Passive Voice: The Unclear Standards for Establishing Personal Jurisdiction in New Mexico via the World Wide Web

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Recommended Citation
Available at: https://digitalrepository.unm.edu/nmlr/vol35/iss3/10
PASSIVE VOICE: THE UNCLEAR STANDARDS FOR ESTABLISHING PERSONAL JURISDICTION IN NEW MEXICO VIA THE WORLD WIDE WEB

MARK D. STANDRIDGE*

I. INTRODUCTION

"We often hear what the Internet can do for us. We should also think about what the Internet can do to us." An amalgam of interconnected computer-based applications that includes "electronic mail ('e-mail'), automatic mailing list services ('mail exploders,' sometimes referred to as 'listservs'), 'newsgroups,' 'chat rooms,' and the 'World Wide Web,'" constitutes what we collectively know as "the Internet." This technology has provided millions of users, from individuals seeking to voice their opinions to Fortune 500 companies looking to expand their market share, with nearly limitless opportunities for publishing information to the world. With its rapid proliferation, however, the Internet has also brought about problems for lawyers, judges, and information technology professionals trying to discern whether or not a Web site will subject its creator or owner to a lawsuit. Specifically, courts have struggled for years to determine at what point a site is so filled with content that the individual or corporation that manages the site will be subjected to personal jurisdiction.

The New Mexico Court of Appeals took up the question of Internet-based personal jurisdiction in *Sublett v. Wallin.* The court held that a defendant company's Web site, which conveyed information about the company's business and featured a method for finding a local franchisee of the business, did not provide sufficient minimum contacts to establish personal jurisdiction over the company. In reaching this decision, the court analyzed the two most prevalent approaches to establishing personal jurisdiction via the Internet: the broad standard of Inset Systems, Inc. v. Instruction Set, Inc., and the more narrow approach of Zippo Manufacturing Co. v. Zippo Dot Com, Inc. Aligning itself with the court in Zippo Manufacturing, the New Mexico Court of Appeals reasoned that primarily "passive" Web sites such as the one in this case did not suffice for subjecting potential defendants to the laws of New Mexico. However, the court ended the

* Class of 2006, University of New Mexico School of Law. I would like to thank Professor J. Michael Norwood, my faculty advisor, for his invaluable guidance and encouragement on this Note, as well as Professor Kip Bobroff for his input on the project. I would also like to thank Camille Pedrick Chavez and Kelly Waterfall, my manuscript editors.

3. Id.
4. See id. at 850–53.
7. Id. ¶ 30, 33, 94 P.3d at 853.
11. *Sublett,* 2004-NMCA-089, ¶ 33, 94 P.3d at 853; *see infra* text accompanying notes 185–189.
discussion there, leaving open the questions of whether or not an "active" Web site would suffice to establish personal jurisdiction, as well as whether particular types of suits—namely trademark, libel, and defamation—would merit a more scrutinized Internet-based personal jurisdiction analysis. This Note will examine the court’s findings on “passive” and “active” Web sites against the backdrop of Internet-based personal jurisdiction jurisprudence, as well as the implications of the decision’s unanswered questions.

II. BACKGROUND

In general terms, “[p]ersonal jurisdiction is the power of a court to decide a matter in controversy and the control by the court over the” parties involved in a given controversy. Personal jurisdiction is critical to the litigants in any dispute, as a judgment rendered by a court that does not have proper personal jurisdiction cannot be enforced if properly challenged. “A court may exercise two types of personal jurisdiction: ‘general jurisdiction,’ which extends to all cases and controversies that may be brought before a court within the legal bounds of rights and remedies; or ‘specific jurisdiction,’ which covers only a particular case or class of cases.” As it is “more limited in nature than general jurisdiction,” specific jurisdiction typically “requires a lower threshold of proof to be” established within a forum. Various factors are considered by courts when determining whether to utilize specific or general jurisdiction. Such factors include the nature and quality of a defendant’s activities within the forum, as well as a defendant’s advertising habits within a forum state. When attempting to base personal jurisdiction on a defendant’s activities over the Internet, most courts in the United States have sought specific jurisdiction.

A. U.S. Supreme Court Personal Jurisdiction Jurisprudence

Any discussion of the concept of personal jurisdiction begins with the general principles handed down by the U.S. Supreme Court in Pennoyer v. Neff and International Shoe Co. v. Washington. Historically, the jurisdiction of courts to

13. See infra Part IV.
14. See infra Parts II.C–E, V.A–B.
15. See infra Part V.
16. Dunne & Musacchio, supra note 5, at 386.
17. Id.
18. Id. See generally M.E. OCCHIALINO, WALDEN’S CIVIL PROCEDURE IN NEW MEXICO (2d ed. 1988).
19. Dunne & Musacchio, supra note 5, at 386. “For the purposes of a jurisdictional analysis, only contacts with a forum that are related to the underlying causes of action are to be considered.” James P. Donohue, Personal Jurisdiction, in 1 INTERNET LAW AND PRACTICE § 9:4 (2004).
20. Dunne & Musacchio, supra note 5, at 387.
21. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1985) (holding that jurisdiction was proper over franchisee where he had entered into a contract and “established a substantial and continuing relationship with” franchisor in the franchisor’s state of residence).
22. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (discussing the possibility of establishing jurisdiction “through advertising reasonably calculated to reach the [forum]”).
render judgment is grounded on the courts’ power over the defendant’s person. In *Pennoyer*, the Supreme Court emphasized that a court has no personal jurisdiction unless the person appears before it, is found in the state, is a resident of the state, or has property within the state. Therefore, the defendant’s presence within the territorial jurisdiction of a court was a prerequisite to the court’s rendering of a judgment that would personally bind the defendant.

Decades later, the U.S. Supreme Court expanded the *Pennoyer* personal jurisdiction principles in *International Shoe*. In its ruling in that case, the Supreme Court held that, as

> the *capias ad respondendum* has given way to personal service of summons or other form of notice, due 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.”

In the decades following *International Shoe*, federal and state courts have had ample opportunity to shape and explain what kinds of “minimum contacts” are necessary to subject a defendant to the laws and judgments of a given forum. To that end, a number of jurisprudential tests have been fashioned by the courts. One such test analyzes whether or not “a defendant targets a particular forum,” and whether “the effects of his or her action[s] are felt [so] strongly in” that forum that the “defendant may be called to answer for” those actions there. In addition to this “purposeful direction” or “effects” test, there is the notion of “purposeful availment,” a theory justifying jurisdiction where a party “reach[es] out beyond one state and create[s] continuing relationships and obligations with citizens of another state.” Where such relationships and obligations exist, the party is subject to the regulations and sanctions in that state for the consequences of his or her activities. As business and personal relationships permeate state lines, courts have

