

# PERSONAL JURISDICTION AND THE INTERNET: A SHIFT IN THE *INTERNATIONAL SHOE* ANALYSIS FOR USERS OF E-COMMERCE AND PEER-TO-PEER WEBSITES\*

Jayci Noble\*\*

## I. INTRODUCTION

Imagine a fictitious Ellen White, mother of four and grandmother of seven. Ellen has been making memory quilts out of her home in Southern Illinois for over thirty years and gifting them to her friends and family. Some of the quilts she creates are her own custom designs and patterns, while others are made from t-shirts her loved ones have gathered from their various activities, whether that be sports, gymnastics, or dance. While quilting has been Ellen's passion for many years, and is a skill that she has refined greatly, it has become a very expensive hobby. The costs per quilt range from \$50 all the way to \$1000, depending on whether she is purchasing the materials. Now that Ellen is being recognized as an outstanding quilt maker in her local area of Southern Illinois, Ellen's family is urging her to begin selling her quilts. With quilt requests building up, Ellen's granddaughter Sarah has agreed to set up an Etsy account where Ellen can sell her quilts all over the Internet, while making them from home. Ellen initially hesitates, but Sarah urges her to do it, and she finally agrees.

Six months later, Ellen is enjoying the revenue she is earning from her online sales, entrusting her granddaughter to handle the logistics of her Etsy account while she enjoys the quilt making process. All of Ellen's sales are local, in the states of Illinois and Missouri. Unbeknownst to Ellen, one of her quilts has made its way across the country to California, where it was resold by one of Ellen's customers. One morning she receives an angry email from an individual in California, claiming that the buyer's daughter suffered severe skin reactions and had to be hospitalized after rubbing against Ellen's quilt. Ellen is mortified at the situation, and in the midst of trying to figure out what went wrong, she receives service of process summoning her to a state court in California to be sued for products liability.

Ellen frantically calls several of her friends, seeking their advice, but none of them have any idea how to handle the situation. She then reaches out to a lawyer, to have her legal options explained to her. Ellen is both confused and shocked at the price of legal representation. Furthermore, the

lawyer's explanation as to personal jurisdiction and the reasons why Ellen might have to defend herself in California are utterly confusing, and do not seem fair. Additionally, once Ellen meets with this lawyer and realizes that she very well might be required to travel to California for the lawsuit, she is even further alarmed. Ellen cannot bear the cost of traveling to California to defend herself and has no idea how to proceed in this confusing situation.

Ellen's situation demonstrates one of the litigation hazards associated with small business owners using online platforms such as Etsy, Amazon, Ebay, or another similar Internet platform, to sell their products to individual purchasers. These individuals are distinct from the boisterous large online business seller, who has a longstanding reputable company, sells his products nationwide, and leaves any potential products liability litigation to the company's legal department to handle. Rather, this comment places a focus on small, individual business-sellers, similar to the fictitious Ellen, who might find themselves trapped in a troubling litigation situation.

These particular types of individuals are unsuspecting electronic commerce (e-commerce) users, oftentimes with very little business experience. They likely do not create the seller's platform, such as building their own individualized website. Rather, they are using a web platform that is already in existence to sell and market their products, often to audiences whose geographic location are unknown to the seller at the time of contact. These unsuspecting sellers may be at risk when their products travel to an unintended location, and they are forced to defend themselves and handle the costs of litigation in a foreign state. Individuals such as Ellen will encounter multiple legal fees that are associated with defending oneself in a foreign jurisdiction, including the basic costs of traveling to that forum state and residing there for the duration of the litigation.

Situations like these, among others, have prompted an ongoing debate in the legal community about how to analyze an individual's online activities in order to determine personal jurisdiction in cyberspace, particularly as it pertains to e-commerce and peer-to-peer (P2P) websites. As the law currently stands, there is a great deal of uncertainty for online business sellers trying to determine the limits of their personal jurisdiction, especially if there is no physical location for the activity, and they did not personally create the contacts that are related to the claim.

The unique characteristics of the Internet make crafting a test for personal jurisdiction more challenging than ever. Case law provides guidance on this topic, albeit through inconsistent decisions spread across various jurisdictions. In 2011, Supreme Court Justice Breyer suggested that the developing nature of Internet commerce might necessitate a change to the prevailing framework for personal jurisdiction.<sup>1</sup> However, the Court did not

---

\* Outstanding Student Note (2017), Southern Illinois University Law Journal.

further discuss or rule on that particular issue because it was unnecessary for the resolution of the particular case that was being decided at that time.<sup>2</sup>

Historically, courts have agreed upon a traditional, three-prong test for personal jurisdiction.<sup>3</sup> This test contains three distinct elements.<sup>4</sup> First, the defendant must have sufficient minimum contacts with the forum state.<sup>5</sup> Second, the claim asserted against the defendant must arise out of those sufficient minimum contacts.<sup>6</sup> Finally, the exercise of jurisdiction must be reasonable.<sup>7</sup>

Courts disagree over the first prong of this jurisdiction test—sufficient minimum contacts. There is much debate regarding what it means to have sufficient minimum contacts with the forum state, particularly in Internet transactions. The lack of clarity on this topic makes it difficult to predict the outcome of litigation for individuals who are questioning whether they will have to travel to a foreign jurisdiction to defend themselves in litigation.

