

## LEGAL UPDATE

### HOW TECHNOLOGICALLY SAVVY DO YOU HAVE TO BE TO APPLY *ZIPPO*?: AN APPROACH TO INTERNET PERSONAL JURISDICTION AFTER *FANCASTER* AND *EDVISORS*

*Joshua Beldner\**

I.	INTRODUCTION .....
II.	THE BASICS OF PERSONAL JURISDICTION .....
III.	PERSONAL JURISDICTION ENTERS THE INTERNET AGE .....
IV.	JUDGES AT WORK: <i>FANCASTER</i> AND <i>EDVISORS</i> .....
	A. <i>Fancaster: Recognizing That Times Have Changed</i> .....
	B. <i>Edvisors: Still Bound by the Past</i> .....
V.	WHAT NOW? LESSONS FOR MASSACHUSETTS PRACTITIONERS AND JUDGES .....
VI.	CONCLUSION .....

#### I. INTRODUCTION

Almost as soon as the Internet began its rapid dissemination across the United States, judges and academics alike began to anticipate fundamental changes in traditional areas of law.<sup>1</sup> As Judge Woodcock observed in *Hasbro*,

---

\* J.D. Candidate, Boston University School of Law, Class of 2012; B.A., Physics, Boston University, 2009; B.A., English, Boston University, 2009.

<sup>1</sup> See, e.g., *Hasbro, Inc. v. Clue Computing Inc.*, 994 F. Supp. 34, 37 (D. Mass. 1997) (observing that the rapid spread of the Internet presents unique challenges to traditional jurisprudence); Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3 (1997) (discussing impending changes to personal jurisdiction); Gwenn M. Kalow, *From the Internet to Court: Exercising Jurisdiction Over World Wide Web Communications*, 65

2011] AN APPROACH TO INTERNET PERSONAL JURISDICTION

*Inc. v. Clue Computing, Inc.*, “The explosive growth of the Internet has sparked new debates in the law. ‘Cyberspace’ poses new issues regarding copyrights and Internet sites, First Amendment inquiries, trademark, and personal jurisdiction issues.”<sup>2</sup> The burden of adapting personal jurisdiction to the Internet has fallen squarely on federal district and circuit courts. To date, the Supreme Court and several circuit courts, including the First Circuit, have not weighed in on the matter.<sup>3</sup>

Ever since the debate over personal jurisdiction via the Internet began, both judges and academics have devoted substantial amounts of time adapting decades of precedent to the unique challenges posed by the Internet.<sup>4</sup> One large reason for this voluminous jurisprudence and scholarship is the rapid evolution of the Internet.<sup>5</sup> Today, courts and scholars remain divided on a universal test for Internet personal jurisdiction, and the most enduring and widely accepted test, first articulated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, receives frequent criticism.<sup>6</sup> Typical cases involve plaintiffs who allege that the defendant harmed them over the Internet using a website based totally outside the plaintiff’s forum state.<sup>7</sup>

---

FORDHAM L. REV. 2241 (1997) (reporting splits between district courts on Internet personal jurisdiction); David L. Stott, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Web Site*, 15 J. MARSHALL J. COMPUTER & INFO. L. 819 (1997) (same).

<sup>2</sup> *Hasbro*, 994 F. Supp. at 37.

<sup>3</sup> *Sportschanel New England Ltd. P’ship v. Fancaster, Inc.*, No. 09cv11884-NG, 2010 WL 3895177, at \*4 (D. Mass. Oct. 1, 2010).

<sup>4</sup> Scholars have been particularly busy. A search of law reviews and journals on Westlaw for articles including “personal jurisdiction” and “Internet” in the same sentence returns over 1,000 articles.

<sup>5</sup> See Vint Cert, *Does the Internet Need to be Governed?*, CIRCLEID, Nov. 4, 2004, [http://www.circleid.com/posts/does\\_the\\_internet\\_need\\_to\\_be\\_governed](http://www.circleid.com/posts/does_the_internet_need_to_be_governed) (discussing the unique features of the Internet in comparison to other traditional communication platforms that have led to its rapid growth).

<sup>6</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). See, e.g., *Fancaster*, 2010 WL 3895177, at \*4 (discussing flaws in *Zippo* test); *Illinois v. Hemi Group LLC*, 622 F.3d 754, 758 (7th Cir. 2010) (refusing again to adopt the *Zippo* test); Richard A. Bales & Susan Van Wert, *Internet Website Jurisdiction*, 20 J. MARSHALL J. COMPUTER & INFO. L. 21, 49 (2001) (arguing that continued technological development has rendered *Zippo* obsolete); Dennis T. Yokoyama, *You Can’t Always Use the Zippo Code: The Fallacy of A Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1148-49 (2005) (questioning the existence of a single theory of Internet personal jurisdiction).

