

Jurisdiction & the Internet

From Allan Ides, Civil Procedure: Cases & Problems (forthcoming edition)

Revell v. Lidov

317 F.3d 467 (5th Cir. 2002)

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Oliver "Buck" Revell sued Hart G.W. Lidov and Columbia University for defamation arising out of Lidov's authorship of an article that he posted on an internet bulletin board hosted by Columbia. The district court dismissed Revell's claims for lack of personal jurisdiction over both Lidov and Columbia. We affirm.

I

Hart G.W. Lidov, an Assistant Professor of Pathology and Neurology at the Harvard Medical School and Children's Hospital, wrote a lengthy article on the subject of the terrorist bombing of Pan Am Flight 103, which exploded over Lockerbie, Scotland in 1988. The article alleges that a broad politically motivated conspiracy among senior members of the Reagan Administration lay behind their willful failure to stop the bombing despite clear advance warnings. Further, Lidov charged that the government proceeded to cover up its receipt of advance warning and repeatedly misled the public about the facts. Specifically, the article singles out Oliver "Buck" Revell, then Associate Deputy Director of the FBI, for severe criticism, accusing him of complicity in the conspiracy and cover-up. The article further charges that Revell, knowing about the imminent terrorist attack, made certain his son, previously booked on Pan Am 103, took a different flight. At the time he wrote the article, Lidov had never been to Texas, except possibly to change planes, or conducted business there, and was apparently unaware that Revell then resided in Texas.

Lidov has also never been a student or faculty member of Columbia University, but he posted his article on a website maintained by its School of Journalism. In a bulletin board section of the website, users could post their own works and read the works of others. As a result, the article could be viewed by members of the public over the internet.

Revell, a resident of Texas, sued the Board of Trustees of Columbia University, whose principal offices are in New York City, and Lidov, who is a Massachusetts resident, in the Northern District of Texas. Revell claimed damage to his professional reputation in Texas and emotional distress arising out of the alleged defamation of the defendants, and sought several million dollars in damages. Both defendants moved to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). The district court granted the defendants' motions, and Revell now appeals.

II-A

Our question is whether the district court could properly exercise personal jurisdiction over Hart Lidov and Columbia University, an issue of law we review *de novo*. The plaintiff bears the burden of establishing jurisdiction, but need only present *prima facie* evidence. We must accept the plaintiff's "uncontroverted allegations, and resolve in [his] favor all conflicts between the facts contained in the parties' affidavits and other documentation." In considering a motion to dismiss for lack of personal jurisdiction a district court may consider "affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery."

A federal district court sitting in diversity may exercise personal jurisdiction over a foreign defendant if (1) the long-arm statute of the forum state creates personal jurisdiction over the defendant; and (2) the exercise of personal jurisdiction is consistent with the due process guarantees of the United States Constitution. Because Texas's long-arm statute reaches to the constitutional limits, we ask, therefore, if exercising personal jurisdiction over Lidov and Columbia would offend due process....

B

Answering the question of personal jurisdiction in this case brings these settled and familiar formulations to a new mode of communication across state lines. Revell first urges that the district court may assert general jurisdiction over Columbia because its website provides internet users the opportunity to subscribe to the *Columbia Journalism Review*, purchase advertising on the website or in the journal, and submit electronic applications for admission.

This circuit has drawn upon the approach of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, [952 F. Supp. 1119 (W.D. Pa. 1997)], in determining whether the operation of an internet site can support the minimum contacts necessary for the exercise of personal jurisdiction. *Zippo* used a "sliding scale" to measure an internet site's connections to a forum state. A "passive" website, one that merely allows the owner to post information on the internet, is at one end of the scale. It will not be sufficient to establish personal jurisdiction. At the other end are sites whose owners engage in repeated online contacts with forum residents over the internet, and in these cases personal jurisdiction may be proper. In between are those sites with some interactive elements, through which a site allows for bilateral information exchange with its visitors. Here, we find more familiar terrain, requiring that we examine the extent of the interactivity and nature of the forum contacts....

