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### No Shoes, No Service? Why Cybersquatting Has Outgrown the International Shoe Framework for Personal Jurisdiction, and the Need for Legislative Reform

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**NO SHOES, NO SERVICE? WHY  
CYBERSQUATTING HAS OUTGROWN THE  
*INTERNATIONAL SHOE* FRAMEWORK FOR  
PERSONAL JURISDICTION, AND THE NEED FOR  
LEGISLATIVE REFORM**

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INTRODUCTION

At a time when “email” was simply a misspelled word, Chief Justice Warren’s opinion in *Hanson v. Denckla* warned that advancements in communication and travel must not be read as signaling “the eventual demise of all restrictions on . . . personal jurisdiction.”<sup>1</sup> Throughout the history of the Court’s jurisprudence, restrictions on personal jurisdiction have always centered upon geographic boundaries.<sup>2</sup> As a result, the lower federal courts have struggled to comply with Justice Warren’s mandate while grappling

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<sup>1</sup> 357 U.S. 235, 251 (1958).

<sup>2</sup> Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

with claims arising from the virtual realm of the Internet.<sup>3</sup> Underscoring this challenge, one district court judge reasoned that “[t]here being no District Court of Cyberspace, the defendants’ argument that laboring on the Internet defeats traditional personal jurisdiction is unpersuasive; Defendants will have to settle begrudgingly for the Western District of Virginia.”<sup>4</sup>

The jurisdictional problems posed by claims arising from cyberspace stem from the nature and origin of the Internet.<sup>5</sup> Concerned with both the rising costs of centralized computing and the potential for Cold War hostilities, the progenitors of the Internet sought to create a decentralized communications network that could withstand a nuclear attack.<sup>6</sup> These efforts resulted in the initial framework for the modern Internet—a diffuse “network of networks” without a centralized hub.<sup>7</sup> As a result, the Internet defies traditional notions of geographic boundaries, as online actions occur both everywhere and nowhere at once.<sup>8</sup>

Yet, out of all online activities, this Comment posits that cybersquatting poses the greatest obstacle to the territorial restrictions of personal jurisdiction. Cybersquatting occurs when an individual seeks to profit by registering a website address—known as a domain name—under another’s well-established trademark.<sup>9</sup> For example, cybersquatting occurs when an individual with no affiliation to Coca-

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<sup>3</sup> Yasmin R. Tavakoli & David R. Yohannan, *Personal Jurisdiction in Cyberspace: Where Does it Begin, and Where Does it End?*, 23 No. 1 INTELL. PROP. & TECH. L.J. 3, 3 (2011).

<sup>4</sup> *Design88 Ltd. v. Power Uptik Productions, LLC*, 133 F. Supp. 2d 873, 877 (W.D. Va. 2001).

<sup>5</sup> John J. Schulze, Jr., *Caveat E-Emptor: Solutions to the Jurisdictional Problem of Internet Injury*, 29 AM. J. TRIAL ADVOC. 615, 618 (2006).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997).

<sup>9</sup> See *Panavision, Int’l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998). *Panavision* is one of the first—and certainly most heralded—cybersquatting cases, in which notorious cybersquatter Dennis Toeppen registered the domain name “panavision.com,” and sought to extort a fee from the rightful trademark holder in exchange for surrendering the domain name.

Cola seeks to profit by registering the domain name “coca-cola.com.” Because cybersquatting involves purely online activities, the lack of any geographic nexus created between this conduct and the forum state proves uniquely problematic for injured plaintiffs, as they bear the burden of establishing a “prima facie case for personal jurisdiction” over the defendant.<sup>10</sup> Yet, this burden may have been lessened considerably due to a recent decision from the Seventh Circuit Court of Appeals.<sup>11</sup> In a surprising ruling that is sure to become the darling of all future plaintiffs in cybersquatting disputes, the Seventh Circuit bent the traditional rules for personal jurisdiction beyond their breaking point to uphold a cybersquatting claim filed against GoDaddy—the world’s largest domain name provider.<sup>12</sup>

In this Comment, I will argue that the Seventh Circuit’s reasoning in *uBID, Inc. v. GoDaddy Group, Inc. (GoDaddy II)* demonstrates the fundamental disjunction between the *International Shoe* standard for personal jurisdiction and claims of cybersquatting filed under the Anticybersquatting Consumer Protection Act (“ACPA”). Part I of this Comment examines the growth and development of the Supreme Court’s precedent regarding personal jurisdiction, highlighting the territorial restrictions imposed by the due process clauses of the Fourteenth and Fifth Amendments. Part II of this Comment provides a brief overview of cybersquatting and the ACPA. Part III of this Comment focuses on the Seventh Circuit’s decision in *GoDaddy II*. In Part IV, I shall demonstrate how both the *GoDaddy II* majority and concurrence utilized reasoning that undermines existing Supreme Court jurisprudence, and how Congress can resolve these jurisdictional issues with the stroke of a pen.

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<sup>10</sup> *E.g.*, *uBID, Inc. v. GoDaddy Group, Inc. (GoDaddy II)*, 623 F.3d 421, 423 (7th Cir. 2010).

<sup>11</sup> *Id.*

<sup>12</sup> *See id.* at 433.

## I. The Origins And Development Of Personal Jurisdiction

### A. *The Other Shoe Drops: The Shift to Minimum Contacts*

The Supreme Court's opinions on personal jurisdiction deal primarily with the constitutional requirements of the Fourteenth Amendment's due process clause, which provides that: "[n]o State . . . shall deprive any person of life, liberty, and property, without due process of law. . . ."<sup>13</sup> Throughout the history of the Court's jurisprudence, the Due Process Clause has consistently required some physical connection between the defendant and the forum state.<sup>14</sup> Historically, this requirement imposed a severe limitation: A court's power to exercise personal jurisdiction over a defendant depended entirely on her presence within the forum state.<sup>15</sup> This "power theory," articulated by the Supreme Court's decision in *Pennoyer v. Neff*, was eventually cast aside in order to cope with the changing landscape of American commerce.<sup>16</sup> As the reach of corporations began to extend across state lines, the Court recognized that the "presence" of these corporations could no longer be confined to their state of domicile.<sup>17</sup> Laying the framework for what would soon become the touchstone for all Due Process inquiries into personal jurisdiction, the Court's landmark decision in *International Shoe v. Washington* crafted a new standard for determining the constitutional scope of personal jurisdiction."<sup>18</sup>

In *International Shoe*, the Court considered whether Due Process permitted the exercise of personal jurisdiction over a non-resident corporation based upon the commercial activities of its employees

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<sup>13</sup> U.S. CONST. amend. XIV.

<sup>14</sup> Perdue, *supra* note 2, at 509. The author explains that the Court's opinions evidence a belief that the requirements of personal jurisdiction serve a substantive interest tied to state boundaries. *Id.* This substantive interest flows from the requirement that the defendant must have sufficient contacts with the forum state. *Id.*

<sup>15</sup> *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

<sup>16</sup> See *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (examining the expanding role of corporations in interstate commerce).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

within the forum state.<sup>19</sup> Writing for the majority, Chief Justice Stone reasoned that a corporation's "continuous and systematic" commercial transactions within a state may well serve as a proxy for its presence within the forum.<sup>20</sup> As the corporate entity itself is a constructive fiction, its "presence" may manifest itself through the commercial activities of its employees.<sup>21</sup> Thus, a corporation that enjoys the benefit of conducting business within a state must also incur the costs and obligations arising from those transactions.<sup>22</sup>

The reasoning from *International Shoe* demonstrated both equitable and practical considerations.<sup>23</sup> Namely, the Court recognized that the rigid territorial restrictions on personal jurisdiction no longer remained practical in light of the decreasing costs of interstate commerce that allowed businesses to stretch their economic presence across state lines.<sup>24</sup> As such, conditioning the exercise on the territorial state boundaries was no longer sufficient to deal with vast expansion of interstate commerce.<sup>25</sup> Instead, the Court declared that the exercise of personal jurisdiction remains constitutionally permissible so long as the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."<sup>26</sup>

Although *International Shoe* heralded a new era in personal jurisdiction, the Court's newly minted jurisdictional framework test remained loyal to the traditional emphasis on the geographical nexus between the defendant and the forum.<sup>27</sup> This notion underscores the

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<sup>19</sup> *Id.* at 311.

<sup>20</sup> *Id.* at 316–17.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 319.

<sup>23</sup> *See id.* at 317. Previously, a nonresident corporation could only be subject to jurisdiction if they provided an agent for the service of process. *Id.* The Court's decision recognized that a corporate "presence" could not be construed so narrowly. *Id.* at 316–18.

<sup>24</sup> *Id.* at 320.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 316 (internal quotation marks omitted).

<sup>27</sup> *See id.* (grounding the due process inquiry on the defendant's activities within the forum state).

distinction between general and specific jurisdiction, which is outlined in the following sections.

### 1. General Jurisdiction

The Court's decision in *Helicopteros Nacionales de Columbia, S.W. v. Hall*<sup>28</sup> first articulated the distinction between general and specific jurisdiction.<sup>29</sup> The concept of general jurisdiction is best conceptualized as personal jurisdiction over the defendant, as she must defend herself against any conceivable claim filed within the forum.<sup>30</sup> For instance, imagine that A lives in Colorado but is subject to general jurisdiction in Iowa. While on vacation in Australia, A gets into a car accident with Z, who hails from Spain. If Z decides to file a personal injury lawsuit against A in Iowa, A must travel to the forum to defend against the suit—despite the fact that none of the parties, evidence, or injuries bear any relationship to A's activities within the forum.<sup>31</sup> Indeed, one commentator argues that the concept of general jurisdiction “should be termed ‘dispute-blind’ because the exercise of jurisdiction does not depend on the nature of or the facts involved in the dispute.”<sup>32</sup> Instead, the exercise of general jurisdiction requires that the defendant's activities create a permanent proxy for her presence within the forum state.<sup>33</sup>

Although the general jurisdictional analysis only requires a single inquiry—the relationship between the defendant's activities and the forum state—the Court's opinion in *Helicopteros* demonstrates that

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<sup>28</sup> 466 U.S. 408 (1984).

<sup>29</sup> *Id.* at 414, n.8. While this was the first opinion in which the Court actually referred to these concepts as such, these concepts were first expressed in *International Shoe*. See 326 U.S. at 317–18.

<sup>30</sup> See *Helicopteros*, 466 U.S. at 414; accord, e.g., *GoDaddy II*, 623 F.3d 421, 426 (7th Cir. 2010).

<sup>31</sup> See *Helicopteros*, 466 U.S. at 414.

<sup>32</sup> Charles W. “Rocky” Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 819 (2004) (citing Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 613, 680 (1988)).

<sup>33</sup> See Rhodes, *supra* note 32, at 849–50 (noting that the contemporary doctrine of general jurisdiction hinges upon a “constructive presence”).

this analysis imposes an incredibly high threshold requirement.<sup>34</sup> For instance, the *Helicopteros* plaintiffs brought a wrongful death action in Texas based upon a helicopter crash that occurred in Peru.<sup>35</sup> The defendant corporation made numerous trips to forum, where it contracted for helicopter services and spent over \$4 million to purchase 80% of its helicopter fleet and related equipment.<sup>36</sup> Additionally, the defendant sent its pilots, management, and maintenance personnel to Texas for related training.<sup>37</sup> Nevertheless, the Court found these frequent trips and high volume purchases failed to create the forum contacts necessary to establish general jurisdiction.<sup>38</sup> Rather, an earlier precedent demonstrates that this requirement can only be met when a defendant directs her continuous and systematic activities from a physical location within the forum state.<sup>39</sup>

## 2. Specific Jurisdiction

Specific jurisdiction is best conceptualized as jurisdiction over the claim, rather than the defendant.<sup>40</sup> Essentially, specific jurisdiction permits the court to adjudicate claims that “directly arise from or relate to” the defendant’s contacts with the forum state.<sup>41</sup> The relevant analysis breaks down into two separate inquiries: (1) the defendant’s contacts with the forum; and (2) the relationship between these

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<sup>34</sup> See *Helicopteros*, 466 U.S. at 417–18 (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923) (defendant that made frequent trips to forum to purchase majority of its inventory was insufficient to establish general jurisdiction)).

<sup>35</sup> *Helicopteros*, 466 U.S. at 410.

<sup>36</sup> *Id.* at 410.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 415–16.

<sup>39</sup> See *id.* at 414–415. Specifically, the Court examined the earlier decision of *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). In *Perkins*, general jurisdiction existed when a Philippine mining company established a temporary corporate office in Ohio due to the Japanese occupation of the Philippine Islands. *Id.*

<sup>40</sup> Cf. *Burger King v. Rudzewicz*, 471 U.S. 462, 472–73 (1985).

