

THE “LONGITUDE PROBLEM”: DETERMINING PURPOSEFUL AVAILMENT ON THE INTERNET’S HIGH SEAS

*Cassandra Simmons**

“Change is apparent in the position both of the stars and of the whole heaven, and this change must be reconciled with one of three possibilities. Either (1) both are at rest, or (2) both are in motion, or (3) one is at rest and the other in motion.”¹

INTRODUCTION

The ancients’ contemplation of the heavens resembles the American jurist’s deliberation of due process. In addition to the philosophic ends of the astronomer, navigators looked to the constellations to determine their position in navigating the land or seas. Similarly, jurists look to due process to determine the extent of their authority over a dispute in navigating litigating parties to resolution. One component of the due process analysis is personal jurisdiction.² The limits of a State’s exercise of personal jurisdiction rely on the history, precedent, and policy justifications expounding the meaning of the Constitution’s Due Process Clause.³ Yet no text alone can completely capture the

* J.D., Notre Dame Law School, 2026; B.S., B.A., Purdue University, 2023. Thank you to Professor Derek Muller, Professor Jay Tidmarsh, Joshua Geesling, and friends from the Notre Dame Law School community for invaluable feedback, comments, and guidance throughout the preparation of this Note. Thank you to my friends on the *Notre Dame Law Review* and to my fellow “mariners” who have made this Note and all other work possible and enjoyable. All errors are my own.

1 ARISTOTLE, ON THE HEAVENS 183 (W.K.C. Guthrie trans., 1939).

2 See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

3 See U.S. CONST. amend. XIV, § 1; see also Charles W. “Rocky” Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a “Generally” Too Broad, but “Specifically” Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. REV. 135, 141 (2005).

fullness of personal jurisdiction.⁴ Nor can a telescope capture the nature of the stars.⁵

When personal jurisdiction was determined by mere “presence,” a court’s exercise of jurisdiction stood on solid ground.⁶ Even when the Supreme Court added “reach” as an additional instrument for jurisdictional navigation in the mid-twentieth century, the disputes over jurisdiction still resembled mariners’ consistent navigation of the well-traveled waters of the Mediterranean.⁷ Then the Age of Discovery and the Internet Age dawned, respectively. Trans-Atlantic exploration confronted rulers and mariners of the seventeenth century with the “longitude problem”—a navigational inability to determine a ship’s accurate east-west position.⁸ For modernity, the seas of jurisdiction feel ever-changing with the tides of technological and economic growth, jurisprudential development, and political evolution.

In the twenty-first century, the internet’s rapid evolution challenges the accuracy of our instruments designed by precedent for measuring personal jurisdiction. The dual values of personal

4 See THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) (“But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.”); see also A.W.B. Simpson, *Legal Iconoclasts and Legal Ideals*, 58 U. CIN. L. REV. 819, 838 (1990) (“[T]he law is, in truth, a science . . . [I]ts home is on earth, it belongs to our imperfect state, and not to the perfection of heaven.” (quoting JOEL PRENTISS BISHOP, *THE FIRST BOOK OF THE LAW* bk. 2, at 58–59 (Boston, Little, Brown & Co. 1868))); GEORGE ELIOT, *MIDDLEMARCH* 140 (London, William Blackwood & Sons new ed. 1891) (“Language gives a fuller image, which is all the better for being vague.”).

5 As Immanuel Kant writes:

The observations and calculations of astronomers have taught us much that is worthy of admiration, but most important, probably, is that they have exposed for us the abyss of our *ignorance*, which without this *information* human reason could never have imagined to be so great; reflection on this ignorance has to produce a great alteration in the determination of the final aims of the use of our reason.

IMMANUEL KANT, *CRITIQUE OF PURE REASON* 519 (§ II, A 575/B603) n.* (Paul Guyer & Allen W. Wood eds. & trans., 2d ed. 2025).

6 *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). *International Shoe v. Washington* characterized *Pennoyer* as standing for the proposition that “presence within the territorial jurisdiction of a court was prerequisite to [that court’s] rendition of a judgment personally binding him.” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

7 See *Int’l Shoe*, 326 U.S. at 321; Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 HARV. L. REV. 1821, 1821 (2003); William J.H. Andrewes, *Introduction*, in *THE QUEST FOR LONGITUDE* 1, 2 (William J.H. Andrewes ed., 1996) (“[U]nlike navigation in the well-traveled waters of the English and European coastal regions, [Atlantic] ocean voyages took mariners out of sight of land for several weeks.”).

8 Alan Stimson, *The Longitude Problem: The Navigator’s Story*, in *THE QUEST FOR LONGITUDE*, *supra* note 7, at 71, 80, 78–80.

jurisdiction—fairness and interstate federalism⁹—are distorted by the jarring sensation of being cast out to sea. Scholars bewail this symptom with criticisms of the internet’s threatened obsolescence of out-of-state sovereignty.¹⁰ As transactions get increasingly decentralized, depersonalized, and digital, Judge Easterbrook’s recommendation should give us greater pause: “Develop a sound law of [civil procedure] . . . then apply it to computer networks.”¹¹

In the story of oceanic navigation, it was not the astronomers or philosophers who solved the longitude problem, but a tinkering clock-maker.¹² In 1735, John Harrison unveiled the marine timekeeper “H1.”¹³ Considered to be the “first workable marine timekeeper ever constructed,” the H1 sea clock incorporated two frictionless, counter-weighted pendulums that could withstand a ship’s pitching and rolling and the dramatic temperature changes on the open sea.¹⁴ By 1759, Harrison designed three more marine chronometer models, each providing successive improvements in accuracy.¹⁵

While jurists do not have physical gears and counterweights to tinker with, their opinions are filled with references to substantive cues such as “purposeful availment,” “arise out of or relate to,” and “traditional notions of fair play and substantial justice.” And since no magical arrangement of words will *in themselves* unlock the rhythm of personal jurisdiction quite like the marine chronometer used time to translate mariner’s east-west position, we can evaluate the procedural arrangement of words firstly in the context of the principles that they represent, and secondly for their accuracy in extending or denying personal jurisdiction.

9 See *Int’l Shoe*, 326 U.S. at 316. But see Scott Dodson, *Personal Jurisdiction and Federalism*, 103 WASH. U. L. REV. 1 (2025) (arguing that personal jurisdiction should not include considerations of interstate federalism).

10 See *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1680 (1999) (“The seemingly borderless, transnational scope of Internet communications has made state sovereignty a common theme in commentaries . . .”).

11 Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 208 (emphasis omitted).

12 David W. Waters, *Nautical Astronomy and the Problem of Longitude*, in *THE USES OF SCIENCE IN THE AGE OF NEWTON* 143, 143–44, 159–61 (John G. Burke ed., 1983).

13 *Id.* at 160; DAVA SOBEL & WILLIAM J.H. ANDREWES, *THE ILLUSTRATED LONGITUDE: THE TRUE STORY OF A LONE GENIUS WHO SOLVED THE GREATEST SCIENTIFIC PROBLEM OF HIS TIME*, ch. 8, 93–105 (1998).

14 JONATHAN BETTS, *TIME RESTORED: THE HARRISON TIMEKEEPERS AND R.T. GOULD, THE MAN WHO KNEW (ALMOST) EVERYTHING* 88, 87–91 (2006).

15 *The Harrison Timekeepers H1, H2, H3 and H4*, REDFERN ANIMATION, <https://redfernanimation.com/the-harrison-timekeepers/> [https://perma.cc/JE4K-M9XM] (last visited Nov. 22, 2025).

The story behind the measurement of longitude can help us define the problem of measuring due process specifically in the context of personal jurisdiction in the internet age.¹⁶ While this is a massive undertaking, this Note aims to clarify one of the contours of the first prong of the minimum contacts test (which is only relevant to *specific* personal jurisdiction), commonly referred to as “purposeful availment,” in the context of internet sales and an emergent circuit split. Part I provides the general orientation of internet personal jurisdiction today, describing the internet’s effect on the historical development of the doctrine. Then, Part II outlines the relevant circuit split in four recent cases from the Sixth, Seventh, Eighth, and Ninth Circuits. Finally, Part III synthesizes common strands underlying each circuit’s methodological approach and outcomes, thus proposing a baseline for a future paradigmatic approach, and comments on some implications.

I. BACKGROUND

“A court may exercise its power only over defendants subject to personal jurisdiction in the court’s state.”¹⁷ A court’s exercise of personal jurisdiction extends via one of two avenues: general or specific.¹⁸ For general jurisdiction, a court’s jurisdiction extends over “any and all claims” for defendants “essentially at home” in the forum state.¹⁹ Scenarios of general jurisdiction include: (1) the defendant’s place of domicile; (2) the defendant’s place of incorporation or principal place of business; and (3) the connections between the defendant and forum that are so “continuous and systematic” such that the defendant is “essentially at home” in the given forum.²⁰ Specific jurisdiction, on the other hand, extends over a more limited class of claims where the suit “arise[s] out of or relate[s] to” the “defendant’s contacts with the forum.”²¹

16 “Albert Einstein once said, ‘If I were given one hour to save the planet, I would spend 59 minutes defining the problem and one minute resolving it.’” Michael Cooper, *Defining Problems: The Most Important Business Skill You’ve Never Been Taught*, NBC (Sept. 26, 2014, 15:16 EDT), <https://www.nbcnews.com/id/wbna56125046> [<https://perma.cc/685W-22GM>].

17 *AMB Media, LLC v. OneMB, LLC*, No. 23-5607, 2024 WL 2052151, at *2 (6th Cir. May 8, 2024).

18 *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021).

19 *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

20 *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945); *Goodyear*, 564 U.S. at 919, 924; *see also* *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014).

21 *Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408, 414 (1984); *see also* *Leading Cases*, 101 HARV. L. REV. 119, 260 (1987).

