STATE OF MICHIGAN

COURT OF APPEALS

DAVID M. CLAPPER and FORTHRIGHT II, INC.,	UNPUBLISHED June 16, 2000
Plaintiffs-Appellees,	
v	No. 211139 Wayne Circuit Court
FREEMAN MARINE EQUIPMENT, INC.,	LC No. 97-737513 CK
Defendant-Appellant.	

Before: Talbot, P.J., and Neff and Saad, JJ.

SAAD, J., concurring.

I concur in the result, though I believe the majority too summarily disposed of plaintiffs' argument that defendant's Internet activity constitutes sufficient contacts for personal jurisdiction. Plaintiffs raise a significant and novel issue in Michigan jurisprudence that requires both a thorough analysis and a published opinion.[1]

With the explosion of e-commerce, this issue is bound to recur frequently in a variety of factual contexts. Trial courts and litigants will need guidance in discerning when Internet activity does and does not establish minimum contacts for jurisdiction. Consequently, it is not sufficient to decide this issue with a conclusory statement that the website here does not establish jurisdiction. Though I appreciate the majority's reluctance to decide this issue beyond the narrow context of one particular case, I do not believe that this issue can be decided in a vacuum. Rather, I believe that this Court should carefully review the large body of Internet case law from our sister states and deduce the essential principles for deciding when a defendant's web activity constitutes the requisite minimum contacts for the assertion of personal jurisdiction. If we do not have an understanding of what these principles are, courts will have to decide each individual case on an ad hoc basis—hardly conducive to promoting uniformity and predictability in the law. I would therefore prefer to decide the Internet issue here with a published opinion offering the following analysis.[2]

ANALYSIS

Nature of the Case

This case adds a new dimension to a longstanding legal paradigm: when does a defendant's Internet activity constitute a sufficient contact with a state to allow that state to assert personal jurisdiction over the defendant? Unheard of just a few years ago, this issue has become a leading topic of controversy in American courts, generating reams of legal analysis and commentary in judicial opinions and law reviews. See Anno: *Effect of Use, or Alleged Use, of Internet on Personal Jurisdiction in, or venue of, Federal Court Case*, 153 ALR Fed 535.[3] E-commerce may seem so radically different from traveling salesmen displaying shoes in hotel rooms that one might despair of rationally applying *International Shoe v Washington*, 326 US 310; 66 S Ct 154; 190 L Ed 95 (1945), and its progeny to the information superhighway. We can keep this issue in perspective, however, by remembering that while the technology of the Internet is a new innovation, the functions of E-commerce—buying, selling, advertising—have always been at the center of personal jurisdiction controversies. Bearing in mind that the Internet merely provides a faster and more sophisticated way for buyers and sellers to find each other, we can sensibly evaluate a particular defendant's Internet activity and determine if personal jurisdiction is warranted.

Plaintiffs' argument raises an issue of first impression in Michigan. We should not treat this issue lightly, as it raises serious implications for Internet commerce. E-commerce has grown geometrically, and is rapidly establishing itself as a major economic force. It provides an important outlet of advertising and sales for a wide variety of businesses, from multinational corporations to fledgling entrepreneurs operating in basements and garages. If Web sales and advertising by themselves could be construed as a "constant presence" in a forum state, then an Internet business would be subject to general personal jurisdiction in any state that has access to the Web—that is, *every* state. This would effectively obliterate all restrictions on the exercise of personal jurisdiction over any out-of-state defendant that avails itself of Internet marketing. On the other hand, were we to regard Internet commercial activity as a species of "virtual business" occurring only in "cyberspace" and not creating any "presence" or "contact" in a jurisdiction, we would radically depart from the essential principles expressed by our long-arm statutes and in *International Shoe*.[4] With the understanding that *International Shoe* and its progeny will govern the issue here, I briefly review this line of case law.

