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Defamation in the Internet Age: Missouri's Jurisdictional Fight Begins with Baldwin v. Fischer-Smith

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DEFAMATION IN THE INTERNET AGE: MISSOURI'S JURISDICTIONAL FIGHT BEGINS WITH *BALDWIN v. FISCHER-SMITH*

INTRODUCTION

"The Internet is becoming the town square for the global village of tomorrow."

– Bill Gates, 1999.[1]

For centuries, determining jurisdiction in defamation cases was easy because defamatory comments made in a village town square would be settled in the courts of that village.[2] In the twentieth century, the introduction of radio and television and the nationalization of print media brought additional jurisdictional concerns to defamation cases as this new technology allowed easy communication across jurisdictional lines.[3] Now, with the expansion of the Internet, worldwide communication is available to anyone with a computer and an Internet connection.[4] Unfortunately, many bloggers and other Internet content providers fail to realize that "[w]hat you type today can haunt you tomorrow."[5]

While Internet users may view cyberspace as a new province independent of real-world concerns, the impact of Internet activity is felt in the real world and thus the resolution of Internet defamation cases must occur in a real-world jurisdiction.[6] The Internet has created a global village where information can

1. IQUOTE: BRILLIANCE AND BANTER FROM THE INTERNET AGE 6 (David L. Green ed., 2008).

2. While records from early antiquity are scarce, libel and slander have existed as causes of action for at least 2500 years. Roscoe J. C. Dorsey, *Roman Sources of Some English Principles of Equity and Common Law Rules*, 8 AM. L. SCH. REV. 1233, 1241 (1938). Under the laws of the Roman Republic, "[w]hen anyone publicly abuses another in a loud voice, or writes a poem for the purpose of insulting him, or rendering him infamous, he shall be beaten with a rod until he dies." *The Twelve Tables*, *in* 1 THE CIVIL LAW 70 (S.P. Scott, trans., 1932).

3. *See, e.g.*, Kelly v. Hoffman, 61 A.2d 143, 143, 145 (N.J. 1948).

4. MATTHEW COLLINS, THE LAW OF DEFAMATION AND THE INTERNET ¶ 26.03 (3d ed. 2010).

5. Kathleen Parker, *Defusing the Google Bomb*, ST. LOUIS POST-DISPATCH, Aug. 28, 2009, at A13.

6. ROLF H. WEBER, SHAPING INTERNET GOVERNANCE: REGULATORY CHALLENGES 3–4 (2010). While most, if not all, Internet defamation cases have been Internet libel cases, this Note will explore defamation, in general, on the Internet. The Internet is no longer restricted to written content, and websites such as YouTube make video-based defamation readily accessible.

travel quickly around the world, but our court system is still bound by traditional geographic boundaries.[7] When both the plaintiff and the defendant are residents of the same real-world jurisdiction, selection of a proper court is generally an easy process.[8] But when an out-of-state defendant has no contacts with a state other than his Internet activity, disagreement over jurisdiction is sure to follow.[9]

Missouri had its first chance to consider jurisdiction in an Internet defamation case when the Court of Appeals for the Southern District decided *Baldwin v. Fischer-Smith*.[10] Defendants Karen Fischer-Smith of Arizona and Patricia Hall of Pennsylvania created the website stop-whisperinglane.com, which accused a Missouri dog breeder of being a "puppy mill" and called Missouri the "puppy mill capital of the world."[11] In deciding that the defendants' website established the minimum contacts required for jurisdiction in Missouri to be appropriate, the court warned, "[I]f you pick a fight in Missouri, you can reasonably expect to settle it here."[12] The court used a test from the 1985 case of *Calder v. Jones*, now known as the *Calder* effects test, to conclude that the defendants expressly aimed their tortious activity toward

Missouri has recognized that defamation over a broadcast or in electronic communication, whether spoken or written, is classified as libel. *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 313 (Mo. 1993). Missouri courts have not addressed, however, if "electronic communication" includes online videos or podcasts. In fact, courts worldwide have varied views on radio defamation. Some courts would consider a YouTube video slander because the defamatory words reach the ear, others would consider it libel because of the visibility and wide dissemination of such a transmission, and yet other courts take a middle position. *See* JOHN G. FLEMING, THE LAW OF TORTS 604 (9th ed. 1998). Therefore, because Missouri statutes speak of libel and slander interchangeably and the issues are the same regardless of classification, this discussion will focus on defamation in general. *See* MO. REV. STAT. § 509.210 (2000).