In the case of specific jurisdiction, a court evaluates whether the contacts of the defendant rise to the level that satisfies due process—commonly called the “minimum contacts” standard.²² Thus, in addition to a statutory grant, a plaintiff bears the burden of proving that the defendant “ha[s] certain *minimum contacts* with [the forum] such that . . . the suit does not offend ‘traditional notions of fair play and substantial justice.’”²³ The hallmark of specific jurisdiction is the emphasis on the *defendant’s* contacts.²⁴ Thus, all the different shades of application of the minimum contacts standard have been the Court’s navigation of balancing the “quality and nature of the defendant’s activity” with the essential element that “there be some act by which the defendant purposefully avails itself” of the forum’s protection and jurisdiction.²⁵

Understandably so, then, the standard is constantly confronted with changing circumstances that affect the quality and nature of a potential defendant’s contacts. Over the last several decades in particular, the internet has revolutionized commerce and outpaced traditional storefronts.²⁶ While acknowledging that “technological progress has increased the flow of commerce between States,” the Supreme Court has avoided drawing rigid boundaries around disputes arising from

22 See *Int’l Shoe*, 326 U.S. at 316. While courts differ on their analytical approaches, minimum contacts sufficient for specific personal jurisdiction typically satisfy three general prongs: (1) purposeful availment or purposeful direction, (2) relatedness, and (3) reasonableness. *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1090 (9th Cir. 2023).

23 *Int’l Shoe*, 326 U.S. at 316 (emphasis added) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

24 See, e.g., *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 108–09 (1987). *World-Wide Volkswagen Corp. v. Woodson* became the cornerstone of this principle when the Court held that a consumer’s unilateral activity cannot form the foundation for a defendant’s relationship with a forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); see also *Walden v. Fiore*, 571 U.S. 277, 289 (2014).

25 *Hanson*, 357 U.S. at 253.

26 See David R. Bell, Santiago Gallino & Antonio Moreno, *The Store is Dead—Long Live the Store*, MIT SLOAN MGMT. REV. (Mar. 1, 2018), <https://sloanreview.mit.edu/article/the-store-is-dead-long-live-the-store/> [<https://perma.cc/L9KL-UEDH>]; see also, e.g., Derek Thompson, *What in the World Is Causing the Retail Meltdown of 2017?*, ATLANTIC (Apr. 10, 2017), <https://www.theatlantic.com/business/archive/2017/04/retail-meltdown-of-2017/522384/> [<https://perma.cc/X59F-SD48>]; ET Online, *Retail Apocalypse: Macy’s, CVS, and Foot Locker Lead Wave of 15,000 Store Closures in 2025*, ECON. TIMES (Mar. 24, 2025, 21:32 IST), <https://economictimes.indiatimes.com/news/international/global-trends/retail-apocalypse-macys-cvs-and-foot-locker-lead-wave-of-15000-store-closures-in-2025/articleshow/119433473.cms?from=mdr> [<https://perma.cc/P24P-VWD9>]; Koen van Gelder, *E-commerce Worldwide—Statistics & Facts*, STATISTA (June 3, 2025), <https://www.statista.com/topics/871/online-shopping/#topicOverview> [<https://perma.cc/MX6U-JWG6>] (predicting e-commerce sales to reach over \$4.3 trillion in 2025).

internet transactions.²⁷ The Court—quite possibly exercising prudence—does not want to be too reactive and set the future of personal jurisdiction explicitly on the ever-shifting sand of technological development. The Court might also confidently trust that the core of due process which undergirds purposeful availment and minimum contacts is sufficient to weather the squall of technological change. Or the Court might simply not know where to draw the new lines and has pragmatically determined that any change would only affect the margins.

Whatever the motivation may be, the circuit courts happily divide over internet transactions and the exercise of their jurisdiction. In particular, a split among the circuits has recently emerged regarding whether a court may properly extend jurisdiction over a defendant when the relevant transaction is a plaintiff-initiated internet sale of a physical good.²⁸ Not only do the courts seem to differ in method of jurisdictional analysis, but they also set diverging factual thresholds.²⁹ The differences in method are significant because the circuits have aligned their personal jurisdiction precedents to different aspects of Supreme Court precedent—thereby creating a patchwork design for minimum contacts in the internet context. The differences in factual threshold are significant because the internet’s expansion of a seller’s potential buyers increases the likelihood that buyers are geographically dispersed.³⁰ Additionally, the structure of transactions and relationships between buyers and sellers has changed drastically; and these changes seem permanent.³¹ Another layer of complexity is added when

27 *Hanson*, 357 U.S. at 250–51; *See Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1029 n.4 (2021); *see also Walden*, 571 U.S. at 290 n.9. These recent decisions that are seen as landmark personal jurisdiction cases generally have expressly avoided internet contexts or applications. The inference is that the Court would like to leave the development and attempts to create a stable theory to the circuits to be evaluated on later.

28 The case noting the split, but not deciding the question itself, was the Ninth Circuit’s *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1095–96 (9th Cir. 2023) (first citing *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 165, 171–72 (2d Cir. 2010); then citing *NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 624–25 (7th Cir. 2022); then citing *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 953–54 (8th Cir. 2022); and then citing *Admar Int’l, Inc. v. Eastrock, LLC*, 18 F.4th 783, 787–88, 788 n.1 (5th Cir. 2021)).

29 *Compare Bros. & Sisters in Christ*, 42 F.4th at 953–54 (holding that one sale was insufficient to support jurisdiction) *with NBA Props.*, 46 F.4th at 625 (holding that one sale was sufficient to confer jurisdiction on the basis of the defendant’s sales structured towards the forum).

30 *See Jeonghye Choi, David R. Bell & Leonard M. Lodish, Traditional and IS-Enabled Customer Acquisition on the Internet*, 58 MGMT. SCI. 754 (2012).

31 Not only is this assertion supported by the sheer quantity of e-commerce transactions, *see U.S. Dep’t of Com., Quarterly Retail E-Commerce Sales: 4th Quarter 2024*, U.S. CENSUS BUREAU NEWS (Feb. 19, 2025, 10:00 EST), <https://www2.census.gov/historical/ecommerce>

the case’s factual circumstances include third-party marketplaces³² or social media.³³

In order to understand the current split at-issue among the circuits, it is necessary to begin with a brief history of internet jurisdiction. The broadest interpretation of internet jurisdiction was established by *Inset Systems, Inc. v. Instruction Set* in 1996.³⁴ There, the district court interpreted the purposeful availment requirement to include internet advertising activities on the basis of their continuous availability and readiness to service the forum.³⁵ This holding practically permitted jurisdiction in all fifty states for a seller merely advertising on a national scale via the internet.³⁶ Luckily for defendants, the *Inset* approach

/24q4.pdf [https://perma.cc/BLT7-4J8N] (“Total e-commerce sales for 2024 were estimated at 1,192.6 billion . . . [and] accounted for 16.1 percent of total sales.”) but also companies are specifically shaping and patenting their retailing experience to “maximize[] the likelihood that consumers will complete their purchases,” *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 73 F. Supp. 2d 1228, 1236 (W.D. Wash. 1999) (referencing expert testimony regarding Amazon’s 1-Click purchasing innovation), *vacated by* 239 F.3d 1343 (Fed. Cir. 2001).

32 See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 890 (2011) (Breyer, J., joined by Alito, J., concurring) (noting his concerns about the standards surrounding a defendant targeting of a forum in his concurrence when the situation includes websites, intermediaries, or pop-up advertising).

33 See generally Gregory C. Cook & Andrew Ross D’Entremont, *No End in Sight? Navigating the “Vast Terrain” of Personal Jurisdiction in Social Media Cases after Ford*, 73 ALA. L. REV. 621 (2022).

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

35 See *id.* at 164–65 (“The Internet . . . [is] designed to communicate with people and their businesses in every state. . . . Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. [The defendant] has therefore, purposefully availed itself of the privilege of doing business within [the forum].” *Id.* at 165.). Critics characterize the breadth of this interpretation as “all but [holding] that maintaining a website constitutes purposeful availment of every state in the country.” Carlos J.R. Salvado, *An Effective Personal Jurisdiction Doctrine for the Internet*, 12 U. BALT. INTELL. PROP. L.J. 75, 98 (2003).

36 See *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 727 (E.D. Pa. 1999) (“[F]ollowing the rationale of *Inset Sys.* would subject anyone who posted information on the Web to nationwide jurisdiction.”); Christopher M. Kindel, *When Digital Contacts Equal Minimum Contacts: How Fourth Circuit Courts Should Assess Personal Jurisdiction in Trademark Disputes over Internet Domain Names*, 78 N.C. L. REV. 2105, 2135 (2000); see also Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the “Interwebs,”* 100 CORN. L. REV. 1129, 1144–45 (2015) (presenting the paradox that the creation of minimum contacts through a website with every state or none means “[a]t least one of those positions ha[s] to be wrong,” *id.* at 1145).

became quickly eclipsed by a case out of the Western District of Pennsylvania³⁷ and so was never adopted by any of the circuit courts.³⁸

"The most influential test pertaining to Internet jurisdiction was set forth in a trademark infringement case, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*"³⁹ There, the district court outlined a "sliding scale" test which anchored its internet jurisdiction analysis in the level of intentional contact or engagement—later called "interactivity"—that a defendant pursued beyond its boundaries.⁴⁰ The court stated "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."⁴¹ In its decision, the district court relied on *CompuServe, Inc. v. Patterson*, a 1996 Sixth Circuit case, which had held that the defendant's "deliberate and repeated" website activity (i.e. "interactivity") was sufficient to meet the threshold for purposeful availment.⁴² Building off this formulation, the greater the interactivity of the website, the more likely that personal jurisdiction could be justly extended, and vice versa.⁴³

While courts found the framework established in *Zippo* attractive at first, the middle tier between "passive" and "active"—which required an examination of the "level of interactivity and commercial nature of the exchange of information that occurs on the Web site"⁴⁴—soon swallowed most if not all websites.⁴⁵ Additionally, the Supreme

37 *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1125 (W.D. Pa. 1997) ("[*Inset*] represents the outer limits of the exercise of personal jurisdiction based on the Internet.")