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26. *Id.* at 316.
27. *Pennoyer*, 95 U.S. at 733.
28. *Id.*
29. *Id.* at 723.
30. *Id.*
31. *Id.* at 733–34.
32. *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). A *capias ad respondendum* is “[a] writ commanding the sheriff to take the defendant into custody to ensure that the defendant will appear in court.” BLACK’S LAW DICTIONARY 200 (7th ed. 1999).
33. See, e.g., *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415–16 (1984) (holding that a corporation’s contacts with a state, including purchasing helicopter parts and training employees there, were not sufficient to subject it to personal jurisdiction within that state); *Gray v. Am. Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761, 442–43 (Ill. 1961) (holding that jurisdiction was proper where the court inferred that defendant manufacturer’s commercial transactions resulted in substantial use and consumption of defendant’s products in the forum state).
34. OCCHIALINO, supra note 18, § 1-22.
36. Donohue, supra note 19, § 9:5.
37. See *Calder*, 465 U.S. at 787 n.6.
40. *Id.*; see also Donohue, supra note 19, § 9:6.
continued to create mechanisms by which a party's minimum contacts may be examined for purposes of establishing jurisdiction over that party.41

B. State Long-Arm Statutes

One manner by which individual states have attempted to assert personal jurisdiction over defendants outside their territories is by the promulgation of long-arm statutes.42 Essentially, there are two types of these statutes.43 One type of long-arm statute encompasses those found in the states of, among others, Rhode Island44 and Arkansas,45 "which permit the exercise of personal jurisdiction to the full extent permitted by the due process clause."46 Consequently, in these jurisdictions, a court's analysis "collapses into a single step: evaluating whether personal jurisdiction comports with the requirements of due process under the U.S. Constitution."47 Then, there are long-arm statutes like the ones found in Missouri48 and New Mexico,49 which place limits beyond the Due Process Clause on a court's ability to exercise personal jurisdiction.50 New Mexico, for example, limits the exercise of personal jurisdiction over foreign entities to causes of action that arise from a specific list of situations.51

Under the New Mexico Long-Arm Statute,52 a defendant's actions must satisfy

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41. See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980) (discussing the “stream of commerce” test); see also Donohue, supra note 19, § 9:7.
42. Dunne & Musacchio, supra note 5, at 387; Occhialino, supra note 18, § 1-17.
43. Dunne & Musacchio, supra note 5, at 387.
44. R.I. GEN. LAWS § 9-5-33 (1997) (stating that defendants outside of the state that “have the necessary minimum contacts with the state... shall be subject to the jurisdiction of the state... in every case not contrary to the provisions of the constitution or laws of the United States”).
45. ARK. CODE ANN. § 16-4-101 (1999) (“The courts of this state shall have personal jurisdiction of all persons, and all causes of action or claims for relief, to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution.”).
46. Dunne & Musacchio, supra note 5, at 387-88.
47. Id.
50. Dunne & Musacchio, supra note 5, at 387.
52. The New Mexico Long-Arm Statute, NMSA 1978, § 38-1-16 (1971), reads as follows:

A. Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from:
   (1) the transaction of any business within this state;
   (2) the operation of a motor vehicle upon the highways of this state;
   (3) the commission of a tortious act within this state;
   (4) the contracting to insure any person, property or risk located within this state at the time of contracting;
   (5) with respect to actions for divorce, separate maintenance or annulment, the circumstance of living in the marital relationship within the state, notwithstanding subsequent departure from the state, as to all obligations arising from alimony, child support or real or personal property settlements under Chapter 40, Article 4 NMSA 1978 if one party to the marital relationship continues to reside in the state.
B. Service of process may be made upon any person subject to the jurisdiction of the courts of this state under this section by personally serving the summons upon the defendant outside this state and such service has the same force and effect as though service had been personally made within this state.
one of five statutory conditions, one of which is the performance of a "transaction of any business" within the state. The defendants must also have sufficient "minimum contacts" to satisfy constitutional due process standards in order for a New Mexico court to obtain personal jurisdiction over that defendant. The "transaction of any business" element is an oft-litigated part of long-arm legislation: New Mexico courts have equated transacting business with the due process standard of "minimum contacts," even though the New Mexico Long-Arm Statute makes no specific mention of a "minimum contacts" standard.

The prime illustration of New Mexico courts' tendency to analyze "transaction of any business" and "minimum contacts" in the same light is found in Caba Ltd. Liability Co. v. Mustang Software, Inc. In Caba, the New Mexico Court of Appeals held that a company that maintained a connection to a New Mexico corporation by phone, fax, and mail while maintaining no physical presence in the state did not conduct business within the state sufficient to establish personal jurisdiction. The defendant, Mustang Software, sold products in New Mexico stores but did not itself maintain an office within the state. Mustang established a relationship with the plaintiff Caba during a conference in California. Subsequent to that meeting, a series of telephone calls, faxes, and mailings (including a Letter of Intent signed by both parties) transpired between the two companies, resulting in an agreement whereby the plaintiff would create software for the defendant. When that agreement was broken, plaintiff Caba attempted to bring suit against Mustang, necessitating a personal jurisdiction inquiry.

In determining whether or not a transaction of business under the long-arm statute existed, the court of appeals applied a series of factors listed in the New Mexico federal district court case, Pelton v. Methodist Hospital. Those factors:

C. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction is based upon this section.
D. Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereafter provided by law.
53. Id.
56. See, e.g., State Farm Mut. Ins. Co. v. Conyers, 109 N.M. 243, 245, 784 P.2d 986, 988 (1989) (holding that jurisdiction was proper over defendants who purchased insurance in New Mexico and thus transacted business in the state); Salas v. Homestake Enters., Inc., 106 N.M. 344, 345, 742 P.2d 1049, 1050 (1987) (holding that defendant corporation's telephonic invitation to plaintiff to visit defendant for further negotiations out-of-state did not constitute transaction of business in New Mexico); Kathrein v. Parkview Meadows, Inc., 102 N.M. 75, 77, 691 P.2d 462, 464 (1984) (holding that defendant's solicitation of business within the state, telephone calls to the consumer, and treatment of the consumer's spouse gave rise to the proper exercise of jurisdiction); Cronin v. Sierra Med. Ctr., 2000-NMCA-082, ¶ 21, 10 P.3d 845, 851 (holding that jurisdiction was proper over defendant hospital where its active solicitation of patients in New Mexico constituted intentional, purposeful, and persistent transaction of business in the state).
58. See NMSA 1978, § 38-1-16 (2004); supra text accompanying note 52.
60. Id. ¶ 21–22, 984 P.2d at 810–11.
61. Id. ¶ 2–3, 984 P.2d at 806.
62. Id. ¶ 4, 984 P.2d at 806.
63. Id. ¶ 6–7, 984 P.2d at 806–07.
64. Id. ¶ 8, 984 P.2d at 807.
included a determination of (1) which party initiated the transaction, (2) "where the transaction was entered into," and (3) where performance of the agreement was to take place. The court found that the first Pelton factor was not met, as the parties' initial conversation regarding their deal took place in California. As to the second factor, the court found that the transaction was not entered into in New Mexico when the companies' only interaction came by way of phone, fax, and mail. Additionally, with respect to the third factor, the court of appeals held that no transaction of business or minimum contacts existed sufficient to obtain personal jurisdiction because only Caba's specific performance of the agreement was to take place in New Mexico. In equating the transaction-of-business element with minimum contacts, the court did not look at these facts in isolation, but instead analyzed them in conjunction with other factors, such as the defendant's purposeful availment of the forum. Thus, under Caba, a defendant will be found to have sufficient minimum contacts to satisfy due process where the defendant has a connection with the forum state and has acted in New Mexico in such a manner that the defendant should reasonably anticipate being haled into court there.