Due Process Considerations and General Jurisdiction

In the landmark 1945 case *International Shoe*, *supra*, the United States Supreme Court constructed the framework courts would use to decide when a state could properly assert jurisdiction over an out of state defendant. At issue was the State of Washington's right to assert jurisdiction over an out-of-state shoe retailer who engaged salesmen to take shoe orders from Washington customers. The Supreme Court held that although the defendant had no physical presence in the state of Washington, personal jurisdiction was acceptable under the Due Process Clause provided that the plaintiff could establish sufficient "minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.*, 216.

The Supreme Court has continued to refine the *International Shoe* holding. In *World-Wide Volkswagen v Woodson*, 444 US 286; 100 S Ct 559; 62 L Ed 2d 490 (1980), the Court emphasized

that jurisdiction is valid only if the nonresident defendant's "conduct and connection with the forum [are] such that he should reasonably anticipate being haled into court there." *Id.*, 297. In *World-Wide Volkswagen*, the plaintiffs purchased a car from a New York automobile dealership, and proceeded to drive the car across the country. In Oklahoma, the car's fuel tank ignited during a collision and three occupants of the car were badly burned. The Supreme Court held that the plaintiffs could not sue the New York dealership and regional (northeastern states) distributor in Oklahoma because these defendants had not "availed themselves of . . . the privileges and benefits of Oklahoma law." *Id.*, 295.

In *Helicopteros Nacionales d Colombia v Hall*, 466 US 408; 104 S Ct 1868; 80 L Ed 2d 404 (1984) the Supreme Court discussed the concept of general jurisdiction. There, the plaintiff's wrongful death action against a Colombian helicopter service did not arise out of any activity the defendant conducted in the forum state of Texas. *Id.*, 409, 414. However, the Court stated that the lack of such connection did not preclude personal jurisdiction under the Due Process Clause. *Id.*, 414. Rather, personal jurisdiction would be proper provided that the defendant's contacts with the forum state constituted "continuous and systematic general business contacts." *Id.*, 416.

The Supreme Court further elaborated on these principles in *Burger King Corp v Rudzewicz*, 471 US 462; 105 S Ct 2174; 85 L Ed 2d 528 (1985). Burger King, which is based in Florida, filed a lawsuit in Florida against a Michigan resident who owned a Burger King franchise in Michigan. The Michigan franchisee challenged the Florida court's personal jurisdiction over him. The Supreme Court devised a two-prong test for analyzing the validity of Florida's jurisdiction over the defendant. First, the plaintiff must establish the requisite minimum contacts. Next, the court must determine whether sustaining jurisdiction would offend traditional notions of fair play and substantial justice. *Id.*, 476-477. The latter test involves consideration of four factors: (1) the state's interest in providing its citizens with a forum for redress; (2) the plaintiff's interest in a convenient forum; (3) the state's interest in enforcing substantive law and policy, and (4) inconvenience to the defendant. *Id.*, 477-478.

In *Asahi Metal Industry Co v Superior Court*, 480 US 102; 107 S Ct 1026; 94 L Ed 2d 92 (1987), a plurality of the Supreme articulated the "stream of commerce" theory of personal jurisdiction. The defendant in *Asahi* was a Japanese manufacturer that produced a "tire valve assembly" incorporated into a motorcycle that was the subject of a products liability action in California. *Id.*, 106. Justice O'Connor, writing for a four-justice plurality, stated that jurisdiction was not proper because the mere possibility that a product will end up in a forum state does not constitute a "minimum contact". Instead, the plaintiff must show that the defendant purposefully directed its activities at the forum, such as by targeted advertising. *Id.*, 111-112. However, concurring opinions by Justices Brennan and Stevens maintain that jurisdiction was acceptable under the minimum contact prong, but failed under the fairness test. *Id.* 120-122.

I now consider how these rules should apply here, where plaintiffs allege that defendant's operation of a website justifies a Michigan court's exercise of general jurisdiction over the defendant.