38 See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997); *Maynard v. Phila. Cervical Collar Co.*, 18 F. App'x 814, 816–17 (Fed. Cir. 2001).

39 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, 1149 (2005).

40 *Zippo Mfg. Co.*, 952 F. Supp. at 1124, 1123–24.

41 *Id.* at 1124.

42 *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265, 1264–1266 (6th Cir. 1996); *Zippo Mfg. Co.*, 952 F. Supp. at 1124; see also *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003).

43 *Zippo Mfg. Co.*, 952 F. Supp. at 1124 ("This sliding scale is consistent with well developed personal jurisdiction principles."). "*Zippo* created a continuum" where commercial activity over the internet fell into one of three general categories: "(1) passive, (2) interactive, or (3) integral to the defendant's business." Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601, 618 (2003). The court in *Zippo* did this rather explicitly by outlining each scenario and then sorting the relevant (albeit scattered) caselaw up until that point into the three categories. See *Zippo Mfg. Co.*, 952 F. Supp. at 1124.

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

45 See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 414–17 (2002) ("If all such sites are deemed interactive under the *Zippo* framework, however,

Court in *Bristol-Myers Squibb v. Superior Court of California* lodged a serious critique of the compatibility of a “sliding scale approach” with personal jurisdiction and due process.⁴⁶ The grand leap towards clarity that the *Zippo* test had offered soon placed all the courts back in their original conundrum: Should a court’s jurisdiction extend when a defendant’s “contacts” are made via an interactive website?⁴⁷ Despite this fact, many circuits adopted the test.⁴⁸

After the *Zippo* test fell out of favor, some circuits simply cabined its applicability to its specific context.⁴⁹ Other circuits returned or maintained fidelity to their traditional mechanisms for evaluating “minimum contacts.”⁵⁰ Still other circuits shifted away from strict application of the *Zippo* test and either blended or replaced it with the *Calder* “effects test.”⁵¹

On the books since 1984, the *Calder* effects test emphasized inquiry of “the relationship among the defendant, the forum, and the litigation” by looking to the effects of a defendant’s actions on the forum.⁵² The test asks “whether the defendant: ‘(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm

they will all subject the site owner to universal jurisdiction, returning us to a solution like the one reached in [*Inset*].” *Id.* at 417.).

46 *Bristol-Myers Squibb Co. v. Superior Ct.*, 582 U.S. 255, 264 (2017) (“[T]he [court’s] ‘sliding scale approach’ is difficult to square with our precedents.”).

47 See A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 87–88. Not only was *Zippo* criticized for its inadequacy in the specific jurisdiction context, but some courts even noted its uselessness in a general personal jurisdiction analysis. See *Cossaboon v. Me. Med. Ctr.*, 600 F.3d 25, 36 n.5 (1st Cir. 2010); *Tamburo v. Dworkin*, 601 F.3d 693, 703 n.7 (7th Cir. 2010); *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 710–12 (8th Cir. 2003).

48 See, e.g., *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999); *ALS Scan, Inc. v. Digit. Serv. Consultants, Inc.*, 293 F.3d 707, 713–14 (4th Cir. 2002); *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 251–52 (2d Cir. 2007) (finding it useful for the limited statutory inquiry and noting other circuits’ adoptions); *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 431 n.3 (7th Cir. 2010) (“[T]he interactivity of [a] website is relevant to, but not dispositive of, the sufficiency of those contacts.”).

49 See, e.g., *Revell v. Lidov*, 317 F.3d 467, 471–72 (5th Cir. 2002) (“*Zippo*’s scale does more work with specific jurisdiction—the context in which it was originally conceived.” *Id.* at 471.). For a helpful visualization of the relatively recent state of the *Zippo* test in the circuit courts, see Trammell & Bambauer, *supra* note 36, at 1150 fig. 1.

50 See, e.g., *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1355 n.10, 1356–57 (11th Cir. 2013).

51 See Berman, *supra* note 45, at 417 & n.432 (citing a sample of cases that rely on the “effects test”).

52 *Calder v. Jones*, 465 U.S. 783, 788, 788–89 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

that the defendant knows is likely to be suffered in the forum state.’”⁵³ In *Panavision International v. Toeppen*, the Ninth Circuit applied the *Calder* “effects test” to a trademark dispute which included conduct in cyberspace—the first case to apply it to a case involving the internet at a circuit level, fourteen years after the test was announced.⁵⁴

The splintering approaches to specific jurisdiction in the wake of *Zippo*’s wane and *Calder*’s renaissance leaves internet-context disputes on shaky and unpredictable ground. Not only do jurisdictions have differing methods more generally, but also any test’s applicability might vary according to the dispute or injury in a given case.⁵⁵ Additionally, the unfolding story of internet jurisdiction reveals deeper questions of state authority in the “Information Society.”⁵⁶ It is against this backdrop that the current circuit split, added to most recently by *AMB Media v. OneMB*⁵⁷ in the Sixth Circuit, emerges.

II. CIRCUIT SPLIT

So, for the purposes of personal jurisdiction, does a company’s single electronic sale of a physical product constitute *purposeful availment* of a forum where the plaintiff generated the sale? The Ninth Circuit concludes yes.⁵⁸ The Eighth Circuit concludes no, one sale is insufficient.⁵⁹ The Seventh Circuit characterizes a “single sale” in the context of a sales arrangement as sufficient for establishing minimum contacts.⁶⁰ And the Sixth Circuit implies that a single transaction needs a higher level of “affirmative targeting.”⁶¹ In addition to the divided outcomes, the issue distills the distinctive methodologies of each circuit. The Eighth Circuit applies a five-factor guided analysis that leans

53 *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1091 (9th Cir. 2023) (quoting *Will Co. v. Lee*, 47 F.4th 917, 922 (9th Cir. 2022)).

54 *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1318, 1321–22 (9th Cir. 1998); *cf.* *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 420 (9th Cir. 1997) (“However, we don’t see this as a *Calder* case.”).

55 For example, some scholars make a valiant attempt to clarify the relationship between all the specific jurisdiction tests, and in the process make a persuasive demonstration of the confusion facing the courts. See C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 614–25 (2006).

56 See Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1951 (2005).

57 *AMB Media, LLC v. OneMB, LLC*, No. 23-5607, 2024 WL 2052151 (6th Cir. May 8, 2024).

58 See *Herbal Brands*, 72 F.4th at 1095.

59 *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 953 (8th Cir. 2022).

60 See *NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 617, 625–27 (7th Cir. 2022).

61 *AMB Media*, 2024 WL 2052151, at *5.

heavily on relatedness to narrow a defendant’s contacts.⁶² The Seventh Circuit applies a three-part standard that emphasizes whether the defendant structured their sales towards the forum.⁶³ The Sixth Circuit also applies a three-part standard but looks to regularity of commerce with the forum.⁶⁴ And the Ninth Circuit takes differing approaches to “purposeful direction” and “purposeful availment” triggered by the type of dispute in the facts.⁶⁵

In addition to the circuits that have specifically reviewed this question, the First, Second and Fifth Circuits have expressed fortuitous decisions in similar, or at least relevant, disputes. The First Circuit—in a three-step, fact-specific inquiry regarding online activities and a foreign defendant—held that the defendant could have reasonably anticipated the exercise of personal jurisdiction as a result of “voluntary service of the U.S. market and its not insubstantial income.”⁶⁶ The Second Circuit looked to the “totality of [the d]efendants’ contacts with the forum state” and determined that an employee’s single act combined with their employer’s extensive business activity in a forum gave rise to personal jurisdiction over the employee.⁶⁷ The Fifth Circuit, on the other hand, explicitly applied the *Zippo* framework and found that “[m]erely running a website that is accessible in all 50 states, but that does not specifically target the forum state, is not enough to create the ‘minimum contacts’ necessary to establish personal jurisdiction in the forum state.”⁶⁸

As the circuits face increasing pressures for updates to their “jurisprudence on personal jurisdiction in the age of internet commerce,”⁶⁹ the Supreme Court continues to grapple with clarifying the boundaries of personal jurisdiction in completely concrete or physical disputes.⁷⁰ Thus, the most recent Supreme Court holdings that are available to the circuits translate rather messily to the internet context.⁷¹ The advantage, however, is that the circuits function as

62 *Bros. & Sisters*, 42 F.4th at 952.

63 *See NBA Props.*, 46 F.4th at 623.

64 *AMB Media*, 2024 WL 2052151, at *3.

65 *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1090–91 (9th Cir. 2023).

66 *Plixer Int’l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 10, 6–7 (1st Cir. 2018).

67 *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 164, 164–65 (2d Cir. 2010).

68 *Admar Int’l, Inc. v. Eastrock, L.L.C.*, 18 F.4th 783, 785 (5th Cir. 2021).

69 *Chloé*, 616 F.3d at 165.

70 The most recent developments in personal jurisdiction jurisprudence from the Supreme Court include *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), *Walden v. Fiore*, 571 U.S. 277 (2014), and *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021).

71 For example, one circuit cites *Nicastro* in supporting the proposition that “[t]he Supreme Court ‘has strongly suggested that a single sale of a product in a State does not

laboratories for articulating and concretizing the contours of specific jurisdiction in the internet context. Additionally, a slow-moving development of the jurisprudence could arguably preserve the foundational premises of due process that are meant to animate personal jurisdiction.⁷²

Either way, each of the circuits are tinkering with many of the available tools given by precedent to fashion a stable logic for extending or denying jurisdiction over a dispute arising out of an internet sale. Their attempts merit close inspection firstly for how they measure up to our established understanding of personal jurisdiction and secondly for their adaptability to technological and economic advancement.

