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Virtual Pretrial Jurisdiction for Virtual Contacts

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INTRODUCTION

Consider a scenario in which a small business owner, who runs a modest, web-based commercial enterprise selling access to a dog pedigree database, is defamed by an out-of-state competitor, who posts terrible—yet demonstrably false—statements about the business owner on his rival website.[1] The business owner is active in the dog breeding community mainly within his own state, yet the nationwide community is rather small, and word of the competitor's vicious remarks quickly spreads. The business owner loses a substantial number of customers, with all such loss attributable to the rumors posted by his competitor.

To stop his competitor from further ruining his reputation, and to recover some of his business losses, the business owner files a lawsuit in his state trial court. The competitor quickly files a motion to dismiss for lack of personal jurisdiction.[2] The competitor argues that he has never set foot in the business owner's state where the lawsuit is pending, nor did the content of the posts have any relation to the business owner's local community. After all, the competitor merely posted information on his own website, which is primarily accessed by the tightknit dog breeding community in the competitor's own hometown. The court quickly grants the competitor's motion to dismiss, finding that he lacked sufficient contacts with the business owner's home state for the courts sitting in that state to exercise jurisdiction over the competitor. Unfortunately for the business owner, he does not have the financial means to refile his lawsuit—or to litigate it—in the competitor's home state. The posts stay up, the information continues to spread, and the business owner becomes a pariah in the dog breeding community.

According to personal jurisdiction precedent, as it stands presently, the trial court made the correct decision.[3] But the result

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[1] This scenario is loosely based on the facts of *Tamburo v. Dworkin*. *See* Tamburo v. Dworkin, 601 F.3d 693, 698–99 (7th Cir. 2010).

[2] *See* FED. R. CIV. P. 12(b)(2).

[3] For a discussion of this precedent, see *infra* Part I.

is wholly unsatisfying. The court was unable to adjudicate a real harm caused to the business owner simply because the competitor's harmful conduct took place on the internet. Worse still, the business owner squandered precious financial resources in litigation only to find that his state lacked authority to even hear his case. And while this is an admittedly kooky hypothetical, it nevertheless serves to illustrate the necessity for reform in the messy arena of personal jurisdiction battles stemming from internet-based harms.

Personal jurisdiction is a threshold requirement for any civil court's constitutional exercise of authority over a defendant,[4] and one of civil procedure's most fundamental concepts.[5] For the last seventy-five years,[6] the Supreme Court has been acutely aware of potential difficulties in personal jurisdiction doctrine in a world of rapidly evolving commerce and technology.[7] It has been well documented, however, that recent—and, at times, inconsistent—trends in Supreme Court personal jurisdiction jurisprudence have served to further complicate the doctrine rather than generate workable solutions.[8] Such overcomplication often leads to unpredictability, which both increases expenses for litigants and creates additional work for the already overburdened federal civil docket.[9] It also frontloads the focus of litigation so that unyielding threshold issues become the main event and prevent judicial consideration of a case's substantive merits.[10] This problem is exacerbated when litigation arises out of

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[4] *See* U.S. CONST. amend. XIV, § 1; *see also* Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

[5] *See* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 108.01 (2020), LexisNexis. While personal jurisdiction is required with respect to a defendant, this note argues that it may be unnecessary—at least as a threshold issue—over a civil action generally. *See infra* Part II.

[6] The Supreme Court decided *International Shoe* on December 3, 1945. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 310 (1945).

[7] *See, e.g.*, Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 424–25 (1984) (Brennan, J., dissenting) (expressing concern that the majority's refusal to differentiate between "related to" and "arise out of" standards for specific jurisdiction "remove[d] its decision from the reality of the actual facts"). See *infra* Section I.B for a more comprehensive discussion of specific jurisdiction.

[8] *See, e.g.*, Katherine Florey, *What Personal Jurisdiction Does—And What It Should Do*, 43 FLA. ST. U. L. REV. 1201, 1202 (2016); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1304–05 (2014).

[9] *See, e.g.*, Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 246 (2014) (noting the tendency of clear personal jurisdiction rules to minimize litigation costs); Cara Bayles, *Crisis to Catastrophe: As Judicial Ranks Stagnate, 'Desperation' Hits the Bench*, LAW360 (Mar. 19, 2019), https://www.law360.com/articles/1140100/as-judicial-ranks-stagnate-desperation-hits-the-bench [https://perma.cc/YWE7-XREX] (describing increasing caseloads with no corresponding increase in judgeships throughout U.S. district courts).

[10] This is not to say that more cases need to go to trial, only that more cases should travel more smoothly through the earliest procedural stages of litigation when such smooth travel is warranted. For a discussion of the trend away from cases going to

a defendant's online conduct,[11] largely because much of our existing personal jurisdiction jurisprudence is grounded in concepts of physicality and a tactile connection between a judicial forum, a defendant, and a claim.[12]

Cases involving assertions of personal jurisdiction predicated on internet-based contacts have become especially unpredictable.[13] Jurisdiction tests that rely on "minimum contacts"[14] become confused when those minimum contacts are intangible.[15] But, as this note will argue, much of this confusion is avoidable.[16] The personal jurisdiction issue has become a problem precisely because it is a threshold matter.[17] The traditional personal jurisdiction analysis requires a court to look at a defendant's contacts within a forum but lacks a useful, objective test for determining the type of conduct that qualifies as "contact." And this analysis is performed at the outset of the case, before the court has had an opportunity to form a clear picture of the case's underlying facts or merits. While traditionally defined full-bore personal jurisdiction—the authority to adjudicate a claim to a final judgment—must comport with constitutional due process

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trial, see generally John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012) (examining historical developments responsible for the trend toward drastically reduced rates of civil jury trials).

[11] *See* Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs,"* 100 CORNELL L. REV. 1129, 1131 (2015). Personal jurisdiction is by no means the only doctrine that is facing technology-driven revolution. *See, e.g.*, David S. Han, Brandenburg *and Terrorism in the Digital Age*, 85 BROOK. L. REV. 85 (2019) (examining the Supreme Court's recent technology-driven changes to Fourth Amendment doctrine as a template for reimagining First Amendment incitement doctrine).

[12] *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017) ("[T]here must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State . . . .'" (second alteration in original) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011))); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory he have certain minimum contacts with it . . . ."). While the Court has avoided language requiring literal physical presence by defendants, that does seem to be the general thrust of the underlying ethos.

[13] This trend toward the unpredictable is arguably applicable to specific jurisdiction doctrine more generally, but recent trends in general jurisdiction have made that branch of the personal jurisdiction tree more predictable. *See* Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 503–04 (2015); *see also* Trammell & Bambauer, *supra* note 11, at 1136–37 (noting the clarity of general jurisdiction doctrine post-*Daimler* and *Goodyear*).

[14] *See Int'l Shoe*, 326 U.S. at 316.

[15] The Supreme Court seems wholly unsure of what constitutes a contact with respect to the internet. *See* Transcript of Oral Argument at 55, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (No. 09-1343) (Roberts, C.J., "[A]re Web sites targeted to the United States?").

[16] *See infra* Part III.

[17] *See* Sachs, *supra* note 8, at 1305–07.

requirements,[18] it does not necessarily follow that this must extend to *all* phases of *all* "Cases" or "Controversies."[19] The judiciary must have personal jurisdiction over the litigant somewhere, which is why the scope of this note's proposal is limited to cases with domestic litigants, such that there will always be a domicile,[20] state of incorporation, or principal place of business to fall back on.[21] With that security in mind, it should be possible for courts to adjudicate pretrial, or pre-judgment, internet-based cases without offending the Constitution (and without unnecessarily dismissing the claims).

There is existing statutory precedent for the concept of pretrial administration of a civil action: "coordinated or consolidated pretrial proceedings" in multidistrict litigation (MDL).[22] While the comparison between MDL and cases arising out of online conduct is not perfect,[23] it is a helpful aid in envisioning a system that uses existing procedural tools to add flexibility to an area of law that is needlessly rigid.[24] A court's pretrial case management authority should apply to internet-based claims, so that courts can begin to examine the merits of the claims before dismissal. To solve the theoretical and practical problems that have plagued courts' personal jurisdiction analyses in cases arising from web-based conduct, courts should use precisely those communicative tools that the internet makes possible, coupled with a lowered procedural bar inspired by MDL's pretrial jurisdiction.[25]

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[18] Even this premise is not without controversy. *See* Trammell, *supra* note 13, 544–45 (acknowledging "that the actual constitutional standards governing personal jurisdiction are quite lax" and citing scholarship positing that Supreme Court limits on personal jurisdiction are constitutionally "inspired, but not compelled," and are therefore "subject to revision by Congress" (citing Henry P. Monaghan, *Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 10 (1975))). The proposal contained in this note does not push the boundaries of personal jurisdiction doctrine quite so far. For an example of a proposal involving more sweeping personal jurisdiction reform, see generally Sachs, *supra* note 8 (arguing for nationwide federal personal jurisdiction that relies on venue statutes to maintain fairness in litigation).