C. The Proliferation of the Internet and Subsequent Personal Jurisdiction Issues

In attempting to determine when personal jurisdiction is and is not proper, the rapid proliferation of Internet technology has added new layers of analysis under which federal and state courts must work. The U.S. Supreme Court has described the Internet as "an international network of interconnected computers" that allows users to access a massive amount of information by connecting to a host computer. The Supreme Court further characterized the Internet as "a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers." For the past ten years, courts nationwide have struggled to find an appropriate manner to determine what kinds of sites subject a Web operator to the jurisdiction of a foreign state in which a site was accessed or used.

As discussed by the U.S. Supreme Court in Reno v. ACLU, the Internet applications that are most relevant to the establishment of personal jurisdiction are

67. Id. ¶ 13, 984 P.2d at 808.
68. Id. ¶¶ 14–16, 984 P.2d at 809. "[A] nonresident does not engage in business in New Mexico when it enters into contact with a New Mexico resident by mail, fax, and telephone without ever entering the state." Id. ¶ 16, 984 P.2d at 809.
69. Id. ¶ 18, 984 P.2d at 810.
70. Id. ¶ 23–25, 984 P.2d at 811. For a discussion of purposeful availment, see supra text accompanying notes 38–40.
72. See generally Dunne & Musacchio, supra note 5, at 389–402.
74. Reno, 521 U.S. at 853.
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The last of these services, the Web, presents the arm of the Internet with which most ordinary computer users are highly familiar. A Web site consists of one or more pages marked by "a unique 'address' that allows users to locate it" and to find a Web site either by entering this address into an internet browser program or via the use of a commercial search engine.

The World Wide Web itself encompasses an even greater number of interactive applications. For example, a Web site may require a user to provide login information, which can range from a simple e-mail address and password to providing a mailing address and/or other traditional contact information, to the storing of billing information, including mailing and shipping addresses, credit card numbers, and shopping preferences. Additionally, a Web site's message board or site forum can provide a high degree of interactivity. Typically, these forums require permanent login information from a user, thus allowing that user to post and reply to messages on any given topic for public viewing over the Internet. Recently, the promulgation of Web-logging (blogging) software has expanded independent information publishing opportunities, as individuals now have the ability to instantaneously post personalized anecdotes and opinions on their own blog sites.

"With the Internet, the average computer blogger has, in effect, his or her own printing press to reach the world." The broad range of services provided on the Internet can be categorized as proactive and reactive. Proactive services include e-mail, news groups, and Telnet. With e-mail, one of the Internet's most basic and popular services, a user can send an electronic message to another user from practically any location in the world. News groups are a form of E-Mail through which people who share common interests post messages in a public forum. There are over "20,000 news groups to which people can 'subscribe.'" In each of these systems, "messages are

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77. See id. at 851.
81. "[l]nteractive possibilities on the Internet such as message boards and chat rooms permit virtually unlimited viewpoint dissemination from a multitude of independent 'sources.'" Prometheus Radio Project v. FCC, 373 F.3d 372, 468 (3d Cir. 2004) (Scirica, C.J., concurring in part and dissenting in part).
85. Id.
86. Id.
87. Id.
88. Id. This number has likely gone up since the publication of the Hernandez and May article on July 15, 1996.
directed by the writer either to a particular person or to a particular group of people."
Additionally, "[t]he Telnet service allows a user to physically access remote computers as if they were" locally available.

Reactive services include Gopher, Hyper Text Transfer Protocol (HTTP), File Transfer Protocol (FTP), and the World Wide Web. FTP allows users to download large-sized files electronically from a host computer. At its core, the World Wide Web, while encompassing a number of lesser proactive and reactive services, allows users to browse information passively at their leisure from any given location. In sum, these reactive services enable searching and acquisition of data from a remote computer known as a "Web server." A Web server is a program that accepts requests for information framed according to the HyperText Transport Protocol (HTTP). The server processes these requests and sends the requested document.

At their most basic level, each of these systems has the potential to transmit information, whether it is public, personal, commercial, or otherwise, across state lines and into a variety of different forums. With the rapid pace at which these services have spread, courts have had a difficult time fashioning legal rules in response to the progress of Internet technology. This is particularly true when the discussion turns to Web-based personal jurisdiction, given the Web's preeminence and popularity as a medium for communication and commerce. It is no surprise, then, that differing approaches to establishing personal jurisdiction over the World Wide Web have arisen.

D. Two Analytical Approaches to Web-Based Personal Jurisdiction


In evaluating approaches to Web-based personal jurisdiction, several federal courts have followed the example set in *Inset Systems, Inc. v. Instruction Set, Inc.* In *Inset Systems*, the plaintiff, a Connecticut computer software developer/marketer, sued the defendant, a computer technology/support corporation that was neither

89. *Id.*  
90. *Id.*  
91. Gopher is a service that predates the existence of the World Wide Web "for organizing and displaying files on Internet servers. A Gopher server presents its contents as a hierarchically structured list of files. With the ascendance of the [World Wide] Web, many Gopher databases were converted to Web sites which can be more easily accessed via Web search engines" such as Google or Yahoo, thus making Gopher an essentially "dead" technology. ISP Glossary, *Gopher*, at http://isp.webopedia.com/TERM/G/gopher.html (last visited Mar. 25, 2005).  
94. See supra notes 72–83 and accompanying text.  
95. Hernandez & May, supra note 84.  
96. *Id.* (quoting QUE'S COMPUTER AND INTERNET DICTIONARY 554 (6th ed. 1995)).  
98. See infra notes 100–139 and accompanying text.  
99. See supra notes 72–75 and accompanying text.  
incorporated in nor conducted business in Connecticut on a regular basis. The plaintiff company sued over the defendant’s use of a trademark name belonging to the plaintiff. The U.S. District Court for the District of Connecticut applied Connecticut’s long-arm statute to the defendant Web site owner, holding that the owner “purposefully availed itself of the privilege of doing business within Connecticut.”

The federal district court in *Inset Systems* based its holding on the notion that a Web site is analogous to a print, television, or radio advertisement and becomes more powerful due to the fact that it is continually accessible. The court made its ruling without evidence of the number of Connecticut users who accessed the site in question; instead, the federal court assumed that thousands of Connecticut users could access the site. Thus, it allowed for Connecticut’s invocation of personal jurisdiction over the defendant Massachusetts site owner. In the years following the *Inset Systems* decision, a handful of courts have adopted a similarly broad standard. At the same time, a growing number of courts have become critical of the *Inset Systems* approach, and many have opted instead for the more narrow approach found in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*


In contrast to the broad, expansive approach to Internet-based personal jurisdiction found in *Inset Systems*, the federal district court for the Western District of Pennsylvania developed a “sliding scale” approach in the case of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* Zippo Manufacturing involved a dispute over a Web site name between the manufacturer of Zippo cigarette lighters and the owner of a Web site that sold subscriptions to an internet news service.