Personal Jurisdiction and the Internet

Because this is an issue of first impression in Michigan, I will look to cases decided in other jurisdictions for guidance. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 121; 602 NW2d 390 (1999). Unfortunately, the lack of consistency and uniformity in this body of case law makes it impossible to reduce this legal oeuvre to a few succinct, cogent rules. Unlike the case here, most Internet cases involve exercise of limited jurisdiction, where the plaintiff's cause of action was arguably connected to the defendant's Internet activity in the state. Several cases involve allegations of misfeasance such as trademark infringement or defamation, where jurisdiction could be asserted in the plaintiff's home state on the ground that the defendant's conduct had distinct "effects" in that state.[5] Although some of these cases, as discussed below, offer instructive dicta on the issue, they rely extensively on factors and considerations that have little direct relevance to our general jurisdiction question.[6]

Fortunately, it is neither necessary nor desirable to attempt a comprehensive analysis and evaluation of all previous cases examining personal jurisdiction based on Internet activity. I therefore focus my analysis on plaintiffs' argument that Michigan may properly assert *general* jurisdiction[7] over defendant because defendant directed its business activity at Michigan by making its website accessible to Michigan residents, and by using that website to offer Michigan residents a sales catalog and to inform Michigan residents of the company's telephone and fax number.

I begin my analysis with *Zippo Mfg Co v Zippo Dot Com, Inc*, 952 F Supp 1119 (WD Pa, 1997), which involved a Pennsylvania court's limited jurisdiction over a California Internet news service. *Zippo Mfg* is a trademark case and not directly relevant here. However, the case is noteworthy for its establishment of a framework for classifying commercial Internet activity according to the degree of "interactivity" found in the defendant's website. The plaintiff was Zippo Manufacturing, a Pennsylvania manufacturer of tobacco lighters. The defendant was the news service Zippo Dot Com. The plaintiff sued the defendant in a Pennsylvania federal court, alleging that the defendant's use of the domain name "Zippo" violated the plaintiff's trademark rights. The defendant challenged the court's personal jurisdiction. The court stated:

> the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g. *CompuServe, Inc v Patterson*, 89 F3d 1257 (CA 6, 1996). At the opposite end are situations where a defendant has simply posted information on an Internet website which is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. E.G. *Bensusan Restaurant Corp v King*, 937 F Supp 295 (S D N Y 1996). The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction

> is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website. E.G. *Maritz, Inc v Cybergold, Inc* 947 F Supp 1328 (ED Mo, 1996). [*Id.*, 1124.]

The court concluded that the defendant's website created sufficient contacts with the forum state because the defendant "sold passwords to approximately 3,000 subscribers in Pennsylvania and entered into seven contracts with Internet access providers to furnish its services to their customers in Pennsylvania. *Id.*, 1126.

The *Zippo* Court relied on *Bensusan, supra* for its statement on passive websites. In *Bensusan*, 937 F Supp 295 (SD NY), aff'd 126 F3d 25 (CA 2, 1997), a Columbia, Missouri jazz club called "The Blue Note" advertised its restaurant and posted its performance schedule on a website that was accessible anywhere. A Greenwich Village, Manhattan jazz club, also named "The Blue Note," sued the Missouri club in a New York Court and claimed that the website established a sufficient contact with New York to warrant personal jurisdiction. The Southern District held that the site was merely a passive site, and did not establish a sufficient nexus to the forum. The site merely provided information on the Missouri Blue Note. Interested patrons could not use the website to schedule reservations or purchase tickets; they would have to call the club or visit the box office. The court deemed that this was not "purposeful availment" of the forum of New York. *Id.*, 301.

The *Zippo* "sliding scale" and passive/interactive classification of websites provides a good starting point for our analysis, and indeed has been the basis for many subsequent court decisions. Though we believe the test requires some fine-tuning, we find that it offers useful guidance in assessing the nature and extent of a defendant's Internet contacts with the forum state. The essential rule of personal jurisdiction is that the forum may assert jurisdiction only when the defendant has had sufficient contact with the jurisdiction and the nature and quantity of contacts are such that the defendant should reasonably anticipate being haled into the forum's courts. The *Zippo* passive/interactive/middle distinction offers a logical way to apply these principles to Internet activity.