[19] *See* U.S. CONST. art. III, § 2.

[20] *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile . . . .").

[21] *See* Daimler AG v. Bauman, 571 U.S. 117, 118 (2014) ("The paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business.").

[22] *See* 28 U.S.C. § 1407.

[23] The MDL statute was designed to deal with its own set of specific problems, such as avoiding duplicative pretrial proceedings in separate, factually related cases. *See In re* Plumbing Fixtures Cases, 298 F. Supp. 484, 499 (J.P.M.L. 1968).

[24] *See generally* Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (granting Supreme Court the power to promulgate procedural rules for District Courts).

[25] *See generally* Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1287 (2017)

Part I of this note addresses the Supreme Court's foundational personal jurisdiction jurisprudence and tracks the trends found in some of its contemporary decisions.[26] Part II investigates the sources of law relevant to personal jurisdiction reform and considers what tools are available to craft a solution for commonsense personal jurisdiction reform, and particularly focuses on MDL's underpinnings. Part III offers draft proposals for legislation and civil procedure rules that provide a solution to the problem of personal jurisdiction and internet-based conduct. Finally, Part IV considers the proposed solution in action in several hypothetical scenarios.

I. PERSONAL JURISDICTION JURISPRUDENCE: HISTORICAL BACKGROUND AND MODERN TRENDS

Personal jurisdiction serves as a gatekeeping mechanism so that a court does not overstep the bounds of its coercive power and exert undeserved authority over a defendant.[27] The two principal rationales for requiring personal jurisdiction are fairness to defendants and concern for state sovereignty.[28] Each of these rationales is grounded in the Fourteenth Amendment's due process clause.[29] A court cannot bring its coercive power to bear on a defendant over whom it lacks jurisdiction.[30] For example, a court in California may not exercise authority over a defendant from New York who has neither been to California nor has had any meaningful contacts with California or its citizens.[31] This protects defendants from arbitrary exercise of power by states they have never associated with, and it protects a state's own legal system from any interference from other states.[32] In other words, a court must be justified in exercising its authority over a defendant; and a court of one jurisdiction may not arbitrarily exercise authority

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(discussing judges' use of social media and dedicated MDL websites in facilitating information dissemination in MDL cases).

[26] *See* Trammell & Bambauer, *supra* note 11, at 1130, 1130 n.2 (remarking on the Supreme Court's recent flurry of activity on personal jurisdiction).

[27] *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1779 (2017).

[28] *See* Florey, *supra* note 8, at 1210. *But see* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 899 (2011) (Ginsburg, J., dissenting) ("[T]he constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty.").

[29] U.S. CONST. amend. XIV, § 1.

[30] *See* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 108.01 (2020), LexisNexis ("Bases for Jurisdiction").

[31] *See id.* ("[T]he person or property must have the adequate territorial connection with the state . . . ."); *see also Bristol-Myers Squibb*, 137 S. Ct. at 1783–84 (holding that specific jurisdiction requires a nexus between each plaintiff's claim and the defendant's in-state conduct in a mass action involving many out of state plaintiffs).

[32] *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

over citizens of a different jurisdiction.[33] From these foundational principles, courts have developed two distinct modes of personal jurisdiction: general and specific.

A. General Jurisdiction

A court with authority in a defendant's home jurisdiction is said to have general personal jurisdiction over that defendant.[34] For individual defendants, general jurisdiction is relatively uncontroversial and is based on the individual's "domicile," that is, the state where the defendant resides.[35] Corporate defendants, however, are subject to general jurisdiction wherever they have "affiliations with the State . . . so 'continuous and systematic' as to render them essentially at home."[36] Prior to 2014,[37] this meant corporations were subject to jurisdiction wherever they had substantial business activities.[38] This concept was fairly straightforward until the Supreme Court's 2014 decision in *Daimler AG v. Bauman* upended corporate general jurisdiction, substantially narrowing it to include only: (1) the entity's state of incorporation, and (2) the state that is home to its principal place of business.[39] While the definition of corporate general jurisdiction is not especially important to the problem of specific jurisdiction analysis with respect to internet-based contacts, the Supreme Court's recent decisions narrowing personal jurisdiction and adopting bright line rules are particularly noteworthy.[40] Consequently, a statutory remedy is the appropriate solution to

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[33] *See, e.g.*, *Nicastro*, 564 U.S. at 879–80 (Kennedy, J., plurality opinion) (summarizing the limits of state sovereign power over defendants).

[34] *See* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 108.52 (2020), LexisNexis ("Courts routinely exercise general jurisdiction over individual defendants who are forum domiciliaries . . . .").

[35] *Id.* § 108.22.

[36] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

[37] This note applies the decision date for *Daimler* although the *Daimler* Court seems to indicate that the principal-place-of-business/state-of-incorporation test was already settled law after *Goodyear*. *See* Daimler AG v. Bauman, 571 U.S. 117, 118 (2014) ("The paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business." (citing *Goodyear*, 564 U.S. at 924)). *But see* Trammell, *supra* note 13, at 516–18 (noting that some courts continued to apply more expansive general jurisdiction doctrine in the wake of *Goodyear*).

[38] *See generally, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (involving a defendant, incorporated in Delaware and with its principal place of business in Oklahoma, implicitly conceding general jurisdiction in Kansas based on substantial business ties to the state).

[39] *Daimler*, 571 U.S. at 138–39.

[40] *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 96 (2010) (constraining the definition of corporate citizenship for diversity jurisdiction and acknowledging "the necessity of having a clearer rule" in subject-matter jurisdiction analyses even though anomalous results are probable).

the problems facing courts called upon to address challenges to personal jurisdiction. General jurisdiction can also play an important theoretical—if not functional—role in the proposed framework for internet-specific pretrial jurisdiction.[41]

B. Traditional Specific Jurisdiction Framework

Specific jurisdiction is more critical in internet-based cases.[42] The specific jurisdiction doctrine arose during the twentieth century in response to an increasingly mobile population and a corresponding rise in interstate and international corporate activity.[43] Specific jurisdiction grants a court adjudicative authority in a forum where the defendant has had "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[44] The minimum contacts analysis has evolved into a three-part test that considers the following: (1) whether "the defendant has 'purposefully directed' [their] activities at residents of the forum";[45] (2) whether "the litigation results from alleged injuries that 'arise out of or relate to' those activities";[46] and (3) whether the exercise of jurisdiction would be reasonable or fair.[47]

This outwardly simple minimum contacts test is actually quite difficult to apply[48] and involves three separate prongs, each of which is a standard rather than a rule.[49] Were the contacts sufficient? Was the litigation related enough to those contacts? Even if the answer to each of these questions is "yes," should the court exercise jurisdiction, or should it decline jurisdiction based

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[41] *See infra* Parts III and IV.

[42] This premise is at least true for the purposes of this note, where hypothetical solutions are contained to the realm of federal diversity cases. A plaintiff attempting to sue a defendant in the plaintiff's home forum will necessarily be asserting specific jurisdiction over a non-forum defendant.

[43] Trammell & Bambauer, *supra* note 11, at 1135; *see also* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1121, 1136 (1966) (proposing "a new system of terminology" in the realm of personal jurisdiction and coining the phrase "specific jurisdiction").

[44] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see also* Trammell, *supra* note 13, at 526–28 (2015) (arguing that in the specific jurisdiction context it is really the lawsuit itself that must be "at home" in the forum, with no theoretical need for any contacts by the defendant, although conceding that the Supreme Court has not explicitly espoused this view).

[45] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)).

[46] *Id.* (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

[47] *Id.* at 476–78 (1985) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

[48] *See* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1178–79 (2018).

[49] Trammell & Bambauer, *supra* note 11, at 1151.

on some hard-to-pin-down notion of prudential fairness?[50] The as-applied complexity of the test combined with a historical lack of bright line rules has made specific jurisdiction minimum contacts analysis maddening even without the wrinkle that internet cases add—making those minimum contacts virtual rather than physical.[51]

Although bright line rules are analytically simple, they are not necessarily always helpful. In its 2017 *Bristol-Myers Squibb Co. v. Superior Court* decision, the Supreme Court created one such bright line rule, narrowly construing the test's "arise out of or relate to"[52] language to require a "connection between the forum and specific claims at issue" as a condition for the exercise of personal jurisdiction.[53] That case concerned a mass action where eighty-six California plaintiffs and several hundred non-California plaintiffs all asserted identical claims against pharmaceutical manufacturer Bristol-Myers Squibb.[54] The Court held that although the non-California plaintiffs' injuries were the same as those of the California residents, California could only assert jurisdiction over the California plaintiffs' claims.[55]

Justice Sotomayor, the lone dissenter, considered the Court's decision to be inconsistent with its precedent in *Keeton v. Hustler Magazine, Inc.*, which had allowed a nationwide defamation suit in New Hampshire.[56] Although that case relied on a particular legal nuance regarding the cause of action itself,[57] not applicable to *Bristol-Myers Squibb*, personal jurisdiction issues are at least nominally constitutional in nature. And a common law tort

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[50] *See World-Wide Volkswagen*, 444 U.S. at 312 (Brennan, J., dissenting) (expressing concern that the majority's narrow definition and overemphasis of minimum contacts would lead to an outcome where a defendant has "veto power" over fora despite their fairness and reasonableness).