[T]he question of general jurisdiction is not difficult here. Though the maintenance of a website is, in a sense, a continuous presence everywhere in the world, the cited contacts of Columbia with Texas are not in any way "substantial." ...

C

Turning to the issue of specific jurisdiction, the question is whether Revell has made out his *prima facie* case with respect to the defendants' contacts with Texas....

Revell urges that, given the uniqueness of defamation claims and their inherent ability to inflict injury in far-flung jurisdictions, we should abandon the imagery of *Zippo*. It is a bold but ultimately unpersuasive argument. Defamation has its unique features, but shares relevant characteristics with various business torts. Nor is the *Zippo* scale...in tension with the "effects" test of *Calder v. Jones* for intentional torts, which we address in Part II.D.

For specific jurisdiction we look only to the contact out of which the cause of action arises—in this case the maintenance of the internet bulletin board. Since this defamation action does not arise out of the solicitation of subscriptions or applications by Columbia, those portions of the website need not be considered.

The district court concluded that the bulletin board was "*Zippo*-passive" and therefore could not create specific jurisdiction. The defendants insist that Columbia's bulletin board is indistinguishable from the website in [*Mink v. AAAA Development LLC*, 190 F.3d 333 (5th Cir. 1999)]. In that case, we found the website would not support a finding of minimum contacts because it only solicited customers, provided a toll-free number to call, and an e-mail address. It did not allow visitors to place orders online. But in this case, any user of the internet can post material to the bulletin board. This means that individuals *send* information to be posted, and *receive* information that others have posted. In *Mink* and *Zippo*, a visitor was limited to expressing an interest in a commercial product. Here the visitor may participate in an open forum hosted by the website. Columbia's bulletin board is thus interactive, and we must evaluate the extent of this interactivity as well as Revell's arguments with respect to *Calder*.

D-1

In *Calder*, an editor and a writer for the *National Enquirer*, both residents of Florida, were sued in California for libel arising out of an article published in the *Enquirer* about Shirley Jones, an actress. The Supreme Court upheld the exercise of personal jurisdiction over the two defendants because they had "expressly aimed" their conduct towards California...The Court also relied upon the fact that the *Enquirer* had its largest circulation—over 600,000 copies—in California, indicating that the defendants knew the harm of their allegedly tortious activity would be felt there.

Revell urges that, measured by the "effects" test of *Calder*, he has presented his *prima facie* case for the defendants' minimum contacts with Texas. At the outset we emphasize that the "effects" test is but one facet of the ordinary minimum contacts analysis, to be considered as part of the full range of the defendant's contacts with the forum.

We find several distinctions between this case and *Calder*—insurmountable hurdles to the exercise of personal jurisdiction by Texas courts. First, the article written by Lidov about Revell contains no reference to Texas, nor does it refer to the Texas activities of Revell, and it was not directed at Texas readers as distinguished from readers in other states. Texas was not the focal point of the article or the harm suffered, unlike *Calder*, in which the article contained descriptions of the California activities of the plaintiff, drew upon California sources, and found its largest audience in California. This conclusion fits well with our decisions in other intentional tort cases where the plaintiff relied upon *Calder*. In those cases we stated that the plaintiff's residence in the forum, and suffering of harm there, will not alone support jurisdiction under *Calder*.⁴¹ We also find instructive the defamation decisions of the Sixth, Third, and Fourth Circuits in *Reynolds v. International Amateur Athletic Federation*, [23 F.3d 1110 (6th Cir. 1994)], *Remick v. Manfredy*, [238 F.3d 248 (3d Cir. 2001)], and *Young v. New Haven Advocate*, [315 F.3d 256, 258 (4th Cir. 2002)], respectively.