101. Id. at 162–63.
102. Id. at 163.
103. Id. at 165.
104. Id.
105. Id.
106. Id. The fact that the court in *Inset* made its ruling despite a lack of evidence regarding the number of users who accessed this particular site provided some of the grounds for criticism and rejection of this approach. See infra note 108.
111. Id. at 1121.
The court in *Zippo Manufacturing* came to the conclusion that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."112 The court identified the existence of a "sliding scale" that places Web sites on a continuum from active to passive.113 An active Web site allows users to enter "into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files."114 On the other hand, a passive Web site is one in which information is merely made available to interested parties.115 Lying between these two ends of the continuum are "Web sites where a user can exchange information with the host computer...[and] the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."116 At both the state and federal level, many jurisdictions have adopted the *Zippo Manufacturing* "sliding scale," or a similar test, in their attempts to resolve issues surrounding Internet-based personal jurisdiction.117 The states that have followed the *Zippo Manufacturing* approach include California,118 Minnesota,119 Ohio,120 Pennsylvania,121 and Texas.122 The federal appellate courts of the Third,123 Fourth,124

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112. Id. at 1124.
113. Id.
114. Id.
115. Id.
116. Id.
117. See, e.g., Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419–20 (9th Cir. 1997) (finding that California jurisdiction was improper in a trademark action against operators of a Web site that had advertised construction services); Conseco, Inc. v. Hickerson, 698 N.E.2d 816, x20 (Ind. Ct. App. 1998) (holding that Indiana jurisdiction was improper in a trademark action against a Web site operator whose site shared information about the plaintiff corporation).
118. Nam Tai Elecs., Inc. v. Titzer, 113 Cal. Rptr. 2d 769, 776–78 (Ct. App. 2001) (dismissing libel action where messages posted on a California-based Internet message board were not found to be directed at the forum state of California), overruled by Pavlovich v. Superior Court, 127 Cal. Rptr. 2d 329 (2002); Jewish Def. Org., Inc. v. Superior Court, 85 Cal. Rptr. 2d 611, 620–23 (Ct. App. 1999) (denying jurisdiction in defamation suit where court determined that defendants' Web posts constituted neither minimum contacts nor purposeful availment).
120. Edwards v. Erdey, 770 N.E.2d 672, 679 (Ohio 2001) (upholding jurisdiction based upon the level of interactivity and the commercial nature of the exchange of information that occurred on Web site between plaintiff and defendants).
122. Gessmann v. Stephens, 51 S.W.3d 329, 339 (Tex. Ct. App. 2001) (holding that appellant's Web site, which posted appellant's name, logo, and e-mail link, were insufficient facts upon which to base specific jurisdiction).
123. Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 451–52 (3d Cir. 2003) (mandating consideration of Internet and non-Internet contacts beyond company's Web site that might suffice to bring defendant within jurisdiction).
Fifth, 125 Eighth, 126 Ninth, 127 and Tenth 128 Circuits have also adopted the Zippo Manufacturing approach to one degree or another. 129

E. Determining an Approach to Internet-Based Personal Jurisdiction in New Mexico

Prior to the Sublett opinion, the federal district court for the District of New Mexico applied a very similar standard to that found in Zippo Manufacturing. 130 In Origins Natural Resources, Inc. v. Kotler, 131 the court “analogized various ... Internet activities to more established forms of communication and information dissemination in order to create a working standard very similar to” the Zippo Manufacturing sliding-scale approach. 132 According to the court in Origins Natural Resources, analyzing personal jurisdiction principles in the context of the Internet requires no more of a departure from the traditional requirements of minimum contacts and due process than had previous advances in communication or broadcast technology, including the ascendance of the telegraph, telephone, fax, television, and radio. 133

The court in Origins Natural Resources compared passive postings of information on the Internet to “magazine or interstate billboard advertising.” 134 Determining the target of Internet postings presents a number of problems, as the global reach of the Internet could potentially subject defendants who post information on the Web to virtually every jurisdiction in the world. 135 The court felt that this question was not as problematic when applied to Web sites that are clearly “interactive,” which the court analogized to telephone or mail communications. 136 In either scenario, the court in Origins Natural Resources essentially declared that the “purposeful availment” analysis remains the dominant inquiry in questions pertaining to jurisdiction. 137 Analyzing a defendant’s prospects for being subjected

125. Revell v. Lidov, 317 F.3d 467, 476 (5th Cir. 2002) (dismissing defamation action where author’s Internet bulletin board post neither referred to nor was directed at plaintiff’s forum state); Mink v. AAAA Dev. L.L.C., 190 F.3d 333, 336–37 (5th Cir. 1999) (denying jurisdiction where court found a Web site to be a passive advertisement incapable of handling business orders online).
126. Lakin v. Prudential Sec., 348 F.3d 704, 712–14 (8th Cir. 2003) (denying specific jurisdiction that was based in part on Internet contacts).
127. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419–20 (9th Cir. 1997) (finding that defendants’ use of an Internet Web page name was passive and that defendant had conducted no commercial activity in Arizona; thus, their contacts with Arizona were insufficient to establish jurisdiction).
129. For example, some courts have applied the Zippo rationale to questions of specific jurisdiction but have declined to apply it to a general jurisdiction analysis. See, e.g., Lakin, 348 F.3d at 710–11; Revell, 317 F.3d at 470–71.
130. Origins Natural Res., Inc. v. Kotler, 133 F. Supp. 2d 1232, 1236 (D.N.M. 2001) (distinguishing Web sites that are “interactive” from those that are not). Note that, despite the similar reasoning employed in both opinions, Origins Natural Resources does not cite Zippo Manufacturing as persuasive authority.
134. Id.
135. See Barron, supra note 132, at 7.
137. See Barron, supra note 132, at 7; see supra text accompanying notes 38–41.
to the courts of a given jurisdiction, as well as the extent to which the defendant benefits from the protections of that jurisdiction's law, was held to be a determinant analysis that must be done on a case-by-case basis. Following Origins Natural Resources, the first New Mexico state court decision to touch upon the concept of the Internet as applied to personal jurisdiction was Sublett v. Wallin.

III. STATEMENT OF THE CASE

Scott Wallin was a franchisee of Pillar To Post, Inc., a home inspection business incorporated in the state of Delaware. Sandra Sublett was a California resident who had decided to purchase a house in New Mexico. Sublett learned of Pillar To Post and Wallin's New Mexico franchise (also named Pillar To Post) via a commercial Internet search engine and an advertisement in the Albuquerque phonebook. While visiting the Pillar To Post Web site, Sublett used a feature labeled “Locate an inspector,” whereupon she was asked to enter the name of the city in which she planned to have a home inspected. Upon receiving information about Wallin’s Moriarty, New Mexico, franchise from the Pillar To Post Web site, Sublett “contracted with Wallin to inspect a house that [she] planned to purchase in Tijeras, New Mexico.” After purchasing the property, Sublett discovered that the pipes in the home’s heating system were made from a defective material that the inspection had not revealed, despite Sublett’s claim that she specifically inquired about them.