<sup>41</sup> *Id.*

contacts and the plaintiff's claim.<sup>42</sup> These dual components serve a primary policy consideration of the *International Shoe* framework.<sup>43</sup> Specifically the geographic nexus between the defendant's contacts, the forum, and the claim must allow the defendant to reasonably anticipate that her conduct will subject her to the judicial powers of the state.<sup>44</sup>

The Court's decisions mandate that the defendant's intentional conduct must create the geographic nexus between contacts, claim, and forum.<sup>45</sup> In light of this requirement, the plaintiff's contacts with the forum cannot subject the defendant to the state's judicial powers.<sup>46</sup> For instance, a Florida state court lacked jurisdiction over a trustee whose only contact with the forum arose when the settlor of the trust subsequently moved from Delaware to Florida.<sup>47</sup> Similarly, Oklahoma's exercise of specific jurisdiction over a New Jersey car dealership was held impermissible based solely upon the fact that the plaintiff sustained an injury while driving through the forum.<sup>48</sup> These cases demonstrate a recurring theme that appears throughout the Court's decisions: "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."<sup>49</sup> Rather, what is critical to the exercise of personal jurisdiction is that the defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."<sup>50</sup>

By focusing on the geographic nexus established through the substance of the defendant's contacts with the forum, the jurisdictional

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<sup>42</sup> See, e.g., *GoDaddy II*, 623 F.3d 421, 427–42 (7th Cir. 2010) (analyzing components separately).

<sup>43</sup> *Burger King*, 471 U.S. at 474.

<sup>44</sup> *Id.*; accord *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>45</sup> See, e.g., *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 252.

<sup>48</sup> *World-Wide Volkswagen*, 444 U.S. 286.

<sup>49</sup> *Hanson*, 357 U.S. at 252.

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

analysis allows the defendant to reasonably anticipate the possibility of having to defend her actions in the forum.<sup>51</sup> The Court's opinions take great pains to emphasize this requirement, often declaring that the basis for exerting specific jurisdiction cannot stem from the defendant's "random, fortuitous, or attenuated" connections with the forum that bear no relation to the substance of the plaintiff's claim.<sup>52</sup> Thus, where the defendant lacks the necessary connections with the forum to assert general jurisdiction, the strong geographic connection among the defendant, the suit, and the forum required to exert specific jurisdiction serves two primary functions.<sup>53</sup> First, it protects a non-resident defendant from the threat of litigation in a distant forum.<sup>54</sup> Second—and more importantly—it ensures that the jurisdictional power of the respective states remain largely confined to acts occurring within their territorial borders.<sup>55</sup>

### 3. The Relatedness Inquiry

The aspect of the *International Shoe* analysis that has proven particularly troubling for courts is determining the nexus between the defendant's forum contacts and the substance of the plaintiff's claim—often referred to as the "relatedness inquiry."<sup>56</sup> Although *Helicopteros* established that the exercise of specific jurisdiction over the plaintiff's claim must "arise from or relate to" the defendant's contacts with the forum,<sup>57</sup> the Court's decisions have never set forth a standard to determine when this requirement is satisfied.<sup>58</sup> As a result, this language from *Helicopteros* spawned a variety of disparate tests used to determine whether a defendant's contacts satisfy the "relatedness"

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<sup>51</sup> *World-Wide Volkswagen*, 444 U.S. at 297.

<sup>52</sup> *Burger King v. Rudzewicz*, 471 U.S. 462, 462 (1985).

<sup>53</sup> *Hanson*, 357 U.S. at 251.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g., GoDaddy II*, 623 F.3d 421, 429 (7th Cir. 2010).

<sup>57</sup> 466 U.S. 408, 414 n.8 (1984).

<sup>58</sup> Robert J. Condlin, "Defendant Veto" or "Totality of the Circumstances"? *It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH U. L. REV. 53, 126 (2004)

component of the *International Shoe* standard.<sup>59</sup> The two most commonly employed tests for this analysis derive from the tort-related concepts of but-for and proximate causation.<sup>60</sup>

Under the but-for causation standard, the exercise of specific jurisdiction is often a foregone conclusion whenever the plaintiff can establish that the defendant has purposefully availed itself within the forum.<sup>61</sup> Devoid of any limiting factor, the but-for standard closely scrutinizes each link in the causal chain to uncover any possible connection between a defendant's contacts and the plaintiff's claim.<sup>62</sup> Armed with the benefit of hindsight, courts applying the but-for standard may exert specific jurisdiction so long as the plaintiff demonstrates that her injury would not have occurred in the absence of the defendant's forum contacts.<sup>63</sup>

At the other end of the spectrum, courts employing the proximate cause standard impose a far greater threshold requirement for demonstrating the relatedness component of the specific jurisdictional inquiry.<sup>64</sup> The "proximate cause" standard requires a showing that the defendant's forum contacts are the legal cause for the plaintiff's injury.<sup>65</sup> Essentially, this analysis turns on whether any of the defendant's forum contacts are relevant to the facts underlying the plaintiff's complaint.<sup>66</sup>

One last standard for examining the relationship between contacts and the claim requires a closer examination, as this standard ultimately controlled the outcome of the Seventh Circuit majority's opinion in *GoDaddy II*.<sup>67</sup> In *O'Connor v. Sandy Lane Hotel Co.*, the Third Circuit

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<sup>59</sup> *GoDaddy II*, 623 F.3d at 429.

<sup>60</sup> *Id.* at 430.

<sup>61</sup> *Nowak v. Tak How Inv., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996).

<sup>62</sup> *See id.*

<sup>63</sup> *Id.*

<sup>64</sup> *GoDaddy II*, 623 F.3d at 430.

<sup>65</sup> *Id.* (citing *Mass. Sch. of Law at Andover, Inc., v. Am. Bar Ass'n*, 142 F.3d 26, 35 (1st Cir. 1998)).

<sup>66</sup> *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 319 (3d Cir. 2007).

<sup>67</sup> 623 F.3d at 430.

fashioned its “quid-pro-quo” standard in response to a rather esoteric set of facts that gave rise to a negligence claim.<sup>68</sup>

Following their vacation in Barbados, the plaintiff and his wife began receiving newsletters and solicitations from the hotel they stayed at during their trip.<sup>69</sup> The following year, the plaintiff and his wife decided to return to Barbados, electing to stay at the same hotel they had booked on their earlier trip.<sup>70</sup> After securing their reservations, the couple received a brochure from the hotel detailing the various services provided at its spa.<sup>71</sup> Enticed by the brochure, the couple called the hotel to purchase a spa package for the upcoming trip.<sup>72</sup> After receiving one of the massages included in this package, the plaintiff slipped in the shower and “tore his rotator cuff.”<sup>73</sup> Upon returning home to Pennsylvania, the plaintiff filed a negligence claim in federal court against the Barbadian resort.<sup>74</sup>

Reasoning that the resort’s continued solicitation of the plaintiff provided the forum contacts required by *International Shoe*, the Third Circuit considered whether the negligence claim at bar arose from or related to these contacts, finding that the resort’s continued solicitation of the plaintiff provided the forum contacts required by *International Shoe*.<sup>75</sup> Having rejected the proximate cause standard in an earlier precedent,<sup>76</sup> the Third Circuit’s opinion in *O’Connor* cast aside the but-for cause standard as too over-inclusive.<sup>77</sup> In an attempt to strike a balance between these two extremes, the court carved out a new “quid-pro-quo” standard for assessing the relationship between contacts and claim.<sup>78</sup>

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<sup>68</sup> 496 F.3d at 315–16.

<sup>69</sup> *Id.* at 315.

<sup>70</sup> *Id.* at 316.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 318.

<sup>76</sup> *Id.* at 320.

<sup>77</sup> *Id.* at 322.

<sup>78</sup> *Id.* at 323.

The Third Circuit explained that the relatedness inquiry should focus on the “reciprocity principle” underlying the requirements of specific jurisdiction.<sup>79</sup> Specifically, each economic or legal benefit derived from a defendant’s forum contacts naturally gives rise to accompanying obligations.<sup>80</sup> In light of this concept, the relatedness component of the *International Shoe* test must “maintain balance in this reciprocal exchange.”<sup>81</sup> Although conceding that this method is less stringent than the proximate cause standard employed by other courts, the Third Circuit reasoned that the relationship between the claim and contacts must be “intimate enough to keep the quid-pro-quo proportional and personal jurisdiction reasonably foreseeable.”<sup>82</sup>

Turning to the substance of the plaintiff’s claim, the Third Circuit concluded that the relationship between the plaintiff’s negligence claim and the resort’s forum contacts was “intimate enough” to uphold specific jurisdiction over the plaintiff’s claim.<sup>83</sup> Essentially, the court reasoned that “through its mailings and phone calls,” the resort had entered into a contractual obligation to provide the plaintiff’s with spa services.<sup>84</sup> The benefits that the hotel received from this contract gave rise to certain obligations—such as ensuring that it exercised due care in performing its services.<sup>85</sup> Having failed to do so, the court concluded that the relationship between the plaintiff’s claim and the hotel’s various brochures and phone calls were intimately related enough to keep the quid-pro-quo balanced and reasonable.<sup>86</sup>

Ironically, although the Third Circuit seemed quite enamored with its “new” standard for examining the relatedness component of the specific jurisdictional inquiry, this quid-pro-quo standard is little more than a repackaged version of the but-for causation standard that the court expressly rejected as too “over- inclusive.”<sup>87</sup> Indeed, the court’s

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

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

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

<sup>86</sup> *Id.*

<sup>87</sup> *See id.* at 322.

explanation of the proportional relationship between economic benefits and obligations is primarily a rephrasing of the policy rationales underlying the *International Shoe* decision<sup>88</sup>—not a formula for determining the relationship between contacts and claim. If anything, the ambiguous language of the *O'Connor* decision seemingly incorporates an ad-hoc cost-benefit analysis into the but-for standard for determining the relationship between contacts and claim.<sup>89</sup> Under the Third Circuit's rationale, would this relationship between the plaintiff's injury and the hotel's contacts have ceased to exist if the hotel simply offered to provide the massage for only a dollar? What if the parties had waited to consummate the transaction until the plaintiff arrived in Barbados? These types of economic factors speak to whether the "nature and quality" of the defendant's contacts form the requisite geographic nexus with the forum, *not* the relationship between these contacts and the plaintiff's claim.<sup>90</sup>

Although the Supreme Court has yet to endorse any of these standards, the proximate cause standard tracks closest with the guiding principles of the *International Shoe* framework—the defendant must be able to reasonably anticipate that her conduct will subject her to the state's judicial powers.<sup>91</sup> Whereas the but-for standard threatens to trap an unwary defendant within the links of an attenuated causal chain, the proximate cause standard allows defendant to reasonably anticipate being subject to jurisdiction within the forum by requiring that her conduct forms the legal cause for the plaintiff's claim.<sup>92</sup> Moreover, this requirement of legal causation avoids the quid-pro-quo standard's discretionary cost-benefit analysis detailed above.<sup>93</sup>

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<sup>88</sup> See 326 U.S. 310, 319 (1945) (explaining that one who enjoys the benefits and protections of a forum's laws must bear the accompanying obligations).

<sup>89</sup> The Third Circuit explained that the relatedness component must ensure a close fit between the scope of the benefits derived from the defendant's forum contacts and the accompanying obligations. See 496 F.3d at 423.

<sup>90</sup> See *International Shoe*, 326 U.S. at 318.

<sup>91</sup> *Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985); *Nowak v. Tak How Inv., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996).

<sup>92</sup> *Nowak*, 94 F.3d at 715.

<sup>93</sup> See *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 323 (3d Cir. 2007) (balancing economic benefits against resulting legal obligations).

#### 4. The Reasonableness Inquiry

Once the plaintiff provides a prima facie case for personal jurisdiction over the defendant, a court must examine additional factors to determine the reasonableness of maintaining a suit within the forum.<sup>94</sup> Such factors include “the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several State’s in furthering fundamental substantive social policies.”<sup>95</sup>

The Court’s opinions steadfastly claim that this reasonableness inquiry forms a critical component of any jurisdictional inquiry; however, its treatment of the aforementioned factors remains little more than a token gesture.<sup>96</sup> As the Court noted in *Burger King*, a defendant that “seeks to defeat jurisdiction . . . must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.”<sup>97</sup> As one commentator notes, the Court’s opinions demonstrate that the final outcome rests almost exclusively on whether the defendant has created the requisite minimum contacts by “purposefully availing” herself of the benefits and protections of the forum state’s laws.<sup>98</sup>

##### *B. Tabloids and Dirty Magazines: The Bases of Jurisdiction in GoDaddy II*

Before proceeding further, there are two particular Supreme Court precedents that require a closer examination in order to understand the

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<sup>94</sup> *Burger King*, 471 U.S. at 476.

<sup>95</sup> *Id.* at 477 (internal quotation marks omitted).

<sup>96</sup> William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 634 (1993).

<sup>97</sup> *Id.* (quoting *Burger King*, 471 U.S. at 477).

