




2014

Maryland Personal Jurisdiction Law in the Cyberspace Content

Saad Gul
Saul Ewing LLP

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>

 Part of the [Civil Procedure Commons](#), [Computer Law Commons](#), [Jurisdiction Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Gul, Saad (2014) "Maryland Personal Jurisdiction Law in the Cyberspace Content," *University of Baltimore Law Forum*: Vol. 45: No. 1, Article 2.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol45/iss1/2>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

ARTICLE

MARYLAND PERSONAL JURISDICTION LAW IN THE CYBERSPACE CONTEXT

By: Saad Gul¹

INTRODUCTION

In the late 1930s, Winston Churchill disclaimed any ability to forecast the Soviet Union's reaction to Nazi aggression, reputedly terming the Russian colossus 'a riddle wrapped in a mystery inside an enigma.' That phrase might just as aptly describe the doctrinal vagaries of the concept of personal jurisdiction.²

A century ago, personal jurisdiction largely hinged on a simple litmus test: the defendant's presence in the forum state. The issue of personal jurisdiction gained prevalence as the nation evolved from its earlier days of detached, semi-sovereign entities, whose citizens rarely interacted, to a nation where interstate commerce had increased, with interstate litigation growing correspondingly.³ In *Pennoyer v. Neff*,⁴ the Supreme Court of the United States effectively limited⁵ a state's jurisdiction to persons physically present within its territorial borders. However, in today's increasingly

¹ Associate, Saul Ewing LLP. The author would like to thank Donald A. Rea of Saul Ewing and Brian Boyd of Terrence Carmody for their insights into this piece. I would also like to thank Emily Weil, Lauren Vint, and Katelyn Vu of the *University of Baltimore Law Forum* for their assistance. The views expressed herein are the author's alone, and do not represent the position of Saul Ewing LLP or any other entity.

² *Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 462 (1st Cir. 1990).

³ See Lindy Burris Arwood, Note, *Personal Jurisdiction: Are the Federal Rules Keeping Up with (Internet) Traffic?*, 39 VAL. U. L. REV. 967, 976-78 (2005) (providing historical context).

⁴ 95 U.S. 714, 733-34 (1877) (holding that "to subject the property of a non-resident to valid claims against him in the [s]tate, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered'" (internal citation omitted)).

⁵ At the time, *Pennoyer* would have represented a virtually universal understanding. See, e.g., Damon C. Andrews & John M. Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 MD. L. REV. 313, 332 n.100 (2013) ("Jurisdiction of the person or property of an alien is founded on its presence or *situs* within the territory. Without this presence or *situs*, an exercise of jurisdiction is an act of usurpation.").

interconnected world, physical presence appears to represent an anachronism set in the post-Civil War, horse-and-buggy America of *Pennoyer*.

Since then, long-arm jurisdiction has devolved into a confused “state of flux, if not chaos . . . a ‘mess of state long-arm legislation and vacillating Supreme Court jurisprudence.’”⁶ Personal jurisdiction jurisprudence has become a latter-day rule against perpetuities, befuddling litigators⁷ and courts⁸ alike. This befuddlement is compounded by the rapid evolution of technology. Technological progress generates jurisdictional wrinkles at a pace that consistently outstrips the ability of the legal profession to deal with them.

In recent years, the complexity of those issues has increased exponentially by the development of cyberspace;⁹ actors a world away can exert influence in Maryland with the touch of a keystroke. Of course, at the headquarters of the National Security Agency (“NSA”), actors in Maryland can return those intrusions with interest. However, for counsel representing clients other than the NSA, the issue of what level of “cyber” or “virtual” activity suffices to allow Maryland to assert jurisdiction over an actor is one with immediate repercussions.¹⁰

The overarching theme of this article is that Maryland courts do, and should, adapt to these changes the same way they have adapted to previous technological developments:, such as the rise of the automobile or the corporate form, by adapting existing concepts to new developments, rather

⁶ Friedrich K. Juenger, *The Need for A Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309, 1312 (1999).

⁷ See, e.g., *Viron Int’l Corp. v. David Boland, Inc.*, 237 F. Supp. 2d 812, 818 (W.D. Mich. 2002) (“[P]laintiff is confused about the concept of personal jurisdiction.”).

⁸ See, e.g., *Leema Enters. v. Willi*, 582 F. Supp. 255, 257 (S.D.N.Y. 1984) (“The jurisprudence of personal jurisdiction, however, is an occasionally confusing and complex area of the law.”); *Babich v. Karsnak*, 528 A.2d 649, 653 (Pa. Super. 1987) (“Federal district courts sitting in Pennsylvania have professed that the issue of personal jurisdiction over such individuals is a somewhat confusing area of law which has divided courts in this circuit for at least a decade.”); *Curtis v. Curtis*, 789 P.2d 717, 725 (Utah Ct. App. 1990) (“The Utah and Mississippi trial courts apparently confused the rules concerning subject matter jurisdiction with those of personal jurisdiction.”).

⁹ “Cyberspace” can be defined as the “total interconnectedness of human beings through computers and telecommunication without regard to physical geography.” STEVEN A. HILDRETH, CONG. RESEARCH SERV., RL30745, CYBERWARFARE 1 (June 19, 2001), <http://fas.org/irp/crs/RL30735.pdf>.

¹⁰ See Russell J. Weintraub, *A Map out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 (1995) (“[T]he threshold determination of personal jurisdiction has become one of the most litigated issues in state and federal courts . . .”).

than creating new jurisprudence to this end.¹¹ As the Fourth Circuit has explained:

Until the due process concepts of personal jurisdiction are reconceived and rearticulated by the Supreme Court in light of advances in technology, we must develop, under existing principles, the more limited circumstances when it can be deemed that an out-of-state citizen, through electronic contacts, has conceptually ‘entered’ the State via the Internet for jurisdictional purposes.¹²

II. JURISDICTION AND TERRITORIALITY

Pennoyer was premised on two simple principles. First, a state had exclusive jurisdiction and sovereignty over persons and property within its territory.¹³ Second, it was powerless over persons and property not within its territory.¹⁴ Therefore, the Court effectively barred states from exercising personal jurisdiction over person or property outside those territorial limits.¹⁵ Seventy-five years after *Pennoyer*, in *International Shoe v. Washington*, the Supreme Court replaced territoriality as the touchstone of jurisdiction with a new test: Whether the defendant had sufficient “minimum contacts” with the forum so that the assertion of jurisdiction would not offend “traditional notions of fair play and substantial justice[?]”¹⁶ In tying jurisdiction to the nature of defendants’ activity in a particular state, the Court acknowledged that the rise of the corporate form, an entity that did not readily lend itself to the old litmus test of physical presence, required the development of a new test for personal jurisdiction.¹⁷

¹¹ Cf. *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-11 (D.C. Cir. 2002) (“Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet.”); *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 543 (E.D. Pa. 1999) (“The construction of the information superhighway does not warrant a departure from the well-worn path of traditional personal jurisdiction analysis trod by the Supreme Court and innumerable other federal courts, which leads to the exercise of personal jurisdiction only when a foreign corporation has had sufficient minimum contacts with the forum state. I conclude today that a web site alone does not minimum contacts make.”).

¹² *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 713 (4th Cir. 2002).

¹³ *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

¹⁴ *Id.*

¹⁵ *Id.* at 723.

¹⁶ *Int’l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁷ *Id.* (“Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its ‘presence’

International Shoe did not mark an abrupt departure from *Pennoyer*. First, *Pennoyer* itself had allowed for certain exceptions.¹⁸ Second, in the intervening years, the Court had accepted a series of fictions that effectively circumvented *Pennoyer*'s apparently iron-clad territoriality rule, such as fictions of implicit consent via tortious conduct,¹⁹ or implicit presence²⁰ via the conduct of business activities. In an interesting precursor to internet interactivity disputes, the Court drew distinctions between jurisdictions where a corporation "merely" solicited business, and those in which it undertook additional activities.²¹

However, as the dissent in *International Shoe* presciently warned, the new test was hopelessly nebulous, relying on "vague Constitutional criteria," and introduced tremendous uncertainty by substituting "elastic standards" for simplistic standards.²² The very concerns that Justice Black's dissent identified in *International Shoe* continue to plague personal jurisdiction today. However, with fantastic scenarios involving space-based or ship-borne servers rapidly evolving from the realm of science fiction into reality, – Google has sought a patent for clusters of servers floating on artificial islands on the high seas²³ territoriality would have been no panacea for jurisdiction issues in cyberspace.²⁴

Even in current circumstances, where system configurations can filter out contacts within particular jurisdictions,²⁵ territoriality is no silver bullet. Cyberspace does not necessarily equate to its physical manifestation. The Fourth Circuit has already held that the location of servers in Maryland does not rise to the level of minimum contacts: "It is unreasonable to expect that, merely by utilizing servers owned by a Maryland-based company, [defendant] should have foreseen that it could be haled into a Maryland court

without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.") (internal citations omitted).

¹⁸ See, e.g., *Pennoyer*, 95 U.S. at 733-35 (divorce actions could be adjudicated in plaintiff's home state even absent service within the state); *id.* at 735-36 (foreign corporation doing business in a state was deemed as having consented to suit in the state).

¹⁹ *Hess v. Pawloski*, 274 U.S. 352, 354-56 (1927).

²⁰ *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 265 (1917).

²¹ *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 579, 583, 589 (1914).

²² *Int'l Shoe*, 326 U.S. at 323-25 (Black, J., dissenting).

²³ *Water-Based Data Center*, U.S. Patent No. 7,525,207 (filed Feb. 26, 2007) (issued Apr. 28, 2009); Ashlee Vance, *Google's Search Goes Out to Sea*, N.Y. TIMES BITS BLOG (Sept. 7, 2008, 9:59 PM), [http:// bits.blogs.nytimes.com/2008/09/07/google-search-goes-out-to-sea/](http://bits.blogs.nytimes.com/2008/09/07/google-search-goes-out-to-sea/) (Google has sought a patent for clusters of servers floating on artificial islands on the high seas).

²⁴ See generally Andrews & Newman, *supra* note 4, at 325.

²⁵ Michael Traynor & Laura Pirri, *Personal Jurisdiction and the Internet: Emerging Trends and Future Directions*, 712 PRACTICING L. INST. 93, 121-22 (2002).

and held to account for the contents of its website.”²⁶ Additionally, in a North Carolina case, the Fourth Circuit dismissed the level of contacts created between a defendant and a North Carolina web server as *de minimis*.²⁷

Indeed territoriality had already receded as the *sine qua non* of jurisdiction by the 1950s. The Court would subsequently explain the rationale for the shift in *McGee v. International Life Insurance*:

In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more [s]tates and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a [s]tate where he engages in economic activity.²⁸

McGee was decided in the same term as *Hanson v. Denckla*, which added an additional requirement to substantial justice and fair play: To be subject to specific jurisdiction, there must be “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum [s]tate.”²⁹ “Purposeful availment” means that the defendant’s “contacts proximately result from the actions by defendant *himself* that create a ‘substantial connection’ with the forum [s]tate.”³⁰

In *World-Wide Volkswagen v. Woodson*, the Court reinforced *Denckla*’s holding, reiterating that the traditional notions of fair play and substantial justice would not suffice unless the defendant’s conduct and connection with the forum state were such that he could reasonably “anticipate being haled into court there.”³¹ This was illustrated in *Calder v. Jones*, with the Court finding jurisdiction where the defendant purportedly committed intentional acts expressly aimed at California, knowing “the brunt of that injury would be felt” there.³²

The Court further reinforced the *Calder* analysis in *Burger King v. Rudzewicz*, when it was called upon to determine if a contractual undertaking

²⁶ Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 402 (4th Cir. 2003).