<sup>7</sup> See, e.g., *Zippo*, 952 F. Supp. at 1119-20; *Fancaster*, 2010 WL 3895177, at \*2-3. The

In articulating Internet personal jurisdiction doctrines, courts have struggled to balance the forum state's interest in protecting its residents from illegal conduct over the Internet with the specter of universal jurisdiction over all Internet users.<sup>8</sup> The traditional approach to personal jurisdiction and tests like *Zippo* contribute to this difficulty by leaving little room for judges to consider how the evolution of the Internet as a whole changes the norms governing personal jurisdiction.<sup>9</sup> Our precedential system further complicates matters by requiring judges to find guidance in opinions written during the Internet's constant change.<sup>10</sup>

The value of clarity and uniformity in Internet personal jurisdiction analysis cannot be overstated. Personal jurisdiction jurisprudence provides companies with notice of where plaintiffs might hale them into court.<sup>11</sup> Uncertainty and ambiguity in the jurisprudence makes it more difficult for companies to predict how much their websites expand their liability to potential suits.<sup>12</sup> This unpredictability increases the compliance costs for companies operating websites and might deter them from expanding their websites or increasing their interactivity altogether.<sup>13</sup> At the same time, the unpredictability also makes it difficult for consumers to determine whether local laws will protect them in transactions conducted over the Internet.<sup>14</sup>

Predictability is even more important given the United States' increasing economic dependence on e-commerce and the growing number of people who use the Internet on a daily basis. The growth of e-commerce in 2008 exceeded the growth in three of four major sectors in the economy and businesses, particularly retailers, continued to rely more heavily on the Internet to generate revenue.<sup>15</sup> Google, Facebook, and Twitter continue to redefine our

---

forum state is the state in which the suit is filed. See BLACK'S LAW DICTIONARY 726 (9th ed. 2009).

<sup>8</sup> See, e.g., *Fancaster*, 2010 WL 3895177, at \*3-4; Yokoyama, *supra* note 6, at 1160-64.

<sup>9</sup> See Andrea M. Matwyshyn, *Of Nodes and Power Laws: A Network Theory Approach to Internet Personal Jurisdiction Through Data Privacy*, 98 NW. U. L. REV. 493, 509 (2004).

<sup>10</sup> *Id.*

<sup>11</sup> See Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1347 (2001).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1347-48.

<sup>14</sup> *Id.* at 1348.

<sup>15</sup> U.S. CENSUS BUREAU, E-STATS (2010), available at <http://www.census.gov/econ/estats/2008/2008reportfinal.pdf>.

2011] AN APPROACH TO INTERNET PERSONAL JURISDICTION

relationship with the Internet and change how we access information, communicate and shop. Further, the percentage of American households that used the Internet grew to 68.7% in October 2009 and, if trends hold, will likely continue to grow.<sup>16</sup> The trends suggest that more interactions will take place over the Internet, resulting in an increase in court cases where Internet personal jurisdiction will be an important threshold question.<sup>17</sup>

The rise of e-commerce and increasing global interconnectedness makes it even more important that states strike a careful balance between protecting state citizens and respecting the line between Internet personal jurisdiction and universal jurisdiction.<sup>18</sup> Universal jurisdiction threatens to increase the compliance costs for companies operating websites and the possibility that they will face court cases in distant jurisdictions.<sup>19</sup> In addition, the exercise of universal personal jurisdiction by a court impedes the ability of other states to regulate conduct affecting their citizens and exceeds the state's constitutionally permissible jurisdiction.<sup>20</sup> Though the Internet allows for more distant contact with foreign parties, personal jurisdiction analysis must operate to allow the appropriate forums to regulate a defendant's actions.<sup>21</sup>

This Legal Update reviews two recent Massachusetts federal district court

---

<sup>16</sup> NAT'L TELECOMM. & INFO. ADMIN., DIGITAL NATION: 21ST CENTURY AMERICA'S PROGRESS TOWARD UNIVERSAL BROADBAND INTERNET ACCESS (2010), *available at* [http://www.ntia.doc.gov/reports/2010/NTIA\\_internet\\_use\\_report\\_Feb2010.pdf](http://www.ntia.doc.gov/reports/2010/NTIA_internet_use_report_Feb2010.pdf).

<sup>17</sup> *See also* Bales & Van Wert, *supra* note 6, at 21-22 (observing the growing potential for Internet-related crimes); Matwyshyn, *supra* note 9, at 495-96 (noting strain placed on jurisdictional analysis due to Internet's spread).

<sup>18</sup> With respect to the Internet, universal jurisdiction would exist if a court could exercise jurisdiction over a defendant because the defendant's website was accessible in the forum state. Many courts originally took this approach following *Inset Systems, Inc. v. Instruction Set, Inc.* Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996). Subsequent cases rejected the approach for failing to adequately consider purposeful availment and traditional limits on a court's jurisdiction. *See Yokoyama, supra* note 6, at 1155-57, 1161-63; *see also* Christopher McWhinney et. al., *The "Sliding Scale" of Personal Jurisdiction via the Internet*, 1999 STAN. TECH. L. REV. 1, 1 (observing that *Inset* drew criticism for expanding the scope of personal jurisdiction and not seriously considering the minimum contacts analysis).

<sup>19</sup> Geist, *supra* note 11, at 1347-48.

<sup>20</sup> Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U.L. REV. 411, 413-18 (2004) (discussing the downsides of universal jurisdiction and "regulatory spillover").

<sup>21</sup> *See id.*

cases that highlight the disparity in the sensitivity of judges to the fluid nature of the Internet during personal jurisdiction analysis – *Edvisors Network, Inc. v. Educational Advisors, Inc.* and *Sportschannel New England Limited Partnership v. Fancaster, Inc.*<sup>22</sup> The Update first provides an overview of personal jurisdiction and Internet personal jurisdiction before considering how two district court judges applied the same analysis to reach two different outcomes on similar facts. In conclusion, the Legal Update suggests how both practitioners and judges should approach personal jurisdiction in the face of the growing ubiquity of the Internet.