The *International Shoe v. Washington*<sup>8</sup> case, a landmark personal jurisdiction case decided by the Supreme Court in 1945, provides the modern paradigm for personal jurisdiction. In addition to *International Shoe*, two tests have been proposed to specifically target personal jurisdiction and Internet transactions: the *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*<sup>9</sup> sliding scale test, and the *Calder*<sup>10</sup> effects test. While both of these tests are notable for addressing the topic of personal jurisdiction and the Internet at its infant stage, cultural and commercial changes demand a new way to analyze these online communications.

One of the most frequently cited federal personal jurisdiction cases is *Zippo*.<sup>11</sup> *Zippo* is a circuit court case that provides a sliding scale test to determine the strength between the Internet-based activity and the plaintiff's cause of action.<sup>12</sup> Despite its historical prevalence as being one of the first cases to address the topic of personal jurisdiction and the Internet, many courts have found this test to be too arbitrary and not sufficient in dealing

---

\*\* Jayci Noble is a third-year law student at Southern Illinois University School of Law, expecting her Juris Doctor in May of 2018. She would like to thank her faculty advisor, Professor Angela Upchurch, for her guidance and feedback throughout the writing process.

1. J. McIntyre Machinery, Ltd. v. Nicasastro, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring).

2. *Id.*

3. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122-23 (W.D. Pa. 1997).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

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

10. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

11. *Zippo*, 952 F. Supp. at 1122-23.

12. *Id.* at 1124.

with issues that arise today.<sup>13</sup> This is largely because since the *Zippo* ruling, the Internet has evolved and technological advances have drastically altered the ways individuals communicate and conduct transactions.<sup>14</sup>

While a large amount of commentary has been written regarding personal jurisdiction in cyberspace, and particularly what counts as sufficient minimum contacts in the forum, there is still a lack of clarity on the topic. This is particularly problematic for individual Internet business sellers, who are engaging in online transactions with individuals all over the world. These sellers are subject to uncertainties regarding what online activities will subject them to jurisdiction in a particular state, and what burdens might be associated with that personal jurisdiction. As a result, these sellers may be discouraged from participating in the online market, because of the risks associated with potential litigation, which limits their opportunities for growth and competition.

Take, for example, the fictitious Ellen, an unsuspecting Internet user operating a small business out of her home through an electronic commerce, peer-to-peer website. Ellen is faced with potential litigation after one of her quilts made its way into the forum state of California, through a distant minimum contact. Without special consideration given to the principles of fair play and substantial justice, it is likely that Ellen would be hauled into court, because she had minimum contacts with the forum state, however insignificant those contacts may have been.<sup>15</sup>

The first part of this comment provides insight into the history of personal jurisdiction and how it has evolved over time, particularly as online Internet commerce and peer-to-peer Internet communication has become more prevalent. Next, this comment discusses the nature of online selling platforms such as Etsy and the challenges that these reputable online platforms present to sellers conducting business through their websites. Finally, this comment suggests that the standards for minimum contacts have been set so low, that now a single, unintentional contact could create liability. This would not provide the fairness that the *International Shoe* personal jurisdiction test emphasizes as a crucial point in the analysis. This comment will propose that moving forward, courts should be willing to shift their perspectives more heavily towards the fair play and substantial justice prong of the personal jurisdiction test, in order to provide more flexibility for a defendant such as Ellen.

---

13. See, e.g., *Howard v. Mo. Bone & Joint Ctr., Inc.*, 869 N.E.2d 207, 212 (Ill. App. Ct. 2007) (“We disagree with the arbitrary ‘sliding scale’ approach adopted by *Zippo Manufacturing Co.* . . .”); *Illinois v. Hemi Group LLC*, 622 F.3d 754, 758 (7th Cir. 2010) (“We wish to point out that we have done the entire minimum contacts analysis without resorting to the sliding scale approach first developed in *Zippo Manufacturing Co.* . . .”).

14. *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011) (Breyer, J., concurring).

15. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

## II. BACKGROUND

This section will provide a brief history of personal jurisdiction, and how it has evolved over time. This history will begin with traditional cases like *Pennoyer v. Neff* and will then shift to discussing the modern personal jurisdiction paradigm presented by the Supreme Court in *International Shoe*.