[51] *See* A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 125–26 (2005).

[52] Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (internal citations omitted).

[53] Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1781 (2017). Interestingly, the Supreme Court decided *Daimler* after *Bristol-Myers Squibb* had commenced, with the result that the California Court of Appeal was forced to reverse an earlier finding that California had general jurisdiction over Bristol-Myers Squibb. *See id.* at 1775 (citing Daimler AG v. Bauman, 571 U.S. 117 (2014)); *see also* Bristol-Myers Squibb Co. v. Superior Court, 228 Cal. App. 4th 605, 642 (Ct. App. 2014) (unanimous three-judge appellate panel finding it "difficult to see how it would be more efficient for [Bristol-Myers Squibb] to litigate the same issues in multiple fora throughout the country" prior to *Daimler* decision).

[54] *Bristol-Myers Squibb*, 137 S. Ct. at 1785 (Sotomayor, J., dissenting) (internal citation omitted).

[55] *Id.* at 1783–84 (majority opinion).

[56] *Id.* at 1788 (Sotomayor, J., dissenting) (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 (1984)).

[57] The "single publication rule." *Keeton*, 465 U.S. at 793–74 nn.2–3 (citing RESTATEMENT (SECOND) OF TORTS § 577A(4) (AM. L. INST. 1977)).

rule such as the one at work in *Keeton* will not supplant a constitutional provision. Thus, it seems that what was permissible in *Keeton* ought to be permissible in *Bristol-Myers Squibb*.

Justice Sotomayor found the majority's reliance on the existence of multiple plaintiffs to distinguish *Bristol-Myers* from *Keeton* to be a "distinction without a difference."[58] If the Court—or the Constitution—required that there be a nexus between the claim and the forum, it does not necessarily follow that the multiplicity of plaintiffs changes the jurisdictional calculus. In other words, if it is the *claim* over which a court must have jurisdiction, then *Bristol-Myers Squibb* seems to overrule *Keeton*. While this conundrum does not bear a unique relationship to the internet-specific doctrine, it further illustrates the Supreme Court's inflexibility with personal jurisdiction doctrine.[59] It may also be relevant for a virtual contacts analysis because the *Bristol-Myers Squibb* majority seemed to emphasize the lack of out-of-state defendants' physical connection to the forum.[60]

While the Supreme Court has certainly narrowed the arising-out-of prong for personal jurisdiction, the direction the Court is pushing the purposefully-directed-activities prong of that same test is far less certain.[61] The Court in 2011 revisited the concept of stream-of-commerce-based contacts in *J. McIntyre Machinery, Ltd. v. Nicastro*, a decision that failed to produce a majority opinion but did produce a lively debate on the nature of purposeful contacts.[62] It is now unclear what exactly a plaintiff is required to demonstrate to a state's court that would convince it to exercise jurisdiction based on the defendant's purposeful availment of that state's marketplace,

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[58] *Bristol-Myers Squibb*, 137 S. Ct. at 1788 (Sotomayor, J., dissenting).

[59] *See* Brief of Amici Curiae Civil Procedure Professors in Support of Respondents at 12–18, Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017) (No. 16-466) (arguing that a "causation rule" allowing for exercise of personal jurisdiction only over claims *caused* by defendant's in-state conduct—as opposed to those merely "related to" defendant's in-state conduct—both lacks Supreme Court precedent and unnecessarily limits flexibility of the existing test). While the Court did not explicitly adopt a "causation requirement," it did nevertheless substantially limit multistate plaintiffs' abilities to join together in a cause of action against a defendant in a jurisdiction where that defendant is subject only to specific jurisdiction.

[60] *See Bristol-Myers Squibb*, 137 S. Ct. at 1781 (detailing various relevant actions that nonresidents had *not* taken in California).

[61] See generally *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) and *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987), where both cases failed to produce a majority opinion clarifying what constitutes purposeful availment in the stream-of-commerce context.

[62] *Compare Nicastro*, 564 U.S. at 882 (Kennedy, J., plurality opinion) ("The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum . . . ."), *with id.* at 907 (Ginsburg, J., dissenting) ("[W]hen a manufacturer . . . aims to sell its product to customers in several States, it is reasonable 'to subject it to suit in [any] one of those States if its allegedly defective [product] has there been the source of injury.'" (second and third alterations in original) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980))).

absent physical presence by the defendant. Much of this recent precedent—from which, unfortunately, future personal jurisdiction jurisprudence will necessarily arise—does not explicitly discuss internet jurisdiction itself. Oral arguments in *Nicastro*, however, do shed some light on the Justices' overall understanding of the internet at the time. Chief Justice Roberts, for example, seemed especially perturbed: "[M]aybe everybody knows this except me. Do you - - are websites targeted to the United States? . . . [L]et's say [a hypothetical defendant] put [an advertisement] on their website in England. . . . [C]an't I access that from here?"[63] With that quote in mind, it is wholly unsurprising that the Supreme Court has seemed hesitant to fully grapple with the internet issue. While the Court has refined its conception of the internet somewhat since 2011, it still does not appear altogether comfortable in this space.[64]

C. Alternatives to the Traditional Test: Calder *"Effects" and* Zippo

Before delving into the internet-specific jurisdictional questions, it is important to note an alternative pre-internet personal jurisdiction test, the *Calder* effects test.[65] The *Calder* effects test establishes parameters for jurisdiction over a defendant who had no physical contacts with the forum based on a defendant's "intentional conduct . . . [that is] calculated to cause injury" to a plaintiff in the forum state.[66] The fact that the test does not require physical presence by the defendant has made it an attractive test for internet-based conduct; however, its application is cabined by the requirement of intentional conduct.[67] *Calder* itself dealt with a libel claim.[68] It is possible that the effects test—or at least something resembling an effects test—could be expanded, within the context of internet-based cases, to encompass a broader array of defendant activity and connectivity

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[63] Transcript of Oral Argument at 55, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (No. 09-1343).

[64] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) ("The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.").

[65] Calder v. Jones, 465 U.S. 783, 789–91 (1984).

[66] *Id.* at 791.

[67] While any exercise of specific jurisdiction requires *purposeful* availment, the purpose requirement seems particularly heightened in the effects test context. *See, e.g.*, Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321 (9th Cir. 1998) (using "effects" test analysis to find specific jurisdiction proper over defendant for internet-only contacts to California in trademark dilution case, which, although not a tort case per se, contained the required intentional actions on the part of defendant). For a summary of the *Toeppen* case, see Greg Lastowka, *Google's Law*, 73 BROOK. L. REV. 1327, 1405–06 (2008).

[68] *See Calder*, 465 U.S. at 784.

that can give rise to the exercise of personal jurisdiction.[69] The effects test's limited scope, however, makes it a poor candidate as a tool for sweeping doctrinal and procedural change.

The primary internet-specific analytical framework that federal courts have used for determining personal jurisdiction is the *Zippo* sliding scale test.[70] This test has been used so widely[71] that it is useful to consider the *Zippo* court's language in the relevant passage:

> [T]he 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. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. The middle ground is occupied by interactive Web sites 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 Web site.[72]

The *Zippo* test has become an extraordinarily popular test for courts to invoke, yet is fraught with noteworthy problems.[73] First, the *Zippo* court's test is explicitly derived from the "traditional" approach to personal jurisdiction[74] and, although it does cite one case concerning internet contacts—*Panavision International, L.P. v. Toeppen*—it makes no mention of the effects test that the court in *Panavision* used.[75] While the reliance on traditional concepts is not inherently problematic, it

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[69] *See infra* Part III.

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

[71] *See* Trammell & Bambauer, *supra* note 11, at 1150, fig.1 (detailing the different variations of the *Zippo* test that each circuit court uses, and noting that the Federal Circuit was—at the time of publishing—the only circuit that had not used the test).

[72] *Zippo*, 952 F. Supp. at 1124.