²⁷ Christian Sci. Bd. of Dirs. of First Church of Christ, Scientist v. Nolan, 259 F.3d 209, 217 n.9 (4th Cir. 2001).

²⁸ McGee v. Int’l Life Ins. Co., 355 U.S. 220, 222-23 (1957).

²⁹ Hanson v. Denckla, 357 U.S. 235, 253 (1958).

³⁰ Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (emphasis in original).

³¹ World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294-95, 297 (1980).

³² 465 U.S. 783, 789-90 (1984).

sufficed to confer personal jurisdiction consistent with Due Process standards.³³ It held that the defendant must have a “substantial connection”³⁴ with the forum state: “[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws.”³⁵

Burger King appears to be the last jurisdiction case to achieve a majority. The first post-*Burger King* case, *Asahi Metal Industries v. Superior Ct. of Cal.*,³⁶ split the Court. Justice Scalia aside, the Justices agreed that on the facts of the case exercising personal jurisdiction would “offend ‘traditional notions of fair play and substantial justice[.]’”³⁷ However, no five members could agree on the underlying rationale. Under Court precedent,³⁸ the narrowest common ground between the concurring Justices is the holding of the case. In *Asahi*, the *Int’l Shoe* “fair play and substantial justice” test was the narrowest common ground. .

The Supreme Court recently revisited the issue in *J. McIntyre Mach., Ltd. v. Nicastro*,³⁹ and *Goodyear Dunlop Tires Operations, S.A. v. Brown*.⁴⁰ However, the Court did not articulate any new rules. Although Justices Breyer and Alito have suggested that the Supreme Court needs to clarify jurisdiction in light of rapid globalization and developments in commerce and communications “not anticipated by our precedents,”⁴¹ the Court has yet to do so.

Indeed, the Court may not be able to articulate a separate test beyond *Int’l Shoe*⁴² for cyber-jurisdiction.⁴³ In cyber-jurisdiction, as in other

³³ 471 U.S. at 478.

³⁴ *Id.* at 475 (citing *McGee*, 355 U.S. at 222).

³⁵ *Id.* (quoting *Hanson*, 357 U.S. at 253).

³⁶ 480 U.S. 102 (1987).

³⁷ *Id.* at 113 (involving an indemnification claim by one foreign defendant against another) (quoting *Int’l Shoe*, 326 U.S. at 316).

³⁸ In *Marks v. United States*, 430 U.S. 188, 193 (1977), the Court explained how the holding of a case should be viewed where there is no majority supporting the rationale of any opinion: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”

³⁹ See 131 S. Ct. 2780 (2011). See also Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in J. McIntyre Mach., Ltd. v. Nicastro*, 45 LOY. L.A. L. REV. 341, 345 (2012) (stating that the three McIntyre opinions “exacerbated rather than ameliorated the doctrinal confusion.”).

⁴⁰ 131 S. Ct. 2846 (2011).

⁴¹ *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2791.

⁴² *Goodyear*, 131 S. Ct. at 2853-54 (reaffirming that the *Int’l Shoe* test remains applicable to determine specific jurisdiction) (internal citations omitted).

⁴³ See *Quill Corp. v. N.D.*, 504 U.S. 298, 307 (1992) (noting that the Supreme Court “ha[s] abandoned more formalistic tests that focused on a defendant’s ‘presence’

jurisdictional disputes, the pivotal issue remains the defendant's actions and his connection with a forum state.⁴⁴ There is a strong argument that territoriality is retained as an implicit element of jurisdiction,⁴⁵ and that even minimum contacts are simply a surrogate for physical presence.⁴⁶ Case law concerning cyberspace-related jurisdiction will evolve incrementally in response to technological developments in the same way it has responded to other technological changes.⁴⁷ Maryland courts will continue to draw on the bricks-and-mortar minimum contacts analysis when determining whether they have jurisdiction over defendants for cyber activities in the foreseeable future.

III. APPLICATION: CONSTITUTIONAL CONCERNS AND GENERAL VERSUS SPECIFIC JURISDICTION

Personal jurisdiction has constitutional implications.⁴⁸ Therefore, to comply with Due Process, the defendant must have "minimum contacts" with Maryland, such that any exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'"⁴⁹ "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities" within Maryland.⁵⁰ The "nature" of the defendant's contacts with Maryland must be a factor in the

within a [s]tate in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that [s]tate").

⁴⁴ See *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2789 (Kennedy, J.) (plurality opinion) ("This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a state's courts to subject him to judgment.").

⁴⁵ *Burnham v. Super. Ct. of C.A., Cnty. of Marin*, 495 U.S. 606, 618 (1990) (Scalia, J.) (plurality opinion) (holding that, following *Int'l Shoe*, "defendant's litigation-related 'minimum contacts'" with the forum could "take the place of physical presence as the basis for jurisdiction"). See also *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 941 (4th Cir. 1994) ("[T]he establishment of a surrogate for presence has been the core task in defining the due process boundaries of a state's legitimate exercise of sovereignty over a person beyond its borders.").

⁴⁶ *ESAB Grp. v. Centricut, Inc.*, 126 F.3d 617, 623 (4th Cir. 1997) (citing *Stover v. O'Connell Assoc.*, 84 F.3d 132, 136 (1996)) (stating that minimum contacts jurisprudence has developed as a "surrogate for [physical] presence in the state because a state's sovereignty remains territorial and its judicial power extends over only those persons, property, and activities in its borders").

⁴⁷ See *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-11 (D.C. Cir. 2002).

⁴⁸ See *Goodyear*, 131 S. Ct. at 2850 ("A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause.").

⁴⁹ *Unspam Tech., Inc. v. Chernuk*, 716 F.3d 322, 328 (4th Cir. 2013).

⁵⁰ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

analysis.⁵¹ The Court also considers “the relationship among the defendant, the forum, and the litigation,”⁵² with the plaintiff’s interest not being a factor in the constitutional inquiry.⁵³ Therefore, personal jurisdiction will exist if the defendant “should reasonably anticipate being haled into court” in Maryland.⁵⁴

Jurisdiction is not monolithic. There are two varieties of jurisdiction, “specific” and “general.”⁵⁵ “If the defendant’s contacts with [Maryland] form the basis for the suit,” then Maryland courts have specific jurisdiction.⁵⁶ “If the defendant’s contacts... are not the basis for the suit,” then the defendant must have “continuous and systematic” contacts with the state sufficient to enable a Maryland court to exercise general jurisdiction.⁵⁷ As might be expected, the test for general jurisdiction is significantly more stringent than that for specific jurisdiction.⁵⁸ Courts have found contacts sufficient to justify specific, but not general, jurisdiction within the same case.⁵⁹

In the cyberspace context, it is difficult to envision a scenario in which a defendant would be subject to general jurisdiction in Maryland on the sole basis of its cyber activities.⁶⁰ Nevertheless, it is not inconceivable. There is at least one Pennsylvania decision which found that a Maryland defendant was subject to general jurisdiction by virtue of its interactive website.⁶¹

⁵¹ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-17 (1984).

⁵² *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

⁵³ Wendy C. Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 508-09 (1987) (“[M]odern courts continue to perceive personal jurisdiction as a confrontation between state power and the defendant, with the plaintiff’s interest being largely irrelevant.”).

⁵⁴ *World-Wide Volkswagen*, 444 U.S. at 297.

⁵⁵ *Goodyear*, 131 S. Ct. at 2851.

⁵⁶ *Beyond Sys., Inc. v. Realtime Gaming Holding Co.*, 388 Md. 1, 26, 878 A.2d 567, 582 (Md. 2005).

⁵⁷ *Id.* at 24, 878 A.2d at 580.

⁵⁸ *ALS Scan v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 715 (“[T]he threshold level of minimum contacts sufficient to confer general jurisdiction is significantly higher than for specific jurisdiction.”) (internal citations omitted).

⁵⁹ *Bird v. Parsons*, 289 F.3d 865, 874, 876 (6th Cir. 2002) (holding that Ohio courts lacked general jurisdiction over a nonresident business that registered domain names despite the fact that the defendant had, over its website, registered domain names for over 4,000 Ohio residents, but did have specific jurisdiction).

⁶⁰ *See Robbins v. Yutopian Enter.*, 202 F. Supp. 2d 426, 429 (D. Md. 2002) (holding that general jurisdiction did not exist where defendant conducted forty-six transactions in ten and a half months with Maryland residents, some of which were completed through its active website).

⁶¹ *See Mar-Eco, Inc. v. T & R & Sons Towing & Records, Inc.*, 837 A.2d 512, 517-18 (Pa. Super. Ct. 2003) (holding that the defendants’ website provided a basis for general jurisdiction because customers could use the website to “apply for

General jurisdiction requires sufficient systemic and continuous contacts, such that the defendant is effectively domiciled in the state, and has substantial, ongoing, and concrete contacts in addition to its cyber activities.⁶²

Specific jurisdiction premised on cyberspace activity presents a much knottier issue, and one that does not readily lend itself to bright-line tests. Many jurisdictions other than Maryland have grappled with the issue without developing a bright-line test.⁶³

IV. THE ZIPPO TEST

The seminal case⁶⁴ in the area of internet personal jurisdiction is a 1997 decision from the U.S. District Court for the Western District of Pennsylvania, *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*⁶⁵ Before *Zippo*, some courts had taken a quasi-*Pennoyer* approach of strict territoriality: accessibility of a defendant's website or other web activity equaled jurisdiction.⁶⁶ Other courts pointed out that this analysis meant that any defendant with a cyber presence was subject to jurisdiction throughout the

employment, search the new and used vehicle inventory, apply for financing to purchase a vehicle, calculate payments schedule, order parts and schedule service appointments"). See also *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1079-80 (9th Cir. 2003) (holding that defendant is subject to general jurisdiction on the basis of its internet activities), *vacated as moot*, 398 F.3d 1125 (9th Cir. 2005).

⁶² *Estate of Bank v. Swiss Valley Farms, Co.*, 286 F. Supp. 2d 514, 517-18 (D. Md. 2003) ("[G]eneral jurisdiction is ordinarily reserved for those defendants who have such substantial contacts with the forum state that they may be considered 'essentially domiciled' within that state.>").