<sup>98</sup> *Id.*

Seventh Circuit's fractured decision in *GoDaddy II: Keeton v. Hustler Magazine*<sup>99</sup> and *Calder v. Jones*.<sup>100</sup>

### 1. The Keeton decision

The broadest proposition that emerges from *Keeton* is relatively straightforward: A plaintiff does not have to demonstrate that a defendant corporation specifically focused its business activities on the forum to demonstrate the purposeful availment requirement of *International Shoe*.<sup>101</sup> Rather, a corporation purposefully avails itself in every forum where it conducts a substantial amount of business.<sup>102</sup>

In *Keeton*, the plaintiff brought suit against Hustler Magazine in a New Hampshire State Court, alleging that the magazine printed libelous stories about her in five separate issues of its publication.<sup>103</sup> Although the magazine company was incorporated in Ohio and held its principal place of business in California, it circulated approximately ten to fifteen thousand copies of its magazine throughout New Hampshire each month.<sup>104</sup> As the Court explained in its analysis, the *Keeton* defendant purposefully directed its business activities at the forum through these regular monthly sales of its publication.<sup>105</sup> Therefore, the Court declared that it was “unquestionable” that New Hampshire could exercise specific jurisdiction over any claims directly arising from this monthly circulation of the defendant’s magazine.<sup>106</sup> The tort of libel occurs wherever a publication is circulated, thus New Hampshire could clearly exercise jurisdiction over any claims arising from the circulation of the defendant’s magazine within the forum.<sup>107</sup> While this notion may seem fairly straightforward, a rather unique

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<sup>99</sup> 465 U.S. 770 (1984).

<sup>100</sup> 465 U.S. 783 (1984).

<sup>101</sup> See *Keeton*, 465 U.S. at 779 (forum contacts were a limited part of defendant’s general business).

<sup>102</sup> *Id.* at 779–80.

<sup>103</sup> *Id.* at 772.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 774.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

aspect of the law of libel added a complicated twist to the *Keeton* decision—the single publication rule.<sup>108</sup>

The single publication rule is a limited exception to the general rules governing defamation.<sup>109</sup> Generally, each identical, defamatory statement made by the same individual constitutes a separate cause of action.<sup>110</sup> The single publication rule, however, allows plaintiffs to bring a single, multi-state libel claim for every allegedly libelous publication circulated through the entire country.<sup>111</sup> Put another way, the *Keeton* plaintiff brought suit in New Hampshire for every copy of the magazine distributed throughout the United States—despite the fact that only a small portion of these magazines were actually circulated within the forum.<sup>112</sup> As such, both the district and appellate courts below dismissed the claim for lack of personal jurisdiction, reasoning, “the New Hampshire tail is too small to wag so large an out-of-state dog.”<sup>113</sup>

Disagreeing with the reasoning of the courts below, the Supreme Court found that New Hampshire could properly exercise specific jurisdiction over plaintiff’s multi-state libel claim.<sup>114</sup> First, the Court explained that the defendant had “continuously and deliberately exploited the New Hampshire market” through its monthly circulation within the forum, and thus could “reasonably anticipate” being haled into the forum state to defend against libel claims directly arising from the contents of its magazine.<sup>115</sup> Moreover, the defendant should anticipate that such suits would seek to recover damages for every publication circulated throughout the country, as the defendant “could be charged with knowledge of the single publication rule.”<sup>116</sup> Under this reasoning, the Court concluded that Due Process did not shield the

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<sup>108</sup> *See id.* at 773.

<sup>109</sup> *Id.* at 774 n.3 (citing Restatement (Second) of Torts § 577(A)(4) (1977)).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 773.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 781.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

defendant from being called upon to defend against a multi-state libel suit wherever it regularly sold and distributed its magazine.<sup>117</sup>

## 2. The Effects Test: Creating a Geographic Nexus with the Forum Through the Commission of an Intentional Tort

Decided the same day as *Keeton*, the *Calder* opinion added an unexpected wrinkle into the minimum contacts test—providing a limited means for exerting personal jurisdiction based on acts committed outside the forum state.<sup>118</sup> In *Calder*, the plaintiff filed suit for libel in California based on an article written and edited by the defendants.<sup>119</sup> The defendants, however, arguably lacked any meaningful contacts with the forum that related to the plaintiff's claim.<sup>120</sup> Both defendants lived and worked in Florida, where the allegedly libelous article was written and edited.<sup>121</sup> Although the magazine had its highest circulation within the state of California, neither defendant had any control over the magazine's distribution, nor did they derive any direct economic benefit from its circulation within the forum.<sup>122</sup>

Notwithstanding the lack of any economic ties to the forum, the Court reasoned that the defendants had created the requisite minimum contacts to support specific jurisdiction through their article's effects within the forum.<sup>123</sup> Emphasizing that the claim at issue did not arise from "untargeted negligence," the *Calder* opinion noted that the defendants had "expressly aimed" their conduct at the forum state through their allegedly libelous article.<sup>124</sup> In reaching this conclusion, the Court carefully noted that the defendants culled the information

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<sup>117</sup> *Id.*

<sup>118</sup> See *Calder v. Jones*, 465 U.S. 783, 789–90 (1984) (explaining how the defendant's allegedly tortious article—written entirely in Florida—created the contacts necessary to uphold personal jurisdiction in California).

<sup>119</sup> *Id.* at 784.

<sup>120</sup> *Id.* at 785–86.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 789–90.

used in their article exclusively from sources in California.<sup>125</sup> The article focused entirely on the plaintiff's activities in California, where the plaintiff lived and worked in the entertainment industry.<sup>126</sup> As such, the resulting harm created by the article would have its greatest effect in California, where the damage to the plaintiff's reputation would negatively impact her acting career.<sup>127</sup> In light of these factors, the Court concluded that the defendants should have reasonably anticipated that they might be "hailed into court" based upon the harmful effects of their article.<sup>128</sup>

The reasoning of *Calder* provided what is now commonly known as the three-pronged "effects test" for asserting jurisdiction based upon an intentional act committed outside of the forum state. The effects test requires that the defendant: (1) commit an intentional act; (2) recognize his conduct's harmful effect on the plaintiff; and (3) expressly aim his conduct toward the forum.<sup>129</sup>

Notably, *Calder* does not provide an alternative to the *International Shoe* standard.<sup>130</sup> This is why the Ninth Circuit once reasoned that characterizing *Calder*'s analytical framework as the "effects test" may place too much emphasis on the harmful effects prong.<sup>131</sup> In particular, *Calder* "cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state will always give rise to specific jurisdiction."<sup>132</sup> Had the Court intended such an expansive grant of personal jurisdiction, it would have clearly

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<sup>125</sup> *Id.* at 789.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 790.

<sup>129</sup> *Id.*

<sup>130</sup> *See id.* (explaining that exercise of personal jurisdiction necessarily requires an examination of the defendant's contacts with the forum state).

<sup>131</sup> *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156 (9th Cir. 2006) (something more is required than mere foreseeability of harmful effect felt within the forum).

<sup>132</sup> *Pebble Beach*, 453 F.3d at 1156 (quoting *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087(9th Cir. 2000)).

stated as much in its opinion.<sup>133</sup> Rather, *Calder*'s intensive fact-based analysis demonstrates that the express aiming component of the effects test actually provides the forum contacts necessary to exert personal jurisdiction.<sup>134</sup>

### C. The Lighter Side of Jurisdiction: The Zippo Test

As noted earlier, the *International Shoe* standard serves a critical role in ensuring that a state's jurisdictional powers remain confined within its territorial boundaries.<sup>135</sup> Naturally, these territorial restrictions have proven particularly problematic in regards to Internet-related claims because the allegedly harmful conduct occurs in a realm that defies all notions of geographic borders.<sup>136</sup> Although the Supreme Court has yet to fashion a jurisdictional standard for Internet-related claims, the Western District of Pennsylvania attempted to fashion such a test in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*<sup>137</sup>

This "Zippo test" provides three categories situated along a sliding-scale that determines the propriety of exercising personal jurisdiction based upon the interactivity of a defendant's website.<sup>138</sup> At the "far end of this spectrum" are highly interactive websites that enable a defendant to conduct business over the Internet.<sup>139</sup> If such websites allow the defendant to enter into contractual relationships with its customers, the exercise of personal jurisdiction is proper.<sup>140</sup> At

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<sup>133</sup> *Contra Calder v. Jones*, 465 U.S. 783, 790 (1984) (reaffirming the notion that the exercise of jurisdiction requires a court to examine each individual defendant's contacts with the forum state).

<sup>134</sup> *See, e.g., Tamburo v. Dworkin*, 601 F.3d 693, 705–06 (7th Cir. 2010) (exercising personal jurisdiction requires forum state injury and "something more" in the form of conduct expressly aimed at the forum state); *accord* Condlin, *supra* note 58, at 94. Here, the author explains that the *Calder* Court emphasized the express "targeting" of the forum to demonstrate why it was "fair to take jurisdiction over the defendants." Condlin, *supra* note 58, at 94.

<sup>135</sup> *Hanson v. Denckla*, 357 U.S. 235, 252 (1958).

<sup>136</sup> *Tavakoli & Yohannan, supra* note 3, at 3.

<sup>137</sup> 952 F. Supp. 1119 (W.D. Pa. 1997)

<sup>138</sup> *Id.* at 1124.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

the other end of *Zippo*'s sliding-scale are strictly passive websites that "only make information available" to interested parties.<sup>141</sup> Under the *Zippo* standard, these passive websites are insufficient to support the exercise of personal jurisdiction.<sup>142</sup> Between these two poles lies a middle category, comprised of those websites that allow users to "exchange information" with the defendant's "host computer."<sup>143</sup> Essentially, *Zippo*'s sliding-scale approach applies solely to this middle category, as the *Zippo* standard automatically confers or denies personal jurisdiction whenever a website is deemed either highly-interactive or strictly passive.<sup>144</sup> When websites fall into *Zippo*'s middle category, however, the issue of personal jurisdiction is resolved by closely scrutinizing "the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."<sup>145</sup>

While many courts initially seized upon *Zippo* as a useful guide for exerting personal jurisdiction over Internet-based claims, many commentators question the continued utility of this approach.<sup>146</sup> This is because courts are perfectly capable of determining whether a defendant created the forum contacts necessary to uphold jurisdiction without regard to the interactivity of her website.<sup>147</sup> Although modern companies may use more sophisticated electronic mediums for conducting business, the geographic connection created through their

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *See id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See, e.g.,* Catherine Ross Dunham, *Zippo-ing the Wrong Way: How the Internet Has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis*, 43 U.S.F. L. REV. 559 (2009); Dennis T. Yokoyama, *You Can't Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147 (2005); Bunmi Awoyemi, *Zippo Is Dying, Should It Be Dead?: The Exercise of Personal Jurisdiction by U.S. Federal Courts over Non-Domiciliary Defendants in Trademark Infringement Lawsuits Arising Out of Cyberspace*, 9 MARQ. INTELL. PROP. L. REV. 37 (2005).

<sup>147</sup> *See, e.g.,* Dunham, *supra* note 146, at 579–80. The author explains that the Court's development of the *International Shoe* framework sufficiently deals with remote interactions between the defendant and forum.

forum contacts remains the same.<sup>148</sup> For instance, if a company regularly sells and ships its products to customers in a particular forum, it makes little difference whether the company locates its customers through telephone solicitation, targeted catalogue mailings, or an interactive website.<sup>149</sup> As one commentator explains, the *Zippo* test adds nothing substantive to the *International Shoe* standard for personal jurisdiction.<sup>150</sup>

#### *D. Personal Jurisdiction in the Federal Courts*

The requirements for personal jurisdiction in the federal courts differ fundamentally from personal jurisdiction in state courts.<sup>151</sup> The various personal jurisdiction requirements detailed above all pertain to the *International Shoe* framework, which embodies the due process clause of the Fourteenth Amendment.<sup>152</sup> Notably, the federal judiciary is not always bound by the due process clause of the Fourteenth Amendment, which acts as a limiting factor on state judiciaries.<sup>153</sup> When a federal court adjudicates state law claims between parties of different states, it exercises the judicial powers of the state in which it sits.<sup>154</sup> Conversely, when a federal court considers claims arising under federal law it wields the judicial powers of the United States as a whole, rather than the powers of a particular state.<sup>155</sup> In this context, the Fourteenth Amendment imposes no limitations on the powers of

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<sup>148</sup> *Id.* at 580.

<sup>149</sup> *Id.* at 580.

<sup>150</sup> *Id.* at 581.

<sup>151</sup> Howard M. Erichson, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117 (1989)

<sup>152</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310, 311(1945) (examining personal jurisdiction requirements of Fourteenth Amendment).

<sup>153</sup> See CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1068.1 (3d ed. 2010) (federal court is only bound by *International Shoe* when considering state law claims in diversity jurisdiction).

<sup>154</sup> Erichson, *supra* note 151, at 1140.