[73] Federal courts had cited *Zippo* 1,312 times as of May 28, 2020. *See* lexisnexis.com [https://perma.cc/U5GN-ZR3Q] (search "Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997)" on LexisNexis, then follow "Citing Decisions" hyperlink under "Shepard's®" on the right-hand side of the page).

[74] *Zippo*, 952 F. Supp. at 1122–23; *see also* Lis v. Delvecchio, No. 3:11CV01057 (AWT), 2012 WL 3309384, at *5 (D. Conn. Aug. 13, 2012) ("[A]pplying the *Zippo* sliding scale of interactivity is merely the use of a new tool to measure a defendant's commercial activity within the forum state via its website which is then to be applied to traditional jurisdiction principles.").

[75] *See* Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998).

leaves courts with a test that sounds deceptively innovative, but that is not grounded in anything unique to the internet context.[76] Second—and perhaps the reason why *Panavision* was absent from the analysis[77]—the *Zippo* case and its sliding scale test are especially applicable—if not fully constrained—to e-commerce cases.[78] Finally, *Zippo*'s sliding scale test seems to be dicta.[79]

The *Zippo* sliding scale test and the *Calder* effects test both seem to be readily applicable for cases arising out of online conduct. In practice, however, neither is particularly helpful. The *Zippo* test simply adds new language about "Web sites" to the existing messy framework of malleable standards,[80] while the *Calder* test acknowledges that jurisdiction is possible over an absent defendant and does little to define the terms under which that exercise of jurisdiction is constitutionally permissible.[81] Because the courts have pushed personal jurisdiction jurisprudence into its present unwieldy predicament, statutory intervention is the most practical strategy for its rescue.

II. MULTIDISTRICT LITIGATION AS A POTENTIAL FRAMEWORK FOR REIMAGINING INTERNET-BASED PERSONAL JURISDICTION

Part I considered the relevant personal jurisdiction tests that are grounded in the Constitution, but the Constitution is far from the only relevant source of law in this area.[82] In addition to satisfying the messy constitutional standards of due process and fairness, courts also require statutory authority for the exercise of jurisdiction.[83] For federal courts, which are the primary focus of this note's proposal,[84] this means that they either look to the

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[76] Interactive websites are really just a new take on a traditional business transaction, and passive websites are just advertising. *See* Trammell & Bambauer, *supra* note 11, at 1148.

[77] *Panavision* dealt with trademark infringement and not specifically e-commerce. *See Panavision*, 141 F.3d at 1318.

[78] For a recent example of a quasi-e-commerce case, see *SEC v. Plexcorps*, 17-CV-7007 (CBA) (RML), 2018 WL 4299983, *13–19 (E.D.N.Y. Aug. 9, 2018) (using *Zippo* standard to evaluate interactivity of defendants' web-based contacts, such as Facebook advertisements and sales of allegedly fraudulent cryptocurrency from defendants' website).

[79] Trammell & Bambauer, *supra* note 11, at 1146. See *id.* for a more comprehensive criticism of *Zippo*'s flaws.

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

[81] Calder v. Jones, 465 U.S. 783, 791 (1984).

[82] *See* Trammell & Bambauer, *supra* note 11, at 1153–57 (arguing that personal jurisdiction doctrine includes three separate tiers: (1) constitutional limitations; (2) "prudential, common law restrictions that are inspired—but not required—by the Constitution"; and (3) additional statutory restrictions).

[83] *See* FED. R. CIV. P. 4(k)(1)(A), (C).

[84] The scope of this note is limited to discussions of the federal court system, both for reasons of simplicity, and because all the hypothetical and actual claims discussed *infra*

language of state long-arm statutes,[85] or seek a targeted federal statute authorizing their jurisdiction over a specific type of case.[86] This extra layer of analysis only further complicates the personal jurisdiction quagmire. But both the statutory authorization element and the federal judiciary's rule-making powers are tools that have the potential to effectively mend some of the confusion.[87] They can function as building blocks for a purposefully crafted personal jurisdiction doctrine that is both sensible and still comports with constitutional requirements.[88] In other words, Congress, with additional input from the Judicial Conference's Committee on Rules of Practice and Procedure, can fix this.[89]

Armed with the tools to fix the problem, we can frame a solution. The path toward any solution must begin with an assumption that it is indeed possible for a hypothetical defendant to incur civil liability merely through online conduct.[90] If that defendant can incur liability through online conduct and such liability triggers a cause of action, then there must be a forum where a hypothetical plaintiff is able to bring a lawsuit challenging that conduct.[91] This line of thinking, however, eventually begins to raise questions that are difficult to answer, both philosophically and jurisprudentially. Are a defendant's purely digital contacts with a plaintiff's home forum ever sufficient to authorize that forum to exercise jurisdictional authority over the defendant? Are the "effects" of the defendant's digital conduct sufficient to trigger jurisdiction? It may also matter whether the defendant's conduct intentionally targeted the plaintiff or whether the defendant was aware of the plaintiff's location. These are issues that litigants and courts must confront under the traditional personal jurisdiction

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will generally fall under the federal courts' subject-matter jurisdiction, whether because of diversity of citizenship—amount in controversy concerns are addressed *infra* Part III—or because the claim is subject to federal statute.

[85] Trammell & Bambauer, *supra* note 11, at 1155.

[86] *See, e.g.*, 15 U.S.C. § 1125(d)(2)(A) (allowing courts to exercise in rem jurisdiction over domain names where the owner of the domain is not subject to personal jurisdiction).

[87] *See* Rules Enabling Act, 28 U.S.C. § 2072.

[88] For an argument that the constitutional limitations on courts are actually quite minimal and that the sources of the majority of limitations are either court-made or legislative, see Trammell & Bambauer, *supra* note 11, at 1154.

[89] *See How the Rulemaking Process Works*, U.S. COURTS, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works [https://perma.cc/DQF3-2X8E].

[90] There do exist those who have argued for an ungoverned internet, beyond the authority of any court. I do not advocate that as a workable approach to the internet generally, or as a policy approach to civil litigation. *See* Trammell & Bambauer, *supra* note 11, at 1132, n.12 (citing several articles for the ungoverned internet proposition).

[91] The same due process that protects defendants also protects claimants' right to participate in the legal system. *See* Mullane v. Cent. Hannover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

frameworks,[92] but which have led courts to inconsistent and unpredictable outcomes.[93]

Under the traditional framework and existing case law, it is tempting to view the solution to the personal jurisdiction problem as an all-or-nothing choice.[94] On the one hand, a solution could allow for personal jurisdiction over defendants wherever a plaintiff is able to come into contact with—and be harmed by—those defendants' online conduct.[95] On the other hand, a solution could categorically dismiss mere virtual contacts as sufficient minimum contacts under any circumstances, limiting personal jurisdiction only to fora in which defendants are subject to general jurisdiction.[96] In a sense, this is an accurate portrayal of a choice that fundamentally tethers itself to the problematic traditional personal jurisdiction tests. Viewing this as a binary issue cries out for someone to just make a decision, regardless of who happens to be the decision-maker—whether that is the Supreme Court actually reviewing an internet contacts case and shaping the common law doctrine, or Congress setting statutory limitations on jurisdiction.[97]

A. Escaping the All-or-Nothing Trap

But the choice is not either/or jurisdiction or no jurisdiction; there are many possible solutions. At the very least, there is a third option: a formulation of a "jurisdiction everywhere" premise that does not involve such rigid line drawing. It should be possible to fashion a workable limited pretrial jurisdiction over defendants in internet cases. This is not to foreclose the possibility of other similarly pragmatic solutions to personal jurisdiction doctrine; it is simply to offer an idea for

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[92] *See supra* Part I.

[93] *Compare* Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (finding personal jurisdiction over tech company in Connecticut based on the accessibility of the company's website in Connecticut and the existence of a toll-free number available to Connecticut residents), *with* IDS Life Ins. Co. v. Sunamerica, Inc., 958 F. Supp. 1258, 1268 (N.D. Ill. 1997) (finding no personal jurisdiction in Illinois based on company's website, toll-free number, and television advertising), *aff'd in part, rev'd in part sub nom.* IDS Life Ins. Co. v. Sunamerica Life Ins. Co., 136 F.3d 537 (7th Cir. 1998).

[94] *Cf.* Trammell, *supra* note 13, at 504 (arguing that general and specific jurisdiction lie along a constitutional continuum, rather than representing a binary choice).

[95] This is essentially a highly expansive read on the minimum contacts requirement of specific jurisdiction, far beyond what the Supreme Court has recognized. *See, e.g.*, Walden v. Fiore, 571 U.S. 277, 290–91 (2014) (holding that a plaintiff's Nevada citizenship is insufficient to create a contact between a Georgia defendant based on conduct that occurred exclusively in Georgia).

[96] *See* Trammell & Bambauer, *supra* note 11, at 1158.