7. However, those geographic boundaries are not as solid in some countries. See *infra* Part II.F for a discussion of jurisdictional choice in the United Kingdom and Australia.

8. A good example in Missouri is the "MySpace trial" where teen Megan Meier committed suicide after neighbor Lori Drew created a fake MySpace page and told Meier "[t]he world would be a better place without you." Steve Pokin, *No Charges to be Filed over Meier Suicide*, STLTODAY.COM (Dec. 4, 2007, 12:00 AM), http://www.stltoday.com/suburban-journals/article_fd48db3e-b0ad-5332-b5a5-4ac231bc378c.html. As both Meier and Drew resided in St. Charles County, Missouri, both the St. Charles County prosecutor and the U.S. Attorney for the Eastern District of Missouri had the opportunity to bring suit (though both declined to do so). *Id.* However, this case is one of a growing number of Internet cases where jurisdiction was deemed proper out of state. The third option for trial, and where the case was eventually tried, was California, the state where MySpace.com's servers were physically located. Robert Patrick, *3 Years Sought in Drew Case*, ST. LOUIS POST-DISPATCH, May 7, 2009, at A4.

9. *See, e.g.*, Tamburo v. Dworkin, 601 F.3d 693, 701 (7th Cir. 2010).

10. Baldwin v. Fischer-Smith, 315 S.W.3d 389, 391–92 (Mo. Ct. App. 2010).

11. Jeff Gorman, *Dog Breeder's Libel Lawsuit Reinstated*, COURTHOUSE NEWS SERVICE (July 19, 2010, 9:37 AM), http://www.courthousenews.com/2010/07/19/28948.htm.

12. *Baldwin*, 315 S.W.3d at 398.

Missouri and thus jurisdiction was appropriate.[13] However, the court stressed that it only sought to decide this case and would "let others ponder the grand scheme of things."[14]

This Note will take the step that the Southern District chose not to and will examine potential jurisdictional rules the State can use in future Internet defamation cases. Part II will provide a short history of personal jurisdiction, including rules developed for defamation cases and Internet cases, and will conclude by examining the Southern District's approach in *Baldwin*. Part III will examine the framework used in *Baldwin*, specifically the idea of "express aiming" in an Internet context, and will compare that framework to other jurisdictional approaches suggested by courts, scholars, and international entities. Part IV concludes by predicting the jurisdictional framework Missouri will eventually adopt for Internet defamation cases.

I. THE EVOLUTION OF PERSONAL JURISDICTION

A. Post-war Expansion of Personal Jurisdiction

In the forty years following World War II, the United States Supreme Court established the contemporary basis for personal jurisdiction.[15] Personal jurisdiction over a nonresident defendant is appropriate when the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[16] In judging minimum contacts, a court should focus on "the relationship among the defendant, the forum, and the litigation."[17] Minimum contacts sufficiently connect a defendant with the forum when the defendant "should reasonably anticipate being haled into court there."[18] Minimum contacts exist when a defendant has "purposefully directed" himself toward residents of the forum state.[19] When reviewing fair play and substantial justice, courts "may evaluate the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, [and] the interstate judicial system's interest in obtaining the most efficient resolution of controversies."[20] However, courts must not make litigation "so

13. *Id.* at 397–98.

14. *Id.* at 395.

15. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Shaffer v. Heitner, 433 U.S. 186, 204 (1977); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

16. *Int'l Shoe Co.*, 326 U.S. at 316 (internal quotations omitted).