I find it significant that the *Zippo* Court emphasized the actual contact with Pennsylvania that had resulted from the defendant's Internet activity. I therefore construe this opinion as holding that questions of jurisdiction do not depend solely on the characteristics of a defendant's Internet presence (i.e., whether its website is merely "passive" advertising or whether it "interacts" by providing visitors with an opportunity to do immediate business with the defendant). In other words, an "interactive" site that invites Web users to e-mail a purchase order to the defendant will not warrant jurisdiction if the site fails to attract customers. Rather, an interactive website will warrant jurisdiction only if the website actually garners for the defendant sufficient business in the forum state.

Several cases demonstrate this application of the *Zippo* test. The Eastern District of Michigan recently applied it in *Hi-Tex, Inc v TSG, Inc*, 87 F Supp 2d 738 (ED Mich, 2000). The defendant, a Pennsylvania corporation in the business of textile finishing, operated plants in North Carolina. *Id.*, 741. The plaintiff sued the defendant for patent infringement in Michigan. The plaintiff contended that Michigan had jurisdiction over the defendant "because it has had regular sales to Michigan customers and it advertises nationally through trade magazines, trade shows, and an Internet site." *Id.* After

finding that the defendant did not do sufficient business with Michigan customers to justify jurisdiction, the court stated that "participation in a website, without more, is an insufficient basis for exercising personal jurisdiction." *Id.*, 743.

E-Data Corp v Micropatent Corp, 989 F Supp 173 (D Conn, 1997), offers another example of a court deciding the Internet/jurisdiction question according to the degree of actual contact that the defendant's website established with the forum state. In *E-Data*, the plaintiff, a Connecticut-based corporation, sued the defendant West Stock, a Seattle-based business that sold its stock photography products over the Internet. The defendant's website allowed purchasers to view and select photographs, pay for the use of that photograph by credit card, and download the photographic image. *Id.*, 175. The defendant alleged that the customers were "anonymous without any geographic location, that West Stock does not receive the names or addresses of its customers, that its licensing agreement provides for application of Washington law, and that its only connection with a customer is a credit card transaction number." *Id.*,

The court rejected the plaintiff's contention that the mere existence of this website, and the potential use of the site to gain Connecticut business, were sufficient to establish a basis for jurisdiction without additional evidence that defendant did, in fact, succeed in selling the service to Connecticut residents. The court found this argument "unpersuasive":

> plaintiff merely relies on the national and international character of the Internet to demonstrate that West Stock's Internet advertising had the potential to reach and solicit Connecticut residents. If such potentialities alone were sufficient to confer personal jurisdiction over a foreign defendant, any foreign corporation with the potential to reach or do business with Connecticut consumers by telephone, television or mail would be subject to suit in Connecticut. Indeed, this view of personal jurisdiction is inconsistent with the reasoning of *World-Wide Volkswagen* [*supra*] . . . in which the Supreme Court held that the concept of "foreseeability" alone has never been a sufficient Constitutional benchmark for personal jurisdiction. [*Id.*, 176-177.]

The court concluded that "[i]n the absence of plaintiff's allegation of facts showing that West Stock's Web advertisement *actually reached this forum* through any Connecticut consumer locating West Stock's Web address and using that address to visit its website, the Court concludes that plaintiff's mere presumption that one of these 10,000 users must have visited the Muse website and viewed these solicitations is insufficient to meet plaintiff's burden of proof …." *Id.*, 177. The court also rejected the plaintiff's argument that West Stock's attempt to market itself by distributing a catalog in more than 30 countries constituted advertising that was "purposefully directed at Connecticut residents." *Id.* Although *E-Data* does not cite *Zippo* or use the term "passive" in describing the defendant's website, the case offers another useful example of how the mere posting of a website, without resulting in actual contact, is not a sufficient basis for personal jurisdiction.