[97] For further discussion on the theory that personal jurisdiction jurisprudence is grounded in judge-made common law and not fundamental constitutional concerns, see Trammell, *supra* note 13, at 543, 543 n.203 (citing Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 577 (1995)).

flexible jurisdiction in the context of the inherently flexible medium of the internet.[98]

The internet is a tool for communication.[99] A lawsuit, really any dispute, is a form of communication, where adverse parties communicate their versions of events to the court and the court processes that information and communicates back to the parties—and to the public—its opinion regarding which party is right and which party is wrong, whose story wins and whose loses.[100] Although this is perhaps an overly reductive view of litigation, it is a useful analogy for understanding claims that arise solely from web-based conduct. The internet after all is contributing to many of the problems with a territorial approach to jurisdiction, but it also has a unique ability to play a key role in their solution. The communication tools spawned by the internet have set us free from territorial limitations in many ways.[101] Users can "like" Facebook posts that their friends wrote in distant states.[102] An e-commerce consumer can order a new set of dishes from a manufacturer in Virginia.[103] Sports fans can make their own websites to write about their favorite teams.[104] But courts can, and do, utilize the communicative power of the internet as well.[105]

Due process concerns of fairness and sovereignty should not elicit the same analysis with respect to claims arising from web-based conduct as they do for claims where a defendant had more traditional contacts with a forum resident. Justice Black, writing more than six decades ago, recognized that a changing economy could broaden the reach of what constitutes fair and reasonable

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[98] For an argument that the federal system should altogether scrap personal jurisdiction, see Sachs, *supra* note 8.

[99] It is specifically a tool for computers to communicate with one another, but human beings are often the catalysts for those communications. *See* Ben Tarnoff, *How the Internet Was Invented*, GUARDIAN (July 15, 2016), https://www.theguardian.com/technology/2016/jul/15/how-the-internet-was-invented-1976-arpa-kahn-cerf [https://perma.cc/6NWC-B9NN].

[100] For a discussion of judges' roles in information dissemination, see Bradt & Rave, *supra* note 25.

[101] This concept of decreasing emphasis on territorial borders of course predates the internet. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 308 (1980) (Brennan, J., dissenting) ("[B]oth the nationalization of commerce and the ease of transportation and communication have accelerated in the generation since 1957 [when the Court decided a previous case].").

[102] *See How Do I Like or Follow a Page on Facebook*, FACEBOOK: HELP CTR., https://www.facebook.com/help/216630288356463?helpref=search&sr=31&query=likes [https://perma.cc/33PS-PHZ3].

[103] *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 891–92 (2011) (Breyer, J., concurring) (expressing concern that an "Appalachian potter" could face liability in distant fora based solely on the acts of an intermediary distributor).

[104] *See infra* Section IV.C.

[105] *See, e.g.*, E.D.N.Y. LOCAL CIV. R. 5.2(a) ("Parties serving and filing papers should follow the instructions regarding Electronic Case Filing (ECF) published on the website of each respective Court.").

exercise of jurisdiction over a non-forum defendant.[106] Justice Black's prediction did not exactly pan out.[107] And perhaps it is unfair and in violation of due process to hale a defendant physically into court in a jurisdiction in which the defendant had entirely digital contacts. But what if the defendant, whose contacts were digital, is required to appear virtually, rather than physically, before the court? There is merit to the view that potential defendants ought to have some measure of control over where they are subject to lawsuits,[108] and that exposure to litigation in any forum in which their internet presence is accessible may be considered overbroad.[109] The counterpoint to that position, however, is that with increased ease of communication, near constant internet access, and expansion of the kinds of activities that we can conduct online—from commerce to dating to social media sharing—potential defendants are also able to have a legitimate, albeit virtual, impact on a greater number of potential plaintiffs in more diverse fora than ever before.[110] These plaintiffs should not be precluded from holding defendants accountable solely because the plaintiffs are unable or unwilling to travel to the defendants' fora.

B. Multi-District Litigation's Background and the Pretrial Jurisdiction Phenomenon

It is possible to have a statutory solution that empowers a federal court to exercise pretrial jurisdiction over an internet-based claim. There is already precedent for the exercise of pretrial control over proceedings by a court that does not have personal jurisdiction. Fifty years ago, Congress drafted the MDL statute, 28 U.S.C. Section 1407,[111] and created the Judicial Panel on Multidistrict Litigation (JPML)[112] specifically to "eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district

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[106] *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957) ("[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years.").

[107] *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1783–84 (2017).

[108] *See, e.g.*, *Nicastro*, 564 U.S. at 882–83 (arguing that a defendant's purposeful actions, and not merely "his expectations" or what is "foreseeable," are required for specific personal jurisdiction).

[109] *See* Trammell & Bambauer, *supra* note 11, at 1167.

[110] *See* Reuben Fischer-Baum, *What 'Tech World' Did You Grow Up In?*, WASH. POST (Nov. 26, 2017), https://www.washingtonpost.com/graphics/2017/entertainment/tech-generations/?utm_term=.0415ef3484af [https://perma.cc/WUU3-YY8Y].

[111] 28 U.S.C. § 1407.

[112] *See* Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109, 109–10.

and appellate courts in multidistrict related civil actions."[113] Section 1407 authorizes the JPML to identify factually-related cases that are pending simultaneously in different jurisdictions and transfer those cases, solely for "coordinated or consolidated pretrial proceedings," to a convenient district, so that one judge can manage all of the similar cases at once.[114] The JPML can do this even over the objection of both plaintiff and defendant.[115] After "the conclusion of . . . pretrial proceedings," the transferee court must remand the cases back to their original districts.[116] In essence, section 1407 enables a court to manage a significant portion of a civil action based only on principles of "convenience" and "just and efficient conduct," not fairness or due process.[117]

MDL coordination or consolidation starts from a premise that a civil action is already pending in a federal district court somewhere.[118] This seems to imply that the transferor court could properly exercise personal jurisdiction.[119] But it is unclear whether that even matters. So much of the personal jurisdiction jurisprudential rhetoric voices concerns about defendants forced to show up to courts that do not have authority over them.[120] But when a statute confers specific authority on a court to conduct pretrial proceedings, suddenly these concerns seem to evaporate.[121] In the MDL context, the federal judiciary has no problem managing a case, conducting discovery, approving settlement agreements, etc., all without investigating—and likely without ever having—personal jurisdiction. Even the venue transfer statute contemplates transfer to a district "where [the action] might have been brought *or to any district or division to which all parties have consented*."[122] Personal jurisdiction—unlike subject-matter

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[113] *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 491–92 (J.P.M.L. 1968).

[114] 28 U.S.C. § 1407(a).

[115] *See, e.g.*, *In re* Aviation Prods. Liab. Litig, 347 F. Supp. 1401, 1405 (J.P.M.L. 1972) (transferring case "to avoid the possibility of duplicitous discovery and unnecessary inconvenience to . . . witnesses," although "[a]ll parties to [the] action oppose[d] transfer").

[116] 28 U.S.C. § 1407(a); *see also* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998) (holding that, under the plain meaning of § 1407, transferee courts may not "transfer" the cases to themselves, rather than remanding to the original district).

[117] 28 U.S.C. § 1407(a).

[118] *See id.*

[119] Or at least that parties had consented to its jurisdiction.

[120] *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 892 (2011) (Breyer, J., concurring) (expressing concern that an expansion of personal jurisdiction could lead to a conclusion that a "Kenyan coffee farmer," marketing its products to the United States generally, would have to understand the substantive tort law of all fifty states).

[121] *See* Bradt, *supra* note 48, at 1168–70 (explaining that, while almost 40 percent of the nationwide federal civil docket consists of MDL cases where the managing court has no personal jurisdiction requirement, less than 3 percent of those cases are ever remanded for trial).

[122] 28 U.S.C. § 1404(a) (emphasis added).

jurisdiction[123]—is even waivable if an unwitting defendant neglects to assert a challenge at the proper time.[124] What is grounded in lofty constitutional ideals is quickly and easily overcome by a carefully worded statute or sloppy motion practice.

This is all to say that it should be easy to craft new statutory and Rules[125]-based solutions that allow for the pragmatic resolution of cases and litigation on their merits, while checking aggressive litigation of threshold personal jurisdiction challenges. The bounds of the Constitution are a good deal looser than the Supreme Court has defined them to be in this area,[126] and new rules using the internet to deal with the problems inherent to internet-based minimum contacts cases can produce a system that makes more sense than the one in which courts and litigants are currently forced to operate. This is also merely a starting point. The unique struggles that courts have faced in applying personal jurisdiction doctrine to internet cases are especially fixable. But any such fixes can hopefully function as a foothold for a more thorough and comprehensive overhaul of the personal jurisdiction morass. While *Nicastro* did not directly involve the internet, the future of web-based litigation did seem to be in the Court's purview.[127] Perhaps a solution to internet jurisdiction can lead to further solutions that help to resolve the aftermath of *Nicastro* and head off any potentially problematic Supreme Court ruling on the issue.