⁶³ *Kline v. Williams*, No. 05-01101 (HHK), 2006 WL 758459, at *2 (D.D.C. 2006) ("[T]he challenged conduct at hand . . . presents the difficult yet extremely important task of adapting traditional standards of personal jurisdiction to [i]nternet activity"); *Maritz Inc. v. Cybergold Inc.*, 947 F. Supp. 1328, 1332 (E.D. Mo. 1996) ("The [I]nternet . . . raises difficult questions regarding the scope of court's personal jurisdiction in the context of due process jurisprudence"); *Savage Universal Corp. v. Grazier Const., Inc.*, No. 04 CIV. 1089 (GEL), 2004 WL 1824102, at *8 (S.D.N.Y. 2004) ("The question of personal jurisdiction over foreign defendants has become increasingly complex in the internet age.>").

⁶⁴ Richard K. Greenstein, Essay, *The Action Bias in American Law: Internet Jurisdiction and the Triumph of Zippo Dot Com*, 80 TEMP. L. REV. 21, 30 (2007) (describing the "utter dominance" of the *Zippo* test and the "difficult[y]" in finding a jurisdiction which uses a different analysis for internet jurisdiction).

⁶⁵ 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

⁶⁶ *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996); *Minnesota ex rel Humphrey v. Granite Gate Resorts, Inc.*, No. C6-95-7227, 1996 WL 767431, at *11 (Minn. Dist. Dec. 11, 1996).

nation.⁶⁷ Still, other courts adopted a hybrid approach, finding that the level of activity within the forum state, including the number of hits, must reach a critical mass to subject the defendant to personal jurisdiction.⁶⁸ Personal jurisdiction could be predicated on as few as six hits.⁶⁹ A fourth and final approach focused on the practical business effects of the defendant's internet activity.⁷⁰

Against this backdrop, the *Zippo* court's decision on a motion to dismiss a trademark infringement complaint for lack of jurisdiction became the touchstone of cyberspace jurisdiction analysis.⁷¹ In *Zippo*, the court posited a continuum of interactivity against which websites were to be benchmarked.⁷² At one end of the continuum lay defendants who were doing business in the forum; that they did so over the Internet was tangential to the legal issue.⁷³ These defendants were clearly subject to jurisdiction. At the other end were "passive" websites where defendants had merely posted information that was accessible to interested readers.⁷⁴ These defendants were just as clearly not subject to jurisdiction.

In between, there were lay defendants who fell in neither category because they had "interactive Web sites where a user can exchange information with the host computer."⁷⁵ Alternatively, as the Fourth Circuit has put it, "[o]ccupying a middle ground are semi-interactive websites, through which there have not occurred a high volume of transactions between the defendant and residents of the foreign jurisdiction, yet which do enable users to exchange information with the host computer."⁷⁶ To resolve these cases, *Zippo* adopted a "sliding scale" test, where jurisdiction turned on the degree and nature of the exchange: "[T]he exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the [website]."⁷⁷

Zippo is not without its critics. First, technology in the intervening fourteen years has dramatically transformed our understanding of

⁶⁷ *Naxos Res. Ltd. v. Southam, Inc.*, 1996 WL 635387, at *2 (C.D. Cal. June 3, 1996); *Hearst Corp. v. Goldberger*, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997).

⁶⁸ *Superguide Corp. v. Kegan*, 987 F. Supp. 481, 486 (W.D.N.C. 1997).

⁶⁹ *Am. Network, Inc. v. Access Am./Connect Atlanta, Inc.*, 975 F. Supp. 494, 499 (S.D.N.Y. 1997).

⁷⁰ *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 465, n.18 (D. Mass. 1997).

⁷¹ As of the date of writing, *Zippo* has been cited 5,306 times.

⁷² *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs, Inc.*, 334 F.3d 390, 399 (4th Cir. 2003).

⁷⁷ 952 F. Supp. at 1124.

interactivity.⁷⁸ At the time of writing, most, if not all, websites have some “interactive” features. Therefore, jurisdiction defaults to the thorny middle, where the test has the least predictive value. One commentator notes that the vast middle area of *Zippo* “has created a black hole of doubt and confusion, as courts have struggled with the question of whether an interactive site constitutes purposeful availment.”⁷⁹

Even the textbook defendant who “clearly does business over the Internet” no longer presents an obvious case. Some Maryland courts have found sales to Maryland residents to be sufficient for jurisdiction.⁸⁰ Others have reached the opposite conclusion.⁸¹ These divergent outcomes are not easily reconciled. However, scrutiny of the underlying analysis reveals that courts are increasingly disinclined to adhere to the original *Zippo* paradigm of gauging the sufficiency of contacts by the level of interactivity on the defendants’ website. As one decision explained, “[d]epending on the facts presented, website interactivity may have some bearing on the jurisdictional analysis, but it does not control the outcome.”⁸² Consequently, courts focus their analysis on the relationship between website interactivity and the forum state as the pivotal issue.⁸³

This does not mean that *Zippo* is dead. It does mean, however, that jurisdiction does not turn on a mechanical assessment of the interactivity of the website.⁸⁴ Indeed, in the general jurisdiction context, a number of courts outside of Maryland have explicitly distinguished interactivity from contacts, holding that it is possible to have one without the other.⁸⁵ *Zippo* does not

⁷⁸ Henning v. Suarez Corp. Indus., 713 F. Supp. 2d 459, 469 (E.D. Pa. 2010).

⁷⁹ 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, 1166-67 (2005).

⁸⁰ Young Again Prods., Inc. v. Acord, 307 F. Supp. 2d 713, 717 (D. Md. 2004) (“Despite the allegedly ‘exceedingly low number of Internet sales by [Defendant] to consumers in Maryland’ . . . [d]efendants do not and cannot dispute that they engage in business in Maryland. Defendant’s [i]nternet activity is directly related to the claims brought against it in this action.”).

⁸¹ Shamsuddin v. Vitamin Research Prods., 346 F. Supp. 2d 804, 812 (D. Md. 2004); cf. United Cutlery Corp. v. NFZ, Inc., CIV. CCB-03-1723, 2003 WL 22851946, at *5 (D. Md. Dec. 1, 2003) (holding that a single internet sale is sufficient to show that a company engaged in significant internet business activities in the forum state).

⁸² *Shamsuddin*, 346 F. Supp. 2d at 811.

⁸³ Toys ‘R’ Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003); cf. GTE New Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343, 1349-50 (D.C. Cir. 2000) (finding that there is no personal jurisdiction absent evidence that the forum residents used the defendant’s interactive website).

⁸⁴ Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154, 1160 (D. Wis. 2004) (“[T]he Supreme Court has never held that courts should apply different standards for personal jurisdiction depending on the type of contact involved.”).

⁸⁵ See, e.g., CollegeSource, Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1075-76 (9th Cir. 2011); Lakin v. Prudential Sec., Inc., 348 F.3d 704, 712 (8th Cir. 2003) (“Under

ignore the nature of defendants' cyber operations and their relationship with the forum; instead, it establishes a framework for benchmarking them.⁸⁶ It is a measure of purposeful availment.⁸⁷ At one end of the *Zippo* continuum, where a foreign defendant puts up a purely informational website, it has not purposefully availed itself of the forum state and there is no jurisdiction. At the other end of the continuum, where a foreign defendant uses the Internet to fire live ammunition into the forum state, clearly subjecting it to forum jurisdiction.⁸⁸ Measured against these scenarios, the *Zippo* sliding-scale test serves as a useful proxy for a defendant's purposeful availment of the forum, and whether it suffices to establish personal jurisdiction.

The crux of the issue is that interactivity or other site features cannot be evaluated independently, out of context to establish jurisdiction. Judge Easterbrook has pointed out the inherent pitfall of developing specific tests for specific contexts; such hyper-focus is necessarily "doomed to be shallow and to miss unifying principles."⁸⁹ Thus, technical measures such as interactivity are appropriately evaluated as proxies for the nature of a defendant's contacts with the jurisdiction, and whether they satisfy due process concerns. Due process, not particular technical arrangements, is the touchstone of internet-based jurisdiction jurisprudence.⁹⁰

the *Zippo* test, it is possible for a [w]eb site to be very interactive, but to have no quantity of contacts."); *Hy Cite Corp.*, 297 F. Supp. 2d at 1160 (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' for the purpose of general jurisdiction.").

⁸⁶ *Tamburo v. Dworkin*, 601 F.3d 693, 703 n.7 (7th Cir. 2010) (referring to the sliding scale as "an alternative minimum-contacts test for Internet-based claims").

⁸⁷ *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002) (expressing approval of *Zippo's* "'sliding scale' of interactivity to identify Internet activity that constitutes purposeful availment"). See *Innovative Garage Door Co. v. High Ranking Domains, LLC*, 981 N.E.2d 488, 497 (Ill. App. Ct. 2012) ("[W]hile a highly interactive website might indicate the quality of commercial contacts with the forum, it is the contacts themselves that would allow us to exercise jurisdiction rather than the mere fact that the website is interactive.").

⁸⁸ Zachary M. Seward, *Internet Hunting Has Got to Stop—If It Ever Starts*, WALL ST. J., Aug. 10, 2007, at A1; cf. *Buckley v. N.Y. Post Corp.*, 373 F.2d 175, 179 (2d Cir. 1967) (noting that "the publisher [of a libel] directly inflicts damage on the intangible reputation just as the frequently hypothesized but rarely encountered gunman firing across a state line does on the body"). See, e.g., *Neogen Corp.*, 282 F.3d at 890; *Tamburo*, 601 F.3d at 703.

⁸⁹ Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207-08.

⁹⁰ See, e.g., *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 750 (D. Mich. 2000) ("[T]he need for a special [i]nternet-focused test for 'minimum contacts' has yet to be established. It seems to this court that the ultimate question can still as

Indeed, the Court of Appeals of Maryland has analogously acknowledged that while a strict binary classification of contacts is not always possible, this is irrelevant as long as the underlying analysis corresponds to the necessary jurisprudential inquiry:

The concept of specific and general jurisdiction is a useful tool in the sometimes difficult task of detecting how much contact is enough, and most cases will fit nicely into one category or the other. If, however, the facts of a given case do not naturally place it at either end of the spectrum, there is no need to jettison the concept, or to force-fit the case. In that instance, the proper approach is to identify the approximate position of the case on the continuum that exists between the two extremes, and apply the corresponding standard, recognizing that the quantum of required contacts increases as the nexus between the contacts and the cause of action decreases.⁹¹

Interactivity is one means of benchmarking the level of contacts,⁹² but it is not the only one.

V. DUE PROCESS AND LONG-ARM JURISDICTION IN MARYLAND

Notwithstanding criticisms, *Zippo* has been widely adopted.⁹³ No other test has achieved similar general acceptance. The Fourth Circuit has adopted

readily be answered by determining whether the defendant did, or did not, have sufficient 'minimum contacts' in the forum state.”).

⁹¹ *Camelback Ski Corp. v. Behning*, 312 Md. 330, 339, 539 A.2d 1107, 1111 (1988).