A. Brothers & Sisters in Christ, LLC, v. Zazzle, Inc.: *A Punishing “Relatedness” Lens*

Brothers & Sisters in Christ (BASIC) owned a trademark for “love happens” and brought an action in federal court against the nonresident, internet-based seller Zazzle for federal claims related to the seller’s sale of a T-shirt with the trademarked logo.⁷³ Zazzle, a California-based corporation, contested the district court’s exercise of personal jurisdiction, arguing that a single sale combined with a nationally available webpage did not constitute sufficient contacts with the forum.⁷⁴ The District Court for the Eastern District of Missouri agreed and dismissed the case for lack of personal jurisdiction.⁷⁵ BASIC appealed to the Eighth Circuit in 2021.⁷⁶ On appeal, it argued that the court could properly exercise personal jurisdiction under either the circuit’s traditional five-factor analysis or, in the alternative, through the *Calder* effects test.⁷⁷ The Eighth Circuit panel, agreeing with the district court, held that Zazzle could not have reasonably anticipated

constitute an adequate basis for asserting jurisdiction over an out-of-state defendant.” Bros. & Sisters in Christ, LLC v. Zazzle, Inc., 42 F.4th 948, 953 (8th Cir. 2022) (quoting *Nicastro*, 564 U.S. at 888 (Breyer, J., concurring)). Yet another circuit rejects the drawing of a “rigid numerical line” because the Supreme Court has warned against “[t]alismanic jurisdictional formulas.” *NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 624–25 (7th Cir. 2022) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985)).

⁷² Cf. Michael Koch, Comment, *If Technology Is the Hare, Is Congress the Tortoise? Split Circuits in the Wake of DAHDA*, 59 B.C. L. REV. E. SUPP. 45 (2018).

⁷³ Bros. & Sisters in Christ, 42 F.4th at 950–51.

⁷⁴ *Id.*

⁷⁵ Bros. & Sisters in Christ, LLC v. Zazzle, Inc., No. 20-cv-280, 2021 WL 1380268, at *11 (E.D. Mo. Apr. 12, 2021).

⁷⁶ Brief of the Appellant, Bros. & Sisters in Christ, 42 F.4th 948 (No. 21-1917).

⁷⁷ Bros. & Sisters in Christ, 42 F.4th at 952, 954.

being haled into federal court in Missouri on the basis of a single sale and nationwide webpage.⁷⁸

The Eighth Circuit’s personal jurisdiction analysis hinged on the question of whether the exercise of personal jurisdiction in this case comports with the Due Process Clause of the U.S. Constitution. A due process analysis requires that the defendant “reasonably anticipate being haled into court” as a result of their conduct and connection with the forum.⁷⁹ Thus, BASIC bore the burden of proving that Zazzle had sufficient minimum contacts with Missouri and that the dispute arose out of or related to those contacts.⁸⁰ In order to determine whether BASIC met these requirements, the court weighed the evidence against five factors.⁸¹ The five factors include: “(1) the nature and quality of [defendant’s] contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) convenience of the parties.”⁸²

Beginning with the first factor, Zazzle’s contacts with the forum include all sales into Missouri—including the single T-shirt sale with the trademark infringing design—and its maintenance of a nationally available webpage that it uses to “advertise its goods, including the trademark infringing goods.”⁸³ Quantity, the second factor, includes then all sales activity into Missouri. Zazzle confirmed lots of goods from its “successful website” are shipped into Missouri.⁸⁴ However, the third factor, relatedness, requires that the court only look to “Zazzle’s contacts with Missouri related to BASIC’s claims” in determining specific jurisdiction.⁸⁵ On account of BASIC’s failure to prove relation of webpage maintenance and other sales activities with the trademark dispute, the court winnowed out all Missouri-related contacts until the single “love happens” T-shirt sale was all that remained.⁸⁶ Thus, “[a]ll BASIC alleges is that a Missouri consumer accessed Zazzle’s nationally

78 *See id.* at 954.

79 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

80 *Bros. & Sisters in Christ*, 42 F.4th at 951–52.

81 *See id.* at 952.

82 *Id.* (alteration in original) (quoting *Whaley v. Esebag*, 946 F.3d 447, 452 (8th Cir. 2020)). The court noted that the first, second, and third factors hold “primary importance”; the fourth and fifth factors, on the other hand, “carry less weight.” *Id.* (quoting *Whaley*, 946 F.3d at 452). The Eighth Circuit’s five-factor test is also reminiscent of the five factors distilled in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985).

83 *Bros. & Sisters in Christ*, 42 F.4th at 952.

84 Brief of the Appellee at 12, *Bros. & Sisters in Christ*, 42 F.4th 948 (No. 21-1917).

85 *Bros. & Sisters in Christ*, 42 F.4th at 952, 952–53.

86 *Id.* at 953.

available website and purchased a shirt” which hardly counted as Zazzle deliberately reaching out beyond its home specifically into Missouri.⁸⁷ Compared to the first three factors counseling against specific jurisdiction, the fourth and fifth factors of state interest and litigants’ convenience do not have a strong counter.⁸⁸

After concluding the totality of the circumstances weighed against granting personal jurisdiction, the Eighth Circuit then looked to BASIC’s second claim: that the *Calder* effects test grants a separate and sufficient ground for jurisdiction. According to Eighth Circuit precedent, “the *Calder* test [is] merely . . . an additional factor to consider when evaluating a defendant’s relevant contacts with the forum state” and cannot grant jurisdiction on the basis of “mere effects.”⁸⁹ In addition to absorption of the *Calder* effects test into the relatedness factor, BASIC also failed on two of the three prongs because Zazzle’s activities were neither intentional nor expressly aimed at Missouri.⁹⁰

Under a favorable light, the Eighth Circuit’s five-factor approach affords flexibility in an area of law that typically becomes a fact-specific inquiry. The Eighth Circuit synthesized the five factors from a set of foundational Supreme Court cases in an effort to grasp the principles animating due process requirements for personal jurisdiction.⁹¹ As long as personal jurisdiction and due process have maintained consistent goals, then the five factor test aligns with Justice Kagan’s statement in *Ford Motor Co.* that the rules of personal jurisdiction “reflect two sets of values—treating defendants fairly and protecting ‘interstate federalism.’”⁹² For example, separating quantity and relatedness into different factors allows for future defendants to meet the threshold of “continuous and systematic” without applying as high of a standard of relatedness as demanded here.⁹³ Obviously this advantages the Eighth Circuit in that clarification by the Supreme Court or even by later cases before a future Eighth Circuit can be integrated more seamlessly than if it were a rigid framework.

87 *Id.*

88 *See id.* at 953–54.

89 *Id.* at 954 (quoting *Johnson v. Arden*, 614 F.3d 785, 796–97 (8th Cir. 2010)).

90 *Id.*

91 *See Aftanase v. Econ. Baler Co.*, 343 F.2d 187, 195–97 (8th Cir. 1965). The court distills the five factors from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Travelers Health Ass’n v. Virginia ex rel. State Corp. Commission*, 339 U.S. 643 (1950); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); and *Hanson v. Denckla*, 357 U.S. 235 (1958).

92 *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

93 *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011).

Additionally, the particular emphasis on the connection between the defendant’s contacts and the underlying dispute in this case follows the Supreme Court’s lead. There is a strong line of cases from the Supreme Court emphasizing that “the defendant’s suit-related conduct must create a substantial connection with the forum State.”⁹⁴ Derived from the Due Process Clause of the Fourteenth Amendment, this narrowing of the defendant’s more general “conduct” to “suit-related conduct” tries to further triangulate the extension of jurisdiction among the characteristics of the *defendant*, *dispute*, and *forum*.

Despite the five-factor approach’s long-standing history and flexibility to respond to recent standards, the Eighth Circuit’s approach specifically in *Brothers & Sisters in Christ* applies too punishing of a “relatedness” lens to the internet context. After having implied that the nature and quality and quantity of contacts favored jurisdiction, the relatedness factor upended the first two factors and dominated the entire analysis. In the wake of *Ford Motor Co.* and *Bristol-Myers Squibb*—two cases where the Court emphasized the need for the *dispute* to relate to the *forum* and not just the *defendant*—the Eighth Circuit seems justified in demanding the defendant’s conduct relating to the forum must also be the same contacts that form the basis of the suit in the first place.⁹⁵ However, this characterization puts all the jurisdictional “ducks” in disarray. Specifically, in *Walden v. Fiore*—the case that described the “suit-related conduct” element—the Court clarified that the “plaintiff cannot be the only link between the defendant and the forum.”⁹⁶ Thus, the Eighth Circuit’s relatedness mandate overly constricts the relevant contacts too much to set up any claim for internal inconsistency with a fuller triangulation of minimum contacts. Rather than too much jurisdiction, this approach grants too little.

There is another problem with the Eighth Circuit’s “relatedness” lens that looms in the background of all applications of specific personal jurisdiction.⁹⁷ As internet commerce suspends conduct further and further from physical reality, “relatedness” itself will increasingly become an abstracted and interpretive concept—much like “fair play”

94 *Walden v. Fiore*, 571 U.S. 277, 284, 283–84 (2014); *see also* *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770 (1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

95 *See Ford Motor Co.*, 141 S. Ct. at 1031 (“The only issue is whether those contacts are related enough to the plaintiffs’ suits.”); *Bristol-Myers Squibb Co. v. Superior Ct.*, 582 U.S. 255, 265 (2017) (explaining that certification of the class failed because there was not enough of a “connection” between the claims and the forum).

96 *Walden*, 571 U.S. at 284, 285.