## II. THE BASICS OF PERSONAL JURISDICTION

For a court to exercise personal jurisdiction, the defendant's conduct must satisfy the applicable long-arm statute and the due process requirements of the Constitution.<sup>23</sup> In states like Massachusetts, where the state long-arm statute is coextensive with the due process clause, the court typically focuses solely on the constitutional analysis of personal jurisdiction.<sup>24</sup>

The court must also decide whether to exercise general or specific jurisdiction. General jurisdiction allows a court to exert jurisdiction over a defendant for virtually any claim brought against the defendant so long as the defendant had "continuous and systematic" contacts with the forum state.<sup>25</sup> Plaintiffs may establish specific jurisdiction when their cause of action arises from the defendant's forum-related activity.<sup>26</sup> In most cases of Internet personal jurisdiction, the defendant's out-of-state website is not enough to establish continuous and systematic contact with the forum state, causing most cases to arise under specific, not general, jurisdiction.<sup>27</sup>

Modern due process analysis of personal jurisdiction begins with *International Shoe v. Washington*.<sup>28</sup> In *International Shoe*, the Supreme Court

---

<sup>22</sup> *Sportschannel New England Ltd. P'ship v. Fancaster, Inc.*, No. 09cv11884-NG, 2010 WL 3895177 (D. Mass. Oct. 1, 2010); *Edvisors Network, Inc. v. Educ. Advisors, Inc.*, No. 10-10347-PBS, 2010 WL 5115752 (D. Mass. Nov. 30, 2010).

<sup>23</sup> *N. Light Tech. v. N. Lights Club*, 97 F. Supp. 2d 96, 104 (D. Mass. 2000).

<sup>24</sup> *Phillips v. Prairie Eye Ctr.*, 530 F.3d 22, 26 (1st Cir. 2008).

<sup>25</sup> *Phillips Exeter Acad. v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir. 1999).

<sup>26</sup> *Id.*

<sup>27</sup> See Nathan A. Olin, *The A-B-Cs of Targeting: A Formula for Resolving Personal Jurisdiction-Internet Issues within the District of Massachusetts*, 23 W. NEW ENG. L. REV. 237, 241 (2002).

<sup>28</sup> *Int'l Shoe v. Washington*, 326 U.S. 310 (1945). For a more thorough overview of personal jurisdiction traditionally and as applied to the Internet, see Yokoyama, *supra* note

2011] AN APPROACH TO INTERNET PERSONAL JURISDICTION

held that due process requires that the defendant maintained “minimum contacts” with the forum state such that the court’s exercise of personal jurisdiction “does not offend traditional notions of fair play and substantial justice.”<sup>29</sup> To determine whether a court’s jurisdiction comports with *International Shoe*, courts frequently employ a multi-factor analysis. Courts in Massachusetts perform a three-factor inquiry:

First, an inquiring court must ask whether the claim that undergirds the litigation directly relates to or arises out of the defendant’s contacts with the forum. Second, the court must ask whether those contacts constitute purposeful availment of the benefits and protections afforded by the forum’s laws. Third, if the proponent’s case clears the first two hurdles, the court then must analyze the overall reasonableness of an exercise of jurisdiction in light of a variety of pertinent factors that touch upon the fundamental fairness of an exercise of jurisdiction.<sup>30</sup>

Courts must affirmatively resolve all three factors to exercise specific jurisdiction.<sup>31</sup>

In cases involving Internet personal jurisdiction, the critical factor in the due process analysis is the second, which asks whether the defendant’s contacts “constitute purposeful availment of the benefits and protections afforded by the forum’s laws.”<sup>32</sup> The heart of the inquiry is whether the “defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”<sup>33</sup>

Three Supreme Court precedents are essential for a basic understanding of purposeful availment and color the inquiry into Internet personal jurisdiction. In *Asahi Metal Industry Co. v. Superior Court*, for a plurality, Justice O’Connor held that “[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”<sup>34</sup> O’Connor further argued that a defendant’s mere awareness that a product may or will end up in the forum state does not elevate the

---

6; Geist, *supra* note 11.

<sup>29</sup> *Int’l Shoe*, 326 U.S. at 316.

<sup>30</sup> *Phillips*, 196 F.3d at 288. Other courts combine the analysis into two factors. Olin, *supra* note 27, at 244 n.37.

<sup>31</sup> *Id.*

<sup>32</sup> Olin, *supra* note 27, at 244-45; *Phillips*, 196 F.3d at 288.

<sup>33</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Many circuits expressly adopted O’Connor’s reasoning in *Asahi* for the purposes of personal jurisdiction analysis. See Olin, *supra* note 27, at 248.

<sup>34</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

placement of a product into the stream of commerce to purposeful direction.<sup>35</sup> “Something more,” such as targeting a product to a particular state or advertising in the forum is required.<sup>36</sup>

*Burger King Corp. v. Rudzewicz* expanded on O’Connor’s analysis in *Asahi* by holding that a court can exercise personal jurisdiction over a defendant even if the defendant never had jurisdictionally significant physical contacts with the forum state.<sup>37</sup> The focus of the inquiry, instead, is on whether the defendant “purposefully directed” its activities toward residents of the forum state.<sup>38</sup> Connecting back to *Asahi*, the court in *Burger King* emphasized the voluntariness of the defendant’s behavior and the foreseeability of being summoned into court in the forum state.<sup>39</sup> The court, however, did contend that it should not exercise jurisdiction in cases where it would be unreasonable or fundamentally unfair.<sup>40</sup>

*Calder v. Jones* added to *Asahi* and *Burger King* by holding that the defendant meets the purposeful availment requirement through intentional acts targeted at a resident of the forum state.<sup>41</sup> The court emphasized that the defendant’s acts were “aimed” at the forum state and the defendant engaged in “intentional conduct in Florida calculated to cause injury to [the plaintiff].”<sup>42</sup> In light of the targeted effect of its conduct on the plaintiff, the defendant could have reasonably foreseen being haled into court in the forum state.<sup>43</sup>

### III. PERSONAL JURISDICTION ENTERS THE INTERNET AGE

The rise of the Internet in the 1990’s forced courts to adapt the foundations of personal jurisdiction – *International Shoe*, *Asahi*, *Burger King* and *Calder* – to court cases based in cyberspace.<sup>44</sup> Despite the rise of the *Zippo* test,

---

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 111-12.