<sup>155</sup> *Id.* The federal courts possess limited subject matter jurisdiction, which means that they can only hear certain types of disputes. *Cf.* WRIGHT & MILLER, *supra* note 153. There are two forms of subject matter jurisdiction, being: (1) diversity jurisdiction; and (2) subject matter jurisdiction. See *id.*

the federal government.<sup>156</sup> Instead, the due process clause of the Fifth Amendment limits the federal court's exercise of personal jurisdiction.<sup>157</sup>

The language of the Fifth Amendment's due process clause mirrors that of the Fourteenth Amendment's,<sup>158</sup> however, the Fifth Amendment imposes a far lower threshold requirement for the exercise of personal jurisdiction.<sup>159</sup> While the due process clauses of the Fifth and Fourteenth Amendment condition the exercise of personal jurisdiction on the defendant's contacts with the forum, the critical distinction is the nature of the applicable forum.<sup>160</sup> Specifically, when a federal court examines an issue of federal law, the applicable forum is the United States as a whole.<sup>161</sup> As a result, the Fifth Amendment's threshold requirement for personal jurisdiction is whether the defendant has minimum contacts with the United States as a whole.<sup>162</sup> Although many federal courts require that the exercise of personal jurisdiction must also comport with the fairness component of the *International Shoe* rubric, the majority of these circuits concede that these concerns are sufficiently protected through the venue and transfer provisions in the Federal Rules of Civil Procedure.<sup>163</sup> The national contacts approach, however, is only one limitation on a federal court's ability to exercise personal jurisdiction in cases arising

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<sup>156</sup> WRIGHT & MILLER, *supra* note 153. By its terms, the Fourteenth Amendment only applies to the states. *Id.*

<sup>157</sup> WRIGHT & MILLER, *supra* note 153.

<sup>158</sup> The due process clauses of the Fifth and Fourteenth Amendment both provide that "no person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.; U.S. Const. Amend. XIV.

<sup>159</sup> Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 484–85 (1981); *cf.* *United States v. De Ortiz*, 910 F.2d 376, 381 (7th Cir. 1990).

<sup>160</sup> See *Erichson*, *supra* note 151, at 1141.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* While the Supreme Court has declined to expressly adopt this approach, the federal courts generally apply this standard in claims arising under federal law. WRIGHT & MILLER, *supra* note 153.

<sup>163</sup> WRIGHT & MILLER, *supra* note 153, at n.34 (collecting cases).

under federal law; the defendant must also be amenable to service of process.<sup>164</sup>

Given the low threshold requirement of the national contacts test, the federal court's ability to exercise personal jurisdiction over a defendant essentially hinges on the service of process.<sup>165</sup> When the federal law at issue provides for nationwide service of process, the service of a summons confers personal jurisdiction over any defendant in the United States so long as she has sufficient national contacts.<sup>166</sup> However, when the federal law lacks a provision that allows for nationwide service of process, a federal court's exercise of personal jurisdiction becomes analogous to that of the local state judiciary—both must comply with the requirements of *International Shoe*.<sup>167</sup>

## II. TYPOSQUATTING, CYBERSQUATTING, AND THE ACPA

### A. *But Are You Still Master of Your Domain? The Rise of Cybersquatting*

Dennis Toeppen may never fully appreciate how his business ventures at the end of the twentieth century thrust the issue of cybersquatting into the national spotlight.<sup>168</sup> During the mid-nineties, Toeppen registered hundreds of names incorporating widely recognized trademarks, such as EddieBauer.com, YankeeStadium.com, and NorthwestAirlines.com.<sup>169</sup> His claim to fame, however, derived from his registration of the domain name Panavision.com, which he used to create a rudimentary website that depicted aerial photographs

<sup>164</sup> See WRIGHT & MILLER, *supra* note 154.

<sup>165</sup> See *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) (“Service of process is how a court gets jurisdiction over the person.”)

<sup>166</sup> WRIGHT & MILLER, *supra* note 154; See FED. R. CIV. P. 4(k)(1)(C) (stating that service of a summons confers personal jurisdiction over the defendant if authorized by federal law).

<sup>167</sup> See FED. R. CIV. P. 4(k)(1)(C).

<sup>168</sup> Ray Everett-Church, *Domain Names*, in THE INTERNET ENCYCLOPEDIA, VOLUME 1, 455 (Hossein Bigdoli ed., 2003).

<sup>169</sup> *Id.*

of Panna, Illinois.<sup>170</sup> When Panavision International, holder of the registered trademark “Panavision,” learned of these events, it demanded that Toeppen refrain from using both its trademark and the Panavision.com domain name.<sup>171</sup> In response, Toeppen sent a letter to Panavision offering to “settle the matter” for the price of \$13,000, and inquired why Panavision would “want to fund [its] attorney’s purchase of a new boat” when it could obtain the domain name “cheaply and simply instead?”<sup>172</sup> Rather than succumbing to these demands, Panavision filed suit against Toeppen for the dilution of its trademark.<sup>173</sup> Toeppen instantly became what one commentator refers to as “the poster child for the crusade against cybersquatting.”<sup>174</sup>

Early cybersquatters, such as Toeppen, utilized cybersquatting as a technology-driven form of extortion.<sup>175</sup> Before it became commonplace for large corporations to develop their own websites, early cybersquatters would preemptively register a domain name under a well-known corporate trademark, hoping to sell the infringing domain name to the rightful trademark holder for a negotiated price.<sup>176</sup> Yet, even those technologically savvy trademark holders that managed to outrun potential cybersquatters in the race to the registrar quickly learned of another danger lurking along the information superhighway—Typosquatters.<sup>177</sup>

As the growth of new industries often leads to specialization, a stylized breed of cybersquatters referred to as “typosquatters” began blazing their own path into the burgeoning online world. Understanding that the domain name game provided countless roads to

<sup>170</sup> Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 309, 322 (2002) (chronicling the background and controversy surrounding *Panavision, Int’l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998)).

<sup>171</sup> *Panavision*, 141 F.3d 1316, 1319 (9th Cir. 1998).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Sherry, *supra* note 170, at 322.

<sup>175</sup> Mark A. Rush, Jeffrey M. Gitchel, and Wade J. Savoy, *Protecting the Open Seas: Fighting Cyberpiracy*, 5 No. 1 CYBERSPACE LAW. 1, 18 (2000).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

riches, typosquatters set about incorporating misspelled—but strikingly similar—trademarks into domain names as an alternative to cybersquatting.<sup>178</sup> By registering domain names under various iterations of a well-known trademark—such as YooTube.com or UTube.com—the typosquatter seeks to reap the profits from the careless spelling of unwary Internet users.<sup>179</sup> The hasty web-surfer that enters “wwwebay.com” (notice the missing period after “www”) into her Internet browser may unintentionally fill the coffers of a clever typosquatter through a variety of means.<sup>180</sup> She may find a website offering similar products or advertising for a business rival of the rightful trademark holder.<sup>181</sup> Alternatively, she may find herself “mousetrapped” upon her arrival at the misspelled page, unable to exit due to infinite pop-up ads that provide a stream of revenue with each click of the mouse.<sup>182</sup>

The innovative typosquatter can also exponentially increase her ill-gotten proceeds by registering countless variations of infringing websites.<sup>183</sup> After all, statistical studies demonstrate that between ten and twenty percent of all manually entered domain names contain typographical errors, creating upwards of 20 million “wrong numbers” each day.<sup>184</sup> These staggering statistics demonstrate how typosquatting legend John Zuccarini profited to the tune of \$1 million dollars—each year—through his 3000 infringing domain names.<sup>185</sup> To be fair, Mr. Zuccarini’s motivations weren’t *solely* profit-driven.<sup>186</sup> Zuccarini gained his notoriety by mixing business with pleasure, registering numerous domain names that resembled children’s websites, such as

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<sup>178</sup> *Id.*

<sup>179</sup> Paul Boutin, *The Typo Millionaires*, SLATE, Feb. 11, 2005, available at <http://www.slate.com/id/2113397>.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

“Dinseyland.com.”<sup>187</sup> However, these innocuous looking domain names actually guided youthful web-surfers to an entirely different form of entertainment—hardcore pornography.<sup>188</sup>

Although trademark holders prevailed in a few notable battles in the early days of online trademark disputes, the cybersquatters soon gained the upper-hand in this ongoing war by navigating through the loopholes in existing trademark dilution laws.<sup>189</sup> Specifically, these laws required plaintiffs to demonstrate that the putative defendant engaged in the commercial use of the infringing domain name.<sup>190</sup> Many cybersquatters, however, merely “warehoused” infringing domain names and waited for the rightful trademark-holder to contact them with a lucrative purchase offer.<sup>191</sup> This created substantial difficulties for trademark holders that preferred to put their resources toward legal remedies, as this “passive” cybersquatting failed to satisfy the required element of commercial use.<sup>192</sup> As cybersquatters grew adept at avoiding legal sanctions, the need for new legislation became increasingly clear.<sup>193</sup>

*B. There’s a new sheriff in town:  
The Congressional enactment of the ACPA*

In 1999, Congress responded to the growing problem of cybersquatting by passing the Anticybersquatting Consumer Protection Act (“ACPA”).<sup>194</sup> The ACPA provides civil liability for one who

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<sup>187</sup> Roy Mark, *Notorious URL Scammer Pleads Guilty*, ESECURITY PLANET, Dec. 11, 2003, <http://www.esecurityplanet.com/trends/article.php/3287981/Notorious-URL-Scammer-Pleads-Guilty.htm>.

<sup>188</sup> *Id.*

<sup>189</sup> Jonathon H. Anschell & John Lucas, *What’s in a Name: Dealing with Cybersquatters*, 21 ENT. & SPORTS LAW. 3, 3 (2003).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> 15 U.S.C. § 1125(d) (2011). The ACPA was incorporated into the Federal Trademark Code commonly referred to as the Lantham Act. Joseph J. Weissman,

“registers, traffics in, or uses” an infringing domain name, “without regards to the goods or services” offered by either litigant.<sup>195</sup> Rather than requiring commercial use of the domain name, the ACPA only requires the plaintiff to demonstrate the cybersquatter’s “bad-faith intent to profit” from the appropriated trademark.<sup>196</sup> To further alleviate the burden on plaintiffs, the ACPA provides a non-exhaustive list of means of demonstrating the necessary bad-faith intent to profit, such as:

- (I) the trademark or other intellectual property rights of the person, if any, in the domain name;
- (II) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;
- (III) the person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;
- (IV) the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;
- (V) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;
- (VI) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct;

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*The Anticybersquatting Consumer Protection Act: Developments Through Its First Six Years*, 95 TRADEMARK REP. 1058, 1058 (2005).

<sup>195</sup> See 15 U.S.C. § 1125(d)(1)(a).

<sup>196</sup> See *id.*

- (VII) the person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;
- (VIII) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and
- (IX) the extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous.<sup>197</sup>

Notably, Congress expressly provided a safe harbor provision for domain name registrars to shelter them from liability for their customers' acts of cybersquatting.<sup>198</sup> This provision expressly exempts a registrar from liability for merely registering an infringing domain name "absent a showing of bad faith intent to profit from such registration or maintenance of the domain name."<sup>199</sup>

Although the ACPA clearly provides a targeted remedy to address the harm caused by cybersquatting, trademark holders often faced an uphill battle in bringing a cause of action for this form of online trademark infringement.<sup>200</sup> While both cybersquatting and typosquatting may form the basis of a claim under the ACPA,<sup>201</sup> the fact remains that the wrongful conduct takes place entirely online.

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<sup>197</sup> *Id.* at §§ 1125(d)(1)(B)(i)(I)–(IX).

<sup>198</sup> *Id.* at § 1114 (2)(D)(iii).

<sup>199</sup> *Id.*

<sup>200</sup> *See, e.g.,* *Subsalve USA Corp. v. Watson Mfg., Inc.*, 392 F. Supp. 2d 221, 223–24 (D.R.I. 2005) (dismissing for lack of personal jurisdiction upon finding that act of cybersquatting was not aimed at forum state).

<sup>201</sup> *See* 15 U.S.C. § 1125 (d)(1)(A)(ii)(I) (proscribing the registration of an domain name that is identical or strikingly similar to another's previously registered trademark).

Whereas cybersquatting pioneers such as Dennis Toepfen resorted to outright extortion in order to profit from their trade,<sup>202</sup> this species of early cybersquatting has almost entirely vanished into antiquity.<sup>203</sup> Modern cybersquatters have no need to ransom out their infringing domain names to the rightful trademark holders.<sup>204</sup> Instead, the safer road to riches is lined with pay-per-click advertising and the poor typing skills of the masses.<sup>205</sup> And though the ACPA is strictly a creature of federal law, the statute itself does not contain any provision for nationwide service of process.<sup>206</sup> Thus, in claims filed under the ACPA, a federal court's exercise of personal jurisdiction must comport with the geographic nexus requirements of *International Shoe*.<sup>207</sup> However, the Seventh Circuit's fractured analysis in *GoDaddy II* indicates that cybersquatting has outgrown the limitations of *International Shoe*.