17. *Shaffer*, 433 U.S. at 204.

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

19. *Burger King Corp.*, 471 U.S. at 476.

20. *Id.* at 477 (internal quotations omitted).

gravely difficult and inconvenient" that a party has a "severe disadvantage" compared to the opponent.[21]

Additionally, States will only bring a nonresident into their courts where proper under that state's long-arm statute.[22] The long-arm statutes of many states permit jurisdiction to the extent permitted by the Due Process Clause of the Fourteenth Amendment, and thus showing minimum contacts while refraining from offending the traditional notions of fair play and substantial justice is typically sufficient to establish jurisdiction in American courts.[23]

B. Personal Jurisdiction and Defamation

The Missouri long-arm statute applies to defamation cases when the elements of that statute are met.[24] The long-arm statute states, in part, that "[a]ny person . . . who in person or through an agent does any of the acts enumerated in this section . . . [submits himself] to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts: . . . (3) The commission of any tortious act within this state . . . ."[25]

In *Pfeiffer v. International Academy of Biomagnetic Medicine*,[26] a nonresident's publication of a magazine article which allegedly libeled a Missouri resident was considered a "tortious act within the state" because it produced actionable consequences within Missouri.[27] Therefore, jurisdiction was proper under Missouri's long-arm statute.[28]

In addition to satisfying a state's long-arm statute, additional jurisdictional rules have applied in defamation cases to determine whether the defendant's conduct has established minimum contacts with the forum state. The landmark case for such personal jurisdiction quarrels in defamation cases is *Calder v. Jones*.[29] There, actress Shirley Jones sued the National Enquirer in her home state of California regarding an allegedly libelous article in its magazine.[30] The article was written and published in Florida, by a Florida corporation with

21. *Id.* at 478.

22. COLLINS, *supra* note 4, ¶ 32.01. For Missouri's long-arm statute, see MO. REV. STAT. § 506.500 (2000).

23. COLLINS, *supra* note 4, ¶ 32.01.

24. *See, e.g.*, Norman v. Fischer Chevrolet Oldsmobile, Inc., 50 S.W.3d 313, 316–17 (Mo. Ct. App. 2001).

25. *See* MO. REV. STAT. § 506.500 (2000).

26. Pfeiffer v. Int'l Acad. of Biomagnetic Med., 521 F. Supp. 1331 (W.D. Mo. 1981).

27. *Id.* at 1333, 1336.

28. *Id.* at 1336.

29. Calder v. Jones, 465 U.S. 783 (1984).

30. *Id.* at 785. The Court alternately refers to the National Enquirer as a "magazine" and a "newspaper." *See id.* at 784, 785. While the classification of this periodical does not change the legal analysis, this Note refers to it solely as a "magazine" to avoid confusion.

its principal place of business in Florida, but issues of the magazine were sold nationwide, including in California.[31]

The Court addressed the traditional framework and remarked that the defendant must have minimum contacts with California so that a lawsuit there would not offend traditional notions of fair play and substantial justice.[32] The Court commented that the libelous story concerned the California activities of a California plaintiff with a California-centered career.[33] Therefore, because (1) petitioners committed an intentional tort, (2) California was the focal point of the statements, and (3) the brunt of the harm was felt there, jurisdiction was "proper in California based on the 'effects' of their Florida conduct in California."[34]

Calder's companion case, *Keeton v. Hustler Magazine, Inc.*, discussed the plaintiff's required minimum contacts with the forum state.[35] There, the plaintiff chose to bring suit in New Hampshire because it was the only state where the statute of limitations had not run.[36] While the plaintiff had essentially no connection to New Hampshire and was obviously forum shopping, the Court found that a plaintiff is not required to establish minimum contacts with a state for personal jurisdiction over the defendant to be appropriate.[37] *Calder* noted, however, that the plaintiff's contacts with a forum, if substantial, might allow jurisdiction when the plaintiff's absence would otherwise prohibit jurisdiction.[38]

C. Personal Jurisdiction and the Internet

Courts initially struggled in applying this jurisdictional framework to Internet activities, and early cases treated the Internet as providing minimum contacts in every forum.[39] However, courts quickly abandoned this broad

31. *Id.* at 785.

