. 541, 544 (2012).

⁹² *Id.* (citations omitted).

⁹³ *Id.* at 545.

⁹⁴ *Id.* at 547.

with how the Court in *Calder* framed its viewpoint on the jurisdictional question, that the effects of the article were *themselves* a contact with California that was sufficient to give rise to personal jurisdiction therein.⁹⁵ This is especially important in light of the fact that the Court in *Calder* did not rely on the contacts associated with the activities of the employer, or the specific circulation of the magazine within California, in reaching this conclusion.⁹⁶

The facts in *Calder* represent an important analogy to the internet. In *Calder*, jurisdiction was asserted over individuals who promulgated allegedly libelous information into a forum with which they otherwise had limited contact.⁹⁷ While *Calder* predates the internet, it addresses an industry, the publishing industry, that shares many characteristics with the internet; wide-reach, accessibility, and the ability to have an effect in a forum without having entered it. An individual posting on a social media website can have the same effect as the article in *Calder* without ever leaving their home. *Calder*, therefore, represents an important building block when assessing how personal jurisdiction should be assessed in cases involving the internet and is especially relevant to defamation cases involving the internet and social media.

The holding in *Calder* has not been interpreted uniformly by lower courts.⁹⁸ Further, the Supreme Court addressed the application of *Calder* in *Walden v. Fiore*.⁹⁹ In *Walden v. Fiore*, tortious conduct occurred in Georgia that had an effect on the plaintiff in Nevada.¹⁰⁰ The defendant had no other contact with Nevada.¹⁰¹ The district court in that case relied on *Calder* to dismiss the action, because defendant's knowledge that plaintiff lived in Nevada and that the harm would occur in Nevada was not sufficient to confer jurisdiction to the Nevada forum.¹⁰² The Ninth Circuit reversed, holding that the tortious activity was "expressly aimed" at Nevada with

⁹⁵ *Calder*, 465 U.S. at 787.

⁹⁶ Ludington, *supra* note 91, at 551.

⁹⁷ *Calder*, 465 U.S. at 786.

⁹⁸ Grossi, *supra* note 32, at 644.

⁹⁹ *Walden v. Fiore*, 134 S. Ct 1115, 1123–24 (2014).

¹⁰⁰ *Id.* at 1119.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1120.

knowledge that the effect of that activity would be felt in Nevada.¹⁰³ The Supreme Court ultimately held that personal jurisdiction could not be exercised because the only connection between the defendant and the forum state was the plaintiff.¹⁰⁴ In reaching this holding, the Court further elaborated on its holding in *Calder*:

The crux of *Calder* was that the reputation-based “effects” of the alleged libel connected the defendants to California, not just to the plaintiff . . . because publication to third persons is a necessary element of libel, the defendants’ intentional tort actually occurred *in* California. . . . In this way, the “effects” caused by the defendants’ article—i.e., the injury to the plaintiff’s reputation in the estimation of the California public—connected the defendants’ conduct to *California*, not just to a plaintiff who lived there. That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court’s exercise of jurisdiction.¹⁰⁵

The Court held that in cases of defamation, a “contact” between the alleged libeler and the forum state can be established upon the publishing of the content, as long as there are factual circumstances that suggest a focus on that forum.¹⁰⁶ This implies a case-by-case review of facts and circumstances consistent with established personal jurisdiction precedent. This clarification is particularly relevant to defamation cases because libel is directly connected with the act of publishing the content.¹⁰⁷ As such, personal jurisdiction in cases involving online defamation would necessarily involve at least some contact with the forum in which a plaintiff asserts the injury has occurred. Whether this contact is sufficient to satisfy the “minimum contacts” test still requires applying the foundational personal jurisdiction precedents and assessing policy goals of fairness as dictated by those precedents.

B. Zippo Sliding Scale

Turning to cases directly involving the internet, the Western District of Pennsylvania addressed personal jurisdiction in a dispute over an internet domain

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1126.

¹⁰⁵ *Id.* at 1123–24.