Sublett sued Wallin, the franchise, and Pillar To Post in the district court of Bernalillo County on a number of theories, including negligence, fraud, and breach of contract. Sublett alleged that both Wallin, as franchisee, and Pillar To Post, as franchisor, had reason to know that she would rely on Wallin’s inspection in making a decision to purchase the home. At the trial court level, Pillar To Post moved to dismiss for lack of personal jurisdiction, asserting that the corporation was not subject to the New Mexico long-arm statute, as Sublett had “failed to allege sufficient facts to establish that Pillar To Post had minimum contacts with New Mexico.” Sublett responded by arguing that the Pillar To Post corporation’s Web site and its franchise relationship with Wallin were sufficient to sustain personal jurisdiction. In support of this contention, Sublett attached materials that included her affidavit, a printout of the Web page listing Wallin’s franchise under “Pillar To Post in your area,” and her check to “Pillar To Post” which had been endorsed

139. Sublett, 2004-NMCA-089, ¶ 9, 94 P.3d at 848.
140. Id. ¶ 1, 94 P.3d at 847.
141. Id. ¶ 12, 94 P.3d at 848.
142. Id. ¶ 6, 94 P.3d at 847.
143. Id. ¶¶ 1, 6, 94 P.3d at 847, 848.
144. Id. ¶ 6, 94 P.3d at 848.
145. Id. ¶ 1, 94 P.3d at 847.
146. Id. ¶ 2, 94 P.3d at 847.
147. Id. ¶ 3, 94 P.3d at 847.
148. Id. ¶ 8, 94 P.3d at 848.
150. Id. ¶ 9, 94 P.3d at 848.
151. Id.
The district court dismissed Sublett's action, and her appeal ensued. Upon consideration of Sandra Sublett's appeal from the district court, in which she alleged that defendant company "Pillar To Post had the requisite minimum contacts with New Mexico" to sustain personal jurisdiction, the New Mexico Court of Appeals affirmed the district court's dismissal of her cause of action. Sublett asserted two grounds for the imposition of personal jurisdiction over Pillar To Post: the company's relationship with Wallin and his franchise, and the existence of the Pillar To Post Web site. The court of appeals held "that the franchise relationship in this case [did] not establish the basis for personal jurisdiction," and that Pillar To Post's "essentially passive" Web site also did not comprise a sufficient basis for personal jurisdiction.

IV. RATIONALE

At the outset, the New Mexico Court of Appeals observed that the sole issue to be decided in Sublett was whether the district court correctly determined that it lacked personal jurisdiction over Pillar To Post, a question of law to be reviewed de novo. The court noted that, as a foreign corporation, Pillar To Post would have been subject to the personal jurisdiction of a New Mexico district court only if its conduct relating to Sandra Sublett's home purchase met a three-part test: (1) Pillar To Post "must have done at least one of the acts enumerated in" the New Mexico long-arm statute, (2) Sublett's cause of action must have arisen from that act, and (3) Pillar To Post must have sufficient minimum contacts with the state to satisfy constitutional due process concerns. In order to meet the first prong of this test, Sublett must have shown that Pillar To Post performed an act included in the long-arm statute; specifically, the court of appeals noted that Sublett's action must have arisen from Pillar To Post's transaction of business within the state or from the company's commission of a tortious act within the state.

After holding that the franchisor/franchisee relationship between Pillar To Post and Scott Wallin was not sufficient to provide a basis for personal jurisdiction, the court of appeals turned its attention to the existence of the Pillar To Post Web

152. Id. (alteration in original).
153. Id. ¶ 10, 94 P.3d at 848.
154. Id. ¶ 4, 94 P.3d at 847.
155. Id. ¶ 5, 94 P.3d at 847.
156. Id. ¶ 13, 94 P.3d at 849.
157. Id. ¶ 4, 94 P.3d at 847.
158. Id. ¶ 5, 94 P.3d at 847.
159. Id. ¶ 11, 94 P.3d at 848. As this was a question of law and not of fact, the court of appeals used the trial court's record but reviewed the evidence and law without deference to the trial court's rulings. Id.
160. See supra notes 49–54 and accompanying text.
162. Id. ¶ 13, 94 P.3d at 849; see NMSA 1978, § 38-1-16(A) (1971).
163. Sublett, 2004-NMCA-089, ¶ 22, 94 P.3d at 851. According to the court, the Plaintiff "presented only a bare franchiser/franchisee relationship without any additional indicia of business transactions in the state." Id. As the analysis portion of this Note focuses on the second of Sublett's two asserted grounds for personal jurisdiction (the Web site issue), much of the court's discussion of the issues surrounding the franchiser/franchisee relationship, outside of those issues pertinent to the discussion of the Web site itself, have been omitted.
site. Specifically, the court analyzed whether the site's feature permitting a user to locate a local Pillar To Post franchise constituted a transaction of business and provided adequate minimum contacts in New Mexico to support personal jurisdiction. The court noted that Sublett was the first New Mexico state court case to deal with the Internet in a jurisdictional context.

The court began its analysis with a brief background discussion regarding the nature of the Internet. Among the multitude of cases that attempted to resolve jurisdictional questions regarding the Internet, the court of appeals identified the emergence of the two major approaches discussed above: the expansive view of personal jurisdiction exemplified in *Inset Systems, Inc. v. Instruction Set, Inc.*, and the "sliding scale" approach utilized in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* Relying on more recent legal authorities, the court cautioned that the issue of Internet-based personal jurisdiction is "considerably more complex" than either *Inset Systems* or *Zippo Manufacturing* may let on. The court further noted that these approaches to Internet-based personal jurisdiction questions "operate with the backdrop of due process concerns."

To decide what approach best suited the courts of New Mexico, the court of appeals first looked to established case law regarding personal jurisdiction. The court noted that this particular case alleged specific jurisdiction, as opposed to general jurisdiction. The court first reiterated "that a business that 'intentionally initiated commercial activities in New Mexico for the purpose of realizing pecuniary gain' subjects itself to personal jurisdiction" in the state. The court went on to recognize that "it is [a] defendant's activities which must provide the basis for personal jurisdiction, not the acts of other defendants or third parties." Moreover, the court noted its approval of the personal jurisdiction framework found in *Caba Ltd. Liability Co. v. Mustang Software, Inc.* that evaluates who initiated

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164. *Id.* ¶ 22, 94 P.3d at 851.
165. *Id.* ¶ 23, 94 P.3d at 851.
166. *Id.* ¶¶ 23–24, 94 P.3d at 851. "The question of whether a foreign corporation's Web site can support a finding of personal jurisdiction in New Mexico is one of first impression." *Id.* ¶ 23, 94 P.3d at 851.
167. *Id.* ¶ 24, 94 P.3d at 851; see *supra* notes 72–83 and accompanying text.
171. *See* Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004) ("[R]egardless how interactive a website is, it cannot form the basis for personal jurisdiction unless a nexus exists between the website and the cause of action or unless the contacts through the website are so substantial that they may be considered 'systematic and continuous.'"); Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2001).
173. *Id.*
174. *Id.* ¶ 28, 94 P.3d at 852.
175. See *supra* text accompanying note 18.
the transaction that becomes the basis for jurisdiction, where that transaction was entered into, and where the performance was to take place.\footnote{180}