32. *Id.* at 788.

33. *Id.* at 788–89.

34. *Calder*, 465 U.S. at 789–90.

35. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984).

36. *Id.* at 773.

37. *Id.* at 779. While this Note focuses primarily on the ability of a Missouri plaintiff to bring suit in Missouri, *Keeton* would allow a nonresident plaintiff to bring suit in Missouri against a Missouri defendant or a nonresident defendant with minimum contacts in Missouri. *See id.*

38. *Calder*, 465 U.S. at 788.

39. *See, e.g.*, Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996). This rule is similar to those in the United Kingdom and Australia where traditional jurisdictional rules apply to defamation cases. COLLINS, *supra* note 4, ¶ 18.70–.71. There, jurisdiction is proper where the defamatory material is "published," which means anywhere it is read, heard, or seen. *Id.* Therefore, for Internet cases in those countries, jurisdiction is proper in any court, and the court's only inquiry is whether to decline jurisdiction due to *forum non conveniens*. *Id.*

jurisdictional rule, motivated by a framework developed in a Pennsylvania district court.[40]

In *Zippo Manufacturing v. Zippo Dot Com, Inc.*, the court developed a passive versus active test—also known as the "sliding scale" test—where the court examined the level of interaction between a website and its viewers.[41] If the website is a passive website that merely makes information available to residents of another state should they seek it, then jurisdiction in that foreign state would not be appropriate.[42] If, however, the website is used to develop business contacts in another state or actively seeks out residents of that state, jurisdiction there would be appropriate.[43] In the middle, where an interactive website allows a user to exchange information with the host computer, "jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[44]

Under *Zippo*, because a passive website does not actively encourage residents of the forum state to access the site, the creator of that website has not purposefully availed himself of the forum state.[45] Courts following *Zippo* argue that the Internet would expose a defendant to jurisdiction anywhere the Internet is located if a passive website constituted purposeful availment.[46] Some courts have found *Zippo* to be too broad and have narrowed its scope; for example, in *Millennium Enterprises, Inc. v. Millennium Music, LP*, the court found that for those cases falling in the middle category of the *Zippo* test, the defendant must also have had "deliberate action" within the forum state.[47]

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

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419–20 (9th Cir. 1997).

46. *Id.* at 420. As most Internet cases involve business contacts, the full *Zippo* spectrum can be viewed with business cases, starting on one end with *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). There, CompuServe created a website in Ohio to sell products to its customers in many states and thus a customer who accessed the website and completed a business transaction purposefully availed himself to the courts of Ohio. *Id.* at 1264–65. At the other end of the spectrum is *Bensusan Rest. Corp. v. King*, 126 F.3d 25 (2d. Cir. 1997). There, the defendant created a website for a jazz club in Missouri that used the trademarked logo of a jazz club in New York. *Id.* at 26–27. However, the defendant did not conduct business through the website, but merely provided information about his business. *See id.* at 27, 29. Therefore, he did not purposefully avail himself of New York and jurisdiction there would be inappropriate. *Id.* at 29.

47. Millennium Enters., Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907, 921 (D. Or. 1999).

While many courts have embraced the sliding scale test, *Zippo* has not been immune to criticism.[48] As Dr. Michael Geist discusses, "the majority of Web sites are neither entirely passive nor completely active. Accordingly, they fall into the 'middle zone,' which requires courts to gauge all relevant evidence and determine whether the site is 'primarily passive' or 'primarily active.'"[49] Further, an active website may appear to be passive due to the presence of "cookies" or other behind-the-scenes data collection.[50] Finally, Internet technology is developing so rapidly that designations of "passive" and "active" make judicial consistency difficult as a "passive" website with merely an e-mail link would have been considered "active" ten or fifteen years ago.[51]

D. Personal Jurisdiction and Internet Defamation

When the Internet was in its infancy, most scholars assumed that the existing jurisdictional framework would be sufficient to handle Internet defamation cases.[52] Once Internet defamation cases began reaching the courts, however, *Zippo's* "sliding scale" test was gaining popularity and proved a useful early solution.[53] This approach was especially popular when the Internet was new, as the line separating passive and interactive websites was easily determined.[54] However, as the Internet has become more interactive as

48. *See, e.g.*, Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 489 (2004) (suggesting *Zippo* should not be followed at all in libel cases).