⁹² *See, e.g., Pervasive Software, Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 227 n.7 (5th Cir. 2012) (internal citations omitted) (“Although interactivity along the *Zippo* sliding scale can be an important factor in an internet-based personal jurisdiction analysis because it can provide evidence of purposeful conduct, internet-based jurisdictional claims must continue to be evaluated on a case-by-case basis, focusing on the nature and quality of online and offline contacts to demonstrate the requisite purposeful conduct that establishes personal jurisdiction.”) (citations omitted); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252 (2d Cir. 2007) (internal citations and quotation marks omitted) (“While analyzing a defendant’s conduct under the *Zippo* sliding scale of interactivity may help frame the jurisdictional inquiry in some cases . . . it does not amount to a separate framework for analyzing internet-based jurisdiction. Instead, traditional statutory and constitutional principles remain the touchstone of the inquiry.”).

⁹³ *Best Van Lines, Inc.*, 490 F.3d at 251-52; *Toys ‘R’ Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003); *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002); *Soma Med. Int’l v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997).

its own three-part version of the *Zippo* test.⁹⁴ The Fourth Circuit has instructed trial courts deciding a jurisdictional challenge to consider: (1) the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in Maryland; (2) whether the plaintiff's claims arise out of those activities directed at Maryland; and, (3) whether the exercise of personal jurisdiction would be constitutionally reasonable.⁹⁵ It has separately held that simply placing information on the Internet does not create personal jurisdiction.⁹⁶

The Court of Appeals of Maryland has, in turn, adopted the Fourth Circuit's three-part test.⁹⁷ The analysis begins with the Maryland long-arm statute.⁹⁸ Maryland jurisprudence holds that even though the limits of the long-arm statute are coextensive with constitutional limits, the statutory inquiry may not be dispensed with, and analysis must begin with the statute.⁹⁹ The rationale is that there may be factual situations where the long-arm statute is not applicable even though constitutional requirements are met.¹⁰⁰ Put another way, if the defendant has contacts falling within the enumerated instances, then the statute is applicable to the constitutional limit.¹⁰¹ Thus, jurisdictional analysis is a two-part process: (1) whether the contacts are covered in the long-arm statute; and, (2) whether this is within the constitutional limit.¹⁰²

VI. THE MARYLAND LONG-ARM STATUTE

The starting point for any specific jurisdiction analysis is Maryland's long-arm statute. The statute provides that Maryland courts may exercise personal jurisdiction over a defendant who (1) transacts any business or performs any character of work or service in Maryland; (2) contracts to supply goods, food, services, or manufactured products in Maryland; (3) causes tortious injury in Maryland by an act or omission in the state; (4)

⁹⁴ *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

⁹⁵ *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003).

⁹⁶ *ALS Scan, Inc.*, 293 F.3d at 714.

⁹⁷ *MaryCLE v. First Choice Internet Inc.*, 166 Md. App. 481, 499, 890 A.2d 818, 828 (2006).

⁹⁸ See generally MD. CODE ANN., CTS. & JUD. PROC. § 6-103 (West 2014).

⁹⁹ *Mackey v. Compass Mktg., Inc.*, 391 Md. 117, 141, 892 A.2d 479, 493 n.6 (2006) (citing *Beyond v. Realtime*, 388 Md. 1, 877 A.2d 567 (2005)).

¹⁰⁰ *Krashes v. White*, 275 Md. 549, 559, 341 A.2d 798, 804 (1975).

¹⁰¹ *Ellicott Mach. Corp., Inc. v. John Holland Party Ltd.*, 995 F.2d 474, 477 (4th Cir. 1993).

¹⁰² *Bond v. Messerman*, 391 Md. 706, 721, 895 A.2d 990, 999 (2006) (citing *Mackey*, 391 Md. at 29-30, 892 A.2d at 486).

causes tortious injury inside or outside Maryland by an act or omission outside the state if he or she regularly does or solicits business, engages in any other persistent course of conduct in the state, or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the state; (5) has an interest in, uses, or possesses real property in Maryland; or (6) contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation, or agreement located, executed, or to be performed within Maryland at the time the contract is made, unless the parties otherwise provide in writing.¹⁰³ Interestingly, the statute specifically provides that it is applicable to “computer information and computer programs in the same manner” as goods and services.¹⁰⁴

A. Analysis in the Cyber Context

Three provisions of the long-arm statute are the most frequently litigated in the cyber context. Section (b)(1) subjects any defendant who “transacts any business” in Maryland to jurisdiction within the state;¹⁰⁵ defendant need not be engaged in business for profit.¹⁰⁶ The question of what constitutes “transacting business” is complex. It is clear that a tangential connection with Maryland will not suffice under the “purposeful availment” test.¹⁰⁷ Therefore, “Maryland courts have construed the phrase ‘transacting business’ narrowly, requiring, for example, significant negotiations or intentional advertising and selling in the forum state.”¹⁰⁸

The defendant need not have been physically present in Maryland.¹⁰⁹ Nevertheless, the plaintiff must show “some purposeful act in Maryland in relation to one or more of the elements of [the] cause of action” pursuant to Section (b)(1).¹¹⁰ It is not always clear what level of cyber activity, and what

¹⁰³ MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b)(1)-(6) (West 2014).

¹⁰⁴ *Id.* § 6-103(c)(2).

¹⁰⁵ MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b)(1) (West 2014).

¹⁰⁶ *Novack v. Nat'l Hot Rod Ass'n*, 247 Md. 350, 356, 231 A.2d 22, 26 (1967).

¹⁰⁷ *Capital Source Fin., LLC v. Delco Oil, Inc.*, 625 F. Supp. 304, 316 (D. Md. 2007).

¹⁰⁸ *Music Makers Holdings, LLC v. Sarro*, No. RWT-09-1836, 2010 WL 2807805, at *3 (D. Md. July 15, 2010).

¹⁰⁹ *Capital Source Fin., LLC*, 625 F. Supp. 2d at 313 (“Subsection (b)(1) does not require the defendant to have been present physically in Maryland.”); *Bahn v. Chicago Motor Club Ins. Co.*, 86 Md. App. 559, 634 A.2d 63, 67 (1993) (“The defendant need never have been physically present in the state.”).

¹¹⁰ *Talegen Corp. v. Signet Leasing & Fin. Corp.*, 104 Md. App. 663, 669, 657 A.2d 406, 409 n.3 (1995). *See also Dring v. Sullivan*, 423 F. Supp. 2d 540, 546 (D. Md. 2006) (“[I]t appears arguable that Defendant performed work or service in Maryland in connection with his referee duties, the cause of action does not arise from that work or service.”); *Bond v. Messerman*, 162 Md. App. 93, 116, 873 A.2d 417, 430 (Md. Ct. Spec. App. 2005) (“The fact that Messerman referred his client to Sheppard

level of corresponding effects, satisfy the requirement. What is clear is that mere communication, whether by electronic¹¹¹ or other means, will not suffice because they do not equate to transacting business within the meaning of Section (b)(1).¹¹²

Section (b)(3) appears to have generated relatively little case law involving internet contracts. Perhaps this is because of the requirement that both the tortious conduct and the injury must occur in Maryland.¹¹³ Such conduct implies that a defendant has developed connections within the state that could support personal jurisdiction. However, it is easy to envision cyber activity,¹¹⁴ such as anonymous defamation, where the location is not always known to the plaintiff, even if it is identifiable.¹¹⁵ Envision a hacker in a remote locale whose spyware program replicates itself and eventually ends up in Maryland. Did the tortious act in fact occur in Maryland? Can the plaintiff establish that it occurred in the state? Personal jurisdiction is often not available in such instances.¹¹⁶ The plaintiff might seek jurisdictional discovery as a compromise measure if he can otherwise make out a *prima facie* case for jurisdiction.

Section (b)(3)'s location restrictions may be why plaintiffs appear to prefer section (b)(4), where the tortious conduct need not occur in Maryland.¹¹⁷ Section (b)(4) requires that the defendant's contacts with Maryland be extensive, continuous and systematic before it can be subject to specific jurisdiction in a Maryland court.¹¹⁸ However, the "persistent conduct" requirement requires that the plaintiff must establish that the

Pratt has no bearing as to the jurisdictional issue because that referral is in no way connected to Bond's cause of action against Messerman.").

¹¹¹ See, e.g., *Chatterly Int'l, Inc. v. JoLida, Inc.*, No. WDQ-10-2236, 2011 WL 1230822, at *14 (D. Md. 2011) (rejecting the assertion that emails to Maryland constitute purposeful availment).

¹¹² See *Music Makers Holdings, LLC v. Sarro*, No. RWT-09-1836, 2010 WL 2807805, at *6 (D. Md. July 15, 2010) ("A defendant does not 'transact business' within the meaning of section 6-103(b)(1) of Maryland's long-arm statute by sending written communications to a purported infringer of its rights." The *Music Makers* court relied on a number of decisions that "have uniformly held that cease-and-desist letters alone do not establish personal jurisdiction."). See also *Bond*, 162 Md. App. at 93, 873 A.2d at 417.

¹¹³ *Dring*, 423 F. Supp. 2d at 546 (D. Md. 2006).

¹¹⁴ There are many cyber activities the legal system has just begun to grapple with. See *People v. Marquan*, No. 139, slip op. 04881 (N.Y. App. Ct. July 1, 2014).

¹¹⁵ See, e.g., *Chatterly Int'l*, 2011 WL 1230822 at *14 ("Assuming that [plaintiff] has been injured in Maryland, it has not shown that the [alleged tortious conduct] took place in Maryland.").

¹¹⁶ *Id.*

¹¹⁷ MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b)(3)-(4) (West 2014).

¹¹⁸ *Virtuality L.L.C. v. Bata Ltd.*, 138 F. Supp. 2d 677, 683-84 (D. Md. 2001) (rejecting argument that website presence constituted "persistent course of conduct in the [s]tate" under § 6-103(b)(4)).

defendant had “greater contacts than those necessary to establish jurisdiction under (b)(1).”¹¹⁹ Thus, a plaintiff who cannot establish jurisdiction under Section (b)(1) is almost automatically barred from establishing it under (b)(4).¹²⁰

B. Illustration

In one illustrative case, the forum selection clause in the company’s “Terms of Use” brought defendants within the ambit of the statute by virtue of their internet activity.¹²¹ In *CoStar Realty Info., Inc. v. Field*, the plaintiff, CoStar, provided subscription-based information to proprietary data on its servers in Bethesda.¹²² The Texas and Florida-based defendants allegedly accessed the servers utilizing the credentials of another customer.¹²³ When CoStar sued, defendants moved to dismiss for lack of personal jurisdiction. The court denied the Motion, partially on the basis of the Maryland long-arm statute.¹²⁴

The court noted that defendants allegedly had a business relationship with CoStar for years, by accessing data and contacting technical support personnel.¹²⁵ The court viewed this alleged conduct as falling within Section 6–103(b)(1)’s ambit extending jurisdiction when a defendant “transacts any business or performs any character of work or service in the State.”¹²⁶ It also indicated that jurisdiction might rest on claimed copyright infringement, which it viewed as falling within the Section 6-103(b)(4) provision extending jurisdiction to a foreign defendant who “[c]auses tortious injury in the State or outside the State if he . . . engages in any other persistent course of conduct in the State.”¹²⁷ Against facts virtually identical to *Field*, the court in *CoStar Realty Info., Inc. v. Meissner*¹²⁸ also predicated jurisdiction on the “transacts any business or performs any character of work or service in the State” test of Section 6-103(b)(1).