97 Subjectivity will reemerge as a problem throughout the entire Note.

and “reasonableness” already are today.⁹⁸ Hinging what is fundamentally an interpretation of “purposeful availment” on “relatedness” as we understand it in 2025 does not give insight for the future of virtual reality, blockchain, and international markets.⁹⁹ Purposeful availment itself is already an instantiation of logic invoked by due process. If all the theories were to coalesce and settle around “relatedness” as the key to internet personal jurisdiction, the daisy chain meant to anchor a court’s specific jurisdiction to its constitutional grounding might fatally overextend.¹⁰⁰

Furthermore, conflicting and uncertain precedents are the downside to the flexibility afforded by the five-factor approach. When due process is concerned, a court’s exercise of personal jurisdiction is always limited by the idealistic prose that it “does not offend ‘traditional notions of fair play and substantial justice.’”¹⁰¹ While notice has generally fallen out of the picture in a due process analysis, some argue that courts should readopt a notice-inclusive approach to personal jurisdiction to make the doctrine more compatible with these traditional notions underlying principles of due process.¹⁰² Especially because the relatedness factor in this scenario denies jurisdiction and there is very little indication of what would actually qualify as “related enough” for the internet context, the Eighth Circuit’s conclusion is a brittle projection of notice going forward.

In summary, the Eighth Circuit’s approach to personal jurisdiction in the internet context falls short because it overanalyzes the elements of personal jurisdiction to the point that notice and the state’s interests in serving as a forum for vindication of wrongs to its citizens

98 See generally Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941 (2023).

99 But see *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944) (“To what extent it should be carried over to the totally new problems presented by the very different modes of transportation and communication that . . . have already [been] introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship.”).

100 Increasingly, the Court has emphasized “federalism and territorial limitations on state power” which has “breathed new life into *Pennoyer’s* antiquated notions of jurisdiction.” Robert M. Bloom & Janine A. Hanrahan, *Back to the Future: The Revival of Pennoyer in Personal Jurisdiction Doctrine and the Demise of International Shoe*, 56 SAN DIEGO L. REV. 581, 613 (2019); see also Brittney Lane Kubisch, *Finding Jurisdiction in Due Process*, 101 NOTRE DAME L. REV. 915, 918–20 (2026).

101 *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

102 See Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 100–04 (2018); see also Kubisch, *supra* note 100, at 957–59.

are lost. Despite the loss of perspective, there are benefits to the overall flexibility (most useful in non-internet cases) and rigorous demand for a dispute’s relation to the forum.

B. NBA Properties v. HANWJH: Rejecting “It Was All Their Idea”

NBA Properties is a sports association that owns the trademarks for the teams of the National Basketball Association.¹⁰³ In September of 2020, an investigator, on behalf of NBA Properties, purchased a single pair of shorts from HANWJH, a foreign-based, online retailer that operates a storefront on Amazon.com.¹⁰⁴ Their products include sports-fan apparel with logos infringing upon several trademarks owned by NBA Properties.¹⁰⁵ After delivery to Illinois, NBA Properties filed a federal trademark claim in the district court for the Northern District of Illinois.¹⁰⁶ There, the district court held that HANWJH’s willingness and ability to service sales into Illinois, even though through a third-party website, constituted sufficient “minimum contacts.”¹⁰⁷ HANWJH contested personal jurisdiction in its appeal to the Seventh Circuit.¹⁰⁸ However, the Seventh Circuit confirmed HANWJH had “availed itself of the Illinois market in offering and shipping a product to the forum.”¹⁰⁹

The Seventh Circuit has a three-part test for establishing specific personal jurisdiction over an out-of-state or foreign defendant.¹¹⁰ The test requires the traditional factors of purposeful availment, injury arising out to the forum-related activities, and comportment with “traditional notions of fair play and substantial justice.”¹¹¹ Over the past nearly two decades, the Seventh Circuit has developed a body of

103 NBA Props., Inc. v. HANWJH, 46 F.4th 614, 617 (7th Cir. 2022).

104 *Id.*

105 *Id.*

106 *Id.* at 617–18.

107 NBA Props., Inc. v. P’ships & Unincorporated Ass’ns Identified in Schedule “A,” 549 F. Supp. 3d 790, 794 (N.D. Ill. 2021). Specifically, the district court relied on Seventh Circuit precedent outlining minimum contacts being met through the combination of including the forum in “ship-to” options, the confirmation email of the purchase, and the successful shipping of the good to the forum. *See id.*; Curry v. Revolution Lab’s, LLC, 949 F.3d 385, 399 (7th Cir. 2020); Illinois v. Hemi Grp. LLC, 622 F.3d 754, 758 (7th Cir. 2010). Surprisingly, the investigator’s intent in purchasing the pair of shorts—supposedly to create jurisdiction—did not defeat the minimum contacts HANWJH had established. *NBA Props.*, 46 F.4th at 619.

108 *See* Reply Brief of Defendant-Appellant, HANWJH, *NBA Props.*, 46 F.4th 614 (No. 21-2909).

109 *NBA Props.*, 46 F.4th at 627, 624–25.

110 *Id.* at 623 (citing Curry, 949 F.3d at 398).

111 *Id.* (quoting Curry, 949 F.3d at 398).

caselaw translating the general principles of personal jurisdiction into preliminary principles for the online context.¹¹² Most applicable to its minimum contacts analysis in *NBA Properties*, the Seventh Circuit invoked *uBID v. GoDaddy*,¹¹³ *Illinois v. Hemi Group*,¹¹⁴ and *Matlin v. Spin Master*.¹¹⁵ Additionally, the court looked to the additional case relied upon by the district court's analysis: *Curry v. Revolution Laboratories*.¹¹⁶

With regards to the purposeful availment analysis of HANWJH's contacts, the Seventh Circuit strikingly declared that these precedents "[did] not require [the court] to break new ground."¹¹⁷ Through establishing an online store through Amazon.com, HANWJH exercised analogous conduct as the defendant in *Curry*. HANWJH established a storefront on a third-party website, sent a confirmation receipt to the Illinois purchaser, and then shipped the product to Illinois.¹¹⁸ The Seventh Circuit in *Curry* characterized each of these activities as a "sales arrangement" that purposefully established commercial contacts such "that the defendant reasonably could foresee that its product would be sold in the forum."¹¹⁹ As counsel for NBA Properties argued in oral argument, rather than viewing the dispute as only one contact, "it's the acts leading up to the sale taking place and following that sale *collectively* that show and establish" minimum contacts.¹²⁰

112 See *id.* at 622 ("We have applied these principles to online retailers.").

113 In *uBID*, the defendant GoDaddy fell within the forum's jurisdiction for "thoroughly, deliberately, and successfully exploit[ing] the Illinois market" to the point that it could not "point to its hundreds of thousands of customers in Illinois and tell us 'It was all their idea.'" *Id.* at 622 (quoting *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 427–428 (7th Cir. 2010)).

114 *Id.* at 622–23. Additionally, in *Hemi Group* personal jurisdiction was upheld over a defendant that chose not to exercise its ability to exclude forums from its customer base and sold over 300 packs of cigarettes to the forum—far fewer contacts than seen previously in *uBID*. *Illinois v. Hemi Grp., LLC*, 622 F.3d 754, 755, 760 (7th Cir. 2010).

115 *NBA Props.*, 46 F.4th at 623. However, in *Matlin*, the Seventh Circuit did not find minimum contacts from proof of a single purchase to contest royalties between employees and their former employer. *Matlin v. Spin Master Corp.*, 921 F.3d 701, 703–04, 707 (7th Cir. 2019). The sale was insufficient on the basis of scale of contact, weak relationship between the plaintiff and forum, and timing of the sale which had occurred *after* the filing of the suit. *Id.* at 706–07.

116 See *NBA Props.*, 46 F.4th at 621; *NBA Props., Inc. v. P'ships & Unincorporated Ass'ns Identified in Schedule "A,"* 549 F. Supp. 3d 790, 794–95 (N.D. Ill. 2021); see also *Curry v. Revolution Lab's, LLC*, 949 F.3d 385 (7th Cir. 2020).

117 *NBA Props.*, 46 F.4th at 624.

118 See *id.*; cf. *Curry*, 949 F.3d at 399 (explaining the defendant's conduct).

119 *Curry*, 949 F.3d at 399, 399–400 (citing *Keeton v. Hustler Mag.*, 465 U.S. 770, 781 (1984)).

120 Oral Argument at 15:53–16:04, *NBA Props.*, 46 F.4th 614 (No. 21-2909) (emphasis added), https://media.ca7.uscourts.gov/sound/2022/lp.21-2909.21-2909_04_07_2022.mp3 [<https://perma.cc/LBR7-APTZ>].

There are a few repercussions of this characterization. First, the “sales arrangement” characterization shifts the analysis away from determining a holding on whether a “single sale” constitutes minimum contacts. Additionally, the adoption of a strict numerical approach would violate the Supreme Court’s express rejection of “[t]alismanic jurisdictional formulas”¹²¹ in personal jurisdiction analyses where the standard should instead be “fair play and substantial justice.”¹²² Lastly, with a view towards the collective activities in which HANJWH had to engage, the court could reject the appeal to fairness with the defendant’s “unilateral” argument.¹²³ In its opinion, the Seventh Circuit stated:

Here, HANWJH shipped a product to the forum only after it had structured its sales activity in such a manner as to invite orders from Illinois and developed the capacity to fill them. It cannot now point to its “customers in Illinois and tell us, ‘It was all their idea.’”¹²⁴

The benefit of the Seventh Circuit’s approach is that it remains faithful to the intuition that clear-cut, rigid jurisdictional rules that draw lines in the metaphorical sand on facts such as number of sales or number of interactions are inappropriate for a personal jurisdiction analysis.¹²⁵ Additionally, *NBA Properties* demonstrates the versatility of the Seventh Circuit’s precedent to adapt to varying factual scenarios in the internet context. This allows jurisdiction over differing quantities to be shipped into a forum, either by multiple plaintiffs or one large single transaction, such that the relation between the transaction and the forum is *more substantive* than a one-off unilateral transaction.¹²⁶

However, the Seventh Circuit’s holding in *NBA Properties* might not be that helpful in other contexts because the dispute at hand—

121 *NBA Props.*, 46 F.4th. at 625 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985)).