### III. UBID, INC, V. GODADDY GROUP, INC.

From its headquarters in Arizona, GoDaddy provides domain name registration and website hosting for customers located across the country.<sup>208</sup> Arguably, the company's rapid growth is largely attributable to its aggressive advertising campaign.<sup>209</sup> Its frequently-run television commercials featuring the "GoDaddy Girls" have become somewhat of a staple during the past several Super Bowls.<sup>210</sup>

<sup>202</sup> See *supra* Part II.A. As discussed earlier in this Comment, Toepfen is best known for registering a domain name under Panavision's well-known trademark. He attempted to profit from his actions by offering to release the domain name in exchange for a bribe.

<sup>203</sup> Patrick Thibodeau, *Cybersquatting Can Yield Pay-Per-Click Bounties*, COMPUTERWORLD, Apr. 16, 2007, <http://www.computerworld.com/s/article/289576>.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *GoDaddy II*, 623 F.3d 421, 425 (7th Cir. 2010).

<sup>207</sup> *Id.*

<sup>208</sup> *uBID Inc. v. GoDaddy Group, Inc. (GoDaddy I)*, 673 F. Supp. 2d 621, 625 (N.D. Ill. 2009), *rev'd* 623 F.3d 421 (7th Cir. 2010).

<sup>209</sup> *GoDaddy II*, 623 F.3d at 424.

<sup>210</sup> *Id.*

For those that prefer stadium seating to the comforts of home, GoDaddy's billboards and advertisements appear at sporting arenas throughout the country.<sup>211</sup> Additionally, fans of Indycar racing may recognize GoDaddy's logo from driver Danica Patrick's car, while golf aficionados can glimpse it emblazoned on Anna Rawlson's hat.<sup>212</sup> As a result of its efforts, GoDaddy has emerged as one of the largest domain name registrars in the country.<sup>213</sup>

Despite its national client-base, GoDaddy's operations are limited almost entirely to its home state of Arizona.<sup>214</sup> Indeed, the company has few offices or employees outside of its home state.<sup>215</sup> GoDaddy provides the majority of its services on an automated basis; customers throughout the world can access GoDaddy's services remotely through its website.<sup>216</sup> Moreover, the company handles its domain name registration and maintenance through its computer servers in Scottsdale, Arizona.<sup>217</sup>

GoDaddy's business model provides customers with two different methods of registering domain names.<sup>218</sup> First, GoDaddy's aptly named "free parking" service allows its customers to register domain names at no-charge. GoDaddy creates a rudimentary website under its customers' domain names and monetizes the sites through "pay-per-click" advertising.<sup>219</sup> As an alternative to its free parking services, GoDaddy sells a "cash parking" service, which allows its customer to share in the pay-per-click advertising revenue in exchange for a small monthly fee.

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<sup>211</sup> See *id.* at 428. Notably, the opinion only refers to GoDaddy's billboards in Illinois stadiums. *Id.* Nevertheless, the fact that GoDaddy referred to Illinois as only a part of its national advertising campaign indicates that these billboards and signs appear at sports stadiums throughout the country. *Id.*

<sup>212</sup> *Id.* at 424.

<sup>213</sup> *GoDaddy I*, 673 F. Supp. 2d at 625.

<sup>214</sup> *GoDaddy II*, 623 F.3d at 424.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> See Complaint at ¶ 8, *GoDaddy I*, 673 F. Supp. 2d 621 (N.D.Ill. 2009) (No. 09 cv 02123), 2009 WL 1109520.

Like GoDaddy, uBID's revenue stream flows from the electronic currents of cyberspace.<sup>220</sup> Headquartered in Chicago, uBID runs an online auction service that deals primarily with excess inventory of electronics manufacturers through its website, uBID.com.<sup>221</sup> In 2009, uBID discovered that numerous individuals had registered 171 domain names that bore a substantial similarity to uBID.com through GoDaddy's cash parking and free parking services.<sup>222</sup> Yet rather than pursuing the various individuals, uBID named a single defendant in its complaint—GoDaddy, the Internet-based registrar that provided the infringing domain names.<sup>223</sup>

Perhaps anticipating the difficulties created by the ACPA's safe harbor provision for registrars, uBID's allegations focused entirely on the manner in which GoDaddy manifested a bad-faith intent to profit from the parked pages created under the infringing domain names.<sup>224</sup> First, GoDaddy trafficked in these infringing domain names despite its knowledge that they were "identical or confusingly similar" to uBID's well-known trademarks.<sup>225</sup> Second, GoDaddy offered to sell these infringing domain-names for "financial gain."<sup>226</sup> Third, GoDaddy used pay-per-click advertising links that diverted customers to the websites of uBID's competitors.<sup>227</sup>

In response to uBID's complaint, GoDaddy filed a motion to dismiss for lack of personal jurisdiction, or, in the alternative, to transfer the case to its home state of Arizona.<sup>228</sup>

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<sup>220</sup> *GoDaddy II*, 623 F.3d at 423.

<sup>221</sup> *Id.*

<sup>222</sup> Defendant's Memorandum of Law in Support of their Motion to Dismiss, or, in the Alternative, to Transfer Venue, at 5, *GoDaddy I*, 673 F. Supp. 2d 621 (N.D.Ill. 2009) *rev'd* 623 F.3d (No. 109CV02123), 2009 WL 2236587 [hereinafter *GoDaddy's Motion to Dismiss*].

<sup>223</sup> *Id.*

<sup>224</sup> See Complaint, *supra* note 219, at ¶¶ 41–43 (detailing GoDaddy's alleged acts of cybersquatting).

<sup>225</sup> *Id.* at ¶ 43.

<sup>226</sup> *Id.* at ¶ 42.

<sup>227</sup> *Id.* at ¶ 41.

<sup>228</sup> *GoDaddy I*, 673 F. Supp. 2d 621, 626 (N.D.Ill. 2009).

*A. The District Court's Dismissal for Lack of Personal Jurisdiction*

Penning the opinion for the district court, Judge Charles Kocoras began by dismissing the notion that GoDaddy's advertising and sales within the state of Illinois established the "continuous and systematic" contacts necessary to support general jurisdiction.<sup>229</sup> Next, Judge Kocoras focused on whether uBID met its burden in establishing a prima facie case for specific jurisdiction over its claim.<sup>230</sup> Notably, Judge Kocoras excluded GoDaddy's advertisements and the majority of its sales within the forum from the specific jurisdiction analysis.<sup>231</sup> Although uBID contended that both of these factors should weigh heavily in its favor, Judge Kocoras explained that the only relevant facts in the inquiry were those that directly pertained to the litigation between the parties or the "operative facts of the dispute."<sup>232</sup> As a result, the opinion's specific jurisdiction analysis was confined to whether the two infringing domain names registered by Illinois residents established the minimum contacts needed to support specific jurisdiction.<sup>233</sup>

To uBID's dismay, Judge Kocoras answered this question in the negative.<sup>234</sup> Presuming that GoDaddy had only established two Illinois contacts that pertained to the litigation at hand, Judge Kocoras determined that GoDaddy's business model precluded any determination that the domain name registrar had purposefully availed itself such that it should "reasonably expect to be subject to jurisdiction in Illinois."<sup>235</sup> Specifically, GoDaddy had purposefully established a website that allowed its customers to register domain names on an automated basis.<sup>236</sup> From anywhere in the world, a

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<sup>229</sup> *Id.* at 627–28.

<sup>230</sup> *See id.* at 628.

<sup>231</sup> *See id.* at 628–29.

<sup>232</sup> *Id.* at 628 (*citing* GCIU-Emp'r Ret. Fund v. Goldfarb Corp., 565 F.3d 1018, 1024 (7th Cir. 2009)) (internal quotation marks omitted).

<sup>233</sup> *GoDaddy I*, 673 F. Supp. at 628.

<sup>234</sup> *Id.* at 628–29.

<sup>235</sup> *Id.* at 629.

<sup>236</sup> *Id.*

customer could register, purchase, and obtain a desired domain name without ever interacting with a GoDaddy employee.<sup>237</sup>

Viewed from this standpoint, Judge Kocoras determined that GoDaddy's customers, rather than GoDaddy itself, initiated the only contacts relevant to the litigation—the infringing websites registered by two Illinois residents.<sup>238</sup> Reasoning that these registrations were “the unilateral activity of . . . third [parties],” Judge Kocoras explained that GoDaddy could not reasonably anticipate being haled into court based solely upon these contacts.<sup>239</sup> Accordingly, the District Court dismissed uBID's complaint for lack of personal jurisdiction.<sup>240</sup>

### *B. The Seventh Circuit Majority's Opinion*

Unwilling to accept defeat quite so easily, uBID subsequently appealed the district court's ruling to the Court of Appeals for the Seventh Circuit,<sup>241</sup> and the majority's opinion demonstrated that uBID would be rewarded for its perseverance.<sup>242</sup> While agreeing with the lower court's determination that GoDaddy's sales and marketing efforts in Illinois failed to support general jurisdiction, the majority left no doubt that its specific jurisdiction analysis would follow a different line of reasoning than that of the court below.<sup>243</sup>

Drawing support from the Supreme Court's decision in *Keeton v. Hustler Magazine*, the court reasoned that the domain name registrar had purposefully availed itself within the forum as a result of its national business presence.<sup>244</sup> GoDaddy, just like the defendant in *Keeton*, intentionally solicited business from every state through its

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 630.

<sup>241</sup> *GoDaddy II*, 623 F.3d 421, 433 (7th Cir. 2010) (reversing the decision below).

<sup>242</sup> *See id.* at 423.

<sup>243</sup> *Id.* at 423, 426.

<sup>244</sup> *Id.*

national advertising campaign—including the forum at issue.<sup>245</sup> As a reward for its efforts, GoDaddy successfully drew business from thousands of Illinois residents.<sup>246</sup> And while these customers contributed a relatively small portion of GoDaddy’s overall revenue, the company nevertheless received millions from its business within the forum.<sup>247</sup>

In light of this substantial revenue stream flowing from Illinois to GoDaddy’s corporate headquarters in Arizona, the majority opinion quickly pierced through the company’s attempt to shield itself behind its automated processing system.<sup>248</sup> While the majority of its customers secure the company’s services without any human interaction, GoDaddy intentionally structured its business in this fashion.<sup>249</sup> Citing to its own previous decisions, the majority reasoned that GoDaddy’s attempt to paint these Internet transactions as “the unilateral activities of third parties” was misleading in light of the significant steps that the company took before and after each transaction.<sup>250</sup> As such, the court declared that “[GoDaddy] cannot now point to its hundreds of thousands of customers in Illinois and tell us, ‘It was all their idea.’”<sup>251</sup>

Next, the court turned its attention to whether the conduct underlying the complaint at bar arose from or related to GoDaddy’s contacts with the forum.<sup>252</sup> Noting that the Seventh Circuit’s previous opinions had not expressly adopted a particular means of addressing this question, the court majority briefly addressed the proximate causation and but-for causation standards employed by the majority of federal courts.<sup>253</sup> The Seventh Circuit majority found the but-for

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* (citing *Illinois v. Hemi Group, LLC.*, 622 F.3d 754, 758–59 (7th Cir. 2010)).

<sup>251</sup> *GoDaddy II*, 623 F.3d at 428.

<sup>252</sup> *Id.*

<sup>253</sup> *See id.* at 430. While some may read the Seventh Circuit’s reasoning as expressly rejecting both standards, the court majority carefully couched its language

causation standard to be problematically over-inclusive, whereas the proximate cause standard was troublingly under-inclusive.<sup>254</sup>

Declining to follow either approach, the majority settled upon the “quid pro quo” standard recently created by the Third Circuit.<sup>255</sup>

Outlining the contours of this approach, the Seventh Circuit explained that the “the precise causal connection” between a defendant’s contacts and the plaintiff’s claim is unimportant; instead, the dispositive issue was whether the relationship between the two is “intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable.”<sup>256</sup>

Returning to the issue at bar, the majority found the relationship between GoDaddy’s contacts with Illinois and uBID’s complaint “close enough” to satisfy the relatedness inquiry.<sup>257</sup> As to GoDaddy’s contacts, the majority explained that GoDaddy successfully solicited business from hundreds of thousands of Illinois residents through its advertising efforts, evidenced by the company’s substantial profits derived from Illinois.<sup>258</sup> Moreover, according to the allegations in uBID’s complaint, GoDaddy facilitated these sales by providing “free parking” for its customer’s domain names.<sup>259</sup> As to the substance of uBID’s complaint, it alleged that GoDaddy, in bad-faith, trafficked in the domain names registered under its free parking service to garner profits from uBID’s registered trademarks.<sup>260</sup> As such, the court majority declared that the substantive relationship between GoDaddy’s contacts and uBID’s complaint were so “intimately related” that the domain name registrar could hardly be surprised to find itself haled into an Illinois court to defend its actions.<sup>261</sup>

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to avoid this conclusion. Specifically, the *GoDaddy* majority stated that “[w]e have not previously endorsed either approach, and we decline to do so now. *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 431–32.

<sup>258</sup> *Id.* at 431.