III. A SOLUTION TO REFORM PERSONAL JURISDICTION DOCTRINE FOR THE INTERNET ERA

A. Rationale for Changes

While reform is necessary for plaintiffs to have proper redress, it is equally important to maintain protections for defendants, lest they be dragged into court in some forum they

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[123] *Compare* FED. R. CIV. P. 12(b)(1) (defense of "lack of subject-matter jurisdiction"), *with* FED. R. CIV. P. 12(b)(2) (defense of "lack of personal jurisdiction"), *and* FED. R. CIV. P. 12(h) (establishing that the 12(b)(1) defense of lack of subject-matter jurisdiction is not waivable but the 12(b)(2) defense of lack of personal jurisdiction is).

[124] *See, e.g.*, Uffner v. La Reunion Francaise, S.A., 244 F.3d 38, 40–41 (1st Cir. 2001) (reversing district court's *sua sponte* dismissal for lack of personal jurisdiction when the defendant had failed to raise a personal jurisdiction challenge in pre-answer motion practice).

[125] The capitalized "Rule" denotes a reference to the Federal Rules of Civil Procedure.

[126] *See, e.g.*, A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 632–33 (2006) (arguing that the Constitution does not protect defendants from inconvenience).

[127] *See* Transcript of Oral Argument at 54, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (No. 09-1343) (Justice Ginsburg: "[T]here are some cases, just beginning—at the beginning stages, aren't there, involving sales through the Internet?").

have nothing to do with to defend a lawsuit of uncertain merit that they cannot afford. In *Nicastro* Justice Breyer was concerned with small businesses around the world being forced to defend themselves in the United States.[128] That is a valid concern. But it seems to ignore the very real harm suffered by plaintiffs; Mr. Nicastro, for example, lost four fingers to a metal shearing machine.[129] That is, however, an extreme circumstance and *Nicastro* a unique case. This note seeks to propose a solution to a more modest problem: jurisdictional confusion where the alleged harm—and thus the defendant's contacts to the forum—is purely digital (no pun intended with respect to the fate suffered by Mr. Nicastro's digits).

Balancing the conflicting concerns of plaintiffs' vindication and defendants' due process rights requires reworking some of the procedural components of personal jurisdiction in federal courts relating to claims arising out of entirely virtual conduct.[130] Recall that, as an alternative to a state long-arm statute, the Federal Rules of Civil Procedure permit a federal court to exercise personal jurisdiction over a defendant when that exercise is authorized by a federal statute.[131] For example, there is already a federal statute that provides for in rem jurisdiction over internet domain names in trademark infringement suits.[132] Congress should enact a similar federal statute to authorize the exercise of in personam jurisdiction over a defendant in whatever forum a plaintiff has alleged harm arising out of web-based activities.[133]

Because this statute would authorize personal jurisdiction specifically for claims arising over the internet, parties would also be permitted to make court appearances and conduct all pretrial proceedings remotely.[134] Integral in the constitutional analysis of due process are the ideas of fairness and reasonableness.[135] It is both reasonable and fair to require a California-based defendant

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[128] *See id.* at 31.

[129] *See Nicastro*, 564 U.S. at 894 (Ginsburg, J., dissenting).

[130] That is not to say that state judiciaries do not play a role in web-based jurisprudence; however, for the sake of simplicity, the scope of this note is constrained mainly to discussions of federal civil procedure.

[131] *See* FED. R. CIV. P. 4(k)(1)(C).

[132] *See* 15 U.S.C. § 1125(d)(2)(A); *see also* Jacob H. Rooksby, *Defining Domain: Higher Education's Battles for Cyberspace*, 80 BROOK. L. REV. 857, 883–84 (2015) (summarizing the legislative advent of in rem domain name jurisdiction).

[133] This idea may line up more comfortably with the effects test than with the minimum contacts test, but the choice of analysis is inconsequential, a "distinction without a difference." Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1788 (2017) (Sotomayor, J., dissenting). Whatever the framework, the outcome is such that the bar for establishing contacts is drastically lowered in an internet context.

[134] From a purely practical standpoint there would need to be some infrastructure changes in federal courts, discussion of which is beyond the scope of this note.

[135] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

whose internet conduct inflicts harm on a New York-based plaintiff to appear in a virtual capacity to defend that conduct in New York, the forum that they were able to reach virtually—particularly if this virtual appearance is limited to pretrial proceedings.[136] Containing the proposal to pretrial proceedings achieves two key goals. First, such a limitation squares this proposal with the precedential framework set by MDL and section 1407.[137] Second, it clearly signals to the Supreme Court that this is a limited solution, thus permitting the Court to avoid analyzing it under the full gamut of traditional personal jurisdiction doctrine. This could be structured into the existing general venue statute with additional changes in Rule 4's jurisdictional requirements.[138]

In addition to enabling a district court to exercise virtual pretrial jurisdiction over a defendant, there should also be a separate safeguard for defendants added to the existing venue transfer statutes.[139] The existing statutory authorization for transfer requires either (1) that the transferring court exercise personal jurisdiction in the traditional sense over a defendant,[140] or (2) if the transferor does not have jurisdiction, then the transferee court must.[141] The proposal therefore includes an internet-specific transfer analog, where a court is authorized to exercise pretrial internet personal jurisdiction only over a defendant who can transfer a proceeding to a new venue that also has pretrial internet jurisdiction or traditional personal jurisdiction.[142] While it may be unlikely that a court would have reason to transfer an action to another jurisdiction that only has pretrial internet jurisdiction, the goal of the proposal is to provide ample flexibility. This would allow a court where an action is filed to assess what is fair and reasonable to the defendant litigating in the plaintiff's choice of forum and give that court the freedom to transfer the lawsuit to the defendant's home forum if it is warranted by a fairness analysis. This is somewhat analogous to the MDL analysis,[143] with added emphasis on fairness. Because this

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[136] "Virtual appearance" is left intentionally undefined as it is meant to encompass a range of possible contact, such as phone, email, skype or other video chat, etc. It should be a flexible standard to be worked out by the parties and the court that they are before.

[137] *See* 28 U.S.C. § 1407.

[138] *Id.* § 1391; FED. R. CIV. P. 4.

[139] 28 U.S.C. § 1404.

[140] *Id.* § 1404(a).

[141] *Id.* § 1406; *see also* Goldlawr, Inc. v. Heiman, 369 U.S. 463, 465–67 (1962) (holding that § 1406 is not limited to situations where the transferor court has jurisdiction).

[142] While the transfer to a district having traditional personal jurisdiction would already be covered by § 1406, this is somewhat redundant, but due to potential for complications over § 1406's application here, it seems prudent to include this language. *See Goldlawr*, 369 U.S. at 467–68 (Harlan, J., dissenting) (expressing concern for a jurisdiction-less court's exercise of authority over the defendant in the transferred action).

[143] *See* 28 U.S.C. § 1407(a).

is a new proposal, and one that has the potential for butting into constitutional due process concerns, adding fairness language helps courts use their discretion to act on concern for defendants while avoiding the complicated minimum contacts analysis.[144]

If the court in the original filing district approves a transfer to the defendant's home district,[145] the plaintiff would then be permitted to make all appearances virtually up to the point of trial. This mirrors the fairness calculus that allows a defendant to be virtually haled into a forum that they contacted virtually. An additional reason for excusing the plaintiff from physical appearance, following an internet-based pretrial transfer, is that instituting a lawsuit via traditional means where the defendant is subject to general jurisdiction was always available to the plaintiff at the outset, but in the hypothetical scenario they chose not to take that option.

Finally, the proposed changes would include in Rule 12—which deals with, *inter alia*, defendants' pre-answer motions to dismiss—additional features enabling defendants to test the threshold question of pretrial jurisdiction in this new context, built into the existing motion to dismiss for personal jurisdiction.[146] It is necessary to provide defendants with an effective context-specific motion to dismiss that is suited to this new framework. Because the bar for minimum contacts is much lower in the internet context,[147] there would be a presumption in favor of the plaintiff that this prong has been met.[148] This skews the jurisdictional analysis (intentionally) in the direction of the reasonableness prong. A court could still have the discretion to dismiss a claim where it is unfair, unreasonable, or wildly inconvenient to exercise jurisdiction. However, this protects a defendant from the potential danger of plaintiffs bringing frivolous lawsuits in their home fora simply because it is cheaper and easier once pretrial internet jurisdiction is available.