122 *See Burger King*, 471 U.S. at 486 (quoting *Kulko v. Superior Ct.*, 436 U.S. 84, 92 (1978)).

123 *See NBA Props.*, 46 F.4th at 625, 624–25; Brief and Short Appendix of Defendant-Appellant at 4–6, *NBA Props.*, 46 F.4th 614 (No. 21-2909); Reply Brief of Defendant-Appellant, HANWJH at 4–6, *NBA Props.*, 46 F.4th 614 (No. 21-2909) (arguing a “single sham transaction” was not sufficient evidence to show personal jurisdiction, *id.* at 6).

124 *NBA Props.*, 46 F.4th at 625 (quoting *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 428 (7th Cir. 2010)). Following its purposeful availment analysis, the court determined that the defendant’s listing and completed sale were sufficiently related to the harm of customer confusion, and that subjecting the defendant to jurisdiction in Illinois did not offend the notions of fair play and substantial justice. *Id.* at 625–27.

125 *Burger King*, 471 U.S. at 486 & n.29.

126 *Cf.* Anthony Petrosino, Note, *Rationalizing Relatedness: Understanding Personal Jurisdiction’s Relatedness Prong in the Wake of Bristol-Myers Squibb and Ford Motor Co.*, 91 FORDHAM L. REV. 1563, 1585–87 (2023).

trademark infringement—has a low threshold for an actionable injury. In other factual circumstances, where the injury required for a plausible action is higher than mere customer “confusion,”¹²⁷ the “sales arrangement” approach might not hold much water. Where harm is more demanding or complex, there will need to be further exploration as to what constitutes the “something more” because the arrangement of the business might not relate enough to the harm. Another narrowing factor is that this defendant was not only out-of-state but a foreign-based seller. Thus, there is a possibility that the court implicitly considered the fact that the defendant did not have a “home” jurisdiction within the United States.

Lastly, the articulation of the “sales arrangement” and the reliance by the court on the number of choices going into setting up a storefront with a third-party marketplace might be an overestimation of the level of agency going into those choices. It is hard to imagine that the single omission of deselecting a forum combined with packaging a single order, which generally does not involve any conscious awareness of the forum it is being sent to, constitutes minimum contacts. Especially because Amazon and other third-party marketplaces depend on and attract sellers to their platforms by advertising ease of set-up and national capability,¹²⁸ it could be considered almost too easy for possible defendants to structure their business towards all the forums such that notice is defeated.¹²⁹ Raising the threshold will help put future potential defendants on notice to more cautiously arrange their business activities.

In summary, the Seventh Circuit’s “sales arrangement” paradigm provides flexibility but does not make progress for how personal jurisdiction unfolds in new contexts like the internet. The court’s attempt to prevent framing plaintiffs as a scapegoat for problematic conduct traces a loose perimeter around all sales behavior.

127 Lanham Trade-Mark Act, 15 U.S.C. §§ 1114(1)(a), 1125(a) (2018).

128 See Amazon Staff, *Many Sellers Say “Amazon’s Definitely the Best Bang for the Buck.” Here’s Why*, AMAZON NEWS (Dec. 19, 2024), <https://www.aboutamazon.com/news/small-business/amazon-third-party-sellers-success> [<https://perma.cc/F7HV-9PN8>]; see also Richard D. Wang & Cameron D. Miller, *How Third-Party Sellers Can Make Amazon Work for Them*, HARV. BUS. REV. (July 15, 2020), <https://hbr.org/2020/07/how-third-party-sellers-can-make-amazon-work-for-them> [<https://perma.cc/3EWD-NAT4>].

129 There is little pity for this argument because sellers in this position are usually selling trademark-infringing goods, which is de facto harmful, and forums have interest in welcoming cases to vindicate the patent-owner’s rights.

C. Herbal Brands v. Photoplaza: *A Categorical Fork in the Road*

Herbal Brands is a health, wellness, fitness, and nutrition brand that sells its products through authorized retailers from its principal place of business in Arizona.¹³⁰ The authorization of selling is meant to preserve product quality, brand reputation, and consumer trust.¹³¹ In 2021, Herbal Brands filed a complaint in Arizona federal court against a set of defendants (“Photoplaza”) for the unauthorized selling of their products on two Amazon storefronts leading to over 23,000 sales.¹³² The district court dismissed the suit for lack of personal jurisdiction on the grounds that Herbal Brands had “failed to meet its burden of demonstrating that Defendants ‘expressly aimed’ their conduct at Arizona.”¹³³ However, the Ninth Circuit, disagreeing with the district court, found that the exercise of specific personal jurisdiction was supported by the defendants’ operation of a universally accessible interactive website, sales to the forum, and failure to alter their sales structure after receiving three cease-and-desist letters from Herbal Brands.¹³⁴

The Ninth Circuit conducts a three-part test for specific personal jurisdiction; the analysis tests for purposeful direction or purposeful availment of the forum, a harm arising out of the defendant’s contacts with the forum, and reasonableness in exercising jurisdiction.¹³⁵ Compared to other circuits, the first step—purposeful direction or purposeful availment—is comprised of two separate tests triggered by the type of claim at issue which both test for “whether defendants have voluntarily derived some benefit” such that their presence in court is not based on insufficient contacts.¹³⁶ For claims involving contracts and unintentional torts, courts apply the purposeful availment test which

130 Herbal Brands, Inc. v. Photoplaza, Inc., 72 F.4th 1085, 1088 (9th Cir. 2023).

131 In the modern age, manufacturers often deal with third parties reselling their goods through “low-cost, direct access to consumers” on online storefronts with e-commerce platforms such as Alibaba, eBay, and Amazon. Robert W. Payne, *Dealing with Unauthorized Online Dealers: Sales of Genuine Products*, ABA BUS. L. TODAY (July 22, 2014), https://www.americanbar.org/groups/business_law/resources/business-law-today/2014-july/dealing-with-unauthorized-online-dealers/ [https://perma.cc/2NLK-NRE9].

132 *Herbal Brands*, 72 F.4th at 1088–89. Specifically, the complaint alleged trademark infringement, false advertising, and “tortious interference with contracts and business relationships.” See Complaint for Damages, Injunctive and Other Relief, for Violations of 15 U.S.C. § 1114, 15 U.S.C. § 1125(a), and Related Claims at 1, *Herbal Brands, Inc. v. Photoplaza, Inc.*, 2021 WL 5299677 (D. Ariz. 2021) (No. cv-21-00577).

133 *Herbal Brands*, 72 F.4th at 1089.

134 *Id.* at 1091–97.

135 *Id.* at 1090.

136 *Id.*

“typically consists of evidence of the defendant’s actions *in the forum*”¹³⁷ which invoke the “benefits and protections”¹³⁸ of the forum state such that “as a quid pro quo—‘submit [the defendant] to the burdens of litigation in that forum.’”¹³⁹ For claims amounting to an intentional tort, courts apply the purposeful direction test which “consists of evidence of the defendant’s actions *outside the forum* state that are *directed at the forum*.”¹⁴⁰

As a practical matter, the Ninth Circuit explicitly applies the *Calder* effects test to evaluate whether the out-of-state contacts were directed at the forum.¹⁴¹ The *Calder* effects test looks for an intentional act expressly aimed at the forum and the defendant’s likely knowledge that harm would be suffered in the forum state.¹⁴² With trademark infringement constituting an intentional tort and the defendants’ likely knowledge of harm to Arizona being communicated by the cease-and-desist letters, the Ninth Circuit’s review of purposeful direction narrowed to whether the defendants’ actions were “expressly aimed” at Arizona.¹⁴³ In the internet context, Ninth Circuit precedent has established that the “expressly aimed” component can be satisfied through the operation of a website “in conjunction with ‘something more.’”¹⁴⁴

Interestingly, the level of “interactivity” of a website is a relevant but not dispositive factor for express aiming. High “interactivity” is not “something more” alone. Recently, the Ninth Circuit has clarified its precedents in holding that “an interactive platform ‘expressly aims’ its wrongful conduct toward a forum state when its contacts are its ‘own choice.’”¹⁴⁵ Accordingly, website interactivity is a valuable factor that courts can look to in considering the platforms attempts to make contacts.¹⁴⁶ Thus, the Ninth Circuit essentially treats the *Zipco* test as a factor nested within the *Calder* test and only triggered in a purposeful direction analysis.¹⁴⁷

137 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (emphasis added).

138 *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

139 *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

140 *Id.* at 803, 802–03 (emphasis added).

141 *Herbal Brands*, 72 F.4th at 1091.

142 *Id.*

143 *Id.*

144 *Id.* at 1092, 1091–92 (quoting *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011)).

145 *Briskin v. Shopify, Inc.*, 135 F.4th 739, 758 (9th Cir. 2025) (en banc) (quoting *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021)).

146 *Id.* at 757.

147 *See Herbal Brands*, 72 F.4th at 1091–92.

Instead, the Ninth Circuit held that when “a defendant, in its regular course of business, sells a physical product via an interactive website and causes that product to be delivered to the forum, the defendant ‘expressly aimed’ its conduct at that forum.”¹⁴⁸ Of emphasis in the holding are the requirements of the “regular course of business” element and the defendant’s causal relation to delivery into the forum (i.e. “control over distribution”).¹⁴⁹ Rather than requiring a certain number of sales, which the court expresses is “not preferred in this area of the law,” the court roots sufficient contacts in whether the sale—singular or multiple—occurs in the defendant’s regular course of business.¹⁵⁰ Here, Photoplaza’s operation of an Amazon storefront as a business entity and thousands of sales across the United States demonstrates its “genuine attempt to serve the market” of Arizona rather than a loose and attenuated connection.¹⁵¹

At first blush, the Ninth Circuit seems to be the perfect package. First, litigants have clarity of approach depending on the claims included in the complaint. Second, the system finds a home for the *Calder* effects test.¹⁵² Third, the *Zippo* test is consulted as a useful factor but is not given too much weight, which aligns with the general trend of treatment across circuits.