### A. Traditional Paths of Personal Jurisdiction

Personal jurisdiction, broadly speaking, refers to the court's power over the defendant as a consequence of the defendant's connection with the jurisdiction where the court is located.<sup>16</sup> Its purpose is to protect the defendant from the hardship of defending a lawsuit in a distant and inconvenient forum.<sup>17</sup> Personal jurisdiction can broadly be broken down into two categories: (i) traditional paths of jurisdiction, and (ii) modern personal jurisdiction.<sup>18</sup>

A historically notable case defining traditional paths of personal jurisdiction is *Pennoyer*.<sup>19</sup> *Pennoyer* set forth a territorial theory of personal jurisdiction, establishing two main principles.<sup>20</sup> The first principle was that every state possesses exclusive jurisdiction and sovereignty over people and property within its territory.<sup>21</sup> This "possession" reached to include individuals who were simply traveling through a particular state, and not only domiciled residents of the state. The second principle was that no state can exercise direct jurisdiction and authority over persons or property that lie outside of its territorial limits.<sup>22</sup> *Pennoyer* provided three situations in which a court may exercise jurisdiction over a person: (i) when he is physically in the state and served with the complaint, (ii) when he is a citizen (domiciled in the state) even if he is not there at the time of the suit, and (iii) when he consents to personal jurisdiction by appearing in court.<sup>23</sup>

A second notable case defining traditional paths of personal jurisdiction is *Hess v. Pawloski*.<sup>24</sup> This particular case involved a Pennsylvania resident who was in a car accident with a Massachusetts resident, while driving in Massachusetts.<sup>25</sup> The Pennsylvania resident challenged a Massachusetts statute which allowed Massachusetts to exercise jurisdiction over a non-

---

16. *Id.* at 316.

17. *See generally id.*

18. *See generally id.*

19. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

20. *Id.* at 722.

21. *Id.*

22. *Id.*

23. *See generally id.*

24. *Hess v. Pawloski*, 274 U.S. 352 (1927).

25. *Id.* at 353.

resident.<sup>26</sup> This was accomplished by allowing service of process on the state registrar, instead of the defendant personally.<sup>27</sup> This statute fell outside of the *Pennoyer* boundaries, but the court held it to be permissible, stating that the state's power to regulate the use of its highways "extends to their use by nonresidents as well as by residents."<sup>28</sup> This was primarily because the statute did not make any discrimination against non-residents, but rather, sought to put them on the same footing as residents.<sup>29</sup>

## B. Modern Framework for Personal Jurisdiction

These historic cases provided the groundwork for personal jurisdiction, but societal changes and new, unresolved issues led to the landmark personal jurisdiction case, which provides the test that most courts employ in personal jurisdiction cases today. This test is employed when there is a foreign defendant who is not present in the forum state, and a determination is needed as to whether the defendant will be required to travel to the foreign state to defend himself.<sup>30</sup>

The case that provides this landmark test is *International Shoe*, decided by the Supreme Court in 1945.<sup>31</sup> This was a case in which a Delaware corporation became amenable to the state of Washington for court proceedings, by conducting enough activities within the state of Washington, even though the corporation was not physically located in the state of Washington.<sup>32</sup> *International Shoe* set forth the modern framework for personal jurisdiction, which provides that if none of the *Pennoyer* paths to traditional jurisdiction apply, a court may still establish personal jurisdiction over a party if the party has established minimum contacts in the jurisdiction, and if maintenance of the suit in the forum state would not offend traditional notions of fair play and substantial justice.<sup>33</sup>

This two part test is based upon the 14<sup>th</sup> Amendment's protection of due process, and states "...[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."<sup>34</sup> While the *Pennoyer* territorial approach primarily focused on physical presence, the *International Shoe* analysis used today

---

26. *Id.* at 354.

27. *Id.* at 353-54.

28. *Id.* at 356.

29. *Id.*

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

31. *Id.*

32. *Id.* at 311.

33. *Id.* at 316.

34. *Id.* (internal quotations omitted).

focuses on a combination of minimum contacts in the forum state, and fairness for the parties involved in the litigation.

*1. The Determination of Minimum Contacts Within a Forum*

The Supreme Court has, through a series of cases, refined the minimum contacts prong of the *International Shoe* test. Several courts have analyzed this, and the following is a summary of the current state of personal jurisdiction.