<sup>37</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 474-75.

<sup>40</sup> *Id.* at 476-78.

<sup>41</sup> *Calder v. Jones*, 466 U.S. 783, 789-90 (1984).

<sup>42</sup> *Id.* at 790-91.

<sup>43</sup> *Id.* at 790. For more information about *Calder* and the use of the effects test in Internet personal jurisdiction cases, see, e.g., Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601 (2003).

<sup>44</sup> See, e.g., Rice & Gladstone, *supra* note 43, at 615-30 (discussing early cases of Internet personal jurisdiction); Yokoyama, *supra* note 6, at 1156-58 (same); Geist, *supra* note 11, at

2011] AN APPROACH TO INTERNET PERSONAL JURISDICTION

traditional personal jurisdiction jurisprudence still provides the framework, and, in some circuits, the only test for personal jurisdiction analysis.<sup>45</sup> Unlike the Seventh Circuit, courts in Massachusetts have applied *Zippo* to determine whether a defendant purposefully availed itself of the state's laws.<sup>46</sup>

The Federal District Court for the Western District of Pennsylvania premised the *Zippo* test on the idea 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."<sup>47</sup> From this observation, the court crafted a sliding scale based on the interactivity of the defendant's website to determine whether the defendant met the purposeful availment requirement.<sup>48</sup> For the court, a defendant satisfies purposeful availment whenever a defendant "clearly does business over the Internet. If the defendant enters into the contracts with the resident of a foreign jurisdiction that involves the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper."<sup>49</sup> On the opposite end of the *Zippo* scale are passive websites where the defendants only posted information on their site.<sup>50</sup> Passive websites alone are not sufficient to satisfy purposeful availment.<sup>51</sup>

In between the two ends of the *Zippo* sliding scale exists a murky area for "interactive Websites where a user can exchange information with the host computer."<sup>52</sup> For websites straddling the two extremes, courts determine whether to exercise jurisdiction based on "the level of interactivity" and the "commercial nature of the exchange of information that occurs on the Website."<sup>53</sup> To determine a website's level of interactivity, courts engage in a

---

1361-80 (same).

<sup>45</sup> See, e.g., *Illinois v. Hemi Group, LLC*, 622 F.3d 754, 758 (7th Cir. 2010) (rejecting the *Zippo* test and resorting to traditional minimum contacts analysis); *Instabook Corp. v. Instantpublisher.com*, 469 F. Supp. 2d 1120, 1125 (M.D. Fl. 2006) (discussing division over *Zippo* and Federal Circuit's lack of direction as to an appropriate test).

<sup>46</sup> See *Edvisors Network, Inc. v. Educ. Advisors, Inc.*, No. 10-10347-PBS, 2010 WL 5115752, at \*8 (D. Mass. Nov. 30, 2010); *Gather, Inc. v. Gatheroo, LLC*, 443 F. Supp. 2d 108, 115-16 (D. Mass. 2006).

<sup>47</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

<sup>53</sup> *Id.*



fact-intensive inquiry with little guidance.<sup>54</sup> One thing is certain: interactivity alone is not enough. The defendant's website must include additional features, such as the ability to order products to establish personal jurisdiction.<sup>55</sup> Adding to the difficulty is the prevalence of companies with at least a passive website and the increasing number of websites with interactive features.<sup>56</sup>

Both judges and commentators, reacting to the indeterminacy of the *Zippo* test's middle ground and the evolution of the Internet, criticized the test and sought viable alternatives.<sup>57</sup> To be fair, some have praised *Zippo* for connecting new aspects of the Internet to old notions of purposeful availment and for staying technologically neutral.<sup>58</sup> However, most commentators have raised serious questions about *Zippo*'s long-term viability.<sup>59</sup> For instance, one

---

<sup>54</sup> See *Sportschannel New England Ltd. P'ship v. Fancaster, Inc.*, No. 09cv11884-NG, 2010 WL 3895177, at \*5 (D. Mass. Oct. 1, 2010) (acknowledging lack of guidance to courts); *Jennings v. AC Hydraulic*, 383 F.3d 546, 550 (7th Cir. 2004) (observing the uncertainty of how much interactivity is needed but refusing to clarify).

<sup>55</sup> *McBee v. Delica Co., Ltd.*, 417 F.3d 107, 124 (1st Cir. 2005).

<sup>56</sup> *Jennings*, 383 F.3d at 550; Yokoyama, *supra* note 6, at 1367. See also Arthur R. Miller, Remark, *The Emerging Law of the Internet*, 38 GA. L. REV. 991, 996 (2004) (characterizing *Zippo* as "very, very forward thinking").