However, the parsing out of the first factor is a rather novel method for analyzing the purposeful availment prong in specific personal jurisdiction. The Ninth Circuit’s distinction between purposeful availment and purposeful direction stands on more persuasive grounds after Justice Kagan’s approach in *Ford Motor Co.* There, the Supreme Court majority distinguished “arise out of” from “relate to” in finding that personal jurisdiction could be exercised even if there was not a causal approach between the defendant’s contacts with the forum and the suit.¹⁵³ This methodological approach of applying tools

148 *Id.* at 1093.

149 *Id.* at 1094.

150 *Id.* at 1095.

151 *Id.* at 1095, 1094–95.

152 In the absence of traditional minimum contacts or where such contacts are affected by the “substantial[] complicat[ion] . . . that the only significant contacts a defendant has with the forum is through the Internet,” the *Calder* effects test is “useful in helping to analyze the proper assertion of jurisdiction.” Salvado, *supra* note 35, at 107.

153 *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021) (“None of our precedents has suggested that only a strict causal relationship between the defendant’s in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit ‘arise out of or relate to the defendant’s contacts with the forum.’ The first half of that standard asks about causation; but the back half, after the ‘or,’ contemplates that some relationships will support jurisdiction without a causal showing.”

from statutory interpretation to dicta of precedent is not a time-tested practice. Justice Alito, in his *Ford Motor Co.* concurrence, criticizes the practice as “unnecessary” and “unwise,” stating:

The Court parses this phrase “as though we were dealing with language of a statute,” and because this phrase is cast in the disjunctive, the Court recognizes a new category of cases in which personal jurisdiction is permitted: those in which the claims do not “arise out of” (*i.e.*, are not caused by) the defendant’s contacts but nevertheless sufficiently “relate to” those contacts in some undefined way.”¹⁵⁴

In the same way, parsing out “purposeful availment [or] purposeful direction” through judicial custom depends on the long-term stability of tort law and clear-cut categorizations of defendant’s conduct into two silos.¹⁵⁵

Additionally, the Ninth Circuit’s approach falls prey to the criticism lodged at any usage of a *Calder* effects test: What exactly constitutes “expressly aimed”? “Is it sufficient that the defendants are or should be aware that the primary *effects* of their conduct would be felt by the plaintiff in a particular state?”¹⁵⁶ Especially with the increased interconnectivity produced by the internet, the Ninth Circuit’s definition—website interactivity plus something more—might not satisfy intentionality in the long-run.

D. AMB Media v. OneMB: *Inverting the Zippo Test*

AMB Media is a Tennessee-based company in the market for digitizing physical media such as videos, photos, and other media through its product “LEGACYBOX.”¹⁵⁷ It has owned the trademark for Legacybox since 2014.¹⁵⁸ Beginning in 2020, several Arizona-based LLCs including OneMB began to acquire more customers in Tennessee through a similar service, marketing it under the name “MEMORYBOX.”¹⁵⁹ That same year in November, OneMB filed a trademark application for “DIGMYPICS MEMORYBOX” with the United States Patent and Trademark Office, which AMB Media

(citations omitted) (quoting *Bristol-Myers Squibb v. Superior Ct.*, 582 U.S. 255, 262 (2017)).

¹⁵⁴ *Id.* at 1033 (Alito, J., concurring) (citations omitted) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)).

¹⁵⁵ *See Herbal Brands*, 72 F.4th at 1090.

¹⁵⁶ Floyd & Baradaran-Robison, *supra* note 55, at 619 (emphasis added).

¹⁵⁷ *AMB Media, LLC v. OneMB, LLC*, No. 23-5607, 2024 WL 2052151, at *1 (6th Cir. May 8, 2024).

¹⁵⁸ *See id.*

¹⁵⁹ *Id.*

subsequently challenged.¹⁶⁰ Then in 2022, AMB Media filed suit in the Eastern District of Tennessee alleging trademark infringement and unfair competitive practices under both state and federal law.¹⁶¹ The district court dismissed the suit for lack of personal jurisdiction on the grounds that the threshold of purposeful availment had not been met.¹⁶² On appeal, the Sixth Circuit disagreed, finding that “if a company holds itself out to a jurisdiction’s business and does regular commerce there, it has fair warning that it could be subject to suit in that location.”¹⁶³

In cases of specific personal jurisdiction, Sixth Circuit precedent applies the *Mohasco* test.¹⁶⁴ This tripartite standard evaluates (1) the defendant’s purposeful availment of the forum, (2) claims that “arise from the defendant’s activities [in the forum],” and (3) a substantial connection between the defendant or consequences caused by the defendant with the forum such that the exercise of jurisdiction is reasonable.¹⁶⁵ Because the district court rejected personal jurisdiction on the basis of purposeful availment, the Sixth Circuit looked first to its relevant caselaw—*Neogen Corp. v. Neo Gen Screening, Inc.*¹⁶⁶

In *Neogen*, the defendant had purposefully availed itself of the Michigan forum due to the regularity of business transactions with Michigan residents over the Internet.¹⁶⁷ While the defendants argued their website and business model did not surpass “passive availment of Michigan opportunities,” they also expected to conduct a given level of business in the forum year after year.¹⁶⁸ Additionally, they had already conducted an “absolute amount”¹⁶⁹ of business that surpassed a characterization of “random, fortuitous, or attenuated contacts” with

160 *Id.*

161 *Id.*

162 The district court specifically outlined that neither “a website with a commercial function” nor “the mere existence” of a contract between a defendant and a resident of a forum” nor the confirmation of fifty-nine transactions with Tennessee residents were sufficient to confer personal jurisdiction. *See* *AMB Media, LLC v. OneMB, LLC*, No. 22-cv-00210, 2023 WL 3766597, at *4–5, *4–6 (E.D. Tenn. June 1, 2023) (quoting *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 722 (6th Cir. 2000)).

163 *AMB Media*, 2024 WL 2052151, at *4 (citing *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1027 (2021)).

164 *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968).

165 *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890, 889–90 (6th Cir. 2002) (quoting *Mohasco*, 401 F.2d at 381).

166 *AMB Media*, 2024 WL 2052151, at *3; *Neogen Corp.*, 282 F.3d 883.

167 *Neogen Corp.*, 282 F.3d at 892–93.

168 *Id.* at 890, 890–91 (quoting *Khalaf v. Bankers & Shippers Ins. Co.*, 273 N.W.2d 811, 819 (Mich. 1978)).

169 *Id.* at 892.

the forum state.¹⁷⁰ As applied to the dispute between AMB Media's Legacybox and OneMB's MemoryBox, *Neogen* recommended the extension of personal jurisdiction over OneMB for hosting an interactive website paired with its willingness to regularly sell into Tennessee (supported by the roughly twenty sales into the forum on an annual basis).¹⁷¹

This "regular course of business" analysis effectively evaluates the proportionality of a defendant's business transactions with their "affirmative targeting of a forum."¹⁷² And this is how the Sixth Circuit distilled the circuit split over single transactions.¹⁷³ When a defendant has as little as one transaction, then the "affirmative targeting of a forum may be necessary to constitute purposeful availment."¹⁷⁴ On the other hand, when a nationally-serving business regularly conducts business into a forum, the degree of "affirmative targeting" necessary for a showing of purposeful availment decreases.¹⁷⁵ The Sixth Circuit consequently determined that the regular course of internet sales into Tennessee in turn required less "affirmative targeting" such that it satisfied purposeful availment.¹⁷⁶ By inference, the Sixth Circuit hinted at an openness for holding that a single internet transaction with a high degree of specific forum-targeting activities could satisfy purposeful availment.¹⁷⁷ Additionally, as number of sales into a forum increase, the amount of targeting necessary for a website or advertising reduces.

The Sixth Circuit's approach, to its credit, reasonably flows from the intuition that neither one electronic sale alone nor only operating a nationally available website are sufficient to extend personal jurisdiction over a defendant. The former is too depersonalized to have overcome the characterization of "random, isolated or fortuitous"; the latter is too decentralized to qualify as deliberately reaching out to the forum.

170 *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

171 *AMB Media*, 2024 WL 2052151, at *3. Fourteen sales in *Neogen* implies that OneMB's roughly twenty sales surpass the transaction threshold, all other things being held equal. *See id.*

172 *Id.* at *5.

173 *See id.* at *6.

174 *Id.* at *5 (citing *Advanced Sols. Life Scis., LLC v. BioBots, Inc.*, No. 16-cv-00709, 2017 WL 2114969 (W.D. Ky. May 15, 2017)).

175 *Id.*

176 The Sixth Circuit panel even quoted the Seventh Circuit's *NBA Properties v. HANWJH*. *Id.* at *6 (quoting *NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 625 (7th Cir. 2022)).

177 "Specific forum-targeting activities" include website interactivity or directedness of advertising towards a forum.

III. SYNTHESIS: A PURPOSEFUL AVAILMENT “TIMEPIECE”

For the maritime longitude problem, it had been suggested as early as 1530 that:

The difference in longitude between two places could be established with an accurate clock measuring the difference in time between the places. . . . It would have to “keep the time” on the meridian of departure during an entire voyage . . . resist[ing] considerable changes in temperature and relative humidity and [] the movement of a ship.¹⁷⁸

Scholars, scientists, and inventors alike undertook efforts to invent such a device, or to innovate its alternative. Most notably, Galileo Galilei attempted to compile a longitudinal method based on observations of the eclipses of the moons of Jupiter.¹⁷⁹ His efforts were deemed unwieldy for sea-faring needs, and it would be nearly one hundred years later that the breakthrough timepiece was created.¹⁸⁰

A Galilean approach would record all of the different personal jurisdiction cases and try to define the line of best fit among all the predictors to determine whether personal jurisdiction should be exercised. A jovial approach to purposeful availment—if the response to Galileo’s is at all insightful—might translate more readily to “ground-based” jurisdictional questions.¹⁸¹ After outlining the Supreme Court precedent and current circuit split over internet jurisdiction, there are enough tools to tinker with and arrange to outline the trend of “purposeful availment” in the internet context and make a couple of principled recommendations going forward.