Based upon its analysis of the applicable case law, the court of appeals held that the "more restrictive" approach of \textit{Zippo Manufacturing} "is better suited to New Mexico, at least where certain specific torts, such as defamation, are not involved."\footnote{181} In reaching this holding, the court found that the sliding-scale approach emphasized "the degree to which the website operator intentionally initiates the contacts" within New Mexico.\footnote{182} Additionally, the court of appeals opted for the \textit{Zippo Manufacturing} standard because it ensured "that the website operator intended the site to facilitate interactive business-like exchanges with users," thus minimizing "the possibilities that the actions of third parties" would subject the site operator to personal jurisdiction.\footnote{183} Finally, the court noted that the \textit{Zippo Manufacturing} test inherently includes the three-part \textit{Caba} analysis by examining the level of interactivity of a Web site.\footnote{184}

Upon accepting a \textit{Zippo Manufacturing} type approach to Internet-based personal jurisdiction, the court of appeals held that the Pillar To Post Web site was "not sufficient to confer jurisdiction."\footnote{185} Based upon its review of the affidavit and Web site printout provided by Sublett, the court found that the Web site merely provided information about the nearest Pillar To Post franchise.\footnote{186} According to the court, personal jurisdiction has not been found in many cases where informational Web sites are involved.\footnote{187} The court also found that "the only interactive feature of the website. . . was the 'Locate an inspector' feature, which requested minimal information and provided little more than additional advertising information. . . ."\footnote{188} In total, the court found that the features of the Web site made it "primarily passive" and, thus, under the \textit{Zippo Manufacturing} approach, the court refused to apply personal jurisdiction to Pillar To Post.\footnote{189}

As it had noted that the three-part test of \textit{Caba} was inherently part of the \textit{Zippo Manufacturing} Web site analysis, the court of appeals went on to evaluate Sublett’s interaction with Pillar To Post in light of the \textit{Caba} test.\footnote{190} The court found that it was Sublett who initiated the Web site transaction by her use of a commercial search engine.\footnote{191} While still in California, Sublett received information on Wallin’s franchise, thus completing the transaction from the Web site.\footnote{192} Additionally, the court found that all subsequent transactions occurred between Sublett and Wallin.
none of which involved the Web site beyond Sublett’s initial call to Wallin.\footnote{Id.} Finally, the court observed that there was no indication that Pillar To Post benefited monetarily from this particular transaction; “Pillar To Post had already received its benefit from the website by contracting with its franchisees.”\footnote{Id.}

The court summarized its ruling on Internet-based personal jurisdiction by holding that a “degree of interactivity” is required before jurisdiction will be upheld.\footnote{Id.} A passive, informational Web site, offering no opportunity for interaction, “will ordinarily not be enough” to uphold personal jurisdiction.\footnote{Id.} However, the court contemplated the possibility of upholding jurisdiction for defamation, libel, or trademark actions involving a passive Web site.\footnote{Id.} The court concluded by reiterating that the “issue of whether a particular defendant is subject to our long-arm statute must be decided on a case-by-case basis.”\footnote{Id.} Having reaffirmed New Mexico’s ad hoc basis for determining personal jurisdiction, the court of appeals left open the question of whether or not an active Web site would suffice to support personal jurisdiction in a particular case.\footnote{Id.} However, as this case involved a passive Web site, the court of appeals affirmed the district court’s dismissal.\footnote{Id.} The court held that New Mexico had no personal jurisdiction from either the franchise relationship or the existence of Pillar To Post’s Web site.\footnote{Id.}

V. ANALYSIS & IMPLICATIONS

The vague standards regarding Internet-based personal jurisdiction set by the Sublett opinion—in fact, the lack of a cohesive standard among the number of federal and state courts to address this issue—should create a cause for concern in the minds of Web designers, publishers, bloggers, and corporate information technology officers.\footnote{Id.} From the Web designer’s point of view, the Internet “constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can ‘publish’ information.”\footnote{Id.} However, Web designers must now be conscious of what level of interactivity is going into the sites that they create. Designers must be able to determine whether or not the addition of a login script, message board, or tech support forum would subject them or the site owners to personal jurisdiction in a given state. The problem, especially with rulings such as the one in Sublett that essentially “punt” on the question of what degree of interactivity is enough,\footnote{Id.} is that a Web designer in one state may not
know what, if any, interactive Web services will subject his or her site to the constraints of personal jurisdiction on a court-by-court basis. Even in this question’s relative infancy, it has posed problems for resolving the legal ramifications of Web design; legal practitioners have already raised the concern that “[a]nyone who has a web site or is thinking about having a web site should remember that the web site may establish ‘presence’ in another state. The nature and extent of that ‘presence’ may subject [a] website owner to the jurisdiction of courts in other states.”

Ultimately, what is necessary is a clearer delineation by the courts of what constitutes a Web site that is interactive enough to establish personal jurisdiction based on that Web presence alone, as well as a means of analyzing sites that are less interactive but may in fact be one contact among many for a jurisdictional analysis.

A. “Active” versus “Passive” Web Sites

For purposes of determining whether or not their sites will subject them to personal jurisdiction, Web site creators and administrators need to know whether or not their site is “active” enough to establish the necessary contacts. As did the vast majority of other state courts that followed the Zippo Manufacturing “sliding scale” rationale,206 the New Mexico Court of Appeals did not delineate exactly what types of sites fall under the labels “passive,” “active,” or “middle ground.”207 From the facts and holding of Sublett, all that one can be sure of is that the Pillar To Post Web site, with its ZIP code locator and franchise information, absent any other interactive feature, was “passive” in nature.208 Further, under Sublett, it would take a greater degree of interactivity before the site could be considered “active” such that jurisdiction would be upheld.209 As a result, Web designers, regardless of whether or not they contemplate that their information will necessarily be viewed in New Mexico, have little guidance in knowing whether or not their site is “active” enough to subject them to personal jurisdiction within this state.

If Web interactivity, whereby one piece of information is exchanged for another,210 truly is the benchmark, then it may be that a site program such as a login script or sales profile would subject a Web site owner/operator to personal jurisdiction. However, divining just what kind of information must be exchanged is another matter. The New Mexico Court of Appeals seemingly rejected the use of a store locator program as grounds for finding a site to be “active” sufficient for purposes of personal jurisdiction.211 Such a program merely asks for an individual’s ZIP code or street intersection, information that is neither highly unique nor personal.212 Perhaps the exchange of more personalized information, such as a

205. Palmisano, supra note 1.
206. See supra notes 117–129 and accompanying text.
208. Id.
209. Id. ¶ 33, 94 P.3d at 853.
name, address, phone number, and certainly credit card number, would suffice to make a site “active” under the Sublett ruling.