<sup>259</sup> *Id.* (quoting Complaint, *supra* note 219, at ¶ 20 (internal quotation marks omitted)).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

Although GoDaddy asserted that the alleged injuries occurred in Arizona, where the company incorporated its customers' domain names into the parked page service, these arguments fell upon deaf ears.<sup>262</sup> Reasoning that GoDaddy was contractually obligated to provide the registration services paid for by its customers, the court majority declared that "[w]here GoDaddy chooses to locate the servers that complete the task is irrelevant."<sup>263</sup> Nor did the majority place great emphasis on the fact that uBID would have the same claim against GoDaddy regardless of whether the customers who registered the infringing domain names "did so from Illinois, from Wyoming, or from China."<sup>264</sup> Rather, the majority simply explained that "the concept of a geographic nexus" is difficult to apply where the alleged wrongdoing can be described as occurring "wherever the Internet is accessible."<sup>265</sup> Notably, the majority's opinion reasoned that the geographic nexus is "simply less important" where the alleged harm takes place online, as this is merely "one facet of the constitutional inquiry." The plaintiff still must establish the defendant's contacts with the forum, as well as their temporal and substantive relationship to its claim.<sup>266</sup>

### C. Justice Manion's Concurrence

While he agreed with the result reached by the majority, Justice Manion declared that the jurisdictional issue was controlled by an entirely different method—the *Calder* effects test.<sup>267</sup> Formulating the effects test as requiring: "(1) intentional conduct; (2) expressly aimed at the forum state; (3) with the defendant's knowledge that the plaintiff would be injured in the forum state," the concurrence held that uBID's

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<sup>262</sup> *Id.* at 432.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 431.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 434 (Manion, J., concurring).

complaint established each of the required elements.<sup>268</sup> As to the first element, the complaint at bar easily satisfied this requirement of intentional conduct through its detailed description of GoDaddy's efforts to profit from the infringing domain names.

In regards to the second element of the effects test, Justice Manion's opinion seems to indicate that the act of cybersquatting—by its very nature—satisfies this requirement. As the concurrence explained, cybersquatting is simply a technology-driven method for “defrauding business.”<sup>269</sup> The cybersquatter registers these domain names to coerce his victim into making a choice—either pay off the cybersquatter, or shoulder the costs of litigation.<sup>270</sup> In this instance, the concurrence explained that GoDaddy's “conduct is aimed at uBID's headquarters in Illinois,” where the company will be harmed through its lost revenue.<sup>271</sup>

Finally, the concurrence reasoned that GoDaddy's alleged cybersquatting sufficed to demonstrate its knowledge that uBID would be injured in the forum state.<sup>272</sup> “In practical terms,” the complaint described a “targeted scheme” that impacted uBID's “bottom line.”<sup>273</sup> Logically, GoDaddy knew that its conduct would injure uBID “in Illinois, where uBID is incorporated, where it pays state income and property taxes, and where it has many employees.”<sup>274</sup>

Looking back one last time at the second element of the effects test, the concurrence concluded with a final thought: Although acknowledging that the Seventh Circuit's prior decisions demonstrated some “tension . . . about the scope and limits” of the express aiming component, the concurrence nevertheless concluded that this tension provided no reason to refrain from using the effects test “where the intentional acts are clearly directed at Illinois.” Moreover, to the extent

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<sup>268</sup> *Id.* at 435 (*citing* *Virtual Works, Inc., v. Volkswagen of Am.*, 238 F.3d 264, 267 (4th Cir. 2001) (internal quotation marks omitted)).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 435–36.

<sup>273</sup> *Id.* at 436.

<sup>274</sup> *Id.*

that a plaintiff must show “something more” to satisfy the express aiming requirement,” the majority’s detailed description of GoDaddy’s conduct within the forum satisfied “even the strictest ideas of what constitutes “something more.”<sup>275</sup>

#### *D. A Few Last Points*

Two aspects of the opinion bear a closer examination, the first of which is the majority’s refusal to adopt the *Zippo* test for personal jurisdiction.<sup>276</sup> While both parties asked the court to “either adopt or reject” a standard that resolved the purposeful availment issue through “website interactivity,” the majority expressly declined to take either position.<sup>277</sup> Instead, the majority declared that the interactivity of a defendant’s website is certainly “relevant,” but not “dispositive” in assessing the sufficiency of the defendant’s contacts with the forum.<sup>278</sup> As such, the majority explained that adopting a separate standard for examining “Internet-based contacts would be inappropriate when the traditional analysis . . . remains up to this more modern task.”<sup>279</sup>

The second issue that stands out from the *GoDaddy II* decision is the dueling concerns voiced by the majority<sup>280</sup> and concurring opinions.<sup>281</sup> While both opinions held that exercising jurisdiction complied with the requirements of *International Shoe*, both the majority and concurrence nevertheless took issue with the other’s reasoning.<sup>282</sup>

From the majority’s perspective, Justice Manion’s concurring opinion adopted an unnecessarily broad reading of the effects test.<sup>283</sup>

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 431 n.3.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 431 n.1

<sup>281</sup> *Id.* at 433–35 (Manion, J., concurring).

<sup>282</sup> *Id.* at 431 n.1 (voicing concerns about the concurrence’s application of *Calder*’s effects test); see also *id.* at 435 (Manion, J., concurring) (troubled by the majority’s relatedness inquiry).

<sup>283</sup> *Id.* at 431 n.1

Specifically, the majority felt that the concurrence's reading of the express-aiming requirement would result in an overly-expansive jurisdictional standard for intentional tort claims.<sup>284</sup> Here, the majority recognized that some federal opinions—including its own—read *Calder* as supporting jurisdiction in the plaintiff's home state in "almost any alleged intentional tort."<sup>285</sup> Nevertheless, the majority warned that *Calder* "need not and should not" be construed "quite so broadly."<sup>286</sup>

Yet the majority opinion was not alone in its judicial finger-wagging. Rather than confining its critique to a single footnote, Justice Manion spent a few pages expressing *his* concerns with the majority's "unnecessarily broad" method of connecting GoDaddy's forum contacts with uBID's complaint.<sup>287</sup> Significantly, Justice Manion accepted GoDaddy's contention that the actual conduct underlying the complaint bore no relation to its contacts with Illinois.<sup>288</sup> Specifically, the intentional conduct described in uBID's complaint was entirely unrelated to GoDaddy's "hundreds of thousands of Illinois customers," and certainly did not "arise out of its advertising at sporting events." Without any connection to the various instances of "purposeful availment" set forth in the majority's opinion, Justice Manion explained that the court's application of *Keeton* effectively rendered GoDaddy subject to suit in every state where the company "advertises and has customers."<sup>289</sup> In fact, the only limiting factor in the majority's analysis was whether a plaintiff could point to one customer within the forum that registered an infringing domain name.<sup>290</sup>

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<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 434 (Manion, J., concurring).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

### III. ANALYSIS: THE CONFLICT BETWEEN CYBERSQUATTING AND THE GEOGRAPHIC NEXUS REQUIREMENT OF PERSONAL JURISDICTION

#### A. *Where the Money Is: GoDaddy II's Potential Impact on Future Cybersquatting Disputes*

This note suggests that the true significance of *GoDaddy II* is the decision's future impact on cybersquatting claims. In this author's opinion, one of the most interesting aspects of this case is the target of uBID's claim: GoDaddy. As stated earlier in this note, uBID did not seek to pursue any of the various individuals that actually registered the infringing domain names, but rather elected to bring its claim directly against the registrar itself.<sup>291</sup>

Why did uBID file its suit against GoDaddy? The answer is rather simple. To quote the notorious bank robber Willie Sutton, "[b]ecause that's where the money is."<sup>292</sup> The ACPA provides for damages up to \$100,000.00 for each infringing domain name,<sup>293</sup> thus uBID's decision to file suit against GoDaddy stems from a simple cost-benefit analysis. Instead of pursuing each individual that registered an infringing-domain name separately, uBID simply filed a single, multi-million-dollar claim against GoDaddy.<sup>294</sup>

The *GoDaddy II* decision may very well serve as a test-case for the future of cybersquatting claims. As domain name registrars such as GoDaddy are primarily "where the money is," this author believes that many plaintiffs similar to uBID will rely heavily on the reasoning employed by both the majority and concurrence in *GoDaddy II*. Indeed, the Motion Picture Academy recently filed a similar lawsuit

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<sup>291</sup> *GoDaddy's Motion to Dismiss*, *supra* note 222, at 5.

<sup>292</sup> FBI.GOV, *FBI history Famous Cases*, <http://www2.fbi.gov/libref/historic/famcases/sutton/sutton.htm> (last visited March 30, 2011). This comment comes from an interview with Willie Sutton, a notorious bank robber in the early 20th Century. Once asked by a reporter why he decided to start robbing banks, Mr. Sutton famously replied "[b]ecuase that's where the money is." *See id.*

<sup>293</sup> *See* 15 U.S.C. § 1117(d) (statutory damages provision for cybersquatting violations).

<sup>294</sup> *GoDaddy's Motion to Dismiss*, *supra* note 222, at 5.

against a domain name registrar based upon over 100 websites that incorporate “The Oscars” into their domain names.<sup>295</sup> While the *GoDaddy II* opinion speaks only to the jurisdictional issues of such suits, rather than the actual merits of the plaintiff’s claim,<sup>296</sup> the impact of the Seventh Circuit’s personal jurisdiction analysis in future cybersquatting claims cannot be overlooked.

*B. Extinguishing Zippo: the problems with using the interactivity of a website to exert personal jurisdiction over cybersquatters*

Before scrutinizing the analytical frameworks used by the majority and concurrence in *GoDaddy II*, the framework that the Seventh Circuit declined to adopt bears some consideration—the *Zippo* test for personal jurisdiction. Given the jurisdictional issues posed by the Internet, plaintiffs such as uBID<sup>297</sup> often rely on the *Zippo* standard<sup>298</sup> to support personal jurisdiction in the context of cybersquatting claims based on the interactivity of a defendant’s website. As noted earlier in this Comment, many commentators have begun to question the propriety of basing jurisdiction solely on the interactivity of a defendant’s website.<sup>299</sup> For instance, in a typical e-commerce claim, the interactivity of the defendant’s website lacks any substantial value in the jurisdictional analysis.<sup>300</sup>

In the context of cybersquatting, the application of the *Zippo* standard is particularly baffling. Imagine that uBID sought to sue the individuals that actually registered the domain names that infringed

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<sup>295</sup> TECHDIRT, *The Oscars v. GoDaddy*, <http://www.techdirt.com/articles/20100621/0056259883.shtml> (last visited March 30, 2011).

<sup>296</sup> See generally *GoDaddy II*, 623 F.3d 421 (7th Cir. 2010). The Seventh Circuit’s decision in *GoDaddy II* was confined solely to whether the defendant was subject to personal jurisdiction in Illinois. *Id.*

<sup>297</sup> *Id.* at 431 n.3. Specifically, uBID argued that GoDaddy’s interactive website supported both specific and general jurisdiction in Illinois.

<sup>298</sup> *Zippo Mfg. Co., v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

<sup>299</sup> See *supra* Part I.C (outlining academic critiques of *Zippo*).

<sup>300</sup> Dunham, *supra* note 146, at 580–81.

upon its registered trademark, rather than GoDaddy. The parked pages created under these infringing domain names were largely passive, consisting of a rudimentary website filled with advertising links for uBID's competitors.<sup>301</sup> Under the *Zippo* standard, these passive websites would fail to provide a sufficient basis for personal jurisdiction over the nonresident cybersquatters that sought to infringe on uBID's trademarks.<sup>302</sup> Arguably, the same logic should apply to uBID's suit against GoDaddy. Since the conduct underlying uBID's complaint resulted from these parked pages as well,<sup>303</sup> GoDaddy would also escape personal jurisdiction under the *Zippo* test. Indeed, the pay-per-click advertising that fuels modern cybersquatting<sup>304</sup> deprives *Zippo* of any real utility—which is ironic, as this standard was crafted specifically to deal with Internet-related claims.<sup>305</sup>

Recognizing the inherent shortcomings of the *Zippo* test, the Seventh Circuit wisely eschewed this standard in its jurisdictional analysis.<sup>306</sup> Admittedly, the interactive nature of a website may provide some indication of whether the defendant purposefully availed itself by intentionally seeking to draw business from the forum.<sup>307</sup> Nevertheless, this intent provides no insight into the success of the defendant's efforts—the critical component to establishing the contacts necessary to support personal jurisdiction.<sup>308</sup> A defendant's *intent* to create contacts with the forum is not enough to satisfy the requirements of *International Shoe*; rather, the dispositive issue is whether the defendant successfully created the contacts needed to support the exercise of personal jurisdiction.<sup>309</sup>

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<sup>301</sup> *GoDaddy II*, 623 F.3d at 434 (Manion, J., concurring).

<sup>302</sup> *See Zippo*, 952 F. Supp. at 1124 (strictly passive websites are insufficient to confer personal jurisdiction).

<sup>303</sup> *GoDaddy II*, 623 F.3d at 424.

<sup>304</sup> Thibodeau, *supra* note 203.

<sup>305</sup> *Zippo*, 952 F. Supp. at 1124.