*International Shoe* established that a foreign defendant is required to have sufficient minimum contacts with the forum state and that requiring the defendant to maintain the suit in that forum state would not offend fair play and substantial justice.<sup>35</sup> These contacts must not be fortuitous, or in other words, happening by chance.<sup>36</sup> Rather, in order to exercise personal jurisdiction, the defendant must have taken a purposeful action that established minimum contacts with the State which is seeking jurisdiction.<sup>37</sup> Lastly, the policy behind this test requires that the defendant should at a minimum reasonably be able to anticipate being able to defend himself in the forum state, because he had conducted activities with residents of that state.<sup>38</sup>

*State of Illinois v. Hemi Group LLC*,<sup>39</sup> a 2010 Illinois Seventh Circuit case, provided more insight into what it takes for the defendant to have purposefully availed himself of a forum, in order to establish minimum contacts for personal jurisdiction. The court here examined the defendant's contacts in the forum, and how purposeful these contacts were.<sup>40</sup> It held that the unilateral actions of another are insufficient to constitute minimum contacts.<sup>41</sup> When the defendant himself targets a forum, the court is more likely to find minimum contacts.<sup>42</sup> However, when the defendant accesses the forum through an intermediary, the court examines the behavior closely to see if the defendant is targeting the forum or whether interaction with the forum is merely foreseeable.<sup>43</sup> Random contacts are not considered to be purposeful.<sup>44</sup> Finally, the court here examined the relationship between the

---

35. *Id.*

36. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

37. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

38. *World-Wide*, 444 U.S. at 297.

39. *Illinois v. Hemi Group LLC*, 622 F.3d 754 (7th Cir. 2010).

40. *Id.* at 757.

41. *Id.* at 758 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.>").

42. *See id.* at 758.

43. *See id.*

44. *Id.*

claim and the contacts, and noted contacts that were highly relevant to the claim as being extra important.<sup>45</sup>

Additionally, in *World-Wide Volkswagen v. Woodson*<sup>46</sup> it was noted that foreseeability that a cause of action may arise out of one's contact with a state is not, by itself, a sufficient benchmark to establish personal jurisdiction under the 14<sup>th</sup> Amendment.<sup>47</sup> This case emphasized that the foreseeability that was to be considered in the due process analysis of personal jurisdiction cases was not simply a focus on the likelihood that a product would find its way into the forum state.<sup>48</sup> Rather, the court stated that "the foreseeability that is critical to due process analysis" focuses on "the defendant's conduct and connection[s] with the forum State [that make him] reasonably anticipate being hauled into court there."<sup>49</sup>

## 2. *The Determination of Fair Play and Substantial Justice*

The Supreme Court also elaborated on the fair play and substantial justice prong of the *International Shoe* analysis. It noted that in analyzing whether these traditional notions had been offended, the Court would focus strongly on the burden on the defendant.<sup>50</sup> One example of an item that may be considered in this category would be the financial expenses that a defendant would incur in order to defend itself in a foreign jurisdiction.<sup>51</sup> Additional factors that will be considered are the plaintiff's interest in obtaining relief that is both convenient and efficient, as well as the forum state's interest in obtaining an efficient resolution to the dispute.<sup>52</sup> The fair play and substantial justice portion of *International Shoe* is applied to both sides of parties involved in the litigation.<sup>53</sup>

Other cases stress the flexibility of the minimum contacts test. In *Kulko v. Superior Court*,<sup>54</sup> the defendant was a divorced New York resident being sued by his ex-wife in a California court.<sup>55</sup> A divorce decree had been obtained in California, and this action was to modify the terms of this decree

---

45. *Id.* at 759.

46. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). (discussing *International Shoe* and the 14th Amendment's Due Process clause).

47. *See id.* at 296–97.

48. *Id.* at 297.

49. *Id.*

50. *Id.* at 292.

51. *See generally* *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

52. *World-Wide*, 444 U.S. at 292; see also *Illinois v. Hemi Group LLC*, 622 F.3d 754, 759 (7th Cir. 2010) (citing *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 781 (7th Cir. 2003)).

53. *See generally* *Hemi*, 622 F.3d at 759.

54. *Kulko v. Superior Court*, 436 U.S. 84 (1978).

55. *Id.* at 87–88.



regarding visitation and child support.<sup>56</sup> Prior to the action being commenced, the defendant's only contacts with California were that (i) he consented to his daughter living there for a year and purchased her a plane ticket from New York to California and (ii) he had two very brief military stopovers there many years earlier.<sup>57</sup> The Supreme Court held that these contacts were not sufficient enough to allow California to exercise jurisdiction over the defendant.<sup>58</sup>

However, the Court provided a helpful analysis in the case, stating that asserting jurisdiction "would impose an unreasonable burden on family relations, and one wholly unjustified by the 'quality and nature' of appellant's activities in or relating to the State of California."<sup>59</sup> This case is useful because it demonstrates that "the circumstances surrounding the litigation, including the relationship between the parties, can change the threshold at which the minimum contacts test will allow a state court to exercise jurisdiction."<sup>60</sup>

### C. Modern Framework Applied to Internet Cases

The doctrine of personal jurisdiction and courts' interpretations of it have evolved over the twentieth century to adapt and accommodate society as it constantly progresses. As previously discussed, personal jurisdiction began with *Pennoyer* and its strict territorial approach to personal jurisdiction. Then, fairness and modern realities forced the Court to reconsider its approach to determining personal jurisdiction and develop the current and more flexible *International Shoe* standard. Now, the paradigm must adjust again for changes in society, considering much of today's conversations and businesses are rooted in the Internet and Internet commerce. The Court must give consideration to personal jurisdiction as it relates to individuals' activities in e-commerce and peer-to-peer websites, where transactions are taking place.