B. Applications of Web-Based Jurisdictional Law

Given the current state of Internet growth and the ease with which parties, from individuals to corporations, can establish a Web presence, there are literally millions of potential plaintiffs who could attempt to assert jurisdiction via the Internet. The implications of Web-based jurisdiction may very well change based upon the size of the defendant. Take, for example, Wal-Mart, the world’s leading retailer. This corporation not only has a physical retail presence in every state in the United States, but it also maintains a Web site where customers may place orders online. In analyzing whether Wal-Mart has minimum contacts within any given state, its Web presence is almost superfluous, because its physical presence and business activities are already established with its brick-and-mortar stores. Contrast this with a company such as Hastings, a media retailer that also has a customer service-based Web presence, but only has a physical presence within twenty U.S. states. A customer can transact business with Hastings via this site by placing an order for a product, thereby giving Hastings personal and credit information online. However, given the lack of clarity on whether or not even this exchange could be construed as “active” under Internet jurisdiction jurisprudence, Hastings and companies like it will remain uncertain whether or not a customer in a remote state could assert jurisdiction based on the company’s Web presence alone.

By and large, it may very well make sense to allow large corporations with both a massive Web presence and brick-and-mortar stores nationwide to be sued in any American forum. However, the development of a vague rule that allows individuals to drag smaller companies, or vice versa, “far across the country to defend themselves from content related claims based upon a few hundred hits on a Web site in that state” may not make for good policy. To do so would require such entities to keep tabs on the laws of every state in the nation, when their intent may be to do nothing more than to sell products or spread ideas locally. More than anything, it is best that those who maintain a Web presence, no matter what the size or nature of it, know exactly what their site may subject them to in the realm of litigation.

213. See supra text accompanying notes 72-99.
219. See supra notes 113–115 and accompanying text.
221. Id.
C. The Nature of Litigation May Inform When Web-Based Personal Jurisdiction Is Upheld

In addition to the "passive" site versus "active" site issue, the Sublett ruling also left open the question of whether or not Internet-based personal jurisdiction could be upheld in cases of defamation, libel, or trademark actions involving a passive Web site, though the court contemplated the possibility of such a finding. The possibility of allowing for different Internet-based personal jurisdiction standards based upon the nature of the suit brought against a defendant is also problematic. The argument has been made that, "because the Internet is bringing unsophisticated and poorly capitalized people into new situations where they are more likely than ever to make innocent mistakes and be sued for them, due process guarantees should be more robust in this new environment than they have been in more traditional commercial settings." Individual Web designers and bloggers can, and will, make mistakes concerning the content of their Web sites and electronic communications. With a vague standard for personal jurisdiction, suits for defamation, copyright infringement, and trademark infringement, as well as suits for relief in connection with other content-related claims, will be filed against these "unsophisticated and undercapitalized" designers.

1. Defamation and Libel Litigation

It is possible that a mere posting of information on a Web site could alone be the basis to find jurisdiction in a foreign state if the information involves defamatory statements that are expressly directed at a resident of that state. In Calder v. Jones, the U.S. Supreme Court upheld jurisdiction in a case involving a defamatory article published by the National Enquirer about actress Shirley Jones. The Court found that the Enquirer reporters knew that Jones lived and worked in California and that she would be injured most in that state. As such, they should have "anticipate[d] being haled into court there’ to answer for the truth of the[ir] statements," even though the information in the article was not actively "disseminated" by the Enquirer. The Court found that the "effects" of the defamatory article were felt most strongly in that state. Similarly, in the context of a Web site, information does not flow directly to the recipient, but is posted and available for anyone to view. If a defamatory statement regarding a California resident is posted on a Web site based in New York, but the only person to view the

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224. Id.
226. Id. at 789–91.
227. Id. at 789–90.
228. Id. at 790 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).
229. Id. at 789; see also Hernandez & May, supra note 84.
Web site lives in Florida, "it should make a significant difference to a court considering whether to assert jurisdiction over the Website owner." 231

Regarding Web-based personal jurisdiction, a minority of courts have relied on Calder to focus on the location where the harm from actionable statements occurred. 232 In California Software, Inc. v. Reliability Research, Inc., 233 the federal district court for the Central District of California upheld personal jurisdiction over a Nevada software seller who disseminated defamatory messages about a California corporation by mail, telephone, and the Internet, in an effort to reach the corporation's national sales base. 234 Citing Calder, the California District Court held that the resident plaintiff "felt the brunt of the harm from defendants' out-of-state acts in California." 235 According to the court, the Internet postings would have been sufficient to assert personal jurisdiction, so long as the plaintiff could show that some prospective customers did in fact read the defamatory postings. 236 Calder's influence in Internet personal jurisdiction cases has been slight, as most analysis has centered instead on questions of purposeful availment. 237 New Mexico, however, has left this question open—the Sublett opinion addresses neither of these potential approaches as the rule for this state. 238 Therefore, it is questionable whether either the Calder "effects test" standard or the "purposeful availment" test would apply to a defamation case based upon Internet postings in this state.

2. Trademark Infringement Litigation

In much the same way as with courts dealing with defamation and libel suits, courts have been split on the approach to dealing with trademark infringement over the Internet. The Ninth Circuit Court of Appeals rejected the Calder standard with regard to trademark infringement cases in Cybersell, Inc. v. Cybersell, Inc. 239 In that case, the court held that a Florida defendant company's contacts were insufficient to establish "purposeful availment" within the forum state of Arizona. 240 The court declined to go further solely on the ground that the plaintiff Arizona company had alleged trademark infringement over the Internet by the defendant's "use of the registered name 'Cybersell' on an essentially passive web page advertisement." 241 Otherwise, the court reasoned, "every complaint arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction

231. Hernandez & May, supra note 84.
234. Id. at 1357–58.
235. Id. at 1363.
236. Id. at 1363–64.
238. The Sublett opinion does discuss the Calder effects test with respect to defamation actions but makes no affirmative holding approving of that rationale with respect to Internet defamation actions. Sublett, 2004-NMCA-089, ¶ 29, 94 P.3d at 852.
239. 130 F.3d 414 (9th Cir. 1997).
240. Id. at 419–20.
241. Id. at 420.
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wherever the plaintiff's principal place of business is located." As a matter of judicial economy and in deference to traditional notions of purposeful activity and invocation of the benefits and protections of the forum state, the Ninth Circuit rejected Calder with respect to Internet-based personal jurisdiction. 243

Cybersell is illustrative of the choice-of-rule question regarding Internet-based personal jurisdiction and trademark infringement, in that the court analyzed the relative strengths and weaknesses of the "effects" and "purposeful availment" tests. 244 A number of courts have aligned themselves with Cybersell in adopting a purposeful availment test. 245 As with defamation, however, in Sublett the New Mexico Court of Appeals did not address what kind of test it would apply, if any, to an action for trademark infringement over the Internet.