<sup>57</sup> See, e.g., *Illinois v. Hemi Group, LLC*, 622 F.3d 754 (7th Cir. 2010) (adopting traditional personal jurisdiction analysis over *Zippo*); Geist, *supra* note 11 (proposing a test based on the degree to which the defendant targeted or sought to avoid the forum state); Henry H. Perritt, Jr., *Towards a Hybrid Regulatory Scheme for the Internet*, 2001 U. CHI. LEGAL F. 215 (proposing a system of private regulation with public oversight through traditional tort theories); Yokoyama, *supra* note 6, at 1150-51 (recommending that courts use traditional principles of personal jurisdiction analysis to supplement *Zippo* test); Stein, *supra* note 20, at 411-13 (proposing that Internet personal jurisdiction analysis focus on the scope of the regulation and whether the exercise of jurisdiction overly intrudes on other states' jurisdiction); Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction over Virtually Present Defendants*, 64 U. MIAMI L. REV. 133 (2009) (advocating that states use their long-arm statutes to limit potential overreaching of Internet personal jurisdiction).

<sup>58</sup> Yokoyama, *supra* note 6, at 1164; TiTi Nguyen, Note, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKELEY TECH. L.J. 519, 536-37 (2004).

<sup>59</sup> See, e.g., Geist, *supra* note 11, at 1378-80 (questioning *Zippo*'s usefulness and predictability and observing the trend of some courts away from *Zippo*); Matwyshyn, *supra* note 9, at 496-97 (also questioning *Zippo*'s usefulness and predictability); Stein, *supra* note 20, at 430-32 (criticizing *Zippo* for failing to understand the meaning of purposeful availment and creating weird incentives for website operators to limit their websites' functionality).

2011] AN APPROACH TO INTERNET PERSONAL JURISDICTION

commentator questioned whether interactivity actually indicates whether a defendant should be subject to jurisdiction and observed that it provided a strange incentive to limit the functionality of websites.<sup>60</sup> Others doubt *Zippo*'s ability to adapt as the Internet develops.<sup>61</sup> Both courts and commentators have suggested that the traditional personal jurisdiction analysis is adequate if not better suited for evaluating Internet jurisdictional issues.<sup>62</sup>

IV. JUDGES AT WORK: *FANCASTER* AND *EDVISORS*

The Federal District Court for the District of Massachusetts's decisions in *Fancaster* and *Edvisors* came after over a decade of debate among courts and commentators about how to assess Internet personal jurisdiction. The differing decisions offered by Judge Gertner and Judge Saris, however, suggest that the analysis in Massachusetts should be revised to better account for the rapidly changing nature of the Internet.

A. *Fancaster: Recognizing That Times Have Changed*

*Fancaster* arose out of a suit by Sportschannel New England ("Sportschannel") seeking a declaration of its rights to the use of the word FANCASTER, a trademark of Fancaster, Inc.<sup>63</sup> Fancaster, a South Dakota corporation with a principal place of business in New Jersey, operates a website that offers sports-related information and videos.<sup>64</sup> The website allows visitors to register to receive email, play basic trivia, rank videos and contact the site operator by email, but does not allow visitors to upload videos.<sup>65</sup>

SportsChannel operates SportsNet, a Boston-based cable sports network that developed a public service program called "New England FanCaster Program"

---

<sup>60</sup> Allan R. Stein, *supra* note 20, at 411-13 (proposing that the analysis should focus on the scope of the regulation and whether the exercise of jurisdiction overly intrudes on other states' jurisdiction).

<sup>61</sup> See, e.g., Bales & Van Wert, *supra* note 6, at 49 (questioning *Zippo*'s ability to adapt to new technologies and society's increased familiarity with the Internet); Geist, *supra* note 11, at 1379 (noting constant change threatens *Zippo*'s effectiveness).

<sup>62</sup> See, e.g., Hemi Group, 622 F.3d at 758-59; Yokoyama, *supra* note 6, at 1195-96; C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 657-58 (2006).

<sup>63</sup> See Sportschannel New England Ltd. P'ship v. Fancaster, Inc., No. 09cv11884-NG, 2010 WL 3895177, at \*1 (D. Mass. Oct. 1, 2010).

<sup>64</sup> *Id.* at \*3, \*6.

<sup>65</sup> *Id.* at \*6.

to educate local students about broadcasting careers.<sup>66</sup> When Sportschannel expanded the use of its FanCaster name by soliciting corporate sponsorship and posting videos about the program on Video On Demand, Fancaster's president requested that Sportschannel stop using its trademark.<sup>67</sup> After several emails with Fancaster, Sportschannel brought a suit seeking a declaration of its rights.<sup>68</sup>

Judge Gertner's opinion dismissed Sportschannel's case for lack of personal jurisdiction over Fancaster.<sup>69</sup> Her opinion recognized that the Internet and society's relationship with it have changed drastically since the Internet's inception.<sup>70</sup> Judge Gertner's analysis turned on Sportschannel's inability to show that Fancaster purposefully availed itself of the laws of Massachusetts.<sup>71</sup> Her opinion began by observing the lack of guidance that courts have to use in applying the *Zippo* test and noting that the increased interactivity of websites today might lead to universal personal jurisdiction under *Zippo*.<sup>72</sup> Judge Gertner recognized that

[i]n the era of Facebook, . . . most websites now allow users to 'share' an article, choose to 'like' a particular page, add comments, and email the site owners. If virtually every website is now interactive in some measure, it cannot be that every website subjects itself to litigation in any forum.<sup>73</sup>

The need to tailor personal jurisdiction to the development of the Internet guided Judge Gertner's analysis of the interactivity of Fancaster's website. The opinion ultimately characterizes Fancaster's website as "moderately interactive."<sup>74</sup> Sportschannel argued primarily that, under *Hasbro*, the ability to email the site operator was enough to establish personal jurisdiction.<sup>75</sup> In

---

<sup>66</sup> *Id.* at \*1.