49. Michael Geist, *The Shift Toward "Targeting" for Internet Jurisdiction*, *in* WHO RULES THE NET? 91, 104 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003).

50. *Id.*

51. *Id.* Dr. Geist also discusses the cost of websites for businesses and the reality that companies will only create a website if it will benefit them financially. *Id.* Because profit concerns will always demand an "active" website over a "passive" one, the *Zippo* test will allow jurisdiction in all courts where a business is the defendant. *Id.*

52. *See, e.g.*, Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in This New Frontier*, 59 ALB. L. REV. 1083, 1133 (1996) ("[B]y appropriately applying the existing jurisdictional framework to the cyberspace frontier, courts should be able to protect cyberspace travelers from unfairly and unreasonably being pulled into a strange new world that they never intended to visit.").

53. *See, e.g.*, Bailey v. Turbine Design, Inc., 86 F. Supp. 2d 790, 791, 795, 797 (W.D. Tenn. 2000) (finding jurisdiction was not proper in Tennessee when Florida corporation maintained only a passive website); Bochan v. La Fontaine, 68 F. Supp. 2d 692, 694–95, 701–02 (E.D. Va. 1999) (finding jurisdiction was proper in Virginia when residents of Texas and New Mexico interacted through message boards transmitted through a Virginia Internet service provider); Blumenthal v. Drudge, 992 F. Supp. 44, 57 (D.D.C. 1998) (finding jurisdiction was proper in the plaintiff's domicile where the defendant's website was interactive).

54. For example, in *Toys "R" Us, Inc. v. Step Two, S.A.*, the court declined jurisdiction because Step Two's website was in Spanish and its purchase fields did not accommodate addresses from the United States. 318 F.3d 446, 454 (3d Cir. 2003). Websites are not as straightforward anymore. Today, websites use social media to allow visitors to communicate

a whole, more courts are turning to the *Calder* effects test.[55] In fact, some scholars suggest the passive/active distinction may not even be relevant in libel cases as a passive website can harm a person's reputation just as easily as an active website.[56]

1. Applying *Calder* to Internet Cases

When applied to Internet cases, courts have found that all three prongs of the *Calder* effects test must be present to establish jurisdiction.[57] However, the deciding prong in most cases is whether the conduct is "expressly aimed" at the forum state.[58]

While courts agree that "express aiming" is important, their definitions of that term vary. In *Revell v. Lidov*, the Fifth Circuit examined an article posted on an Internet bulletin board.[59] The article accused Revell of complicity in a conspiracy and cover-up of Pan Am Flight 103, which exploded over Lockerbie, Scotland in 1988.[60] The court found there was no "express aiming," in part because "there is no reference to Texas in the article or any reliance on Texas sources."[61] A defendant cannot merely post something on the Internet and purposefully avail himself of "some forum someplace," but must have knowledge of the forum where the plaintiff will be harmed and

with each other, and this perceived interactivity is perhaps more important than actual interactivity. Nan Cui et al., *The Influence of Social Presence on Consumers' Perceptions of the Interactivity of Web Sites*, J. OF INTERACTIVE ADVERTISING, 36, 45 (Fall 2010), http://jiad.org/article138.