While the preceding cases provided the framework for personal jurisdiction in non-Internet based transactions, they were not designed to address the unique challenges associated with Internet-based commerce. The Supreme Court noted in *Hanson v. Denckla*<sup>61</sup> that "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase."<sup>62</sup> Then,

---

56. *Id.* at 88.

57. *Id.* at 87, 90.

58. *Id.* at 101.

59. *Kulko*, 436 U.S. at 98 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

60. James C. Smith, *Online Communities as Territorial Units: Personal Jurisdiction Over Cyberspace After J.McIntyre Machinery, Ltd. v. Nicastro*, 57 ST. LOUIS U. L.J. 839, 843 (2011).

61. *Hanson v. Denckla*, 357 U.S. 235 (1958).

62. *Id.* at 250-51.

nearly thirty years later, the Court expressed a similar opinion in *Burger King Corp. v. Rudzewicz*,<sup>63</sup> stating that personal jurisdiction could not be avoided “merely because the defendant did not *physically* enter the forum State.”<sup>64</sup> These early opinions established that the Court recognized the possible future need for the paradigm of personal jurisdiction to shift again as technology increased.

### 1. *Supreme Court’s Quest Into Online Personal Jurisdiction*

The most well-known case that began the Court’s search into a personal jurisdiction test for online activities was the 1997 district court case of *Zippo*. *Zippo* involved a Pennsylvania corporation suing defendant Zippo Dot Com, a California corporation, that operated an Internet news service selling lighter products through its website.<sup>65</sup> The plaintiff alleged that Dot Com had violated the Federal Trademark Act, and defendant Dot Com filed a motion to dismiss, alleging lack of personal jurisdiction.<sup>66</sup> The court applied the traditional three prong test from *International Shoe* to determine whether the exercise of personal jurisdiction over a non-resident defendant was appropriate: (1) the defendant must have minimum contacts with the forum state; (2) the claim asserted must arise out of those contacts; and (3) the exercise of jurisdiction must be reasonable.<sup>67</sup>

However, assessing the first prong of this test is difficult in Internet cases. After much deliberation and studying of cases and other materials, the court in *Zippo* found that expanding personal jurisdiction in a constitutional manner would be directly proportionate to the nature and quality of the commercial activity that the entity was conducting over the Internet.<sup>68</sup> Thus, the court adopted a sliding-scale test to determine whether there are sufficient minimum contacts for personal jurisdiction in Internet cases.<sup>69</sup>

On one end of the scale are situations where a defendant regularly and knowingly enters contracts and engages in activities with residents of a foreign jurisdiction. Here, personal jurisdiction would be proper.<sup>70</sup> At the opposite end, a defendant may have a passive website where he is not targeting individuals in a foreign jurisdiction, but simply putting information on the Internet for those who are interested in it. Personal jurisdiction in such

---

63. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

64. *Id.* at 476 (emphasis in original).

65. *Zippo Mfg. Corp. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1121 (1997).

66. *Id.*

67. *Id.* at 1122–23. (citing *Mellon Bank (East) PSFS, N.A. v. Farino*, 960 F.2d 1217, 1221 (3d Cir. 1992)).

68. *Id.* at 1124.

69. *Id.*

70. *Id.*

instances would not be proper.<sup>71</sup> Lastly, the middle of the scale is where interactive websites lie, where users may exchange information with host computers.<sup>72</sup> Here, a case-by-case approach is implemented, and a court will examine interactivity levels and the commercial nature of the website to determine whether exercising personal jurisdiction would be proper.<sup>73</sup>

When the Court applied this test to the *Zippo* case itself, it determined that Dot Com was a business that sufficiently conducted its activities over the Internet and made itself subject to jurisdiction in Pennsylvania by purposefully allowing business transactions with Pennsylvania residents.<sup>74</sup> Many courts today have deemed *Zippo* too arbitrary and general to provide the landmark test for personal jurisdiction in cyberspace;<sup>75</sup> however, it is still noteworthy as it was the first case to attempt at creating a framework for handling personal jurisdiction issues in cyberspace.