<sup>67</sup> *Id.*

<sup>68</sup> See *Sportschannel New England Ltd. P'ship v. Fancaster, Inc.*, No. 09cv11884-NG, 2010 WL 3895177, at \*2 (D. Mass. Oct. 1, 2010).

<sup>69</sup> *Id.* at \*4.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at \*4 (holding that the "evidence does not establish that Fancaster sought to do business in Massachusetts, nor that it claimed the protections of Massachusetts law").

<sup>72</sup> *Id.* at \*5-6.

<sup>73</sup> *Sportschannel New England Ltd. P'ship v. Fancaster, Inc.*, No. 09cv11884-NG, 2010 WL 3895177, at \*5-6 (D. Mass. Oct. 1, 2010).

<sup>74</sup> *Id.* at \*6.

<sup>75</sup> *Hasbro, Inc. v. Clue Computing Inc.*, 994 F. Supp. 34, 45 (D. Mass. 1997); *Fancaster*, 2010 WL 3895177, at \*6 (D. Mass. Oct. 1, 2010).

2011] *AN APPROACH TO INTERNET PERSONAL JURISDICTION*

distinguishing *Hasbro*, Gertner focused on the Internet's evolution since *Hasbro* and noted the ubiquity of Contact Us pages on websites, registrations for site access, and user rating systems for videos.<sup>76</sup> Not surprisingly, the fact that Fancaster labeled some of its videos with tags for Massachusetts sports teams did not change Judge Gertner's analysis because the tags simply allowed users to find videos about sports teams and did not specifically reach out to state residents.<sup>77</sup> Further, Fancaster had yet to commercialize its site, weighing against a finding of personal jurisdiction.<sup>78</sup> On the whole, the lack of any activity substantially directed at Massachusetts militated against finding personal jurisdiction over Fancaster.<sup>79</sup>

Judge Gertner's analysis reflected an understanding of the fluid nature of the Internet and the need to evaluate Internet personal jurisdiction in light of the Internet's common features.<sup>80</sup> It also emphasized that courts must be weary of deciding cases in a manner that extends the state's jurisdiction beyond constitutionally permissible limits or closer to universal jurisdiction.<sup>81</sup>

*B. Edvisors: Still Bound by the Past*

Judge Saris's opinion in *Edvisors*, which adopted the recommendation of Magistrate Judge Dein, represents a significant step back after Judge Gertner's push to better tailor personal jurisdiction to the modern use of the Internet.<sup>82</sup> In *Edvisors*, plaintiff Edvisors, a Massachusetts corporation based in Massachusetts, claimed that Educational Advisors, a California corporation based in California, infringed on its EDVISORS trademark by launching

---

<sup>76</sup> *Fancaster*, 2010 WL 3895177, at \*6. *Hasbro* held that the ability to email a website's operator was sufficient to establish personal jurisdiction over the defendant in the forum. *Hasbro*, 994 F. Supp. at 45.

<sup>77</sup> *Fancaster*, 2010 WL 3895177, at \*7. Fancaster might have purposefully availed itself of Massachusetts laws if it used registration data to target Massachusetts residents with information about their local teams. *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at \*7. The court also considered whether letters and emails sent by Fancaster to enforce its trademark might be enough to establish personal jurisdiction but held that it did not. *See id.* at \*7-9.

<sup>80</sup> *See id.* at \*7.

<sup>81</sup> *Fancaster*, 2010 WL 3895177, at \*7 (citing *Jennings v. AC Hydraulic*, 383 F.3d 550, 550 (7th Cir. 2004)). The court in *Jennings* recognized that "although technological advances may alter the analysis of personal jurisdiction, those advances may not eviscerate the constitutional limits on a state's power." *Jennings*, 383 F.3d at 550.

<sup>82</sup> *Edvisors Network, Inc. v. Educ. Advisors, Inc.*, No. 10-10347-PBS, 2010 WL 5115752, at \*1 (D. Mass. Nov. 30, 2010).

www.edadvisors.com and using “edadvisors” in advertising.<sup>83</sup> Both Edvisors and Educational Advisors provide educational counseling to schools, colleges and universities regarding issues such as accreditation.<sup>84</sup> Despite the absence of any physical contacts with, direct advertising to or revenue derived from the state of Massachusetts, the court ultimately found personal jurisdiction over Educational Advisors under the *Zippo* test.<sup>85</sup>

The Educational Advisors website contained many of the features that Judge Gertner found commonplace in *Fancaster*. Like Fancaster’s website, Educational Advisors’s provided general information about the company’s business and featured a “Contact Us” page and a registration page that allowed site visitors to request information and seek a free consultation.<sup>86</sup> The court observed that the website did not specifically target Massachusetts residents on its Contact Us page.<sup>87</sup> However, Judge Dein noted two key differences: the Educational Advisors’s website provided links to accrediting agencies that included Massachusetts schools among the agencies’ members and a link to the Massachusetts Association of Private Career Schools.<sup>88</sup>

For Judge Dein, these differences indicated that Educational Advisors sought “to do business with clients nationwide, including those located in Massachusetts.”<sup>89</sup> After making this observation, Judge Dein held that edadvisors.com was an interactive website on the *Zippo* sliding scale and that Educational Advisors used its website to solicit business from Massachusetts residents.<sup>90</sup> Judge Dein focused on the ability of site visitors to request a free consultation by registering for the site and the connection it had with agencies and organizations in Massachusetts that might allow Educational Advisors to aid Massachusetts schools.<sup>91</sup> Another dagger for Educational Advisors was that a Massachusetts school had requested a consultation, even though no business was transacted between the school and Educational Advisors.<sup>92</sup> On

---

<sup>83</sup> *Id.* at \*2.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at \*3. The website also featured a “Client Logon” feature but the feature was inactive and therefore did not factor into the decision. *Id.*

<sup>87</sup> *Edvisors Network, Inc. v. Educ. Advisors, Inc.*, No. 10-10347-PBS, 2010 WL 5115752, at \*3 (D. Mass. Nov. 30, 2010).