¹⁰⁶ *Id.* at 1124.

¹⁰⁷ *Id.*

name in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*¹⁰⁸ *Zippo* dealt with a trademark dispute between Zippo Manufacturing (“Manufacturing”), a Pennsylvania-based company that produces “Zippo” lighters, and Zippo Dot Com (“Dot Com”), a California company operating an online news service.¹⁰⁹ Manufacturing challenged the use of “Zippo” by Dot Com in its domain name as trademark infringement.¹¹⁰ Manufacturing filed suit in Pennsylvania, and Dot Com moved to dismiss for lack of personal jurisdiction, because the only contact Dot Com had with Pennsylvania was through its website.¹¹¹ This motion was ultimately denied.¹¹² The court’s rationale for allowing the exercise of personal jurisdiction ultimately became known as the “Zippo sliding scale” and was an early, influential case in the development of personal jurisdiction jurisprudence with respect to the internet.¹¹³

The “Zippo sliding scale” represents the notion 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.”¹¹⁴ The court framed this as a “sliding scale,” featuring on one end situations where a defendant clearly conducts business over the internet (i.e., the exercise of jurisdiction is proper if the defendant knowingly and repeatedly transmits files over the internet to the forum) and, on the other end, situations where the defendant merely posts information on the internet that is accessible in foreign jurisdictions (i.e., a passive

¹⁰⁸ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1120 (W.D. Pa. 1997).

¹⁰⁹ *Id.* at 1121.

¹¹⁰ *Id.*

¹¹¹ *Id.* (“Dot Com’s contacts with Pennsylvania have occurred almost exclusively over the Internet. Dot Com’s offices, employees and Internet servers are located in California. Dot Com maintains no offices, employees or agents in Pennsylvania. Dot Com’s advertising for its service to Pennsylvania residents involves posting information about its service on its Web page, which is accessible to Pennsylvania residents via the Internet. Defendant has approximately 140,000 paying subscribers worldwide. Approximately two percent (3,000) of those subscribers are Pennsylvania residents. These subscribers have contracted to receive Dot Com’s service by visiting its Web site and filling out the application. Additionally, Dot Com has entered into agreements with seven Internet access providers in Pennsylvania to permit their subscribers to access Dot Com’s news service. Two of these providers are located in the Western District of Pennsylvania.”).

¹¹² *Id.* at 1121.

¹¹³ Dennis T. Yokoyama, *You Can’t Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1156, 1159 (2005).

¹¹⁴ *Zippo*, 952 F. Supp. at 1124.

website does not give rise to the exercise of jurisdiction).¹¹⁵ In cases falling in the middle, jurisdiction is determined by examining the “level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”¹¹⁶

In *Zippo*, it was held that Dot Com’s activities constituted “purposeful availment” of jurisdiction in the forum state.¹¹⁷ Because the transactions that Dot Com entered into with persons in Pennsylvania were intended to result in the transmission and downloading of electronic messages in the forum state, this activity was sufficient to establish “purposeful availment” of the forum.¹¹⁸ With respect to “minimum contacts,” the court held that sufficient contact existed because a single contact can be sufficient to establish jurisdiction, and the claim arose out of Dot Com’s conduct within the forum state.¹¹⁹ With respect to trademark infringement, the court relied on the principle that the “cause of action occurs where the passing off occurs.”¹²⁰ Because the infringement, and thus the injury, occurred in Pennsylvania, and the claim arose out of these actions within the forum state, the contacts were sufficiently related to the claim to establish personal jurisdiction.¹²¹ The court also considered the reasonableness factors, although it did not cite to *World-Wide Volkswagen*, and concluded that Pennsylvania’s interest in litigating the case, and the plaintiff’s choice of forum, outweighed the burden on the defendant.¹²² Thus, the court concluded the exercise of jurisdiction over Dot Com was appropriate, despite its only contacts being internet-based.¹²³

Like *International Shoe*, the *Zippo* decision created a continuum for evaluating the defendants contacts with the forum state and determining if those contacts were sufficient to exercise personal jurisdiction.¹²⁴ While in *International Shoe* the principal inquiry was the volume of contacts with the forum state and the relatedness

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1125–26.