A second popular doctrine that is frequently applied to Internet-based contacts is the *Calder* effects test, which is actually older than the *Zippo* test.<sup>76</sup> *Calder v. Jones* was a libel case, in which the plaintiff, Shirley Jones, brought a suit in California, for libel against the National Enquirer, its editor (Calder), and the writer of the damaging story.<sup>77</sup> Jones resided in California, but the National Enquirer was a Florida corporation, with Calder and the writer being Florida citizens.<sup>78</sup> The defendants claimed California did not have proper jurisdiction over this case.<sup>79</sup> Here, the Court held that personal jurisdiction would be allowed (1) where the defendant committed intentional acts directly pointed at the forum state, and (2) where the “brunt of the injury” would be felt by the defendant in the forum state.<sup>80</sup>

## 2. *The Nature of Electronic Commerce*

A brief discussion of the nature of electronic commerce is necessary in order to apply the modern personal jurisdiction paradigm to these specific types of situations. E-commerce (electronic commerce) can be defined as “the buying and selling of goods and services, or the transmitting of funds or data, over an electronic network, primarily the [I]nternet.”<sup>81</sup> These specific

---

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1125–26.

75. See cases cited *supra* note 13.

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

77. *Id.* at 784–785.

78. *Id.*

79. *Id.*

80. *Id.* at 789–90.

81. Margaret Rouse, *E-Commerce (Electronic Commerce or EC)*, TECH TARGET, <http://searchcio.techtarget.com/definition/e-commerce> (last visited Oct. 23, 2016).

types of business transactions will occur “as business-to-business, business-to-consumer, consumer-to-business, or consumer-to-consumer.”<sup>82</sup> Websites through which consumers make online purchases are said to be engaging in e-commerce. Companies engaging in e-commerce will often create marketing schemes and attempt to entice consumers to shop directly online.<sup>83</sup> They do this through digital advertising, digital marketing, and targeted advertisements.<sup>84</sup>

The e-commerce market itself is immense. In 2015, online sales accounted for over a third of all of the United States retail growth in 2015.<sup>85</sup> Also in 2015, web sales amounted to \$341.7 billion, which marked a 14.6% increase from the year 2014.<sup>86</sup> Even more notably, e-commerce coupled with a peer-to-peer platform, such as Facebook or Twitter, substantially broadens the audience for online markets.<sup>87</sup> Businesses are strongly embracing “the idea of connecting individuals directly to each other to trade products and services.”<sup>88</sup>

One example of a peer-to-peer (P2P)<sup>89</sup> e-commerce website is the website Etsy. Etsy is a marketplace where “people around the world connect, both online and offline, to make, sell and buy unique goods.”<sup>90</sup> Founded in 2005, Etsy currently has 877 employees, 45 million items for sale, 1.8 million active sellers, 30.6 million active buyers, and over 2.8 billion dollars in annual revenue.<sup>91</sup> Any individual can open an Etsy shop to sell their unique goods by paying \$0.20 USD.<sup>92</sup> Etsy is not directly involved in the sales between its users; rather, the company serves as an intermediary to provide a platform for transactions to take place between users.<sup>93</sup>

This current discussion is tailored towards the small business model, such as Ellen’s quilt selling operation through Etsy. Small business owners are more vulnerable to unexpected litigation because they likely do not have the advantage of an in-house counsel a larger corporation would employ. Similarly, small business owners who are not operating through a web

---

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Doug Hornig, *The Sudden Rise of Peer-to-Peer (P2P) Commerce*, CASEY RESEARCH, <https://www.caseyresearch.com/articles/sudden-rise-peer-peer-p2p-commerce> (last visited Oct. 23, 2016).

89. *Peer-to-Peer (P2P) Definition*, TECH TERMS, <http://techterms.com/definition/p2p> (last visited Oct. 23, 2016).

90. *About Etsy*, ETSY, <https://www.etsy.com/about/?ref=ftr> (last visited Oct. 12, 2017).

91. *Id.* (data current as of July 26, 2017).

92. *Id.*

93. *Id.*

platform are also at risk to unexpected litigation, and thus, this discussion would be applicable to these individual as well.

### III. ANALYSIS

This analysis will begin with a comparison of physical and online transactions and continue with a brief discussion of the unique attributes of the Internet that require a different personal jurisdiction standard.

#### A. A Comparison of Physical and Online Transactions

It is difficult to analyze online interactions using the same framework that one uses for physical interactions taking place in a forum state. A traditional community has a fixed location, whereas online communities have no fixed location. Etsy sellers and buyers have the ability to access the website and engage in purchases and transactions from any place in the world with an active Internet connection. Many individuals have hotspots, or cellular networks that allow them Internet coverage in a large percentage of the United States, especially in larger metropolitan areas.<sup>94</sup>

When an Illinois resident communicates with a California resident via a website such as Etsy, it is not entirely reasonable to think that the Illinois resident is reaching into California, or that the California resident is intentionally reaching into Illinois. If a sale is made, or transactions occur, the link is strengthened, and courts are likely to find purposeful availment. It is reasonable to say that these individuals are interacting on an entirely different platform, “cyberspace,” or the “Internet.” When two members of an online community, such as Etsy or Ebay, buy or sell digital goods or services, the parties’ physical location is irrelevant, except for purposes of that singular sale.<sup>95</sup> “Typically, the parties neither expressly aim an act at any particular state nor know in what state the effects of that act will be felt.”<sup>96</sup> It would follow that traditional personal jurisdiction tests would perhaps not be the fairest means to deal with lawsuits or legal disputes that occur with residents of different states who are interacting over the Internet. The values of fair play and substantial justice set forth in *International Shoe* would likely be abandoned if the Court’s model for personal jurisdiction is not slightly adjusted. Thus, an adjustment to the current personal jurisdiction paradigm is necessary to account for the difference in real life and online interactions between individuals.