Bedrejo v Triple E Canada, Ltd, 984 P2d 739 (Montana, 1999), another case following the *Zippo/Bensusan/E-Data* approach, is directly on point here. The plaintiffs were the victims and surviving relatives of a motor home accident on a Montana highway. *Id.*, 740-741. Defendant was a

Canadian corporation and the manufacturer of the motor home. *Id.*, 741. The plaintiffs maintained that the Montana court had general jurisdiction over the defendant because defendant advertised in nationally circulated magazines which were distributed in Montana, defendant ran an "interactive website" on the World Wide Web, defendant's dealerships provided sales coverage to at least three Montanans, and defendant organized an "adventure club" which planned trips that included travel through Montana. *Id.* The trial court found that these activities, in toto, "do not establish a substantial, systematic, and continuous presence in Montana" and concluded that the defendant "was not 'found within' Montana so as to subject it to the general jurisdiction of Montana courts." *Id.*, 742. With regard to the website, the court further commented that the mere fact of advertising on the website does not cause a defendant to reasonably anticipate being summoned into court in any state that had access to the website.

In *Hiwassee Stables, Inc v Cunningham*, 519 SE 2d 317 (CA NC, 1999), the North Carolina Court of Appeals further elaborated on the interactive/passive test by emphasizing the volume of contact the website generated between the defendant and the forum state. In *Hiwassee*, the plaintiff, a North Carolina corporation, sued a Florida veterinary practice. *Id.*, 319. The plaintiff alleged that the defendant veterinary practice provided to the plaintiff erroneous information about the fertility status of a horse the plaintiff purchased. *Id.* None of the veterinarians in the defendant practice ever performed veterinary services in North Carolina, and the practice's four North Carolina clients began their relationship with the defendant when the clients lived in Florida. *Id.*, However, the trial court determined that North Carolina had jurisdiction over the practice, in part because "solicitation activities were carried on within [North Carolina] by or on behalf of defendants." *Id.* The North Carolina Court of Appeals reversed. With regard to jurisdiction based on the practice's use of a website, the court held:

> the VetQuest service at issue helps Internet users bcate veterinary services. While a Web browser may inquire and obtain information about [the defendant practice] and other veterinarians on the website, no evidence indicated advertisements or solicitation by or on behalf of the defendants occurred therein. We note that Internet websites are, by nature, passive. They can only be browsed upon the instigation of the Internet user. While some "interactive" sites may result in direct communication and possible transactions between the Internet user and the website owner, no evidence indicated direct communication or transactions occurred between plaintiffs and defendants *in the present case*. [*Id.*, 322 (emphasis added.)]

The *Hiwassee Stables* case thus further emphasizes the Internet transactions that actually took place over the nature of the defendant's website.[8]

Synthesizing this line of case law, I conclude that the critical inquiries in questions of personal jurisdiction based on Internet activity are (1) the passive or interactive nature of the defendant's Internet presence; and (2) the degree and volume of contact that actually results from the defendant's efforts to generate business through web marketing. I agree with *Zippo* that purely passive websites that merely advertise a defendant's products and services cannot form the basis for general jurisdiction. Thus, if the answer to the first inquiry is "passive", there is no personal jurisdiction. However, I also conclude that

even highly interactive sites—such as those that provide electronic order forms for e-mail transmission—cannot form the basis for general jurisdiction unless such sites have actually spawned business for the defendant. In a sense, even the most interactive websites are really "passive" because they cannot reach potential customers unless the potential customer takes the initiative of accessing the site, either by entering in the site's address or by using a search engine. Thus, although websites are accessible 24 hours a day, anywhere in the world, by anyone with Internet access, they are actually less intrusive in a forum than advertisements on billboards or buses, broadcast or print media, which will reach anyone within eyeshot or earshot. Put differently, a website, whatever its features, is not inherently interactive; it can become interactive only when computer users take advantage of its features. Then, if sufficient business is generated, that website can serve as the basis for limited, and in some cases general, jurisdiction. As a practical matter, the latter inquiry is no different from the usual jurisdictional consideration of a defendant's business contacts with a forum state.

Contrary Authorities

As stated above, the cases on this issue are not unanimous. Plaintiffs cite three authorities that support their position that even a "passive" website warrants jurisdiction in any forum where Internet users can access the site. I find these authorities unpersuasive.