¹¹⁸ *Id.* at 1126.

¹¹⁹ *Id.* at 1127.

¹²⁰ *Id.* at 1127 (citation omitted).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1128.

¹²⁴ Yokoyama, *supra* note 113, at 1164.

of those contacts to the cause of action, the *Zippo* inquiry revolved around a distinction between passive websites and interactive websites.¹²⁵ The more interactive the website, the more concrete the contact.¹²⁶ The sliding scale allows for courts to take interactivity into account when determining if exercising personal jurisdiction is proper.¹²⁷ The *Zippo* decision fits with the larger jurisprudence on personal jurisdiction for this reason, however this test does not provide adequate means for evaluating personal jurisdiction in online cases where business is not being conducted, because the test is framed in the commercial context.¹²⁸ Further, in cases of online defamation, it is likely that the defamatory content is being transmitted passively, for example by posting on social media or some other online forum. The *Zippo* sliding scale would be of little help to someone seeking to exercise personal jurisdiction in the state where the injury occurred if the information was merely posted on social media and proliferated with limited interaction by the poster or end-user. As the internet has evolved, the way users interact with it has changed, especially in the context of social media. This underlies the uncertainty amongst the courts in how to evaluate personal jurisdiction in cases involving the internet.

Additionally, as discussed *infra*, the “stream of commerce” is analogous to how the internet functions, especially when considering how information can promulgate.¹²⁹ The *Zippo* test, however, does nothing to address this reality. The “stream of commerce” framework can account for unintended or unanticipated promulgation of products into a forum, by denying jurisdiction if there is no purposeful availment of the laws of the forum, and taking into account such considerations as awareness and targeting.¹³⁰ The *Zippo* sliding scale, however, is not designed to account for the internet’s “viral” nature. *Zippo* merely evaluates the level of “interactivity” of the website.¹³¹ It has been suggested that for internet libel cases, *Zippo* should be ignored altogether.¹³² While *Zippo* is a highly influential early

¹²⁵ *Id.*

¹²⁶ *Zippo Mfg. Co.*, 952 F. Supp. at 1124.

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *See supra* Part II.C.

¹³⁰ *See supra* Part II.C.

¹³¹ *Zippo*, 952 F. Supp. at 1124.

¹³² Patrick J. Borchers, *Symposium: Personal Jurisdiction in the Internet Age: Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U.L. REV. 473, 489 (2004).

internet case, it is inadequate for establishing personal jurisdiction in cases relating to online defamation.

IV. IMPROVING THE *YOUNG V. NEW HAVEN ADVOCATE* “TARGETING” TEST

Lower courts have taken a variety of approaches to personal jurisdiction in cases involving the internet.¹³³ One court in particular, the Fourth Circuit, has developed a test for online defamation cases that focuses on where the content is “aimed.”¹³⁴ While this test has been adopted by several other courts,¹³⁵ it is difficult to reconcile with the holding of *Calder*.¹³⁶ An alternative test is proposed.

A. *The Young v. New Haven Advocate* “Targeting” Test

The United States Court of Appeals for the Fourth Circuit addressed personal jurisdiction in an online defamation case in 2002.¹³⁷ Two Connecticut newspapers published articles on the internet that discussed the State of Connecticut’s policy of housing its prisoners in Virginia institutions.¹³⁸ It was alleged that these articles defamed the warden of a Virginia prison.¹³⁹ The Fourth Circuit denied jurisdiction over the Connecticut defendants in Virginia because the Connecticut newspapers “did not manifest an intent to aim their websites or the posted articles at a Virginia audience.”¹⁴⁰ The Fourth Circuit adapted its prior holding in *ALS Scan v. Digital Service Consultants* to better fit the defamation context.¹⁴¹ That holding, in turn, was adapted from *Zippo*.¹⁴²

¹³³ See *Plixer Int’l Inc. v. Scrutinizer GmbH*, 293 F. Supp. 3d 232, 238–40 (D. Me. 2017) (summarizing Circuit Court tests for establishing personal jurisdiction in cases involving the internet).