In *Reynolds* a London-based association published a press release regarding the plaintiff's disqualification from international track competition for two years following his failure of a drug test. The plaintiff, an Ohio resident, claimed that the alleged defamation had cost him endorsement contracts in Ohio and cited *Calder* in support of his argument that personal jurisdiction over the defendant in Ohio was proper. The court found *Calder* inapposite because, *inter alia*, the allegedly defamatory press release dealt with the plaintiff's activities in Monaco, not Ohio; the source of the report was a urine sample taken in Monaco and analyzed in Paris; and the "focal point" of the release was not Ohio.⁴⁷ We agree with the *Reynolds* court that the sources relied upon and activities described in an allegedly defamatory publication should in some way connect with the forum if *Calder* is to be invoked.⁴⁸ Lidov's article, insofar as it relates to Revell, deals exclusively with his actions as Associate Deputy Director of the FBI—just as the offending press release in *Reynolds* dealt only with a failed drug test in Monaco. It signifies that there is no reference to Texas in the article or any reliance on Texas sources. These facts weigh heavily against finding the requisite minimum contacts in this case.

⁴¹ See *Panda Brandywine [Corp. v. Potomac Elec. Power Co.]*, 253 F.3d 865, 870 (5th Cir. 2001)] ("If we were to accept Appellants' arguments, a nonresident defendant would be subject to jurisdiction in Texas for an intentional tort simply because the plaintiff's complaint alleged injury in Texas to Texas residents regardless of the defendant's contacts....")....*But see Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (finding personal jurisdiction over a California business proper under *Calder* on the basis that the defendant's alleged threatening of one of the plaintiff's customers in New Jersey injured the plaintiff, an Illinois business, in Illinois); *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 263-65 (3d Cir.1998) (recognizing circuit split between *Janmark* and views of the First, Fourth, Fifth, Eighth, Ninth and Tenth Circuits and adopting the majority view)....

⁴⁷ The court also cited two distinctions arguably not present in this case: that the plaintiff's professional reputation was not centered in Ohio, and that the defendant did not itself publish or circulate the report in Ohio. *Id.* However, the defendant in *Reynolds* clearly knew that the plaintiff was an Ohio resident, unlike Lidov. See Part II.D.3.

⁴⁸ The Tenth Circuit has suggested that this is not a requirement of *Calder*. In *Burt v. Board of Regents of University of Nebraska*, 757 F.2d 242 (10th Cir. 1985), *vacated as moot, Connolly v. Burt*, 475 U.S. 1063 (1986), the court upheld the application of *Calder* to support personal jurisdiction in Colorado where a University of Nebraska doctor had written unflattering and allegedly defamatory letters about the plaintiff in response to requests from Colorado hospitals, despite the fact that the content of the letters focused on the plaintiff's activities in Nebraska, not Colorado. *Id.* at 244-45. We find more persuasive the view of Judge Seth, who remarked, in dissent, that this represented "but half a *Calder*," which requires both the harm to be felt in the forum *and* that the forum be the focal point of the publication. *Id.* at 245-47 (Seth, J., dissenting).

In *Remick* the plaintiff, a Pennsylvania lawyer, sued several individuals for defamation arising out of two letters sent to the plaintiff in Pennsylvania containing oblique charges of incompetence and accusations that the plaintiff was engaged in extortion of the defendants. The letters concerned the termination of the plaintiff's representation of one of the defendants, a professional boxer. One of the two letters was read by individuals other than the plaintiff when it was faxed to the plaintiff's Philadelphia office. The court held, however, that since there was nothing in the letter to indicate that it was targeted at Pennsylvania residents other than the plaintiff, personal jurisdiction could not be obtained under *Calder*. Furthermore, the court noted that allegations that the charges in the letter had been distributed throughout the "boxing community" were insufficient, because there was no assertion that Pennsylvania had a "unique relationship with the boxing industry, as distinguished from the relationship in *Calder* between California and the motion picture industry, with which the *Calder* plaintiff was associated."