D. Preserving the Internet as a Democratic Forum

Balanced against the rights of litigants to pursue civil actions is the notion of the Internet as the last true populist forum for unrestricted speech. 246 Attempting to invoke any type of restraint on a Web site could have a chilling effect on the promulgation of Internet speech such as blogs, message board posts, and opinion sites. Courts have shown a great willingness to acknowledge the importance of the Internet as a forum for speech and association. 247 "In the information age, electronic communications may be the most important forum for accessing and discussing topics of concern to the community," and, as such, courts should be wary of allowing governmental regulation of this important medium. 248 The Internet's diversity of viewpoints, characterized as a "universe of information," is one of its core strengths as a forum for unrestricted speech and advocacy. Individual citizens, political candidates, businesses and corporations, community organizations, and government entities "may use the Internet to disseminate information and opinions about matters of local concern." The Internet "help[s] citizens discharge the obligations of citizenship in a democracy." 250 If the standards for establishing personal jurisdiction over the Internet for defamation or libel actions remain vague

242. Id.
243. Id.
244. Id. at 419–20. However, even where courts have had the opportunity to analyze the competing approaches of "effects test" and "purposeful availment," they have not set down an affirmative holding that favors one over the other. See, e.g., Sys. Designs, Inc. v. New Customware Co., 248 F. Supp. 2d 1093, 1099 (D. Utah 2003) ("[T]his court finds it unnecessary to create a per se rule regarding direct trademark infringement [over the Internet].").
250. Id.
and open to question, anonymous Internet speakers may withhold their speech for fear of being unmasked by having to respond to either criminal or civil litigation. It is perhaps preferable that the courts should, if they adopt a standard at all, adopt a very stringent standard for the assertion of personal jurisdiction over the proprietors of Web sites, out of respect for the preservation of the Internet as an open democratic forum. While courts may hesitate to establish "bright-line" rules on any subject, let alone Web-based personal jurisdiction, the sheer magnitude of Web diversity mandates that a line be drawn somewhere.

E. Due Process Concerns

Providing the backdrop for all of the foregoing concerns regarding the exercise of Web-based jurisdiction is the basic notion of due process. In terms of jurisdiction, due process requires that the defendant have minimum contacts with the forum such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." In the wake of International Shoe, the former prerequisite of a party's presence in the forum has been eliminated as a requirement for the satisfaction of due process. Naturally, one would tend to believe that a great deal of Internet activity could potentially fall under the umbrella of "minimum contacts" sufficient to satisfy due process. However, the predominant minimum contacts tests include an element of knowledge or intent. Essentially, defendants must purposefully direct activities to the forum or avail themselves of the benefits of the forum. Purpose should presume knowledge; however, it is the Web-based defendants' lack of knowledge that they may be haled into a foreign court for their Internet activities that merits a strict due process analysis of the propriety of Web-based jurisdiction.

Under purposeful direction or availment, defendants intentionally direct activities toward a forum or otherwise make use of the forum in a conscious manner. Web publishers, however, may not be fully cognizant of how individuals in any given forum interact with their sites. To that end, a Web user does not knowingly or purposefully choose to interact within a state several hundred miles away merely by posting on a message board or a blog. To expect a defendant's acquiescence to the laws of a foreign state when that defendant neither knew of nor intended his or her site's interactivity within that state is contrary to International Shoe's notions of due process.
of traditional justice and fair play.\textsuperscript{262} In fact, it has been suggested that courts must look to the subjective intent of the Web publisher in analyzing the due process concerns of Web-based personal jurisdiction.\textsuperscript{263} According to some scholars, the trend among courts "appears to be to look at the intent of the web site owner."\textsuperscript{264} "Where evidence demonstrates an intent to do business or have an effect in the forum state, personal jurisdiction will be found to comport with the requirements of due process."\textsuperscript{265} If nothing else, this trend suggests that courts should incorporate an element of intent as a prerequisite, if not a hard-and-fast requirement, when attempting to assert personal jurisdiction over a defendant via the Web.

In light of the considerations discussed above, it seems proper that fully interactive sites, complete with login information and a commercial transaction element, are the types of sites that merit the "active" label and support the establishment of jurisdiction. As the court in \textit{Sublett} correctly noted, "passive" sites at the other end of the sliding scale merit no such finding.\textsuperscript{266} Those in the middle are a tougher call—it would be unsurprising to see courts analyzing these sites as one contact among many in a minimum contacts analysis. At the very least, courts should spell these propositions out. However, their hesitation to do so leaves Web site operators in a bit of a legal quandary.

Surprisingly, many legal scholars seem content to conclude that, since a Web site owner/operator publishes with the knowledge that "the world is watching," the site owner is purposefully directing the site’s activities to a worldwide audience and, thus, to a worldwide jurisdiction.\textsuperscript{267} This conceptualization could effectively transform the Internet into a sort of "self-censorship Olympics."\textsuperscript{268} That appears to be the safest route to take, given the lack of a discernible standard for basing personal jurisdiction on a defendant’s Web presence.

VI. CONCLUSION

The New Mexico Court of Appeals, in a case of first impression, held that a passive Web site cannot furnish sufficient minimum contacts for the establishment of personal jurisdiction in a civil action, at least where certain specific torts, such as defamation, are not involved.\textsuperscript{269} Essentially, the court ended its discussion there while many pertinent questions remained, such as what exactly constitutes a "passive" or "active" Web site,\textsuperscript{270} when does a site become "active" enough to merit personal jurisdiction against its owner,\textsuperscript{271} and when does the nature of the legal

\begin{itemize}
\item \textsuperscript{262} \textit{Int’l Shoe}, 326 U.S. at 316.
\item \textsuperscript{263} Dunne & Musacchio, supra note 5, at 397 (citing Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 420 (9th Cir. 1997)).
\item \textsuperscript{264} Id. at 398.
\item \textsuperscript{265} Id.
\item \textsuperscript{266} \textit{Sublett}, 2004-NMCA-089, ¶ 33, 94 P.3d at 853.
\item \textsuperscript{268} Id.
\item \textsuperscript{269} \textit{Sublett}, 2004-NMCA-089, ¶ 33, 94 P.3d at 853.
\item \textsuperscript{270} See supra text accompanying notes 207–212.
\item \textsuperscript{271} See supra text accompanying notes 207–212.
\end{itemize}
claim asserted change the analysis. The Sublett opinion is reflective of the general uncertainty among both state and federal courts about where to draw the bright line separating Web sites that do merit the assertion of personal jurisdiction from those that do not.

All that can be said of Internet-based personal jurisdiction at the moment is that proprietors of passive Web sites are safe, so long as they are not committing the specific torts of libel, defamation, or trademark infringement. Apart from that, the standard is unclear for discerning what type of site, if any, is interactive to the point of subjecting its owner, proprietor, or creator to the jurisdiction of a New Mexico court. In the near future, New Mexico courts should have the opportunity to explore these issues further; with the rapidly growing realm of e-commerce and Internet speech, a resolution reached sooner would be infinitely preferable to later.

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272. See supra text accompanying notes 224–245.
273. See supra text accompanying notes 100–129.