¹³⁴ *Young v. New Haven Advocate*, 315 F.3d 256, 258–59 (4th Cir. 2002).

¹³⁵ *Ludington*, *supra* note 91, at 573 n.156.

¹³⁶ *Id.* at 554–55.

¹³⁷ *Young*, 315 F.3d at 256.

¹³⁸ *Id.* at 258.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 258–59.

¹⁴¹ *Ludington*, *supra* note 91, at 552–53.

¹⁴² *Id.* at 552.

The Fourth Circuit posited that the mere act of posting information to the internet was not sufficient to confer jurisdiction.¹⁴³ This was because information posted to the internet is available everywhere, and thus there would be no territorial limit on asserting jurisdiction, which would conflict with “traditional due process principles.”¹⁴⁴ The court examined the content of the allegedly defamatory articles, and determined that the focal point of the articles was Connecticut, and not the Virginia forum, because the articles were focused on Connecticut policy.¹⁴⁵ The court further looked to the larger content of the online newspaper, including the other stories published and the associated advertisements, to conclude that the newspaper had a local focus and was not targeted at the Virginia forum.¹⁴⁶ The Fourth Circuit thus shifted the inquiry from the “effects” of the publishing, as in *Calder*, to a test based on whether an intent to “aim” or target the content to the forum state is present.

B. Awareness as a Threshold for Personal Jurisdiction

The Fourth Circuit’s concerns about the internet’s broad reach, and the potential of undermining due process standards if internet users were subject to jurisdiction everywhere, are reasonable. However, by eliminating the “effects” of internet postings from the analysis, the Fourth Circuit contravenes the mandate of *Calder*. It has been noted that the only distinguishable feature between *Young* and *Calder* is the involvement of the internet.¹⁴⁷ But the Fourth Circuit need not abandon the “effects” test in order to account for this difference.

The Fourth Circuit has interpreted *Calder* narrowly, reading in a requirement that the defendant’s conduct be directed towards the forum state.¹⁴⁸ However, when the Supreme Court used the “effects” rationale in *Calder*, it incorporated the effects of the publication into the contacts analysis.¹⁴⁹ The conduct was “targeted” at the forum state by virtue of the fact that the person allegedly defamed lived in the state, and all of the effects of the reputational harm were felt in the forum state.¹⁵⁰ These

¹⁴³ *Young*, 315 F.3d at 263.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 263–64.

¹⁴⁶ *Id.* at 263.

¹⁴⁷ Ludington, *supra* note 91, at 557.

¹⁴⁸ *Id.* at 262.

¹⁴⁹ *See supra* Part III.A.

¹⁵⁰ *See supra* Part III.A.

effects were ultimately sufficient to give rise to jurisdiction, even with the court electing not to consider the actual circulation of the publication in the forum.¹⁵¹ In *Calder*, those effects gave rise to minimum contacts. The *Young* test can be improved because it ignores the posture of the Supreme Court in *Calder*, with insufficient justification to do so.

As suggested by *Young*, something more than the mere posting of information on the internet is required to find jurisdiction.¹⁵² Returning to our stream of commerce analogy, both effects *and* awareness should be analyzed in order to evaluate if sufficient contact exists with the forum state. Although the Justices differed on how the stream of commerce doctrine should be applied, several at least *considered* how awareness effected the minimum contacts analysis. Justice Brennan deemed that awareness alone would be enough to assert jurisdiction.¹⁵³ Justice O'Connor opined that something more than mere awareness that a product could end up in a particular forum was necessary.¹⁵⁴ This is the very same sentiment expressed by the court in *Young*, though with respect to posting information to the internet rather than placing a product into the stream of commerce. By looking to stream of commerce jurisprudence, the *Young* test can be modified to address the concern of overly broad jurisdiction in the internet context without forcing plaintiffs to litigate in an inconvenient forum. Although the stream of commerce doctrine has not led to a clear personal jurisdiction mandate,¹⁵⁵ the underlying policy rationales are applicable and can help resolve the conflict between *Calder* and *Young*.