In *Inset Systems, Inc v Instruction Set, Inc*, 937 F Supp 161 (D Conn, 1996), the Connecticut-based plaintiff sued the Massachusetts-based defendant for trademark violations. The plaintiff alleged that the defendant improperly used the plaintiff's registered trademark name in the defendant's website domain name. *Id.*, 162-163. The court rejected the defendant's argument that personal jurisdiction was not proper:

> In the present case, [the defendant] has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states. The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. [The defendant] has therefore, [sic] purposefully availed itself of the privilege of doing business within Connecticut. [*Id.*, 165.]

I am unpersuaded by this reasoning. As discussed above, the posting of a website—like an advertisement in a national publication—is merely an attempt to create contacts within the forum state. Unless some contacts actually take place, jurisdiction is not warranted. The unique properties of the Internet warrant a different outcome. Although the Internet allows the viewer to communicate with the website operator almost instantaneously, this still is nothing more than a potential for communication to take place. Furthermore, in *E-Data, supra* the Connecticut District Court repudiated the reasoning of *Inset* in to a large extent.

In *Maritz, Inc v Cybergold, Inc*, 947 F Supp 1328 (ED Missouri, 1996), another trademark case, the court found jurisdiction where the defendant maintained a website that was "continually [sic]

accessible to every [I]nternet-connected computer in Missouri and the world." *Id.*, 1330. Emphasizing the newness of Internet technology and the unique marketing opportunities offered by the Internet, the Court contrasted the Internet from older forms of communication and concluded that the ease and rapidity of Internet communications justified personal jurisdiction based on the website:

> A company's establishment of a telephone number, such as an 800 number, is not as efficient, quick, or easy way to reach the global audience that the internet has the capability of reaching. While the internet does operate via telephone communications, and requires users to place a "call" to a website via the user's computer, a telephone number still requires a print media to advertise that telephone number. Such media would likely require the employment of phone books, newspapers, magazines, and television. Even then, an 800 number provides a less rapid and more limited means of information exchange than a computer with information downloading and printing capabilities. With a website, one need only post information at the website. Any internet user can perform a search for selected terms or words and obtain a list of website addresses that contain such terms or words. The user can then access any of those websites. [*Id.*, 1332-1333.]

The court further commented that the defendant had deliberately used the Internet to reach potential customers and that 131 Missouri residents used the website to contact the defendant for more information. *Id.*, 1333.

Maritz is factually distinguishable here. In *Maritz*, there was not only the potential for contact, but 131 instances in which the defendant succeeded in contacting Missouri residents. *Id.* Interestingly, the court refused to consider the 180 instances in which *plaintiff* accessed the defendant's website, noting that "[i]f such contacts were to be considered, a plaintiff could always try to create personal jurisdiction." *Id.*, 1333, n 4. The court thus implicitly suggested that the *potential* for contact does not by itself create jurisdiction, and that the plaintiff must show *actual* contact. The nature of the *Maritz* plaintiff's cause of action also forms a salient factual distinction. The plaintiff alleged that it was injured by the defendant's trademark violation every time an Internet user accessed the site. The court was thus able to conclude that the defendant's conduct caused a tortious effect in Missouri. *Id.*, 1331. In contrast, plaintiffs here have not shown any injury arising from defendant's Internet activity in Michigan.

Furthermore, I disagree with much of the reasoning in *Maritz*. I believe the court placed undue emphasis on the novelty of Internet technology and the unprecedented speed of Internet communications. Although the Internet's features offer unique and exciting marketing opportunities, it is nonetheless just another medium for advertising, buying and selling. Indeed, as noted before, in some respects Internet websites are usually visible only to those who have gone to some effort to find them.[9] Contrast this to the ubiquitous television commercial that can work its way into the consciousness of anyone simply trying to enjoy a sitcom or soap opera. The Internet's technological sophistication may revolutionize marketing, but it does not alter the Due Process Clause's guarantee of fundamental fairness. Unless a defendant's website has actually succeeded in making contacts in the forum state, jurisdiction will not lie.