Similarly, in *Young v. New Haven Advocate*, two newspapers in Connecticut posted on the internet articles about the housing of Connecticut prisoners in Virginia that allegedly defamed a Virginia prison warden. The Fourth Circuit held that Virginia could not exercise personal jurisdiction over the Connecticut defendants because "they did not manifest an intent to aim their websites or the posted articles at a Virginia audience." [I]t reasoned that "application of *Calder* in the Internet context requires proof that the out-of-state defendant's Internet activity is expressly directed at or directed to the forum state." [*Young*, 315 F.3d at 262.] It observed that more than simply making the news article accessible to Virginians by defendants' posting of the article on their internet sites was needed for assertion of jurisdiction: "The newspapers must, through the Internet postings, manifest an intent to *target* and *focus* on Virginia readers." [*Id.*]

As with *Remick* and *Young*, the post to the bulletin board here was presumably directed at the entire world, or perhaps just concerned U.S. citizens. But certainly it was not directed specifically at Texas, which has no especial relationship to the Pan Am 103 incident. Furthermore, here there is nothing to compare to the targeting of California readers represented by approximately 600,000 copies of the *Enquirer* the *Calder* defendants knew would be distributed in California, the *Enquirer's* largest market.

3

As these cases aptly demonstrate, one cannot purposefully avail oneself of "some forum someplace"; rather, as the Supreme Court has stated, due process requires that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." [*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).] Lidov's affidavit, uncontroverted by the record, states that he did not even know that Revell was a resident of Texas when he posted his article. Knowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm forms an essential part of the *Calder* test. The defendant must be chargeable with knowledge of the forum at which his conduct is directed in order to reasonably anticipate being haled into court in that forum, as *Calder* itself and numerous cases from other circuits applying *Calder* confirm.⁶³ Demanding knowledge of a particular forum to which conduct is directed, in defamation cases, is not altogether distinct from the requirement that the forum be the focal point of the tortious activity because satisfaction of the latter will oftentimes provide sufficient evidence of the former.

Lidov must have known that the harm of the article would hit home wherever Revell resided. But that is the case with virtually any defamation. A more direct aim is required than we have here. In short, this was not about Texas. If the article had a geographic focus it was Washington, D.C.

III

⁶³ See, e.g., *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (stating that *Calder* requires that "the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant *knows to be a resident of the forum state*" (emphasis added)); *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 266 (3d Cir. 1998) ("[T]he plaintiff must show that the defendant *knew* that the plaintiff would suffer the brunt of the harm caused by the tortious conduct *in the forum*, and point to specific activity indicating that the defendant expressly aimed its tortious conduct *at the forum*." (emphasis added)).

Our ultimate inquiry is rooted in the limits imposed on states by the Due Process Clause of the Fourteenth Amendment. It is fairness judged by the reasonableness of Texas exercising its power over residents of Massachusetts and New York. This inquiry into fairness captures the reasonableness of hauling a defendant from his home state before the court of a sister state; in the main a pragmatic account of reasonable expectations—if you are going to pick a fight in Texas, it is reasonable to expect that it be settled there. It is not fairness calibrated by the likelihood of success on the merits or relative fault. Rather, we look to the geographic focus of the article, not the bite of the defamation, the blackness of the calumny, or who provoked the fight....

...Revell asks that we remand for further discovery, but given the uncontroverted facts of the operation of Columbia's website, and lack of purposeful availment, we decline to do so.

IV

In sum, Revell has failed to make out a *prima facie* case of personal jurisdiction over either defendant. General jurisdiction cannot be obtained over Columbia. Considering both the "effects" test of *Calder* and the low-level of interactivity of the internet bulletin board, we find the contacts with Texas insufficient to establish the jurisdiction of its courts, and hence the federal district court in Texas, over Columbia and Lidov. We AFFIRM the dismissal for lack of personal jurisdiction as to both defendants.