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144 And certainly avoiding any application of the *Zippo* test. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

145 For the sake of simplicity, transfer under this proposal is limited to the defendant's home district. It could also be viable to allow for transfer to a convenient district to which neither party has ties, similar to the MDL statute. *See* 28 U.S.C. § 1407. That question is left intentionally open.

146 *See* FED. R. CIV. P. 12(b)(2).

147 There must still be *some* concept of minimum contacts, if for no other reason that we are satisfied that this is the defendant that the plaintiff wants to sue.

148 This may be particularly true in the pleading stage before plaintiff's allegations have been subjected to meaningful testing.

B. Proposed Statutory Changes[149]

The following proposed changes are a thought experiment and a starting point. They are not meant to be literal suggestions to Congress, but rather suggestions for a path that could lead to pragmatic problem solving in this difficult doctrinal area.

AN ACT

To provide for a decrease in excessive litigation over personal jurisdiction in the context of civil actions arising out of a defendant's alleged conduct taking place on the internet, and to simplify analysis of the threshold question of whether or not the court should be able to exercise adjudicative authority over the defendant.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 1391 of Chapter 87 of Title 28 of the United States Code,[150] is amended by inserting therein after § 1391(b)(2):

> § 1391(b)(2)(A). Pretrial Internet Jurisdiction[151]
>
> ('A civil action may be brought in –'[152]) the judicial district in which a substantial part of events or omissions giving rise to the claim have occurred for the purposes of pretrial proceedings only, provided that the defendant was not physically present in the district and subject to its traditional personal jurisdiction, and that the civil action arose from the defendant's alleged Internet- or Web-based contacts with the forum.
>
> § 1391(b)(2)(B).
>
> Nothing in § 1391(b)(2)(A) should be read to preclude the parties from waiving objections to personal jurisdiction and allowing the court exercising pretrial Internet jurisdiction to instead exercise traditional personal jurisdiction.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That Section Chapter 87 of Title 28 of the United States Code, is amended by inserting therein after § 1413:

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[149] Formatting inspiration is drawn largely from the MDL statutes. *See* Act of Apr. 29, 1968, Pub. L. No. 90-296, 82 Stat. 109, 109–10. This proposal also draws heavily from the work of Stephen E. Sachs. *See* Sachs, *supra* note 8. While Professor Sachs may go unnecessarily far in eliminating state-based territorial personal jurisdiction in favor of nationwide jurisdiction, he has certainly considered these issues in a creative and helpful manner.

[150] 28 U.S.C. § 1391.

[151] Using the word jurisdiction in this context of the venue statute is potentially problematic; however, other subsections of § 1391 do make use of personal jurisdiction ideas. *See* 28 U.S.C. § 1391(c)(2).

[152] 28 U.S.C. § 1391(b).

§ 1414. Transfer of Venue for Pretrial Internet Proceedings

The district court of a district in which is filed a case asserting Internet jurisdiction over pretrial proceedings may, if it be in the interest of justice or fairness, transfer such case to any district or division in which it could have been brought.[153]

C. Proposed Rules Changes

In addition to providing statutory authorization for pretrial jurisdiction, it would be necessary to amend Rule 4 of the Federal Rules of Civil Procedure, which is the apparatus that establishes personal jurisdiction over a defendant in federal court.[154]

Proposed addition to Rule 4(k), inserted immediately after Rule 4(k)(2)(B):

4(k)(3) *Federal Internet Jurisdiction.* For a claim that arises out of a defendant's virtual contacts with the forum, serving a summons establishes a rebuttable presumption of pretrial jurisdiction over the defendant and over the Internet-based claims:

(A) provided that that defendant would not be subject to personal jurisdiction under Rule 4(k)(1).

(B) pretrial jurisdiction is allowed pursuant to 28 U.S.C. § 1391(b)(2)(A).

(C) nothing in this section should be construed to preclude a plaintiff from asserting that personal jurisdiction over a defendant is proper under Rule (4)(k)(1) or (2).

Proposed addition to Rule 12(b):

Rule 12(b)(8) lack of pretrial Internet jurisdiction;

Dismissal for lack of pretrial internet jurisdiction would be an extremely high bar for defendants to clear and would be effective only when the forum had no rational reason for an exercise of jurisdiction. The reason that it is included at all is mainly so that courts have a chance to consider challenges under 12(b)(8) and hopefully begin to build a body of jurisprudence around it. If that turns out to be ineffective, the likely solution would be to simply abrogate the new provision.

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153 *See* 28 U.S.C. § 1406, from which I have reproduced significant portions of language.

154 *See* FED. R. CIV. P. 4(k)(1)(A) ("Serving a summons or a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.").

D. Efficiency and Policy Rationales for Proposed Changes

These proposed changes will make it easier and cheaper for a plaintiff to file a lawsuit. Of course, this immediately raises a concern about an increase in excessive, coercive, or frivolous nuisance litigation.[155] On the contrary however, these changes help to weed out weaker cases. Currently, the problem of weak cases being brought to extort settlements from defendants unwilling or unable to afford to litigate threshold matters is exacerbated in the internet context where such threshold jurisprudence is so confoundingly unclear and unpredictable. By eliminating, or at least drastically reducing, complicated and unpredictable fights over personal jurisdiction in internet cases, courts will be able to reach the merits of these cases sooner and more efficiently.[156]

Exercise of pretrial internet jurisdiction would also make cases more efficient for parties and courts alike, especially since the vast majority of cases do not go to trial.[157] In the rare event that a case makes it all the way to trial, the court can decide at that point whether the case may remain in the district where the plaintiff brought it, or whether the court must transfer the case somewhere more traditionally appropriate.

There is also an underlying policy benefit to avoiding overlitigation of personal jurisdiction issues, namely, arriving at merits-based resolutions more expeditiously in more cases.[158] This allows courts additional freedom to build robust case law for the actual adjudication of internet disputes, rather than being left to churn more inconsistent personal jurisdiction-focused material into the existing doctrine. Whether courts are disposing of cases during internet pretrial proceedings—by dismissals for failure to state a claim or summary judgment,[159] by settlement, or by any other pretrial resolution—or at trial—in a transferee district with traditional personal jurisdiction or

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[155] None of the proposed changes or additions would be exempt from Rule 11 requirements of proper, nonfrivolous pleadings. *See* FED. R. CIV. P. 11.

[156] Getting too quickly to the merits could then lead to a subsequent concern with opening the doors to discovery to plaintiffs too easily. However, that concern is offset by the Supreme Court's shift toward a "plausibility" pleading standard, raising the bar to plaintiffs to get to discovery. *See* Ashcroft v. Iqbal, 556 U.S. 667, 678–79 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–57 (2007).

[157] For example, over 97 percent of MDL cases never return to their original districts on remand instead are resolved or settled in a court that only has pretrial jurisdiction. *See* Bradt, *supra* note 48, at 1169.

[158] This includes Rule 12(b)(6) dismissals with prejudice as rulings on the merits.

[159] MDL courts were always meant to have the authorization to enter summary judgment. *See* Comment on Proposed § 1407, at 498, *as reprinted in In re* Plumbing Fixture Cases, 298 F. Supp. 484, 498 (J.P.M.L. 1968). Courts overseeing pretrial internet proceedings would have the same authority.

in the pretrial district with a defendant's consent—everyone benefits from a more comprehensive and predictable version of the internet's interaction with the law.

There may be a concern that permitting virtual representation will afford parties a cheap tactic to drag out litigation without the incentive to settle that can arise in the physical presence of a judge. While this may prove valid, plaintiffs may still prefer a drawn-out adjudication to the alternative of no adjudication at all. And while it may seem that this additional use of technology could prove expensive for the judiciary, much of this infrastructure already seems to be in use, at least in MDL courts.[160]

IV. HYPOTHETICAL APPLICATION IN E-COMMERCE, DEFAMATION, AND INTELLECTUAL PROPERTY CONTEXTS

Part IV applies the proposed changes in appropriate hypothetical scenarios. There are three types of cases where the internet is a particularly common and frustrating participant. First, because of the prevalence of the *Zippo* test, it is necessary to consider the contours of a claim arising out of an e-commerce dispute.[161] Second, in homage to the *Calder* effects test, it is useful to look at a web-based defamation case.[162] Finally, because the internet is fundamentally bound up with concepts of information and content creation, it is important to consider a claim based in intellectual property infringement.[163]

A. E-Commerce

E-commerce is a logical starting-point because it is relatively simple; outcomes in this area will not change under the proposed system in the vast majority of cases. In transactions

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[160] *See* Bradt, *supra* note 48, at 1235 (exploring MDL courts' use of technology). Some state courts are already using video technology to conduct remote proceedings. *See Remote Video Proceedings*, SUPER. CT. CAL., https://www.sb-court.org/divisions/traffic/remote-video-proceedings [https://perma.cc/GFA5-ENQP] (offering remote appearances "as a convenience for parties that were issued a traffic or non-traffic infraction violation," with a contemplated expansion forthcoming to include additional proceedings).