<sup>306</sup> *GoDaddy II*, 623 F.3d at 431 n.3.

<sup>307</sup> *Id.*

<sup>308</sup> *Cf. Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>309</sup> *Id.* at 254.

*C. Hustled: The Majority's relatedness inquiry*

The Seventh Circuit majority relied on equitable principles to uphold specific jurisdiction over GoDaddy.<sup>310</sup> Essentially, the majority applied the quid-pro-quo standard as a means of basing personal jurisdiction on a highly discretionary cost-benefit analysis.<sup>311</sup> Rather than examining the actual relationship between uBID's allegations of cybersquatting and GoDaddy's contacts with the forum state, the court focused on the reciprocal bargain between GoDaddy and Illinois.<sup>312</sup> As GoDaddy garnered business from hundreds of thousands of Illinois residents through the sale of its parked page services, it was only proper to require the registrar to submit to jurisdiction within the state for claims arising from the same services.<sup>313</sup> A closer examination of the majority's opinion, however, demonstrates the flaws in its reasoning, and underscores the fundamental disjunction between cybersquatting and *International Shoe*.

The majority's opinion sought to resolve the conflict between the virtual conduct that constitutes cybersquatting with the only activities that GoDaddy conducted within the state of Illinois—GoDaddy's successful exploitation of the forum state.<sup>314</sup> From the majority's viewpoint, this geographic link stemmed from two sources: GoDaddy's national advertising campaign, and its hundreds of thousands of Illinois-based customers.<sup>315</sup> Based on these contacts, the majority reasoned that GoDaddy's exploitation of the Illinois market created the same basis for specific jurisdiction as *Hustler Magazine's* exploitation of the New Hampshire market.<sup>316</sup> But as Justice Manion recognized in his concurrence, this analogy ultimately fails.<sup>317</sup>

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<sup>310</sup> Cf. *GoDaddy II*, 623 F.3d at 431–32.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 431.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 431 (finding the relationship between GoDaddy's numerous Illinois customers and the cybersquatting alleged in uBID's complaint was "close enough" to satisfy the relatedness requirement).

<sup>315</sup> *Id.* at 433–35 (Manion, J., concurring).

<sup>316</sup> *Id.*

<sup>317</sup> *See id.*

The libel claim in *Keeton* provided a direct geographic nexus between the defendant's exploitation of the forum market and the substance of the plaintiff's claim.<sup>318</sup> Because the tort of libel occurs wherever the allegedly defamatory publication is circulated<sup>319</sup> the portion of the plaintiff's libel claim that occurred in New Hampshire arose at the precise moment that the defendant circulated ten to fifteen thousand copies of its magazines within the forum.<sup>320</sup> This direct causal connection rendered the *Keeton* defendant's exploitation of the forum market relevant to the Supreme Court's specific jurisdiction analysis.<sup>321</sup>

Conversely, GoDaddy's exploitation of the forum market bore absolutely no relation to the substance of uBID's claim.<sup>322</sup> In fact, the majority failed to recognize that no aspect of either GoDaddy's advertising campaign or its numerous Illinois customers played any role in uBID's cybersquatting allegations.<sup>323</sup> This issue stemmed directly from the majority's failure to recognize the actual elements of cybersquatting.<sup>324</sup> Under the ACPA's safe harbor provision, the registration of an infringing domain name, on its own, does not render a domain name registrar liable under the ACPA.<sup>325</sup> Instead, the safe harbor provision requires some demonstration of the registrar's bad-faith intent to profit from the domain name.<sup>326</sup>

In light of the ACPA's safe harbor provision, the substance of uBID's allegations centered entirely around the manner in which

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<sup>318</sup> See *Keeton v. Hustler Magazine*, 465 U.S. 770, 778 (1984).

<sup>319</sup> *Id.*

<sup>320</sup> *Cf. id.* at 772, 778. As libel occurs at the point of circulation, the defendant's circulation of ten to fifteen thousand copies of the magazine effectively created ten to fifteen thousand claims of libel within the forum state. *Id.* at 772, 778.

<sup>321</sup> *Id.* at 773.

<sup>322</sup> *GoDaddy II*, 623 F.3d at 434 (Manion, J., concurring).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* The ACPA specifically provides a safe harbor provision for domain name registrars such as GoDaddy. This provision provides that liability will not fall on these companies upon the registration of an infringing domain name. *Id.*, (citing 15 U.S.C. § 1114(2)(D)(iii)).

<sup>326</sup> 15 U.S.C. § 1114(2)(D)(iii).

GoDaddy manifested a bad-faith intent to profit—the various means through which GoDaddy monetized the parked pages created under the infringing domain names.<sup>327</sup> Unfortunately, the majority failed to recognize that none of these allegedly wrongful activities created any geographic connection between GoDaddy and the forum state.<sup>328</sup> Certainly, GoDaddy did not create these parked pages in Illinois.<sup>329</sup> Nor did GoDaddy place any advertising links on these parked pages in the forum state.<sup>330</sup> Rather, all of the conduct described above actually occurred online—or at best, at GoDaddy’s headquarters in Arizona.<sup>331</sup>

This is precisely why none of GoDaddy’s hundreds of thousands of Illinois customers had any relationship with uBID’s cybersquatting claim. These contacts were nothing more than completely legitimate business transactions that bore no relation to the intentional conduct described in uBID’s complaint.<sup>332</sup> Nevertheless, the Seventh Circuit majority found that these perfectly legitimate contracts were “closely enough related” to the substance of uBID’s claim.<sup>333</sup>

Even when one ignores the ACPA’s safe harbor provision to assume that the actual registration of these domain names rendered GoDaddy liable for cybersquatting, only two out of the 171 infringing domain names were registered by Illinois residents.<sup>334</sup> Notably, the Seventh Circuit believed that these two registrations from within the forum created the necessary geographic nexus between contacts, claim, and forum to uphold specific jurisdiction over GoDaddy.<sup>335</sup>

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<sup>327</sup> *GoDaddy II*, 623 F.3d at 434 (Manion, J., concurring).

<sup>328</sup> *Id.*

<sup>329</sup> *See id.* (recognizing that all of the conduct alleged in GoDaddy’s complaint involved the creation and monetization of parked pages).

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Cf. GoDaddy II*, 623 F.3d at 431. Notably, the Seventh Circuit seemed to take issue with GoDaddy’s entire business model by assuming that GoDaddy’s alleged intent to profit from uBID’s marks was indistinguishable from the services it provided to numerous Illinois customers who only sought to register legitimate domain names of their own choosing. *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *GoDaddy’s Motion to Dismiss*, *supra* note 222, at 5.

<sup>335</sup> *GoDaddy II*, 623 F.3d at 432.

This reasoning overlooks the fact that one cannot connect GoDaddy's alleged acts of cybersquatting to its forum contacts under the but-for cause standard—the same standard that the majority dismissed as overly-inclusive.<sup>336</sup>

Although GoDaddy's successful exploitation of the forum market may arguably serve as a but-for cause for the two domain names registered by Illinois residents, removing these contacts from the causal chain would not alter the substance of uBID's complaint.<sup>337</sup> Specifically, this would still leave 169 infringing domain names in GoDaddy's servers,<sup>338</sup> leaving the register perfectly capable of engaging in each intentional act described in uBID's complaint.

The majority's relatedness inquiry raises substantial concerns because the cornerstone of specific jurisdiction is whether the plaintiff's claim arises from or relates to the defendant's contacts with the forum state.<sup>339</sup> The geographic nexus between contacts and claim allows a defendant to reasonably anticipate that her conduct will subject her to specific jurisdiction within the forum.<sup>340</sup> Nevertheless, the majority dismissed this crucial policy consideration by declaring that “physical geographical nexus is simply less important” when the wrongful conduct occurs via the Internet.<sup>341</sup> While the Seventh Circuit majority may dismiss the importance of this requirement, GoDaddy certainly would have preferred some measure of warning that it would be required to submit to jurisdiction in Illinois based on the alleged acts of wrongdoing set forth in uBID's complaint.

Although the Seventh Circuit declared that “due process does not require [the court] to slice GoDaddy's alleged wrongdoing so finely,” this argument turns the *International Shoe* framework for specific jurisdiction on its head.<sup>342</sup> While *general* jurisdiction only examines

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<sup>336</sup> *Id.* at 430.

<sup>337</sup> *Contra* Nowak v. Tak How Inv., Ltd., 94 F.3d 708, 715 (1st Cir. 1996) (but-for cause standard requires a showing that the injury would not have occurred in the absence of the defendant's forum contacts).

<sup>338</sup> *GoDaddy's Motion to Dismiss*, *supra* note 222, at 5.

<sup>339</sup> *Burger King v. Rudzewicz*, 471 U.S. 462, 472–73 (1985).

<sup>340</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>341</sup> *GoDaddy II*, 623 F.3d at 431.

<sup>342</sup> *Burger King*, 471 U.S. at 472–73.

the geographic nexus between the defendant and the forum,<sup>343</sup> specific jurisdiction is conditioned entirely on an additional nexus between the defendant's contacts and the plaintiff's claim.<sup>344</sup>

The majority's opinion did not simply misapply the requirements of *International Shoe*; rather, it blurred the distinction between general and specific jurisdiction through its application of the quid-pro-quo standard.<sup>345</sup> Indeed, the court implicitly conceded this fact by dismissing the importance of the relationship between contacts and claim, admitting that uBID would have the same claim against GoDaddy regardless of whether the customers that registered the infringing domain names did so "from Illinois, from Wyoming, or from China."<sup>346</sup> This casual disregard for the necessary relationship between contacts and claim allowed the Court to uphold jurisdiction over uBID's claim through a gray area between specific and general jurisdiction.<sup>347</sup> As a result, the majority's discretionary cost-benefit analysis subjected GoDaddy to what can only be described as "intermediate jurisdiction"—a concept that perverts the requirements of *International Shoe*.

#### *D. The Unintended Effects of Justice Manion's concurrence*

Although Justice Manion chided the majority for its overly expansive method of exerting personal jurisdiction over uBID's claim,<sup>348</sup> his concurring opinion fared little better. After recognizing that none of GoDaddy's forum contacts lacked a sufficient connection to uBID's claim, Justice Manion reached for the most attractive

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<sup>343</sup> *Helicopteros Nacionales de Columbia, S.W. v. Hall*, 466 U.S. 408, 414 (1984).

<sup>344</sup> See *Burger King*, 471 U.S. at 472–73 (plaintiff's claim must arise from or relate to defendant's contacts).

<sup>345</sup> Cf. *GoDaddy II*, 623 F.3d at 431.

<sup>346</sup> *Id.* at 431.

<sup>347</sup> Compare *Helicopteros*, 466 U.S. at 414 (general jurisdiction does not require relationship between contacts and claim), with *Burger King*, 471 U.S. at 472–73 (specific jurisdiction is only proper when claim arises from or relates to defendant's contacts with forum).

<sup>348</sup> *GoDaddy II*, 623 F.3d at 434 (Manion, J., concurring).

analytical framework in cybersquatting disputes—the effects test.<sup>349</sup> The effects test, as discussed earlier in this Comment,<sup>350</sup> sets forth a three pronged test for asserting specific jurisdiction over an intentional tort committed outside of the forum state, being: (1) intentional conduct; (2) expressly aimed at the forum state; and (3) with the defendant’s knowledge that the brunt of the harm will be felt within the forum.<sup>351</sup> Yet, whereas the majority’s application of *Keeton* operated in the twilight zone of intermediate jurisdiction, Justice Manion’s application created a far more troubling precedent—universal jurisdiction.

Justice Manion failed to recognize the unique factual circumstances underlying his chosen jurisdictional framework.<sup>352</sup> Namely, *Calder*’s effects test should not be read as an alternative to the *International Shoe* framework.<sup>353</sup> Rather, the Supreme Court’s opinion in *Calder* carefully outlined the manner in which the defendants expressly aimed their conduct at the forum, as they relied exclusively on California sources to provide damaging information about the plaintiff.<sup>354</sup> In this fashion, the *Calder* defendants reached into the forum to gather the necessary materials for their allegedly libelous article.<sup>355</sup> Moreover, the forum became the focal point for the damaging effects of the article because it dealt solely with the plaintiff’s personal life and career as an entertainer in California.<sup>356</sup>

Conversely, Justice Manion simply reasoned that GoDaddy engaged in a “targeted scheme” to deprive uBID of profits through its alleged acts of cybersquatting.<sup>357</sup> While this allegation speaks to the intentional nature of GoDaddy’s conduct, it fails to illuminate how

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<sup>349</sup> *Id.* at 435.

<sup>350</sup> *See supra* Part I.B.2.

<sup>351</sup> *GoDaddy II*, 623 F.3d at 435 (Manion, J., concurring).

<sup>352</sup> *See Calder v. Jones*, 465 U.S. 783, 789–90 (1984) (detailing the manner in which the defendant’s formed the necessary contacts with the forum state).

<sup>353</sup> *Id.* at 790 (demonstrating that in certain circumstances, the commission of an intentional tort may form the contacts required by *International Shoe*).