NOTES AND QUESTIONS

1. *The special problem of the Internet.* Courts have had to adapt their approach to personal jurisdiction – and particularly purposeful availment – in settings where a defendant's contacts with the forum occur via the Internet. As one court explained, "If we were to conclude as a general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State." *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003). In order "[t]o avoid this untenable result," courts have had "to adapt the analysis of personal jurisdiction to this unique circumstance by placing emphasis on the internet user or site *intentionally directing* [their] activity or operation *at* the forum state rather than just having the activity or operation accessible there." *Shrader v. Biddinger*, 633 F.3d 1235, 1240 (10th Cir. 2011).

2. *Types of websites.* In determining whether the operation of a site on the World Wide Web will suffice to constitute purposeful availment with the forum state, the *Revell* court, in part II-B of its opinion, adopted the sliding-scale approach suggested in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). *Zippo* divided websites into three categories, based on the nature of the interaction involved.

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id. at 1124. Did the parties in *Revell* agree that *Zippo* should apply? Did they agree as to which *Zippo* category defendant's website fell? In which category did the court ultimately place it?

Many courts have adopted a *Zippo*-type approach as part of their analysis in deciding whether operation of a website will satisfy minimum contacts. *See, e.g., Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 251-252 (2d Cir. 2007); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003); *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, *supra*, 293 F.3d at 713-714 (4th Cir. 2002); *Neogen Corp.*

v. Neo Gen Screening, Inc., 282 F.3d 883, 890 (6th Cir. 2002); *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1296-1297 (10th Cir. 1999); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417-419 (9th Cir. 1997); *Snowney v. Harrah's Entertainment, Inc.*, 35 Cal. 4th 1054, 112 P.2d 28, 29 Cal. Rptr. 3d 33 (2005).

Yet as *Revell* made clear—clearer perhaps than did the court in *Zippo*—there is nothing magical about how a website is categorized. Even when a site falls into *Zippo*'s most interactive category, the case is still only one in which "personal jurisdiction *may* be proper," depending on how the rest of the minimum contacts analysis proceeds. *Revell*, 317 F.3d at 470 (emphasis added). Moreover, where a website falls into *Zippo*'s passive category, it is still possible that defendant has other contacts with the forum which, when combined with the website, may suffice to allow for the exercise of jurisdiction. As the Second Circuit noted, "[w]hile analyzing a defendant's conduct under the *Zippo* sliding scale of interactivity may help frame the jurisdictional inquiry...it does not amount to a separate framework for analyzing internet-based jurisdiction. Instead, traditional statutory and constitutional principles remain the touchstone of the inquiry." *Best Van Lines, Inc.*, *supra*, 490 F.3d at 252. *And see Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154, 1160-1161 (W.D. Wis. 2004) (a "rigid adherence to the *Zippo* test is likely to lead to erroneous results" if employed "as a substitute for minimum contacts"). In short, categorizing a website under *Zippo* should be only the beginning rather than the end of the minimum contacts analysis.

3. *The effects test and the Internet.* Once the court in *Revell* determined what type of website was involved, it then applied *Calder*'s "effects test" to decide whether defendants had purposeful availment with Texas. In doing so, the court drew upon an array of federal court decisions that, like the Third Circuit's decision in *IMO Industries, Inc. v. Kiekert AG*, have sought to narrow the effects test to keep it from having unduly sweeping consequences. While *Revell* did not expressly adopt the Third Circuit's three-step analysis for invoking the "effects test," it did address each of those steps. Which of them were not satisfied here?

Other federal courts have likewise sought to refine *Calder*'s application in the Internet setting. One of the cases *Revell* cited was *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, *supra*. There, the Fourth Circuit blended *Zippo* and *Calder* to create an "effects test" that is specifically designed for the Internet context. Under the Fourth Circuit's approach, a court

may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging [in] business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in courts located in the State.