In *Heroes, Inc v Heroes Foundation*, 958 F Supp 1 (DC, 1996), the plaintiff, a District of Columbia charitable organization, sued a New York charitable organization for trademark infringement. *Id.*, 1. The defendant challenged the DC court's personal jurisdiction. The plaintiff alleged that the defendant "purposefully availed itself of the privilege of conducting activities within the District" by advertising in *The Washington Post* and by posting a home page on the Internet. *Id.*, 3. The court found that the local newspaper advertising constituted sufficient contact with the forum to justify assertion of personal jurisdiction over the defendant. *Id.*, 3-4. The court also commented, in dicta, that the home page also warranted jurisdiction:

> Because the defendant's home page is not the only contact before the Court, see above [referencing the newspaper ad], the Court need not decide whether the defendant's home page by itself subjects the defendant to personal jurisdiction in the District. In weighing the importance of this particular contact, however, the Court notes that the defendant's home page explicitly solicits contributions, and provides a toll-free telephone number for that purpose. The home page also contains the defendant's allegedly infringing trademark and logo, the subject of the plaintiff[']s underlying claims. And the home page is certainly a sustained contact with the District, it has been possible for a District resident to gain access to it at any time since it was first posted. [*Id.*, 5.]

I would decline to follow *Heroes* for the same reasons that I would decline to follow *Maritz, supra*. *Heroes* is factually distinguishable because of the defendant's newspaper contact with the forum. The defendant's home page featured the allegedly infringing trademark, and thus arguably created a tortious effect within the District of Columbia. Most importantly, the trial court's comments regarding the defendant's "sustained contact" with the District are inconsistent with more recent and better reasoned decisions on Internet contacts with a forum state.[10]

Application of Law to Facts

As discussed above, the first inquiry is whether defendant's website is interactive, passive, or in the middle. The Fifth Circuit in *Mink v AAAA Development LLC*, 190 F3d 333 (CA 5, 1999) summarized the factors to be considered in classifying a website as interactive or passive:

> We note that [defendant] AAAA's website provides an e-mail address that permits consumers to interact with the company. There is no evidence, however, that the website allows AAAA to do anything but reply to e-mail initiated by website visitors. In addition, AAAA's website lacks other forms of interactivity cited by courts as factors to consider in determining questions of personal jurisdiction. For example, AAAA's website does not allow consumers to order or purchase products and services on-line. … In fact, potential customers are instructed by the website to remit any completed order forms by regular mail or fax.
>
> In this case, the presence of an electronic mail access, a printable order form, and a toll-free phone number on a website, without more, is insufficient to establish personal jurisdiction. Absent a defendant doing business over the Internet or sufficient

> interactivity with residents of the forum state, we cannot conclude that personal jurisdiction is appropriate. [*Id.*, 337.]

Here, defendant's website describes defendant's product offerings, but does not enable visitors to use the website to place direct orders. The only "interactive" feature of the website is an electronic form that allows visitors to use e-mail to request a copy of defendant's mail order catalog. This website falls at the passive end of the *Zippo* sliding scale. *Mink, supra*. Accordingly, I see no need to inquire further into the volume of business the website generates in Michigan. Plaintiff cannot predicate personal jurisdiction on the basis of defendant's Internet presence.[11]

/s/ Henry William Saad

[1] The majority says that this concurring opinion attempts to use this case to venture far beyond the limited facts of this case to establish broad, sweeping principles of law relating to Internet e-commerce and the maintenance of Web sites vis-a-vis traditional notions of jurisdiction. I believe, however, that it is appropriate and helpful to bench and bar to articulate the essential principles for deciding when a defendant's web activity constitutes the requisite minimum contacts for the assertion of personal jurisdiction. I am mindful that this Court is restricted to the facts and issues raised.

[2] I am satisfied with the majority's treatment of defendant's non-Internet contacts under the long-arm jurisdiction statutes. I write this concurrence only to thoroughly analyze plaintiff's argument that defendant's website creates a constant presence in the state of Michigan, sufficient to establish general personal jurisdiction.