VII. WHAT CONSTITUTES PURPOSEFUL AVAILMENT IN MARYLAND

¹¹⁹ *Am. Ass'n of Blood Banks v. Bos. Paternity, LLC.*, No. DKC–2008–2046, 2009 WL 2366175 at *8 (D. Md. July 28, 2009).

¹²⁰ *Chatterly Int'l.*, 2011 WL 1230822 at *15.

¹²¹ *CoStar Realty Info., Inc. v. Field*, 612 F. Supp. 2d 660, 668–69 (D. Md. 2009).

¹²² *Id.* at 665.

¹²³ *Id.* at 665–66.

¹²⁴ *Id.* at 672.

¹²⁵ *Field*, 612 F. Supp. 2d at 666.

¹²⁶ *Id.* at 671–72 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b)(1) (West 2008)).

¹²⁷ *Field*, 612 F. Supp. 2d at 671–72 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 6–103(b)(4) (West 2008)).

¹²⁸ *CoStar Realty Info., Inc. v. Meissner*, 604 F. Supp. 2d 757, 766 (D. Md. 2009) (quoting MD. CODE ANN., CTS. & JUD. PROC. § 6–103(b)(1) (West 2008)).

Purposeful availment, and not cyber presence, is the *sine qua non* of specific jurisdiction in Maryland. Since purposeful availment requires that the defendant create a connection with Maryland,¹²⁹ it is clear that *Zippo* will not be an issue where no Maryland residents are affected.¹³⁰

The U.S. District Court for the District of Maryland applied these principles in *Shamsuddin v. Vitamin Research Products*, specifically noting that the mechanics of the Internet did not alter traditional analysis. “The construction of the information superhighway does not warrant a departure from the well[-]worn path of traditional jurisdiction analysis.”¹³¹ The issue was simply whether the defendant was “conducting electronic commerce” by virtue of its website.¹³² *Shamsuddin* began at the “floor” of the sliding scale announced in *Zippo*—a website that only offered information—and went on to note jurisprudential confusion over the definition of the “ceiling,” specifically the level of interactivity that would constitute “doing business over the internet.”¹³³

The court went on to observe that “[w]ebsite interactivity is important only insofar as it reflects commercial activity, and then only insofar as that commercial activity demonstrates purposeful availment of the benefits or privileges of residents of the forum state or purposeful availment of the benefits or privileges of the forum state.”¹³⁴ Ultimately, while it stopped short of clarifying what would suffice in the internet context, the court made clear that limited sales alone would not.¹³⁵

Other cases have made it clear that purposeful availment, not the sale per se, is the touchstone of the personal jurisdiction analysis. However, these are not mutually exclusive. Even a single sale to a Maryland entity can suffice,¹³⁶ but multiple sales may not.¹³⁷ These divergent outcomes are

¹²⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–76 (1985).

¹³⁰ *See Am. Info. Corp. v. Am. Infometrics, Inc.*, 139 F. Supp. 2d 696, 699 n.6 (D. Md. 2001) (stating a website’s interactive features were irrelevant where no Maryland residents were customers of the defendant).

¹³¹ *Shamsuddin v. Vitamin Research Prods.*, 346 F. Supp. 2d 804, 811 (D. Md. 2004) (quoting *S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 534 (E. D. Pa. 1999)).

¹³² *Id.* at 809.

¹³³ *Id.* at 809–10.

¹³⁴ *Id.* at 813.

¹³⁵ *Id.* at 810.

¹³⁶ *See Jason Pharm., Inc. v. Jianas Bros. Packaging Co.*, 94 Md. App. 425, 432, 617 A.2d 1125, 1128 (1993) (holding that a one-transaction contract with a Maryland entity, coupled with “sufficient evidence” of “purposeful activity,” may constitute “transacting business” within the meaning of MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b)(1) (West 2011)).

¹³⁷ *Eagle Coffee Co., Inc. v. Eagle Coffee Int’l, Inc.*, No. L-09-2585, 2010 WL 481201, at *4 (D. Md. Feb. 4, 2010).

impossible to reconcile if analyzed purely through the prism of technology. Alternatively, if their technological background is understood as a component of a larger legal analysis, with the touchstone being purposeful availment, then these divergent outcomes make sense.

A. *The Court of Appeals of Maryland Framework: Electronic Features as Contacts*

In *Beyond Systems, Inc. v. Realtime Gaming Holding Co.*, the Court of Appeals of Maryland held that the state could not exercise jurisdiction over non-Maryland defendants based on the fact that emails directed to Maryland residents contained hyperlinks to the defendants' website. The narrow heart of the holding was that mere access to the defendants' website did not constitute purposeful availment of the state.¹³⁸ The broader jurisprudential principle was that a plaintiff must show a nexus between the defendants' cyber presence and the injury in Maryland.¹³⁹

The Court of Appeals of Maryland affirmed the trial court's ruling that the plaintiff, whose employees had received the emails in question, had established neither general nor specific personal jurisdiction over the defendants.¹⁴⁰ It noted that general personal jurisdiction is predicated on a defendant's "continuous and systematic" contacts with Maryland.¹⁴¹ It rejected the argument that accessibility of the defendants' website in Maryland constituted the requisite continuous and systematic contacts within the state.¹⁴²

Next, the court affirmed the trial court's determination that Maryland lacked specific jurisdiction over the defendants.¹⁴³ Specific jurisdiction turned on whether the defendants had purposefully availed themselves of the state.¹⁴⁴ Absent a prima facie showing of an agency or other contractual relationship between the defendants and the sender of the emails, there was no purposeful availment.¹⁴⁵ The court did not view the mere fact that the emails contained a link to an IP address registered to one of the defendants as sufficient to establish either an agency relationship or specific jurisdiction.

Beyond Systems, Inc. highlights both the advantages and the pitfalls of applying the post-*International Shoe* purposeful availment framework to

¹³⁸ *Beyond Sys., Inc. v. Realtime Gaming Holding Co.*, 388 Md. 1, 28, 878 A.2d 567, 583 (2005).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 25, 878 A.2d at 582.

¹⁴¹ *Id.* at 22, 878 A.2d at 580 (quoting *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002)).

¹⁴² *Realtime Gaming Holding Co.*, 388 Md. at 25, 878 A.2d at 582.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 25, 878 A.2d at 582 (citing *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003)).

¹⁴⁵ *Realtime Gaming Holding Co.*, 388 Md. at 25, 878 A.2d at 582.

internet issues. It is easy to envision a scenario in which an unrelated third party directs emails, with links to a defendant's website, to Maryland residents. Indeed, an enterprising Maryland resident could potentially collude with the unrelated third party to establish the basis of a lawsuit. Fundamental fairness and due process require that defendants not be subject to suit based on IP links to their website alone.

On the other hand, the nature of cyberspace means that it may be exceedingly difficult for a party, except the most sophisticated entities, to identify relationships between different cyberspace actors. Absent discovery, a Maryland plaintiff will find it virtually impossible to unearth connections between real parties of interest and intermediary straw-men, a point neatly articulated by the dissent in *Beyond Systems, Inc.*:

The elusive nature of Internet presence, together with the strong incentives for "spammers" to conceal their identities, portends that often there will be a dearth of jurisdictional facts in future cases brought under the Commercial Electronic Mail statute. The [Maryland] General Assembly has created a private cause of action to aid Maryland residents in the escalating battle against unsolicited, deceptive commercial email. The effectiveness of that tool will be diminished if we close the courthouse door to plaintiffs without providing them the means to uncover facts that would support personal jurisdiction.¹⁴⁶

The issue necessarily entails tradeoffs, and Maryland has yet to identify the optimal midpoint.

B. Email Communication as Contacts

For purposes of determining jurisdiction, email communication is evaluated in the same manner as any other form of communication.¹⁴⁷ As a result, email is functionally indistinguishable from a letter sent through the postal service.¹⁴⁸ There is little dispute that the ease, automation, and sheer volume of email makes it a different creature. Maryland courts are still struggling with whether this difference is a matter of degree or an order of magnitude.¹⁴⁹ It is doubtful whether jurisdiction premised on a single email

¹⁴⁶ *Realtime Gaming Holding Co.*, 388 Md. at 34, 878 A.2d at 587 (Raker, J., dissenting).

¹⁴⁷ *See id.* at 20, 878 A.2d at 578–79.

¹⁴⁸ *See id.*

¹⁴⁹ *See id.* at 25, 878 A.2d at 582.

can pass a Due Process challenge.¹⁵⁰ Alternatively, other states have found that transmission of unsolicited email can give rise to jurisdiction.¹⁵¹

Beyond Systems Inc. v. Keynetics, Inc. involved a situation where all four defendants, collectively, challenged personal jurisdiction, contending that they had no officers or employees in Maryland, owned no property there, and did not solicit or advertise business there.¹⁵² One of the defendants operated a website selling digital products.¹⁵³ Another defendant was allegedly affiliated with marketers who drove Internet traffic to the website by various means, which purportedly included bulk email.¹⁵⁴ A third defendant was a website that supposedly routed its own affiliates to the first defendant.¹⁵⁵ The fourth was an internet service provider who hosted technical services for the other defendants.¹⁵⁶

The court found because the defendants were alleged either to have directed electronic communications into Maryland or to have co-operated with other defendants who did, the plaintiff was entitled to jurisdictional discovery, at least with regard to some defendants:

[T]he core issue is whether [the defendants] in some material way “directed” the allegedly offensive email messages into this [state], either on its own or by agent; otherwise, given the obvious unsolicited nature of the requests that Marylanders make purchases through the Internet, it is clear that the senders manifested an intent to do business here and, to the extent that their messages are found to be false or misleading, that they created in a person within the [state] a potential cause of action under Maryland law.¹⁵⁷

The holding highlighted the connection between the nature of the underlying claim, the alleged emails, and the jurisdictional issue.¹⁵⁸ Absent the nexus between the underlying claim and the electronic communication, email alone will not suffice to support personal jurisdiction.¹⁵⁹

¹⁵⁰ *Hanks v. Kinetics Grp, Inc.*, 878 So. 2d 782, 786 (La. Ct. App. 2004) (asserting that jurisdiction in such circumstances “would offend the traditional notions of fair play and substantial justice”).

¹⁵¹ *Internet Doorway, Inc. v. Parks*, 138 F. Supp. 2d 773, 774 (S.D. Miss. 2001); *Verizon Online Servs. Inc. v. Ralsky*, 203 F. Supp. 2d 601, 622–23 (E.D. Va. 2001).

¹⁵² *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 527–28 (D. Md. 2006).

¹⁵³ *Id.* at 528.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 548.

¹⁵⁶ *Id.* at 528.

¹⁵⁷ *Id.* at 543–44.

¹⁵⁸ *See id.* at 548.

¹⁵⁹ *Id.* at 545 (citing *Realtime Gaming Holding Co.*, 388 Md. at 27, 878 A.2d at 583).