293 F.3d at 714. Pursuant to this test, a defendant whose Internet activity does not fall into *Zippo*'s first category because it did not involve both a contract and repeated Internet dealings with the forum, might still be subject to jurisdiction if the Internet activity was directed to the forum state with the intent to engage in business or other activity there. The Fourth Circuit's approach thus helps to clarify how Internet cases falling into *Zippo*'s "middle ground" should be treated. The Third Circuit adopted a similar analysis for "middle ground" interactive websites, holding that "there must be evidence that the defendant 'purposefully availed' itself of conducting activity in the forum state, by directly targeting its website to the state, knowingly interacting with residents of the forum state via its website, or through sufficient other related contacts." *Toys "R" Us, Inc. v. Step Two, S.A.*, *supra*, 318 F.3d at 454. The Eighth Circuit has endorsed an even narrower version of *Calder* in the Internet setting, ruling that even if a defendant posts defamatory statements on an arguably middle-ground website and intentionally targets plaintiff in the forum state knowing plaintiff will feel the brunt of the injury there, "absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction." *Johnson v. Arden*, 614 F.3d 785,

795-797 (8th Cir. 2010). While lower courts thus continue to struggle with how *Calder* should be applied in the Internet setting, much of the uncertainty that clouded the purposeful availment question in "middle ground" cases has been resolved.

4. *Other bases for purposeful availment with websites.* We have been looking at when operation of a website may establish purposeful availment using the "effects test." A defendant's operation of a website (and *Zippo's* classification of websites) may also be relevant in connection with other bases for finding purposeful availment. For example, Problem 2-9, involved a defendant who fell into *Zippo's* first category by having entered into a contract with a user of its Internet site. In such instances, purposeful availment might be found based on a contractual relationship, as was true in the *McGee v. International Life Ins. Co.* and *Burger King v. Rudzewicz* cases that we read earlier. As another example, Problem 2-12, involving an interactive website that fell into *Zippo's* middle ground, was a case that triggered the "stream of commerce" theory of purposeful availment. In short, when a defendant's forum contacts involve use of the Internet, don't assume that the "effects test" is the only possible way to establish purposeful availment.

5. *Case-specific purposeful availment.* As we come to the end of this section on purposeful availment, it is useful to recall what we said at the outset—that the "four categories" of cases we have been looking at where purposeful availment is often found to exist "are by no means exclusive."¹ There may be times when unique circumstances will satisfy purposeful availment even though the case doesn't fit neatly into or satisfy any one of the usual categories. In the website context, for example, "[i]n deciding whether it can exercise jurisdiction over a cause of action arising from a defendant's operation of a web site, a court may consider the defendant's related non-Internet activities as part of the "purposeful availment" calculus." *Toys "R" Us, Inc, supra*, at 453. A good example of this is *Tech Heads, Inc. v. Desktop Service Center, Inc.*, 105 F. Supp. 2d 1142 (D. Ore. 2000), a patent infringement action. There, an Oregon federal court upheld jurisdiction over a Virginia defendant whose contacts with the forum consisted of operating an interactive website that fell into *Zippo's* "middle ground," hiring an Oregon citizen to work for defendant in Virginia, and employing nationwide newspaper advertising. The court agreed that the website alone did not establish purposeful availment under the "effects test," for the defendant had not used the site to direct any activities at Oregon knowing they would harm plaintiff there. But when the defendant's other Oregon contacts—its having signed an employment contract with an Oregon citizen, and its use of nationwide advertising that reached Oregon—were added to the mix, these contacts together sufficed to establish purposeful availment with Oregon. The case is a healthy reminder not to become rigidly attached to the standard modes of addressing purposeful availment. Though the *Tech Heads* defendant didn't meet any of the standard tests for satisfying this requirement, when the court stepped back and took all of defendant's forum-related contacts into account, it was willing to find purposeful availment. In applying the minimum contacts analysis, be open to new arguments that, though perhaps unique to the facts of the case, are nonetheless consistent with the underlying jurisdictional principles involved.