<sup>88</sup> *Id.* at \*4.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at \*7-8.

<sup>91</sup> *Id.* at \*8.

<sup>92</sup> *Edvisors Network, Inc. v. Educ. Advisors, Inc.*, No. 10-10347-PBS, 2010 WL

2011] AN APPROACH TO INTERNET PERSONAL JURISDICTION

these facts, and in heavy reliance on *Hasbro*, Judge Dein found that Educational Advisors's interactive website rose to the level of purposeful availment under Massachusetts law.<sup>93</sup> Judge Dein found further support for her conclusion in the *Calder* effects test because Educational Advisors allegedly engaged in trademark infringement, an intentional tort, so it knew that its conduct would particularly harm a Massachusetts corporation.<sup>94</sup> The targeted tort, in combination with the interactive website, was enough for the district court to exercise personal jurisdiction over Educational Advisors in Massachusetts.<sup>95</sup>

The decision in *Edvisors* demonstrates that personal jurisdiction jurisprudence fails to account for the Internet's ubiquity today. Features that Judge Gertner recognized as commonplace, such as a Contact Us page and website registration, played a central role in Judge Dein's purposeful availment analysis.<sup>96</sup> Judge Dein also focused on a few mentions of Massachusetts and the intentional nature of trademark infringement, two issues that Judge Gertner did not address.<sup>97</sup> Judge Dein's analysis hinged on the *Hasbro* case, a pre-2000 case that no longer comports with the reality of today's Internet.<sup>98</sup> In addition, Judge Dein brings us closer to universal personal jurisdiction by finding additional support for purposeful availment in mere references to Massachusetts schools and accrediting agencies on the Educational Advisor's website.<sup>99</sup> Given that edadvisors.com listed many national accrediting agencies and thirty-six state accreditation organizations, Judge Dein's decision suggests a lack of direct targeting to Massachusetts residents.<sup>100</sup> This limited targeting would not likely rise to the "something more" that O'Connor required

---

5115752, at \*3, \*8 (D. Mass. Nov. 30, 2010).

<sup>93</sup> *Id.* at \*7-8.

<sup>94</sup> *Id.* at \*8-9.

<sup>95</sup> *Id.* at \*9.

<sup>96</sup> *See id.* at \*7.

<sup>97</sup> *Edvisors Network, Inc. v. Educ. Advisors, Inc.*, No. 10-10347-PBS, 2010 WL 5115752, at \*7-8 (D. Mass. Nov. 30, 2010); *Sportschannel New England Ltd. P'ship v. Fancaster, Inc.*, No. 09cv11884-NG, 2010 WL 3895177, at \*7-8 (D. Mass. Oct. 1, 2010).

<sup>98</sup> *Edvisors*, 2010 WL 5115752, at \*7. Recall that *Hasbro*, decided in 1997, held that encouraging site visitors to send emails to the company was sufficient to establish personal jurisdiction. *Hasbro, Inc. v. Clue Computing Inc.*, 994 F. Supp. 34, 45 (D. Mass. 1997). Judge Gertner in *Fancaster* recognized that the *Hasbro* decision no longer made sense after thirteen years of evolution by the Internet. *See Fancaster*, 2010 WL 3895177, at \*6.

<sup>99</sup> *Edvisors*, 2010 WL 5115752, at \*8-9.

<sup>100</sup> *Edvisors*, 2010 WL 5115752, at \*4.

for the exercise of personal jurisdiction in *Asahi*.<sup>101</sup>

V. WHAT NOW? LESSONS FOR MASSACHUSETTS PRACTITIONERS AND  
JUDGES

Judge Gertner's and Judge Dein's opinions demonstrate that Massachusetts practitioners face the unpredictability feared by many judges and commentators in cases based on *Zippo*.<sup>102</sup> However, *Fancaster* and *Edvisors* provide some guidance for practitioners navigating the murky waters of purposeful availment under *Zippo*. A website's commercial nature and mention of the forum state will make it significantly more difficult for a defendant to overcome personal jurisdiction, especially in light of the forum state's traditional interest in protecting its residents.<sup>103</sup> Adding to Educational Advisors's difficulty of overcoming personal jurisdiction in *Edvisors* was *Edvisors*'s primarily interstate operation within the forum state.<sup>104</sup>

*Fancaster* suggests, however, that practitioners can overcome some level of targeting by emphasizing the commonality of features on their websites in comparison to today's Internet.<sup>105</sup> Part of the practitioner's pleading might need to update judges regarding current Internet trends so they can determine whether the defendant's website contains "something more" than mere interactivity needed to establish personal jurisdiction under *Zippo*.<sup>106</sup> In this manner, practitioners can narrow the gap in technological savvy among judges illustrated by *Edvisors* and *Fancaster* and thereby promote a more uniform application of Internet personal jurisdiction analysis. Such updating may also help to guide judges in evaluating the continued applicability and fairness of precedents like *Hasbro* that no longer make sense in light of today's Internet.<sup>107</sup>

Out-of-state defendants can also point to the threat of universal personal jurisdiction for added support.<sup>108</sup> Judges who apply Internet personal jurisdiction too loosely threaten to intrude on other states where the exercise of

---

<sup>101</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 111-12 (1987).