<sup>354</sup> *Id.* at 789–90.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

GoDaddy expressly aimed its conduct at the forum state.<sup>358</sup> Rather, the concurrence simply posited that this scheme would affect uBID's bottom line, and thus was aimed at uBID's headquarters in Illinois.<sup>359</sup> This terse statement simply conflates the express aiming prong with the third prong of the effects test—the defendant's knowledge that his conduct will cause the greatest injury to the plaintiff within the forum.<sup>360</sup>

The problem with Justice Manion's reasoning is that it substitutes the one element that creates the defendant's contacts with the forum state—the express aiming component—with the defendant's awareness of the plaintiff's home state.<sup>361</sup> Under this reading of *Calder*, the express aiming requirement becomes a foregone conclusion in cases involving a corporate plaintiff because the location of its corporate headquarters is public information.<sup>362</sup> Similarly, Justice Manion's application of *Calder* obviates the third element of *Calder* whenever the harm is economic in nature, as any impact on the plaintiff's bottom-line will naturally be felt at its corporate headquarters.<sup>363</sup>

This is precisely why Justice Manion's explication of the *Calder* effects test paves the way for universal jurisdiction. Essentially, his opinion collapses the effects test's stringent, tripartite analysis into a single element—the commission of an intentional tort.<sup>364</sup> Under this reasoning, personal jurisdiction is automatically conferred in the plaintiff's home state upon the commission of any intentional tort that causes economic harm.<sup>365</sup> Yet, if the Supreme Court intended to set

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<sup>358</sup> See *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1156 (9th Cir. 2006) (something more is required than mere foreseeability of harmful effect felt within the forum).

<sup>359</sup> *GoDaddy II*, 623 F.3d 421, 435 (7th Cir. 2010) (Manion, J., concurring).

<sup>360</sup> *Id.* at 435.

<sup>361</sup> *Contra Pebble Beach*, 453 F.3d at 1156.

<sup>362</sup> See, e.g., CYBERDRIVE ILLINOIS, <http://www.ilsos.gov/corporatellc/> (last visited 30, 2011) (website that maintains corporate records of corporation certificates in Illinois).

<sup>363</sup> Cf. *GoDaddy II*, 623 F.3d at 427 n.1.

<sup>364</sup> *Id.*

<sup>365</sup> Cf. *id.*

such a low threshold for personal jurisdiction it would have expressly stated as much in *Calder*, thus sparing the time and energy needed to formulate the three-pronged effects test. Clearly, this was not the Court's intent, as this reasoning resolves the personal jurisdictional analysis based on the *plaintiff's* contacts with the forum, rather than the defendants.<sup>366</sup> Naturally, this type of universal jurisdiction finds no support from *International Shoe* and its progeny, which demonstrate that the critical issue is the geographical connection between the defendant and the forum state.<sup>367</sup> The effects test simply provides an alternate means of analyzing *International Shoe's* due process requirements, rather than an alternative to the requirements of due process.

*E. A Proposed Solution: The Need for Nationwide Service of Process under the ACPA*

Ironically, while the reasoning employed by the Seventh Circuit majority and concurrence in *GoDaddy II* undermines the due process requirements of personal jurisdiction, their shared decision to uphold personal jurisdiction over GoDaddy actually furthers the policy rationale that gave rise to the Supreme Court's decision in *International Shoe*.<sup>368</sup> The Court created the *International Shoe* framework as a means of adapting to the modernization of interstate commerce during the first half of the twentieth century.<sup>369</sup> Just as technological advances in travel and communication increased the ease of conducting business across state lines, the *International Shoe* reflected an equitable determination that "the need for jurisdiction

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<sup>366</sup> *Contra* *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (explaining that the plaintiff's relationship with the forum cannot support the exercise of personal jurisdiction).

<sup>367</sup> *Burger King v. Rudzewicz*, 471 U.S. 462, 472–73 (1985).

<sup>368</sup> Specifically, the Court recognized that increased ease of engaging in interstate commerce prompted the need for a flexible means of exerting jurisdiction over nonresident defendants. *Hanson*, 357 U.S. at 250–51.

<sup>369</sup> *Id.*

over nonresidents” warranted a similar increase.<sup>370</sup> As such, while the Seventh Circuit’s decision to uphold personal jurisdiction over GoDaddy may not comply with the letter of *International Shoe*, it certainly complies with the spirit of the Court’s decision.

Clearly, the rise of the Internet has radically transformed the manner in which most business conduct transactions across state lines.<sup>371</sup> Yet, the cybersquatter is uniquely able to derive profits from across state lines without ever creating the forum contacts necessary to support personal jurisdiction therein. She has no need for warehouses, offices, or employees. Instead, she can earn her living without ever having to leave the comfort of her home. If the Internet permits cybersquatters to benefit from their wrongful conduct by deriving profits from across the nation, this privilege should carry with it the associated cost of personal jurisdiction outside of their home state.<sup>372</sup> In particular, the need for a relaxed standard for personal jurisdiction in cybersquatting claims becomes far more urgent when one considers that domain name registrars—such as GoDaddy—may also run afoul of the ACPA.<sup>373</sup>

The Internet has created a unique niche for domain name registrars, allowing these companies to siphon billions of dollars from a worldwide market<sup>374</sup> without the need to establish brick-and-mortar offices outside of their corporate headquarters.<sup>375</sup> For instance, GoDaddy is an industry leader in domain name registration.<sup>376</sup> Its

<sup>370</sup> *Id.*

<sup>371</sup> Tavakoli & Yohannan, *supra* note 3, at 3.

<sup>372</sup> *Cf. Hanson*, 357 U.S. at 250–51.

<sup>373</sup> *See generally GoDaddy II*, 623 F.3d 421 (7th Cir. 2010). The case that forms the backdrop of this Comment arose from a cybersquatting claim filed against the domain name registrar, rather than the registrants themselves.

<sup>374</sup> *The Digital 100: The World’s Most Valuable Startups*, BUSINESS INSIDER, Sept. 23, 2010, <http://www.businessinsider.com/digital-100?op=1>. [hereinafter *The Digital 100*].

<sup>375</sup> *Id.* at 424 (noting that GoDaddy has almost no physical presence outside of its home state of Arizona).

<sup>376</sup> *See* GODADDY, <http://www.godaddy.com/> (last visited March 15, 2011); *see also GoDaddy’s BlackBoard*, BUSINESS INSIDER, June 10, 2010, <http://www.businessinsider.com/blackboard/godaddy>. The company proudly proclaims itself to be the largest domain name provider in the world. *Id.*

business presence does not merely extend throughout the country; it extends across the globe.<sup>377</sup> At the time *GoDaddy II* was decided, the company had an estimated value of more than a billion dollars.<sup>378</sup> Industry analysts projected that the company's profits would grow from approximately eight hundred million to more than one billion dollars in 2011.<sup>379</sup>

Due to its unique business model, GoDaddy has accomplished this feat without the need to establish any additional premises outside its home state of Arizona.<sup>380</sup> While the *International Shoe* rubric for personal jurisdiction may prevent plaintiffs from bringing cybersquatting claims against GoDaddy outside of its home state, the equitable considerations underlying *International Shoe* seem to demand a different result.<sup>381</sup>

This Comment suggests that Congress—rather than the federal judiciary—holds the key to resolving the conflict between the personal jurisdiction framework of *International Shoe* and cybersquatting complaints filed under the ACPA. With just a stroke of the pen, Congress can amend the ACPA to provide for nationwide service of process.<sup>382</sup> Such an amendment would free the federal judiciary from relying on the *International Shoe* framework to uphold personal jurisdiction over cybersquatting complaints.<sup>383</sup>

Some critics may contend that this measure is inappropriate, given that plaintiffs may file a complaint under the ACPA in the state court.<sup>384</sup> While this is certainly true, both economic and practical considerations undermine this rationale. Specifically, a state court

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<sup>377</sup> *Id.*

<sup>378</sup> *The Digital 100*, *supra* note 374.

<sup>379</sup> *Id.*

<sup>380</sup> *GoDaddy II*, 623 F.3d 421, 424 (7th Cir. 2010).

<sup>381</sup> *Cf. Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958).

<sup>382</sup> WRIGHT & MILLER, *supra* note 154.

<sup>383</sup> *Id.*

<sup>384</sup> The ACPA is part of the Lanham Act, which does not provide federal courts with exclusive jurisdiction over trademark claims. *See* 28 U.S. § 1338 (2006) (federal courts have original jurisdiction over trademark claims, but not exclusive jurisdiction). As a result, a plaintiff may bring a claim under the ACPA in state court. *See id.*

must comply with the requirements of *International Shoe*'s framework for personal jurisdiction.<sup>385</sup> This renders it highly unlikely that a plaintiff would expend both the time and money needed to file a cybersquatting complaint in state court only to risk having the complaint dismissed for lack of personal jurisdiction.<sup>386</sup> Apart from the economic interests of the plaintiff, a provision for nationwide service of process under the ACPA would also protect the liberty interests of the defendant to the same extent as the *International Shoe* rubric for personal jurisdiction.

The geographic nexus requirement of *International Shoe* ensures that the defendant can reasonably anticipate that her intentional conduct will subject her to personal jurisdiction within the forum.<sup>387</sup> Yet, the absence of this requirement may not prevent a federal court from upholding cybersquatting complaints filed under the ACPA—as demonstrated by the Seventh Circuit's opinion in *GoDaddy II*. Conversely, a provision that allows for nationwide service of process under the ACPA will resolve this issue by bringing the requirement of reasonable anticipation back into the equation. Specifically, this provision would provide individuals with constructive notice that their chosen domain name may require them to defend their actions in the federal courts of any given state.<sup>388</sup> Naturally, individuals can avoid this undesirable result by first determining whether their chosen domain name infringes upon another entity's previously registered trademark.<sup>389</sup> As such, a provision that allows for nationwide service of process would actually further the interests of due process by "giv[ing] a degree of predictability to the legal system that allows

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<sup>385</sup> *GoDaddy II*, 623 F.3d at 425.

<sup>386</sup> *GoDaddy I*, 637 F. Supp. 2d 621, 630 (N.D.Ill. 2009) *rev'd* 623 F.3d (7th Cir. 2010) (dismissing claim for lack of personal jurisdiction).

<sup>387</sup> *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985); *accord* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 218, (1977) (Stevens, J., concurring).

<sup>388</sup> *Cf. Burger King*, 471 U.S. at 472.

<sup>389</sup> For instance, one can perform a free search through a database of registered trademarks. UNITED STATES PATENT AND TRADEMARK OFFICE, *Trademark Electronic Search System*, <http://www.uspto.gov/trademarks/index.jsp> (last visited April 2, 2011).

potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>390</sup>

While some may argue that the economic interests of the defendant may outweigh the degree of predictability provided by nationwide service of process under the ACPA, the Federal Rules of Civil Procedure provide a sufficient means of addressing these concerns.<sup>391</sup> Specifically, the defendant can avoid the costs of litigating in a distant forum by filing a motion to transfer the case to another venue.<sup>392</sup> Alternatively, the *GoDaddy II* opinion demonstrates that these litigation costs already exist *without* a provision for nationwide service of process. The equitable considerations that promoted the Seventh Circuit’s decision will likely provide similar outcomes in future cybersquatting suits. Moreover, the precedent set by these decisions may begin to impact jurisdictional inquiries in other areas of law, undermining the element of predictability that the *International Shoe* framework seeks to provide.<sup>393</sup>

A congressional amendment that provides for nationwide service of process would bring an end to the jurisdictional nightmare created by cybersquatting. This solution would allow the federal judiciary to adhere to the policy considerations that gave rise to the *International Shoe* framework—without undermining its requirements in the process.

## CONCLUSION

As Chief Justice Warren once warned, the rapid technological shifts that ease the restrictions on interstate commerce must not lay waste to the traditional limitations on personal jurisdiction.<sup>394</sup> In its effort to abide by Justice Warren’s mandate, the Seventh Circuit’s opinion in *GoDaddy II* cast aside the same due process considerations

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<sup>390</sup> *World Wide Volkswagen*, 444 U.S. at 297.

<sup>391</sup> See 28 U.S.C. § 1404 (Change of Venue).

<sup>392</sup> *Id.*

<sup>393</sup> *World Wide Volkswagen*, 444 U.S. at 297.

<sup>394</sup> *Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958).

which they struggled to preserve. The fractured reasoning employed by both the court majority and concurrence each demonstrate how cybersquatting has outgrown the limitations of *International Shoe*. The key to resolving this disjunction, however, lies with Congress, rather than the courts. As the ACPA provides targeted means of combating the problems created by cybersquatters, it should naturally provide a targeted means of subjecting these individuals to personal jurisdiction outside of their home state. Therefore, Congress must step in to resolve this jurisdictional quagmire by amending the ACPA to provide for nationwide service of process. Such an amendment would allow the federal judiciary to comply with the due process considerations embodied in *International Shoe*—without eviscerating its requirements in the process.