For instance, in *Consulting Engineers Corp. v. Geometric Ltd.*, the Fourth Circuit held that emails and telephonic communications, on their own, do not establish minimum contacts with the forum state.¹⁶⁰ The defendant, a Colorado corporation, had limited contacts with the plaintiff, including four telephone calls and twenty-four emails.¹⁶¹ The plaintiff argued that the defendant had intentionally directed electronic communications into Virginia with the clear intent of transacting business there.¹⁶² The Fourth Circuit disagreed.¹⁶³ It viewed the determinative test as the quality and nature of the defendant's contacts.¹⁶⁴ On the facts, even if the defendant had "reached out" via email, that fact, even in conjunction with additional emails and phone calls, did not suffice to establish personal jurisdiction.¹⁶⁵

On the other hand, as in *Keynetics*, when the cause of action arises out of the emails, jurisdiction will lie, as illustrated in *Marycle, LLC v. First Choice Internet, Inc.*¹⁶⁶ *Marycle* involved a New York company that purportedly emailed Maryland residents.¹⁶⁷ The defendant conceded that it knew some emails would be opened in Maryland.¹⁶⁸ The Maryland plaintiff purportedly emailed the defendant, asking that they not receive any more emails.¹⁶⁹ The court observed that the defendant had to know that some of its emails, including those directed to the maryland-state-resident.com domain, would target Maryland, and could therefore anticipate being haled into court there.¹⁷⁰ Since the defendant was aware that some emails would go to Maryland residents for the purpose of soliciting business, personal jurisdiction was proper.¹⁷¹ The issue was not the email exchange per se, but its role in underlying events:

[W]hen considering the "nature" of [defendant's] contacts, our focus should be on the fact that the emails are communications specifically and deliberately designed to convince the recipients to engage the services of [defendant] and to promote the products of its customers. Although [defendant] did not deliberately select Maryland or any other

¹⁶⁰ 561 F.3d 273, 282 (4th Cir. 2009).

¹⁶¹ *Id.* at 275–76.

¹⁶² *Consulting Engineers Corp.*, 561 F.3d at 279.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 280.

¹⁶⁶ 166 Md. App. 481, 509, 890 A.2d 818, 835 (2006) (citing *Fenn v. MLeads Enters., Inc.*, 103 P.3d 156, 162 (Utah Ct. App. 2004)).

¹⁶⁷ 166 Md. App. at 489–91, 890 A.2d at 822–24.

¹⁶⁸ *Id.* at 500, 890 A.2d at 829.

¹⁶⁹ *Id.* at 491–92, 890 A.2d at 823–24.

¹⁷⁰ *Id.* at 506–07, 890 A.2d at 833 (citing *Camelback Ski Corp. v. Behning*, 312 Md. 330, 340–41, 539 A.2d 1107, 1112 (1988)).

¹⁷¹ *Marycle*, 166 Md. App. at 506, 890 A.2d at 833.

state in particular as its target, it *knew* that the solicitation would go to Maryland residents. Its broad solicitation of business “instantiates the purpose that makes the connection more than an ‘attenuated nexus,’ ” and thus it should be subject to jurisdiction “wherever its email[s] were received.”¹⁷²

C. Website Access as Minimum Contacts

Access to a defendant’s website in Maryland is generally insufficient to support personal jurisdiction.¹⁷³ As the Fourth Circuit has explained, “the Internet is omnipresent—when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction [I]t would be difficult to accept a structural arrangement in which each [state] has unlimited judicial power over every citizen in each other [state] who uses the Internet.”¹⁷⁴ The issue is whether access constitutes the type of purposeful availment that can lead the defendant to expect to be haled into court there.¹⁷⁵ The answer is almost invariably no.

In *Allcarrier Worldwide Servs., Inc. v. United Network Equip. Dealer Ass’n*,¹⁷⁶ the defendant was a Nebraska non-profit corporation. Via its website, it facilitated transactions in which its members, including a number of Maryland residents, bought and sold computer equipment.¹⁷⁷ However, it did not undertake purchases or sales itself.¹⁷⁸ The court held that absent a more proactive outreach to Maryland by the defendant, the mere existence of the website and its Maryland members did not subject the defendant to jurisdiction:

Plaintiff, along with [thirteen] other Maryland residents, paid membership dues to [defendant] in order to gain full access to [defendant]’s website. However, the [c]ourt declines to find that the mere payment by a Maryland resident of membership dues to a non-resident, non-profit organization

¹⁷² *Id.* at 509, 890 A.2d at 834-35 (citing *Fenn*, 103 P.3d at 162) (emphasis in original).

¹⁷³ *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (2000).

¹⁷⁴ *Id.* at 712-13.

¹⁷⁵ *See* *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456, 466-67 (D. Mass. 1997) (distinguishing websites from telephone and fax calls because a mailed letter, telephone call, and a message sent by fax constitute a “singularly” directed to a state based on a letter’s address or “telephone or fax number with a [particular] area code”).

¹⁷⁶ *Allcarrier Worldwide Servs., Inc. v. United Network Equip. Dealer Assoc.*, 812 F. Supp. 2d 676, 679, 684 (D. Md. 2011).

¹⁷⁷ *Id.* at 682.

¹⁷⁸ *Allcarrier Worldwide Servs., Inc.*, 812 F. Supp. 2d at 682.

would subject that organization to personal jurisdiction in Maryland. Moreover, [p]laintiff does not contend that [defendant] transacts business and provides services in the [S]tate of Maryland any more than it does in every other state or country in which its 267 members reside, but surely [p]laintiff would not contend that [defendant] is subject to personal jurisdiction in every state in which it has a member. To find that the [c]ourt has personal jurisdiction here, based on mere membership dues to an organization, would eviscerate the personal jurisdiction requirements of the long-arm statute and the [D]ue [P]rocess [C]lause.¹⁷⁹

Similarly, in *American Association of Blood Banks v. Boston Paternity*, the court dismissed a trademark infringement claim for lack of personal jurisdiction.¹⁸⁰ The defendant's website contained a "live chat" feature permitting users to discuss pricing with a representative, which the *Blood Banks* court held was semi-interactive under *Zippo*.¹⁸¹ However, the defendant never entered into a transaction with any Maryland resident.¹⁸² Nor did it direct its website into Maryland "with the manifest intent of engaging in any transaction with the state."¹⁸³ Therefore, the court concluded that the website, in addition to the application and payments that defendant had mailed into Maryland on an annual basis, did not satisfy Sections 6–103(b)(1) or (4) of the Maryland long-arm statute.¹⁸⁴ It is notable that nothing in the court's analysis indicates that a fully interactive website would have altered the outcome in the absence of additional connections to Maryland.¹⁸⁵

D. Sales as Contacts—In Context

Sales to Maryland residents present perhaps the most difficult jurisdictional question. On one hand, the sale of a product over the Internet to a Maryland resident, almost by definition, constitutes purposeful availment of its laws.¹⁸⁶ However, where a defendant sells globally, or merely facilitates such sales, such as eBay, courts in other jurisdictions have found it difficult to determine whether the isolated or occasional sale can support jurisdiction comporting with the traditional notions of due process and fair

¹⁷⁹ *Id.* at 682–83.

¹⁸⁰ *Am. Ass'n of Blood Banks v. Bos. Paternity, LLC*, No. DKC 2008–2046, 2009 WL 2366175, at *9 (D. Md. July 28, 2009).

¹⁸¹ *Id.* at *8–9.

¹⁸² *Id.* at *9.

¹⁸³ *Id.*

¹⁸⁴ *American Ass'n of Blood*, 2009 WL 2366175 at *9–10.

¹⁸⁵ *Id.* at *8–10.

¹⁸⁶ *See Young Again Prods., Inc. v. Acord*, 307 F. Supp. 2d 713, 717 (D. Md. 2004).

play.¹⁸⁷ Of course, determining what level or frequency of sales would support due process is another knotty issue.

Where sales involve internet intermediaries, such as eBay, courts generally hold that defendants have not purposefully availed themselves of the forum, even if they have utilized interactive sites.¹⁸⁸ Courts have held that selling goods over internet auction sites does not subject a defendant to the jurisdiction of the purchasers, despite the interactivity of internet auction sites.¹⁸⁹ In *United Cutlery Corp. v. NFZ, Inc.*, the U.S. District Court for the District of Maryland explained the rationale for such holdings: “Although the websites were interactive and designed for the purpose of selling products to participating users, [the defendant] exercised no authority over maintenance of the websites, nor did he exert control over the audience they targeted.”¹⁹⁰

Noting that the defendant’s objective was to sell to the highest bidder, irrespective of a bidder’s state of residence, the court determined that the defendant had not “‘directed activity’ into Maryland with the ‘[manifest] intent of engaging in business or other interactions within the State.’”¹⁹¹ In other words, the defendant had not purposefully availed itself of the privilege of conducting business in Maryland.¹⁹² Interestingly, the defendant’s internet purchases from Maryland suppliers did not alter the outcome.¹⁹³

Other scenarios are arguably closer calls. For instance, in *Eagle Coffee Co., Inc. v. Eagle Coffee International, Inc.*, the court dismissed a trademark infringement case for lack of personal jurisdiction.¹⁹⁴ In *Eagle Coffee*, the only contacts the defendant had with Maryland were a website that advertised its products, and sales occurring over the past two years to seven Maryland customers.¹⁹⁵ Taken together, the sales represented less than a 0.1% of the defendant’s sales.¹⁹⁶ The court found that nothing on the website indicated the defendant’s intent to target residents of Maryland.¹⁹⁷ The court also concluded that the defendant’s interactions with the Maryland residents, such as asking them to “please come again,” confirming orders via phone,

¹⁸⁷ *Machulsky v. Hall*, 210 F. Supp. 2d 531, 539, 542 (D. N.J. 2002); *Winfield Collection, LTD. v. McCauley*, 105 F. Supp. 2d 746, 749, 751 (E.D. Mich. 2000).

¹⁸⁸ *Shamsuddin v. Vitamin Research Prods.*, 346 F. Supp. 2d 804, 810 (D. Md. 2004); *Machulsky*, 210 F. Supp. 2d at 539; *Winfield Collection, Ltd.*, 105 F. Supp. 2d at 749.

¹⁸⁹ *Shamsuddin*, 346 F. Supp. 2d at 810.

¹⁹⁰ No. CCB-03-1723, 2003 WL 22851946, at *4 (D. Md. Dec.1, 2003).

¹⁹¹ *Id.* at *8 (quoting *ALS Scan*, 293 F.3d at 714).

¹⁹² *United Cutlery Corp.*, 2003 WL 22851946, at *7.

¹⁹³ *Id.* at *6.

¹⁹⁴ *Eagle Coffee Co., Inc. v. Eagle Coffee Int’l, Inc.*, Civ. L-09-2585, 2010 WL 481201, at *1-2 (D. Md. Feb. 4, 2010).

¹⁹⁵ *See id.* at *5-6.

¹⁹⁶ *See id.* at *6 n.4.