<sup>102</sup> See Discussion *supra* notes 58-63 and accompanying text.

<sup>103</sup> *Edvisors*, 2010 WL 5115752, at \*10.

<sup>104</sup> *Id.* at \*9.

<sup>105</sup> *Sportschannel New England Ltd. P'ship v. Fancaster, Inc.*, No. 09cv11884-NG, 2010 WL 3895177, at \*5-7 (D. Mass. Oct. 1, 2010).

<sup>106</sup> *Id.* at \*5-6.

<sup>107</sup> See *id.* at \*6-7 (discussing and ultimately refusing to apply *Hasbro*).

<sup>108</sup> *Id.* at \*7.

2011] AN APPROACH TO INTERNET PERSONAL JURISDICTION

personal jurisdiction might be more appropriate.<sup>109</sup> Especially in cases involving broad, non-specific targeting, the general policy against universal jurisdiction might help tip the personal jurisdiction analysis in the defendant's favor. When combined with an emphasis on the commonality of a website's features, an appeal to universal jurisdiction will help to convince judges to update their Internet personal jurisdiction analysis and ensure that defendants truly have purposefully availed themselves of the forum state.

Courts confronting cases like *Fancaster* and *Edvisors* can also take a major step forward by asking two simple questions that belie Judge Gertner's analysis in *Fancaster*. First, courts should ask whether the interactive features of the defendant's website reflect direct targeting of the residents of a forum state in light of the common features of the Internet today.<sup>110</sup> Second, courts should consider how their decision might extend the court's personal jurisdiction beyond constitutional limits and therefore intrude on the jurisdiction of other states.<sup>111</sup> These inquiries free judges from antiquated precedent and focus personal jurisdiction analysis on determining how much the defendant's website directly targets the forum state in comparison to the average website of the day.<sup>112</sup> The second inquiry also forces courts to consider how the exercise of personal jurisdiction might impede the regulatory goals of other states that may be better forums for regulating the defendant's conduct.<sup>113</sup> Taken together, the two questions help judges recognize the limitations of precedent in informing discussions about the Internet and may prevent the rise universal personal jurisdiction in cases involving the Internet.

Both the First Circuit and the Supreme Court could ease the burden on practitioners and move Massachusetts courts in the direction of greater uniformity in Internet personal jurisdiction analysis by offering an opinion that updates *Zippo*'s baselines.<sup>114</sup> Such an opinion, especially if it encourages judges to reevaluate precedent and consider regulatory intrusion in the

---

<sup>109</sup> See *id.*; Stein, *supra* note 20, at 411-13.

<sup>110</sup> See *Sportschannel New England Ltd. P'ship v. Fancaster, Inc.*, No. 09cv11884-NG, 2010 WL 3895177, at \*5-7 (D. Mass. Oct. 1, 2010); Geist, *supra* note 11, at 1345-46. Geist suggests scrapping the *Zippo* test all together and using a technologically independent approach based solely on targeting. *Id.*

<sup>111</sup> Professor Stein suggested a similar inquiry after viewing the issue of Internet personal jurisdiction through the lens of regulatory precision. See Stein, *supra* note 20.

<sup>112</sup> See Geist, *supra* note 11, at 1375-80; Matwyshyn, *supra* note 9, at 509.

<sup>113</sup> See Stein, *supra* note 20, at 450-54.

<sup>114</sup> Recall that, to date, neither the First Circuit nor the Supreme Court have weighed in specifically on the matter. *Fancaster*, 2010 WL 3895177, at \*5.



analysis, could go a long way to reconciling the gap between *Fancaster* and *Edvisors*.

## VI. CONCLUSION

Judge Gertner's and Judge Dein's opinions in *Fancaster* and *Edvisors* indicate that the traditional personal jurisdiction tests and *Zippo* have both lagged behind the Internet's swift development. Judge Gertner's technological savvy allowed her to analyze the level of interactivity of Fancaster's website relative to the Internet's current status and to rule out precedent that no longer comported with the realities of the Internet today.<sup>115</sup> In sharp contrast, Judge Dein's analysis in *Edvisors* demonstrates that strict reliance on traditional personal jurisdiction tests and *Zippo* does not account for the Internet's evolution and may cause judges to trend toward universal personal jurisdiction. Fortunately, Massachusetts practitioners and courts can develop a more modern approach to Internet personal jurisdiction by employing elements of Judge Gertner's treatment in *Fancaster*.

Judge Gertner once remarked on the difficulty of locating the Internet for purposes of personal jurisdiction: "To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps 'no there there,' the 'there' is everywhere where there is Internet access."<sup>116</sup> In the thirteen years since Gertner's remark, courts have not found a specific "there" that fits all Internet personal jurisdiction cases, as the dichotomy between *Fancaster* and *Edvisors* demonstrates. However, by refining how we apply the tests of personal jurisdiction to account for the evolution and pervasiveness of the Internet, both practitioners and courts can move closer to clarifying when the Internet is simply not there for personal jurisdiction purposes.

---

<sup>115</sup> *Fancaster*, 2010 WL 3895177, at \*4-5 ("Thirteen years after *Hasbro*, however, virtually every website has a 'contact us' page . . . . I refuse to find that every website with these characteristics subjects itself to universal jurisdiction); *id.* at \*5 ("I hold merely that a website with features that are now common . . . . cannot be sufficient to enable the site's owners to be haled into court in any forum in which it's accessible.").

<sup>116</sup> *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997).