---

94. See, e.g., *AT&T Coverage Viewer*, AT&T, <https://www.att.com/maps/wireless-coverage.html> (last visited Oct. 12, 2017).

95. James C. Smith, *supra* note 60, at 853.

96. *Id.*

For these exact reasons, some have suggested an entirely new model to deal with personal jurisdiction in the Internet, called the “Cyberspace model.”<sup>97</sup> This model would impose a paradigm where Internet contacts would only exist in cyberspace, and not in any physical state.<sup>98</sup> While this model would certainly solve some of the challenges presented by cyberspace, it also presents new challenges. Primarily, it was acknowledged that if the cyberspace model were adopted, it would “deprive all courts of jurisdiction over the Internet.”<sup>99</sup> To completely remove all online activity from the jurisdiction of United States Courts would be an extreme shift from the current model, and a drastic move by the Supreme Court.

This leaves the remaining problem of how exactly to handle personal jurisdiction in these cases. Courts are beginning to recognize this issue, and it has been briefly addressed in some cases. The Supreme Court case of *J.McIntyre Machinery, Ltd. v. Nicaastro*<sup>100</sup> provided a stream of commerce fact pattern, in which Justice Kennedy employed a “forum-by-forum, or sovereign-by-sovereign, analysis” to analyze personal jurisdiction.<sup>101</sup> Here, the Court held that while McIntyre may have intended to serve the United States’ market, it did not “purposefully avail” itself of the market in New Jersey because its actions did not “manifest an intention to submit to the power of” New Jersey.<sup>102</sup>

This case is notable, primarily for purposes of this comment, because in it, Justice Breyer, in his concurrence, set forth three hypothetical situations in which modern societal concern would promote a change in the law: a company that “targets the world by selling products from its Web site”; a company that “consigns products through an intermediary who then receives and fulfill the orders; and a company that purchases advertising online “that it knows will be viewed in a forum.”<sup>103</sup> The concurring Justices in this case expressed an opinion that the existing personal jurisdiction doctrine is not adequate to address jurisdiction issues arising with online businesses; however, *J.McIntyre* did not address these issues,<sup>104</sup> so the Court is waiting to resolve them until a more appropriate case comes before it.

---

97. Richard Philip Rollo, *The Morass of Internet Personal Jurisdiction: It Is Time for a Paradigm Shift*, 51 FLA. L. REV. 667, 693 (1999).

98. *Id.*

99. *Id.*

100. *J. McIntyre Machinery, Ltd. v. Nicaastro*, 564 U.S. 873 (2011).

101. *Id.* at 884.

102. *Id.* at 881–82.

103. *Id.* at 2793.

104. *J. McIntyre Machinery, Ltd. v. Nicaastro*, 131 S. Ct. 2780, 2793 (2011).

### B. Proposing a Modification to the *International Shoe* Test for Small Business Owners

Perhaps then the most rational way to assign a test to these unique online cases would be to simply implement the *International Shoe* test. In doing so, one would run through the following analysis. First, one must determine whether the user of the e-commerce peer-to-peer website purposefully availed himself of the forum state, through minimum contacts. If purposeful availment is found, one next must ask whether these minimum contacts sufficiently relate to the claim. Finally, several factors must be taken into account (including the burden of the defendant, the forum state's interest, and the plaintiff's interest), to determine whether fair play and substantial justice has been satisfied for the parties involved in the litigation.

While this is a necessary starting point to the analysis and should remain the standard for personal jurisdiction, it does not on its face provide clarity for how purposeful availment of an online community translates into a grant of jurisdiction to a particular court. This is largely due to all of the factors that may be considered, and the fact that a court may interpret these factors differently in each jurisdiction. Ultimately, this situation may be confusing.

This is particularly true for the unsuspecting user of an e-commerce, peer-to-peer website (such as Etsy, Ebay, or Amazon) who is sued when a single, defective product reaches another individual who resides in separate state thousands of miles away. This confusion does not support a fair play and substantial justice analysis, for it is troubling to see how this decision may be fair when a defendant is ultimately completely confused as to how his situation may be handled.

Attempting to take all of these online interactions and tying them down to a specific geographic area is extremely difficult and unpredictable for the defendant, and an arbitrary test such as *Zippo* or *Calder* may impede justice and fair due process for the unsuspecting defendant in these situations. There is a need for the Court to have a heightened awareness of individuals in this particular instance, as they are situated differently from business owners who have regular and consistent online contact with a resident in a different state, and who are held liable.