¹⁹⁷ *See id.* at *7.

and using nationwide delivery, were isolated instances that could not support jurisdiction.¹⁹⁸

On the other hand, in *Young Again Prods., Inc. v. Acord*, the court asserted personal jurisdiction over a nonresident defendant who was accused of using a Maryland corporation's licensed marks after the distributorship agreement between the parties ended.¹⁹⁹ While Maryland was not the focal point for defendants' commercial activities—0.02% of their sales were to Maryland customers—the court found the “[d]efendants do not[,] and cannot dispute that they engage in business in Maryland.”²⁰⁰ The fact that an “exceedingly low number of [i]nternet sales” were to Maryland customers did not alter the calculus.²⁰¹ Since the plaintiff's claims were connected to the defendants' alleged internet activities, the court found that jurisdiction would be appropriate under section 6-103(b)(1), and comport with the principles of fair play and substantial justice.²⁰²

As stated above, it is difficult to reconcile these varied results by looking to the role of Maryland sales alone. Instead, Maryland sales are part of a complex matrix where the relative importance of Maryland to the defendant, the parties' relationship, and the claims at issue all factor into the jurisdictional analysis.

E. Forum Selection Clauses as Jurisdictional Consent

A defendant's expressed or implied consent to a court's jurisdiction satisfies due process requirements to assume jurisdiction over a nonresident defendant.²⁰³ Therefore, a “valid forum selection clause, standing alone, may confer jurisdiction over a nonresident defendant.”²⁰⁴ “[F]orum selection clauses permit parties to an agreement, in essence, to contract around principles of personal jurisdiction by consenting to resolve their disputes in

¹⁹⁸ *Id.* at *8.

¹⁹⁹ *Young Again Prods., Inc. v. Acord*, 307 F. Supp. 2d 713, 714-15 (D. Md. 2004).

²⁰⁰ *Id.* at 717.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *CoStar Realty Info., Inc. v. Field*, 612 F. Supp. 2d 660, 668 (D. Md. 2009) (quoting *Toshin Prods. Co. v. Woods*, No. 86-2157, 1989 WL 87015, at *2 (D. Md. July 28, 1989)).

²⁰⁴ *CoStar Realty*, 612 F. Supp. 2d at 668; *Microfibres, Inc. v. McDevitt-Askew*, 20 F. Supp. 2d 316, 322 (D.R.I. 1998) (holding that an agreement to litigate contractual disputes in Rhode Island implicitly waived the right to challenge personal jurisdiction there); *Inso Corp. v. Dekotec*, 999 F. Supp. 165, 167 (D. Mass. 1998) (holding that a “contractual stipulation to a particular forum implies consent to personal jurisdiction in that forum”).

specified tribunals.”²⁰⁵ The Supreme Court has long held that forum selection clauses are enforceable.²⁰⁶ It recently reinforced that principle by emphasizing that forum selection clauses “should control except in unusual cases.”²⁰⁷ Consequently, forum selection clauses are generally respected.²⁰⁸

There is no analytical reason why forum selection clauses in internet contracts should be exceptions to this general rule. Many sites require the user to assent to a “Terms of Use” agreement before accessing them; when such “Terms of Use” agreements include forum selection clauses, even incorporated by reference to a hyperlink, courts have little difficulty in enforcing them.²⁰⁹ Given users’ reluctance to review “Terms of Use” agreements—up to the point of literally selling their immortal souls to the site owner—²¹⁰this is an invaluable mechanism in resolving personal jurisdiction issues. Plaintiffs have argued that they have no recollection of agreeing to, or even reading, forum selection clauses to no avail.²¹¹

²⁰⁵ *Structural Pres. Sys., LLC v. Andrews*, 931 F. Supp. 2d 667, 671 (D. Md. 2013) (quoting *Allstate Ins. Co. v. Cherry*, No. ELH-11-2898, 2012 WL 1425158, at *15 n.10 (D. Md. April 23, 2012)) (internal quotations omitted).

²⁰⁶ *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 24–25 (1972); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596–97 (1991).

²⁰⁷ *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 574 (2013).

²⁰⁸ *Gilman v. Wheat, First Sec., Inc.*, 345 Md. 361, 377, 692 A.2d 454, 463 (Md. 1997) (Despite the presumption of validity, a forum selection clause may be found to be unenforceable and unenforceable if “(i) it was induced by fraud or overreaching, (ii) the contractually selected forum is so unfair and inconvenient as, for all practical purposes, to deprive the plaintiff of a remedy or its day in court, or (iii) enforcement would contravene a strong public policy of the State where the action is filed.”). See *Vulcan Chem. Techs., Inc. v. Barker*, 297 F.3d 332, 339 (4th Cir. 2002); *TEKsystems, Inc. v. Demasi*, No. GLR-14-670, 2014 WL 2882944, at *3 (D. Md. June 24, 2014) (absent a finding of unreasonableness, a mandatory forum selection clause should be enforced).

²⁰⁹ See *Moretti v. Hertz Corp.*, No. 13-2972, 2014 WL 1410432, at *1 (N.D. Cal. Apr. 11, 2014).

²¹⁰ See Catherine Smith, *7,500 Online Shoppers Accidentally Sold Their Soul To Gamestation*, HUFFINGTON POST (June 17, 2010), http://www.huffingtonpost.com/2010/04/17/gamestation-grabs-souls-o_n_541549.html (Noting only 12% of users challenged a clause that provided: “By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and for ever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamesation.co.uk or one of its duly authorized minions.”).

²¹¹ *Fusha v. Delta Airlines, Inc.*, No. RDB-10-2571, 2011 WL 3849657, at *2 (D. Md. Aug. 30, 2011) (“[W]hether she read the forum selection clause or not, it is undisputed that Fusha clicked the ‘I agree’ button on the vayama.com web site prior

Maryland courts have found that forum selection and jurisdiction clauses in “Terms of Use” agreements are enforceable as to jurisdiction and venue, so long as the user agreed to those clauses.²¹² A single indication of assent will suffice. For example, use of the web site in *LTVN Holdings LLC v. Odeh*, required affirmation of a click-wrap agreement containing a Maryland forum selection clause.²¹³ This met the consent criterion: “A party need not assent to an agreement multiple times in order for a contract to be enforceable In this case, a single click was sufficient to bind [the defendant] and his company to the [a]greement.”²¹⁴ Other Maryland cases have adhered to a similar analysis by finding jurisdiction exists by virtue of a forum selection clause.²¹⁵

While a valid forum selection clause renders a lengthy analysis of minimum contacts unnecessary,²¹⁶ there are exceptions which underscore the necessity of careful drafting. In *Micro Focus (US), Inc. v. Bell Canada*, the Canadian defendant challenged a forum selection clause in an end-user license agreement (“EULA”) as “ambiguous and nonsensical.”²¹⁷ The court agreed, holding that the clause was ambiguous.²¹⁸ Since the issue implicated constitutional concerns, waiver could not be lightly inferred.²¹⁹ Moreover, absent the clause, defendant’s sole connection to Maryland was the EULA itself, and would not meet the “minimum contacts” requirement.²²⁰

VIII. PURPOSEFUL AVAILMENT IN CYBERSECURITY: WHAT ACTIVITY IS DIRECTED AT MARYLAND?

Whether entry to the state was real or virtual should not matter; traditional notions of fair play and justice apply to both traditional and novel avenues of attack.²²¹ In determining whether the exercise of specific personal jurisdiction comports with constitutional due

to purchasing her tickets and therefore agreed to litigate her claims against Airtrade in Santa Clara County, California.”)

²¹² *CoStar Realty Info., Inc. v. Field*, 612 F. Supp. 2d 660, 668 (D. Md. 2009);

CoStar Realty Info., Inc. v. Meissner, 604 F. Supp. 2d 757, 764 (D. Md. 2009).

²¹³ No. CCB-09-0789, 2009 WL 3736526, at *4 (D. Md. Nov. 5, 2009).

²¹⁴ *LTVN Holdings LLC*, 2009 WL 3736526 at *3.

²¹⁵ *CoStar Realty Info., Inc. v. Copier Country N.Y., LLC*, No. 08-CV-3469, 2009 WL 3247431, at *5 (D. Md. Oct. 1, 2009).

²¹⁶ *DMG Am., Inc. v. RT Precision Mach., LP*, No. 3:08-CV-71-RJC, 2009 WL 1783554, at *3 (W.D.N.C. June 23, 2009).

²¹⁷ 686 F. Supp. 2d 564, 568 (D. Md. 2010).

²¹⁸ *Id.* at 569.

²¹⁹ *Id.*

²²⁰ *Id.* at 569 (“Whether that sole contact meets the “minimum contacts” requirement of constitutional due process is doubtful.”).

²²¹ *Cole-Tuve, Inc. v. Am. Mach. Tools Corp.*, 342 F. Supp. 2d 362, 366 (D. Md. 2004).

process, a court traditionally considers, *inter alia*, “the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in the state.”²²² In *Calder v. Jones*, the Supreme Court established the “effects test,” under which courts are permitted to assert jurisdiction over a nonresident defendant, who has *expressly aimed* his tortious conduct at the forum state, knowing that the injury would be felt there.²²³

The Fourth Circuit interprets the effects test narrowly.²²⁴ It views the “express aiming” requirement “narrowly to require that the forum state be the focal point of the tort.”²²⁵ Ultimately, whether Maryland can assert personal jurisdiction in such cases turns on “the defendant’s own contacts with the state”; not the location of the plaintiff, the locale of his injury, or the plaintiff’s contacts with Maryland.²²⁶ Were it otherwise, jurisdiction would always be “appropriate in a plaintiff’s home state, for the plaintiff always feels the impact of the harm there.”²²⁷

The Fourth Circuit has adapted *Calder*’s effects test to online activity. In the context of the Internet, specific jurisdiction “may be based only on an out-of-state person’s Internet activity directed at Maryland and causing injury that gives rise to a potential claim cognizable in Maryland.”²²⁸ To obtain jurisdiction over a defendant for cyber activity tortuously affecting Maryland, the Fourth Circuit requires the defendant’s tortious conduct to be aimed at Maryland in such a way that the state “can be said to be the focal point of the tortious activity.”²²⁹ As discussed below,²³⁰ to establish jurisdiction under this test, the plaintiff would have to show not only injury in Maryland, but that Maryland was the epicenter of those injuries.

When the internet activity involves posting information on a website, the question is whether the defendant “manifested an intent to direct [its] website

²²² *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003) (citing *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 711–12 (4th Cir. 2002)).

²²³ *Calder v. Jones*, 465 U.S. 783, 789 (1984).

²²⁴ *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997).

²²⁵ *Cleaning Auth., Inc. v. Neubert*, 739 F. Supp. 2d 807, 815 (D. Md. 2010) (citing *ESAB Grp.*, 126 F.3d at 626).

²²⁶ *Id.* (citing *ESAB Grp.*, 126 F.3d at 626).

²²⁷ *Id.* (citing *ESAB Grp.*, 126 F.3d at 626).

²²⁸ *See ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (citing *Calder*, 465 U.S. at 789–90).

²²⁹ *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 398 n.7 (4th Cir. 2003) (citing *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265–66 (3d Cir. 1988)).