[3] For a sampling of law review articles, see Richard Philip Rollo, *The Morass of Internet Personal Jurisdiction: It is Time for a Paradigm Shift*, 51 Florida Law Review 667 (1999); Dale M. Cendali, *Personal Jurisdiction and the Internet*, 564 PLI/Pat 79 (1999); Michael L. Russell, *Back to the Basics: Resisting Novel and Extreme Approaches to the Law of Personal Jurisdiction and the Internet*, 30 U Mem L Rev 157 (1999).

[4] Prof. Rollo calls this approach the "cyberspace" model. Rolla, *supra* note 1, p 693. He states that no court has yet adopted this approach, and avers that this is the "most appropriate" approach, but acknowledges that this approach would radically disrupt the traditional model of jurisdiction. Prof. Rollo suggests that personal jurisdiction issues have traditionally involved questions of territorial boundaries, which have no application in "cyberspace".

Prof. Leitstein offers this information on the term "cyberspace":

> "Cyberspace" is a word that was originally coined by William Gibson, a science fiction writer. Gibson used the term to define a world that is analogous to a virtual reality that allows human mind interaction. Though we have not yet reached the level of sophistication that Gibson envisioned, we have nonetheless redefined "Cyberspace." When users go "on-line" they interact with other computers or users. The "place"

where this interaction occurs is sometimes called "Cyberspace." [Leitstein, "A Solution for Personal Jurisdiction on the Internet", 59 *Louisiana L Rev* 565 (1999.)]

[5] In these cases, the courts were able to analogize to *Calder v Jones*, 465 US 783; 104 S Ct 1482; 79 L Ed 2d 804 (1984), where the plaintiff alleged that the defendant's nationally circulated newspaper defamed her. The Court held that the plaintiff's home state, California, could properly assert jurisdiction over the defendant because the "effects" of the defamatory article were most keenly felt in the plaintiff's home state. See, for example *Panavision International, LP v Toeppen*, 141 F3d 1316, 1321 (CA 9, 1998).

[6] For example, the Sixth Circuit's decision in *CompuServe, Inc v Patterson*, 89 F3d 1257 (CA 6, 1996), though often cited in Internet cases and law review articles, is so factually distinct from the case here that I have omitted it from my analysis. The Court there based personal jurisdiction in Ohio over an out of state defendant who had used the Internet to enter into a contract with an Ohio plaintiff.

[7] Michigan's general jurisdiction statute provides as follows:

> The existence of any of the following relationships between a corporation and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise general personal jurisdiction over the corporation and to enable such courts to render personal judgments against the corporation.
>
> (1) Incorporation under the laws of this state.
>
> (2) Consent, to the extent authorized by the consent and subject to the limitations provided in section 745.
>
> (3) The carrying on of a continuous and systematic part of its general business within the state. [MCL 600.711; MSA 27A.711.]

Plaintiffs contend that the website satisfies subparagraph (3). Plaintiffs do not argue that specific jurisdiction is proper under MCL 600.715; MSA 27A.715.

[8] See also *Smith v Hobby Lobby Stores, Inc*, 968 F Supp 1356, 1364-1365 (WD Ark, 1997) (Arkansas had no personal jurisdiction over third-party defendant who ran an advertisement in an on-line trade publication).

[9] I express no opinion regarding the "pop-up" advertisements that are becoming increasingly ubiquitous on line.

[10] Interestingly, *Heroes, Maritz* and *Inset* were all decided in 1996, when the e-commerce was still fairly new. As the Internet becomes increasingly saturated in our society, courts have become less willing to predicate jurisdiction on Internet presence alone—despite the ever increasing numbers of

Internet users. It seems likely that the novelty of the Internet may have temporarily obscured some of the basic principles of personal jurisdiction in the early cases.

[11] Moreover, sending a catalog in response to an Internet e-mail is analogous to sending a brochure in response to a request by phone, which was held not constitute a minimum contact with the state. *Witbeck v Bill Cody's Ranch Inn*, 428 Mich 659, 673; 411 NW2d 439 (1987).