[161] *See, e.g.*, SEC v. Plexcorps, 17-CV-7007 (CBA) (RML), 2018 WL 4299983, at *14–16 (E.D.N.Y. Aug. 9, 2018) (applying *Zippo* test and concluding that defendants' Facebook interactions with customers in the forum were sufficient to exercise personal jurisdiction when the interactions led directly to the allegedly fraudulent transactions).

[162] *See id.* (applying *Keeton* to find that jurisdiction would be proper in the forum based on defendants' dissemination of allegedly fraudulent material, as compared to the defamatory material in *Keeton*) (citing Keeton v. Hustler Magazine, 465 U.S. 770, 773–74 (1984)). While *Keeton* does not explicitly use *Calder*'s effects test, the Supreme Court issued the decisions on both cases on the same day.

[163] *See, e.g.*, Penguin Grp. (USA) Inc. v. Am. Buddha, 946 N.E.2d 159, 165 (N.Y. 2011) (interpreting New York's long-arm statute and concluding that online publisher was subject to personal jurisdiction in New York based on harm to plaintiff occurring in New York).

where at least one party has a reasonably high level of legal literacy, such as a transaction between a large online retailer and an individual buyer, it is very likely that jurisdiction is going to be decided by a forum selection clause.[164] Nothing in the proposed solution alters Supreme Court jurisprudence with respect to forum selection clauses. Problematic as that jurisprudence may be, it is beyond the scope of this note.

The other reason that the proposed changes do not alter the outcome in an e-commerce case is the same as the reason the *Zippo* test is apparently dicta: when there is a clear contract between two parties and goods and money are being exchanged, there is going to be traditional personal jurisdiction, so there is no need to invoke internet jurisdiction

B. Defamation

Recall the scenario of the business owner and his defaming competitor, described at the outset. The proposed solution helps to remedy not only that scenario, but also many of the issues present in *Calder* and in the subsequent line of cases attempting to use its effects test analysis.[165] What made the personal jurisdiction analysis problematic in *Calder* itself was that the defaming authors at the National Enquirer wrote for a nationwide audience, and the "thing" that was injured was Shirley Jones' reputation, which is an intangible thing that is capable of existing anywhere, much like one's internet presence.[166] But this potential for nationwide reputation did not ultimately become a particular problem for the *Calder* decision itself—which found a clear link between the defamatory story and Jones' reputation within her California home—but more for the test that it spawned.[167] The unanimous *Calder* court was easily satisfied that the defendants' intentional conduct was enough to satisfy the due process requirement of personal jurisdiction.[168] Where the plaintiff's reputation is one that lives online (i.e., is less susceptible to traditional territorial conceptualization), the intentionality analysis present in the effects test loses some of its jurisdictional heft.

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[164] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593–96 (1991) (creating presumption of validity for reasonable forum selection clauses).

[165] *See* Calder v. Jones, 465 U.S. 783, 789–91 (1984); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1318 (9th Cir. 1998).

[166] *Calder*, 465 U.S. at 789; *see also* Trammell & Bambauer, *supra* note 11, at 1140–42 (explaining and identifying various problems with the *Calder* effects test).

[167] *See Calder*, 465 U.S. at 785, 788–89; *see* Trammell & Bambauer, *supra* note 11, at 1142.

[168] *Calder*, 465 U.S. at 791.

Intentionality can perhaps be less clear on the internet, but the proposed solution does not have the same stringent intentionality requirement as the effects test. Under the proposed solution, a hypothetical plaintiff could sue authors who had posted defamatory material about the plaintiff on the internet in California, but the authors would not have to appear in person. Everybody wins: the plaintiff gets to bring the suit, the defendants do not have to travel to California,[169] and the public gets an example of what does or does not qualify as defamation.[170] In the rare event that the case goes to trial, the court could determine whether the proper location for that trial is California, the defendants' home district, or another district with a more direct physical connection to the claim.

C. Intellectual Property Infringement

The proposed solution also works in a trademark infringement context, which is arguably the context that is most obviously tied to web-based conduct and therefore the most in need of a commonsense solution to adjudicating claims that arise from internet conduct.

Consider a hypothetical plaintiff from New York who sues a defendant for infringement of a patent that plaintiff holds for a method of streaming live video content. The defendant, who is from California, is in the business of producing live sporting events, for example, thumb wrestling competitions (a hypothetical that hopefully avoids any potentially complicating conflicts with existing professional sports leagues).[171] It turns out that there are a great many thumb wrestling fans in New York who want to stream live footage of the competitions taking place in California. The defendant makes these streams available, using Amazon's subscription-based content hosting service.[172] The defendant also uses plaintiff's patented method to achieve the highest quality video streams. The defendant does not pay the plaintiff any

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[169] There are going to be potential choice of law concerns that, for the sake of simplicity, I am not going to address in depth.

[170] This clearly leaves many questions about practical procedure inside the courtroom unanswered.

[171] This at least avoids conflicts with existing American sports leagues, although there apparently is some heightened interest in the "sport" in the United Kingdom. *See* THUMB WRESTLING CHAMPIONSHIPS, http://www.thumbwrestling.co.uk [https://perma.cc/492B-5ZN6].

[172] For an overview of Amazon's EC2 cloud computing service, see *Amazon EC2 Overview*, AMAZON WEB SERVICES, https://aws.amazon.com/ec2/ [https://perma.cc/FGE2-6PV7]. This also aligns the hypothetical with *Nicastro*, where the court found that sufficient minimum contacts for personal jurisdiction were not created by the acts of the third-party distributor. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 891 (2011) (Breyer, J., concurring).

licensing fees for that use. The defendant also has never had any physical contacts with New York.

Under the traditional personal jurisdiction framework, it is unclear whether using a third-party subscription-based host to broadcast content is enough for New York to exercise personal jurisdiction.[173] Under the proposed solution, however, courts located in New York would exercise authority over the pretrial proceedings. The plaintiff could file suit in New York federal court[174] and serve defendant with process in California.[175] The defendant would then have to appear in whatever virtual context the court deems practical to answer the summons and defend the suit.[176] This absolutely comports with due process concerns—the allegedly infringing defendant will be subject to the court's pretrial jurisdiction and compelled to appear virtually for conduct that the defendant only could have done virtually per the nature of the alleged infringement. If that is somehow still not fair, it is at least reciprocal.

CONCLUSION

It is an uncontroversial assertion that there will continue to be more lawsuits that arise out of fact patterns involving digital conduct.[177] With that in mind, the legal community should fashion updated methods for efficiently dealing with those lawsuits. This note illustrates one such solution that is logical and workable. But whatever solution we end up with, there must be some conscious effort to bring it into being. The common law jurisprudential approach, which works so well in so many fields, is unlikely to be

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[173] Under *Penguin Grp. (USA) Inc. v. Am. Buddha*'s gloss on New York's long-arm statute it may seem that personal jurisdiction would be proper. *See* Penguin Grp. (USA) Inc. v. Am. Buddha, 946 N.E. 2d 159, 165 (N.Y. 2011); *see also* N.Y. C.P.L.R. § 302(a)(3)(ii) (personal jurisdiction permitted based on torts committed outside the state with reasonably anticipated harm occurring within the state). However, *Penguin Group* predated all of the Supreme Court's recent personal jurisdiction jurisprudence.

[174] Of course, the plaintiff also always has the option to sue in California, where the defendant is subject to general jurisdiction. *See* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 108.52 (2020), LexisNexis.

[175] It should be simple enough to hire a process server in California. Nothing about the proposed solution changes the prohibition on the parties themselves serving process. *See* FED. R. CIV. P. 4(c)(2); *see also* Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 510–14 (D.C. Cir. 2002) (finding that, although internet contacts with the District of Columbia were sufficient for personal jurisdiction, dismissal was warranted for improper service of process).

[176] The comparison to MDL is again appropriate here. *See* Bradt, *supra* note 48, at 1235 (highlighting some of the ways that MDL transferee courts use technology—such as dedicated websites for specific MDL proceedings and "web-cast" hearings—to facilitate communication between dispersed parties and the consolidated proceedings).

[177] *See, e.g.*, *Alabama Woman Awarded $10k in Damages in Cyberbullying Lawsuit*, INS. J. (Oct. 30, 2018), https://www.insurancejournal.com/news/southeast/2018/10/30/505985.htm [https://perma.cc/QPV2-KCXH].

effective here. The proliferation of information and technology simply moves too fast as compared to the hashing out of legal doctrines in the federal court system. At the very least, this note has strived to achieve the modest goal of reminding the legal community that we should be working toward a solution.

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