Purposeful availment began as a totem representing the benefits a defendant received from the state in exchange for the forum’s authority to host litigation related to those contacts.¹⁸² A defendant conducting business in a forum functionally puts them on notice that they could be subject to the liability in that state and under state law.¹⁸³ Today, the internet knows no bounds and conducting business with

178 W.F.J. Mörzner Bruyns, *Longitude in the Context of Navigation*, in THE QUEST FOR LONGITUDE, *supra* note 7, at 43, 44.

179 Albert Van Helden, *Longitude and the Satellites of Jupiter*, in THE QUEST FOR LONGITUDE, *supra* note 7, at 85, 89–91.

180 *Id.* at 90–91; *see supra* note 13 and accompanying text.

181 *See* ALESSANDRO DE ANGELIS, GALILEO AND SATELLITE NAVIGATION 13–16, 30 (2024).

182 *See* Int’l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

183 *Id.*; *see* U.S. CONST. amend. XIV.

national reach feels like it's always around the corner.¹⁸⁴ So, how should courts orient themselves on these jurisdictional High Seas?¹⁸⁵

The two principles of “fairness and interstate federalism” in personal jurisdiction respond to due process as pendulums respond to the inescapable reality of gravity. These two principles (analogous to Harrison’s design) are the twin pendulums centrally and necessarily counterbalancing the marine chronometer. They sit at the heart of personal jurisdiction. Especially given the nature of the internet context, interstate federalism is deeply in question. The internet suspends markets to be above the lines of states, so any one state exercising jurisdiction is itself a rather arbitrary treatment of the situation. Regardless, it is important that states *can* exercise jurisdiction. However, too much jurisdiction means that defendants might be subject to the jurisdiction of every state—a practical result already frowned upon by the rejection of *Zippo*.

Defendants’ activities towards or in relation to the forum deserve primacy in a specific personal jurisdiction analysis. This principle emerges from the longstanding logic that if a defendant incurs the benefit of the state’s laws and protections, especially to do business, then states are allowed to exercise jurisdiction.¹⁸⁶ This “trade” between the state and the defendant of contacts for jurisdiction also embodies the principle of state sovereignty mentioned.

However, a court’s analysis of the trade between the potential defendant and forum should only extend as far as the *related* contacts. This is why the Supreme Court has taken such an interest in the nature of relatedness in recent personal jurisdiction cases.¹⁸⁷ As businesses increasingly operate through national or global supply chains, not all of a potential defendant’s activities actually intersect with the dispute alleged by a plaintiff in their forum of choice. This is especially true with disputes arising in the internet context. From surveying the approaches by the circuits and the guidance provided by the Supreme Court, the idea of relatedness in the internet context requires that a single infringing transaction or conduct combined with “something more” intersects with the dispute at the heart of litigation.

But first, there should be a different significance awarded to activities that *constitute* a transaction and activities that are *ancillary* to a

184 See, e.g., Emily Browne, *TikTok Success Stories: 9 Small Businesses That Went Viral*, SHOPIFY (June 15, 2022), <https://www.shopify.com/blog/tiktok-success-stories> [https://perma.cc/DNB8-HP6N].

185 See HENRY WADSWORTH LONGFELLOW, *IN THE HARBOR: ULTIMA THULE* pt. II, at 87–88 (Boston, Houghton, Mifflin & Co. 1882).

186 *Int’l Shoe*, 326 U.S. at 319.

187 See, e.g., *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

transaction. Negotiation and shipment of an order of a product into a forum are activities constitutive of the transaction. Operation of a website or storefront, maintaining the ability to fulfill a potential order, and generalized availability to service a market qualify as ancillary activities to any specific transaction in a forum. The greater the number of constitutive activities the less ancillary activities are needed to push a defendant from values of fairness to values of interstate federalism. In the internet context, a single infringing transaction needs a high number of ancillary activities.

This distinction helps clarify the two types of activities that can comprise the “something more” necessary for jurisdiction. When a court seeks to exercise jurisdiction over a single internet transaction, the court typically looks to the ancillary activities of the seller to determine the presence of “something more.” Thus, the distinction between constitutive and ancillary helps connect ancillary activities as the main subject of “something more” for the purposes of purposeful availment.

The “something more” which constitutes purposeful availment in the internet context is treated differently by each circuit. This is the area in which future experts and the Supreme Court could provide greater direct clarity. Now, the synthesis turns to distilling the “something more” of each circuit and giving a first pass at reconciling them.

The Eighth Circuit, with the narrowest approach, looks past any “something more” unless the activities both (1) relate to the dispute and (2) are directed at the forum. In an effort to adhere to the Court’s emphasis that the defendant must deliberately “‘reach[] out beyond’ its home,” the Eighth Circuit’s emphasis on the direction of the defendant’s activities borders on the level of an intent requirement.¹⁸⁸ This is an extremely high bar. In the internet context, it is unlikely that a receiving forum of a single infringing transaction ever has grounds to exercise jurisdiction without express targeting by the ancillary activities of the seller.

At the other end of the spectrum, the “sales arrangement” analysis by the Seventh Circuit is the most permissive understanding of “something more” because it includes the seller’s mere capacity to fulfill a sale as directing at a forum. Thus, it functions similarly to an improved, yet still questionable “stream-of-commerce” theory. In *Asahi Metal Industries Co.*, the Court rejected a court’s exercise of jurisdiction over a foreign defendant for the mere act of “placing a product in the stream

188 See *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 953 (8th Cir. 2022) (quoting *Ford Motor Co.*, 141 S. Ct. at 1025).

of commerce.”¹⁸⁹ In the same way, the ancillary activities of internet sellers resemble placing the product into a stream (i.e. the internet). Despite the appeal that a defendant can’t simply set up their business and then say “it was the consumer’s idea,” the breadth of the Seventh Circuit’s approach obscures the “substantial connection” where a defendant purposefully directs action toward the forum state.¹⁹⁰

The Ninth Circuit, uniquely in comparison to all the other circuits, analyzes purposeful availment depending on the dispute at issue. For claims rooted in intentional torts, the Ninth Circuit applies the *Calder* effects test which, in essence, means the entire purposeful availment analysis looks at the ancillary activities and their effects on the forum. It takes for granted the existence of constitutive activities, such as the product actually being shipped into the forum, and bases jurisdiction on whether the effects were directed at the forum. Thus, the “something more” analysis typically investigated by other circuits for the internet context in the Ninth Circuit is comprised of website interactivity plus another, miniature “something more.”

Perhaps most reasonably, the Sixth Circuit looks to whether a forum falls within a seller’s “regular course of business.” More sophisticated sellers—ones with a national brand, or viral customer bases, etc.—can target a forum by depending on that forum’s general business. In those cases, a seller has purposefully availed themselves of a forum even for only one transaction because the number of ancillary activities and the business strategy that “targets” the forum is sufficient to effectively put them on notice. This approach does not extend jurisdiction too far to include any and every nationally available seller; it also doesn’t constrict jurisdiction to never look at the function or strategy of a business.

Whatever the future holds for purposeful availment in the internet context, the courts seem to all agree on three basic tenants and then diverge on the contents of a fourth. First, purposeful availment is fundamentally grounded in fairness and interstate federalism. Second, the internet poses a unique problem for recognizing when a seller “enjoys the benefits and protection”¹⁹¹ of a forum, but those benefits need to exist. In the internet context specifically, this occurs when there is at least one sale of an infringing good into a forum plus “something more.” Third, the contacts which trigger the trade of benefits for jurisdiction need to intersect with the dispute that animates the litigation. The circuits disagree, however, on what constitutes the “something

189 *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 110, 112 (1987).

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

191 *Int’l Shoe*, 326 U.S. at 319.

more." Some offer extremely high standards that essentially require multiple transactions regardless of ancillary activities. Others maintain that the mere ability of a business to fulfill an order (aka hypothetical ancillary activities) is enough.

Either way, a company's single electronic sale of a physical product does not constitute purposeful availment of a forum where the plaintiff generated the sale without something more demonstrating the company deliberately reached out beyond its home to target the forum. As technology develops, a more fulsome understanding of what reasonably qualifies as "something more" will be required. This Note has offered a categorical approach of dividing activities between "constitutive" and "ancillary" so that all the activities involved in operating a business can be considered through a weighing system.

CONCLUSION

In review, the complexity of internet jurisdiction might produce an observable trend in due process principles.¹⁹² There is reason to hope that purposeful availment have enough "sound law" to tinker around with to make a working jurisdictional timepiece for the internet context.¹⁹³ The fundamental intuition that purposeful availment requires a transaction plus something more should serve as a launching point for future, comprehensive clarification. Additionally, any approach designed in the future by wiser and more attentive minds (hopefully with more developed Supreme Court precedent) should address the relatedness conundrum and the fact that the internet seems to supersede the boundaries of state sovereignty in a new way.

Whatever we can glean from the example set by John Harrison in "succeed[ing], against all odds, in using the fourth—temporal—dimension to link points on the three-dimensional globe"¹⁹⁴ in our attempt to bring order to the tempestuous state of personal jurisdiction precedent, comfort can at least be drawn that the pieces interpreting the mystery were there all along.

192 These trends can also reflect a more foundational understanding of the original justifications of jurisdiction rooted in due "process." *Cf.* Kubisch, *supra* note 100.

193 See Easterbrook, *supra* note 11, at 208.

194 SOBEL & ANDREWES, *supra* note 13, at 210.