Thus, a new test is proposed. The test for online defamation cases should be the test adopted by the Supreme Court in *Calder*, with one slight modification. The analysis should consider whether the defendant was *aware* that his statements would have an effect in the forum state, rather than if there was an express targeting of the forum. An objective test, based on whether the defendant knew, or should have known, that their statements would cause harm in the forum should be considered in conjunction with the *Calder* effects analysis. This accounts for the breadth of the internet, without requiring the high threshold of "targeting" suggested by the *Young*

¹⁵¹ See *supra* Part III.A.

¹⁵² *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002).

¹⁵³ See *supra* Part II.C.

¹⁵⁴ See *supra* Part II.C.

¹⁵⁵ See *supra* Part II.C.

court.¹⁵⁶ The court in *Young* examined the content of the newspaper, as well as its advertisements to determine that the publication had a local focus that did not reach the Virginia forum.¹⁵⁷ Under an awareness test, a showing that the publishers of the *New Haven Advocate* knew or should have known that potential harm to the warden could occur in the Virginia forum would be sufficient to establish jurisdiction (for example, awareness of his place of employment, the subject of the allegedly defamatory article). In the social media context, a designation of a user's location on their profile would satisfy this standard, i.e., if defamatory comments are made on a business page, and that page designates the business location, the commenter would objectively be aware that damages could occur in that forum.

In both *Calder* and *Young* the defendants were aware of the location of their subjects and that any harm associated with their words would be felt in that forum. However, only one of those defendants had to litigate in the plaintiff's forum. In order to combat the possibility that jurisdiction would be too widespread, awareness of the forum should be part of the analysis of the effects. This would prevent jurisdiction from being asserted in a case where the actor was unaware of the location of the harm. Raising the level of requirement to targeting, however, unfairly limits the ability of plaintiffs to pursue defamation actions when the authors of allegedly defamatory statements knew full well where the harms of their words would be felt. Requiring awareness, but not targeting, would allow jurisdiction to be asserted if the publisher was aware of the location of its subject, even if the publication had no specific intent of reaching any particular forum. Relying on targeting, an intent-based standard, has many of the same difficulties as described in the stream of commerce. Internet users generally do not intend for their content to go viral. Even so, this uncontrolled proliferation can have widespread effect. By using a knowledge based standard, jurisdiction will be fairly limited to forums a defendant would reasonably expect to litigate in.

Thus, the result in *Young* would be to allow jurisdiction in the Virginia forum where the subject of the article was located. The result of *Calder* would be undisturbed. This "awareness" test would broaden the reach of jurisdiction, but not unduly so. Since the internet has such a widespread reach, broadening the reach of jurisdiction would protect plaintiffs. Jurisdiction is still subject to due process limits, so defendants are still protected, as *Calder* informs how the minimum contacts analysis should proceed in defamation cases.

¹⁵⁶ *Young*, 315 F.3d at 263.

¹⁵⁷ *Id.*

V. CONCLUSION

Personal jurisdiction doctrine has evolved significantly since *Pennoyer v. Neff*. As the pendulum has swung from sovereignty to fairness, it is important for courts to remember that the internet has created a new paradigm for how individuals interact—and harm—one another. Because of the ease of posting defamatory information on the internet, courts should be cognizant of the risk of harm to plaintiffs and the burdens they place on their recovery. Adopting an “awareness” component, in addition to the analysis put forth in *Calder*, when establishing personal jurisdiction gives plaintiffs a better opportunity to recover in the forum where they were harmed. Further, defendants should not be shielded from inconvenience if they knew which forum would bear the effects of their statements. Since due process still serves as a baseline in personal jurisdiction analysis, adding “awareness” to the calculus in online defamation cases is a means of focusing on what it means to have contact with a forum.