²³⁰ *Hare v. Richie*, No. ELH–11–3488, 2012 WL 3773116, at *11–12 (D. Md. Aug. 29, 2012).

content [to the forum state's] audience.”²³¹ For example, a website that allegedly infringes on intellectual property does not automatically establish jurisdiction over the website’s owner, even if it is accessible in Maryland, particularly in the absence of other significant or sustained contacts with the state.²³²

A. *Cases Finding Cyber Activity Directed at Maryland*

Ascertaining whether a defendant has directed cyber activity toward Maryland is not an exercise that readily lends itself to bright-line rules. The clearest instance of directing cyber activity toward Maryland arises when the website has sections or features that are geared toward Maryland users. For instance, in *Hare v Ritchie*,²³³ the defendant was accused of publishing defamatory statements about a Maryland resident on its website. The defendant argued that its website was accessible in every state, and thus, could not support jurisdiction in Maryland.²³⁴ The plaintiff conceded that mere internet presence would not suffice to subject the defendant to jurisdiction in Maryland.²³⁵ But he insisted that the site was “intentionally interacting with the residents of Maryland,” citing menu options which included Baltimore and editorial comments on posts that he characterized as defaming Baltimore residents.²³⁶

The *Hare* court agreed, stating “this is not a case where personal jurisdiction is based solely on the posting of information on a website that happens to be accessible in Maryland.”²³⁷ In the court’s view, the very fact that the site’s design permitted users to filter for Baltimore individuals meant that the site had specifically directed electronic activity toward Maryland:

When a user submits a post, [the site] permits the user to select the geographic section of the website in which to place the content. This demonstrates an intent to direct the content to users in that geographic area.

Moreover, [the defendant] manifested an intent to engage in interactions within Maryland by adding its own commentary to posts directed to Baltimore . . . [the defendant] must have known that the primary effects of the posts at issue would be

²³¹ See *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002).

²³² *Am. Ass'n of Blood Banks v. Bos. Paternity LLC*, No. DKC–2008–2046, 2009 WL 2366175, at *9 (D. Md. 2009).

²³³ *Hare*, 2012 WL 3773116, at *3–4.

²³⁴ *Id.* at *10.

²³⁵ *Id.* at *11.

²³⁶ *Id.*

²³⁷ *Id.* at *12.

felt in Maryland, because they were posted in the Baltimore section and concerned Maryland residents and events.

For the foregoing reasons, I conclude that [the defendant] possesses the requisite minimum contacts with Maryland to constitute purposeful availment.²³⁸

Hare presented a relatively easy case because the defendant's alleged actions, the website design, and the asserted claims all aligned to support the claim that the defendant's purported activities were aimed at Maryland.²³⁹

Nevertheless, courts have found instances of cyber activities directed at Maryland in less clear circumstances, such as when the sole predicate for jurisdiction was a globally accessible website. The key was that the effects of the cyber activity focused on Maryland. In *Cole-Tuve, Inc. v. Am. Mach. Tools Corp.*, the plaintiff was a Maryland corporation doing business exclusively in Maryland.²⁴⁰ The defendant, an Illinois corporation, registered a similar domain name, and allegedly used it to direct traffic to its own website.²⁴¹ The court denied the defendant's motion to dismiss the plaintiff's trademark infringement suit for lack of personal jurisdiction, holding that the jurisdiction was proper because the defendant had purportedly registered the domain name in order to redirect Maryland customers away from a Maryland business.²⁴² It explained:

Accepting these allegations as true, [defendant] directed a harm at a Maryland business with the manifest intent of engaging in activities in the state by intentionally infringing on the rights of a company it knew to be in Maryland in order to misdirect its Maryland customers.²⁴³

The "effects plus" requirements for personal jurisdiction were satisfied since the plaintiff's business and customers were in Maryland; therefore, making Maryland the sole target of the defendant's alleged conduct.²⁴⁴

B. Cases Finding Cyber Activity Not Directed at Maryland

On the other hand, courts have generally declined to find that a universally accessible website is aimed at Maryland when its targeted

²³⁸ *Id.* at *11–12.

²³⁹ *Hare*, 2012 WL 3773116, at *11–12.

²⁴⁰ 342 F. Supp. 2d 362, 364–65 (D. Md. 2004).

²⁴¹ *Id.*

²⁴² *Id.* at 368.

²⁴³ *Id.*

²⁴⁴ *Id.* at 367–68.

audience appears to be outside the state.²⁴⁵ In *Elec. Broking Servs., Ltd. v. E-Bus. Solutions & Servs.*, the court found that the defendant's website did not give Maryland personal jurisdiction since there was no evidence that the defendant had "intentionally targeted residents in Maryland through its website or directed its electronic activity into Maryland with the manifested intent of conducting business within the state."²⁴⁶ This general rule applies even if the website has incidental impacts within Maryland, because incidental impacts are not a substitute for directed activity.

For instance, in *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, the Fourth Circuit held that the Illinois defendant was not subject to personal jurisdiction in Maryland, notwithstanding the use of an allegedly infringing trademark on its website and in its domain name.²⁴⁷ The defendant's site solicited contributions through the Internet.²⁴⁸ Nevertheless, there had only been one contribution from a Maryland resident, who happened to be the plaintiff's attorney.²⁴⁹ Most critically, the court found that the defendant's website had a "strongly local character."²⁵⁰ It noted that the website indicated that the defendant operated out of locations in Chicago and its suburbs, taught abstinence in Chicago public schools, and offered assistance to women and families in the Chicago area.²⁵¹ The Fourth Circuit stated:

In fact, the only respect in which [defendant] even arguably reaches out to Marylanders via its Internet website is in its generalized request that anyone, anywhere make a donation to support [defendant's] Chicago-based mission. Such a generalized request is, under the circumstances, an insufficient Maryland contact to sustain jurisdiction in that forum.²⁵²

Similarly, in *Young v. New Haven Advocate*,²⁵³ the Fourth Circuit held that allegedly defamatory material regarding a Virginia plaintiff, and accessible in Virginia, did not give Virginia jurisdiction over the defendant.²⁵⁴ The plaintiff, was the warden of a Virginia prison that had

²⁴⁵ See, e.g. *Allcarrier Worldwide Servs., Inc.* 812 F. Supp. 2d at 683 (holding that a company's "website that accepts applications from members internationally, is insufficient to subject it to personal jurisdiction in Maryland").

²⁴⁶ 285 F. Supp. 2d 686, 691 (D. Md. 2003).

²⁴⁷ 334 F.3d 390, 402 (4th Cir. 2003).

²⁴⁸ *Id.* at 395.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 401.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ 315 F.3d 256 (4th Cir. 2002).

²⁵⁴ *Id.* at 264 (explaining that though the case involved Virginia law, Virginia's long arm statute is virtually identical to Maryland's, and thus provides a useful predictor

contracted with the State of Connecticut to house Connecticut prisoners.²⁵⁵ The defendants were a Connecticut publication and journalists that had published articles, accessible on their website, that the plaintiff argued were defamatory.²⁵⁶

The Fourth Circuit framed the plaintiff's argument for jurisdiction as whether: (1) the defendants knew that the plaintiff was a Virginia resident; (2) defendants defamed him; (3) they made the defamatory statements accessible online in Virginia; and (4) the primary effects of the defamatory statements were felt in Virginia.²⁵⁷

The *Young* court felt that this claim was too broad; the issue was whether the defendants had aimed their tortious conduct at a Virginia audience: "The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers."²⁵⁸ Analyzing the facts, the Fourth Circuit determined that the online content, including the allegedly defamatory statements, were tailored to Connecticut audiences, and focused on the issue of Connecticut's prison transfer policy.²⁵⁹ Though defendants' content referenced the plaintiff, Confederate memorabilia, and Virginia, the defendants "could not have reasonably anticipate[d] being haled into court [in Virginia] to answer for the truth of the statements made in their article[s,]" since they did not post the articles on the Internet with the "manifest intent" of targeting Virginia readers.²⁶⁰

This line of reasoning, which focuses on the defendant's expectations, apparently seemingly follows in the footsteps of *World-Wide Volkswagen*. The bottom line is that the application of the effects test, in the Internet context, "requires proof that the out-of-state defendant's Internet activity is expressly targeted at or directed to the forum state."²⁶¹

IX. CONCLUSION

The *Zippo* "active/passive spectrum" seems particularly outmoded in the increasingly commonplace scenario of websites that collect data on users, and tailor content or advertising accordingly—users have become accustomed to noting advertisements for books, hotels, airfares or vacations to say, Geneva, Switzerland, after browsing Internet content related to the city. Consequently, one author notes that:

of how the Fourth Circuit would handle a similar Maryland case). *Compare* VA. CODE ANN. § 8.01-328.1 (2010), *with* MD. CODE ANN., CTS. & JUD. PROC. § 6-103 (West 2011).

²⁵⁵ *Young v. New Haven Advocate*, 315 F.3d 256, 259 (4th Cir. 2002).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 261–62.

²⁵⁸ *Id.* at 262–63.

²⁵⁹ *Id.* at 263–64.

²⁶⁰ *Id.* at 264 (alterations in original) (quotation omitted).

²⁶¹ *Young*, 315 F.3d at 262–63.

[W]ebsites that a user perceives to be simply ‘dead advertising’ or content that is not collecting significant amounts of information[,] and thus deemed to be relatively ‘passive’ under the sliding scale approach may, in fact, be still highly interactive in real terms because of the extent of data collection being conducted in relation to the user.²⁶²

No case to date has adjudicated whether such customized content, directed to Maryland, constitutes contacts aimed at the state or purposeful availment of its laws. But at least one colorful case from France suggests that it might. When anti-Nazi groups sued Yahoo! in connection with alleged sales of Nazi memorabilia via its services, a French court determined that Yahoo! was tailoring its content to French users based on the fact that users in the country were often presented with French advertisements.²⁶³ Maryland case law does hold that a defendant may not deny purposeful availment on the basis that it is unaware of where its emails end up.²⁶⁴

As technology advances—with our phones, cars, watches, and homes becoming increasingly integrated—the question of whether particular activities are directed at Maryland, or entail purposeful availment of its laws, will acquire both increased complexity and importance. It is unlikely that any revolutionary jurisprudential developments will address these new issues. As with the telephone, the automobile, the airplane, and other technologies, answers will come in incremental developments of existing case law. There will be no revolution in Maryland long-arm jurisprudence, only gradual evolution.

As the D.C. Circuit has observed: “Cyberspace . . . is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar. Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet.”²⁶⁵

²⁶² Andrea M. Matwyshyn, *Of Nodes and Power Laws: A Network Theory Approach to Internet Jurisdiction Through Data Privacy*, 98 NW. U. L. REV. 493, 513 (2004).

²⁶³ Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000, obs. J. Gomez (Fr.), *available at* <http://www.lapres.net/ya2011.html>, *also available at* <http://www.lapres.net/yahen11.html> (providing an unofficial English translation).

²⁶⁴ *MaryCLE, LLC v. First Choice Internet, Inc.*, 166 Md. App. 481, 509, 890 A.2d 818, 834 (2006) (“First Choice cannot plead lack of purposeful availment because the ‘nature’ of the Internet does not allow it to know the geographic location of its email recipients.”).

²⁶⁵ *See Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-11 (D.C. Cir. 2002).