¹ Most cases in which purposeful availment is found to exist fall into one of four categories. The first involves situations where a defendant or its employees entered the state and conducted activity there. *Hess v. Pawloski* (driving in the state) and *International Shoe* (employing salespeople in the state) were of this type. The second category embraces defendants who enter into contractual relationships with forum residents (e.g., a suit against an insurance company that refused to pay the proceeds of an insurance policy issued to a resident of the forum state). The third category covers defendants whose products enter the forum through the ordinary "stream of commerce" (e.g., a products liability suit against the out-of-state manufacturer of a lawn mower purchased in the state). The final category involves defendants whose out-of-state conduct caused an injurious "effect" in the forum state (e.g., a defamation action by a forum resident against the author of a magazine article that libeled the plaintiff). While these categories are by no means exclusive, they offer a helpful starting point in approaching purposeful availment.

PROBLEMS

2-18. Panavision, a California-based company that produces motion picture camera equipment, holds registered trademarks to the names "Panavision" and "Panaflex." In 1995, it sought to register an Internet website with the domain name Panavision.com, only to find that a website using the Panavision trademark had already been established by Dennis, who lives in Illinois. Dennis' Panavision website displayed photos of the City of Pana, Illinois. When Panavision's attorney sent Dennis a letter advising him to cease using Panavision's trademark and the domain name Panavision.com, Dennis wrote to Panavision in California, stating that he had the right to use the name and suggesting that the company buy the name from him for \$13,000, rather than "fund[ing] your attorney's purchase of a new boat." When Panavision refused, Dennis then registered Panavision's other trademark as the domain name Panaflex.com. Thereafter, Panavision sued Dennis in a California federal district court. Dennis has moved to dismiss under Rule 12(b)(2). How should the court rule on his motion?

2-19. Pebble Beach is a well-known golf course and resort located in California. Pebble Beach contends that its trade name has acquired secondary meaning in the United States and the United Kingdom. Caddy, a resident of the United Kingdom, occupies and runs a three-room bed and breakfast, restaurant, and bar located on a cliff overlooking the pebbly beaches of England's south shore, in a town called Barton-on-Sea. The name of Caddy's operation is "Pebble Beach," which, given its location, is no surprise. Caddy advertises his services, which do not include a golf course, at his website, *www.pebblebeach-uk.com*. Caddy's website includes general information about the accommodations he provides, including lodging rates in pounds sterling, a menu, and a wine list. Visitors to the website who have questions about Caddy's services may fill out an online inquiry form. However, the website does not have a reservation system, nor does it allow potential guests to book rooms or pay for services online. Pebble Beach sued Caddy in a United States District Court sitting in California for intentional infringement and dilution of its "Pebble Beach" trademark. Caddy has filed a motion to dismiss for lack of personal jurisdiction. Assuming there is no applicable federal long-arm provision, how should the federal court rule on Caddy's motion?

2-20. Stephen is a psychiatrist who lives in Pennsylvania. An internationally known expert on consumer health issues, he operates a website called Quackwatch to disseminate his views. The Quackwatch website sponsors a health fraud discussion group with 300 users around the country, including Darlene, a resident of Oregon. Darlene disagrees with Stephen's views on water fluoridation. Stephen sued her in a Pennsylvania court, alleging that Darlene defamed him both in messages posted online for various discussion groups and in messages appearing on two passive, noncommercial websites that she maintains. The messages attacked Stephen in his capacity as a health advocate. Darlene has moved to dismiss the suit for lack of jurisdiction. How should the court rule?

Would your analysis be any different if Darlene knew that Stephen lived in Pennsylvania and if the defamatory messages, which were intended to harm Stephen's personal and professional reputations, accused him of sexually molesting his patients?