In order to best serve the goals of fairness and due process to litigants, this comment proposes that the Court be willing to provide more flexibility in determining whether a grant of jurisdiction is proper in a situation where a defendant, such as the fictitious Ellen, has been hauled into court in a foreign jurisdiction over a single minimum contact. I would suggest that special interest be paid to the fair play and substantial justice prong of the *International Shoe* test, and that the burden on this particular type of small-business defendant be given primary focus.

The standards for what constitutes a minimum contact with a forum state have been lowered so much, that now, it is likely that a single, unintentional contact from an unaware small business owner would be sufficient to haul that individual into court in a jurisdiction that is hundreds of miles away. This would not provide the fairness that *International Shoe* focuses on, and moving forward, courts should be willing to provide more flexibility for a defendant in this situation.

This comment proposes that there should be an exception, or a general shifting of focus, to the general *International Shoe* analysis of personal jurisdiction. This exception should specifically address how to determine what particular court will have jurisdiction over single, unsuspecting users of e-commerce, peer-to-peer websites such as Etsy. This exception proposes a compromise that would prevent unsuspecting litigants from being forced to travel potentially thousands of miles away from their home to defend themselves in a situation where they engaged in a single transaction with the user of the forum state.

The rationale for this exception is best explained through example. Assume there is a New York seller on Etsy, who is being sued by a single individual in California who purchased a single product from this user. This Etsy user lives in New York and operates his business entirely out of New York. He has never specifically targeted the state of California through advertising or general promotion on his seller's page, and he has in no way held himself out to be a California business. In fact, this user has specifically only intended to sell his items to the general geographic area in which he resides. Any business transacted from this Etsy seller originated from his home in New York, any merchandise produced by the seller would have been produced in New York, any merchandise shipped from the seller would have been shipped from New York. Yet still, a single sale was made to a California resident, and the product that was shipped in this sale happened to be faulty, and a products liability lawsuit is initiated. It is unfair to ask the Etsy seller in this situation to incur the costs associated with traveling and defending himself in the state of California, for a single, incidental sale that was made there.

While this may have been the historic practice, the number of defendants in this situation is growing, and it does not seem to be the most efficient way of determining jurisdiction today. In particular, it seems unfair that the same analysis is applied to a large business that is fully equipped with legal counsel, where these issues may be easily foreseeable, as well as to an unsuspecting small business owner, who has no reason to foresee being held accountable for a lawsuit in a faraway state over a single, unintentional sale. The result should not be the same for defendants who are of such different natures, and have different means and resources at their disposal. I



would argue that this violates the second prong of *International Shoe*, which is fair play and substantial justice.

Because of the growing popularity of these e-commerce, peer-to-peer websites, these situations are likely to occur with more frequency in the near future, which begs for a more situational approach to the current personal jurisdiction paradigm in order to provide fairness to the litigants.

Thus, when a seller on an e-commerce, peer-to-peer website engages in a sale that places them in this situation, and it was not readily foreseeable that they may be opening themselves up to litigation in a distant state, the Court should be more sympathetic, and should perhaps recognize that the burden on a small-business defendant is likely too great for them to defend themselves in a distant state. This should particularly be the case when the disputed sale is something that was not intentional, and singular in nature.

The Court may choose to deal with these situations by making a blanket exception for these individuals, by implementing another layer of the test for personal jurisdiction (where Internet transactions are at stake), or even by attempting to craft a bright line test to handle personal jurisdiction in Internet based transactions. Of course, there are challenges associated with each of these suggestions. For example, these exceptions would call for a case-by-case analysis of whether the conduct was knowingly aimed at a different state, or whether the user had no intention of selling in that state. Additional factors must also be analyzed, such as did that seller make significant sales in that state, or did the seller maintain other systematic or continuous contacts with that forum state? This type of analysis may not promote efficiency and an effective remedy. Thus, I do not believe that a new test should be crafted, but rather, that the Court approach these types of personal jurisdiction cases with a heightened sympathy towards the small business plaintiff. This would involve moving the primary focus in these situations away from the minimum contacts prong of the *International Shoe* test and shifting the focus towards promoting fair play and substantial justice.

#### IV. CONCLUSION

While the *International Shoe* doctrine and tests such as *Zippo* and *Calder* have accommodated e-commerce users to some extent, there will need to be further exceptions, layers, and refinements to that test to address online communications as the Internet and online communities continue to evolve, and as e-commerce becomes increasingly complex. This comment has addressed just one of the many variations in which one will see a challenging situation which may violate the second prong of *International Shoe*: fair play and substantial justice. Thus, the judicial system will have to continue to adjust and provide flexibility in crafting new standards to most fairly deal with these situations.