55. For a stark example of how the Internet has changed since *Zippo* was decided, consider CNN.com's 1997 coverage of Princess Diana's funeral route, *The Official Schedule for Princess Diana's Funeral*, CNN.COM (Sept. 4, 1997, 6:28 PM), http://edition.cnn.com/WORLD/9709/04/diana.funeral.route/. The article is on "CNN Interactive" and includes links to a message board and a Quicktime movie. *Id.* For CNN.com's 2011 coverage of a happier story for the British Royal Family, see Richard Allen Greene, *William and Catherine Marry in Royal Wedding at Westminster Abbey*, CNN.COM (April 29, 2011, 3:10 PM), http://www.cnn.com/2011/WORLD/europe/04/29/uk.royal.wedding.kate.william/index.html. The article includes buttons to share the article on Facebook and Twitter, embedded comments, and interactive advertisements tailored toward a user's location and browsing history. *Id.*; *see* Cui, *supra* note 54, at 36.

56. Borchers, *supra* note 48, at 489.

57. *See, e.g.*, Xcentric Ventures, LLC v. Bird, 683 F. Supp. 2d 1068, 1072–73 (D. Ariz. 2010). Those prongs are (1) the defendant committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state. Calder v. Jones, 465 U.S. 783, 789–90 (1984).

58. *See, e.g.*, *Xcentric Ventures*, 683 F. Supp. 2d at 1072–73; Griffis v. Luban, 646 N.W.2d 527, 536–37 (Minn. 2002).

59. Revell v. Lidov, 317 F.3d 467, 468 (5th Cir. 2002).

60. *Id.* at 469.

61. *Id.* at 474.

reasonably anticipate being haled into court there.[62] This case represents the "narrow" view of *Calder*, where the forum state must be the "focal point" of the tort, and the defendant must target not only the plaintiff residing within the forum state, but additionally must target the forum state itself.[63]

Other courts have adopted a broader view of *Calder*, where jurisdiction is proper when the defendant targets a plaintiff and knows the plaintiff is a resident of the forum state.[64] In *Bancroft & Masters, Inc. v. Augusta National, Inc.*, Bancroft filed suit in California to obtain declaratory judgment that it had the right to use the web address masters.com, which it had previously registered.[65] Augusta National sent a cease-and-desist letter to Bancroft in California and an additional letter to a domain name registration company in Virginia, which led to the lawsuit.[66] Because Augusta National knew Bancroft was located in California and knew the effects of its letters would be felt in California, the court held that Augusta National had purposefully availed itself of California and jurisdiction there was proper.[67]

Even when the website itself is insufficient to establish minimum contacts, a court may use other online activities to find jurisdiction proper. In *Zidon v. Pickrell*, the District Court of North Dakota used the *Zippo* test to determine that the defendant's website was interactive.[68] Then, using the *Calder* effects test, the court examined all of the defendant's activities, including e-mails to

62. *Id.* at 475. Similarly, the Fifth Circuit recently found jurisdiction was improper in *Clemens v. McNamee*, 615 F.3d 374, 380 (5th Cir. 2010). There, McNamee made statements alleging athlete Roger Clemens took steroids, and those statements were included in baseball's Mitchell Report and posted online at SI.com. *Id.* at 377. The statements did not involve activity in Texas and were not directed toward Texas residents (they were directed toward residents of all fifty states). *Id.* at 380. Therefore, jurisdiction was not proper in Texas, even though Clemens alleged harm there. *Id.*

63. *Cf.* Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1074 n.9 (10th Cir. 2008). While the court held the defendant must have made the forum state the focal point of the tort, this can be accomplished indirectly. *Id.* at 1075. The court remarked:

> [The defendant's actions are] something like a bank shot in basketball. A player who shoots the ball off of the backboard intends to hit the backboard, but he does so in the service of his further intention of putting the ball into the basket. Here, defendants intended to send [notice] to eBay in California, but they did so with the ultimate purpose of cancelling plaintiffs' auction in Colorado. Their "express aim" thus can be said to have reached into Colorado in much the same way that a basketball player's express aim in shooting off of the backboard is not simply to hit the backboard, but to make a basket.

Id.

64. *See, e.g.*, Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1087 (9th Cir. 2000).

65. *Id.* at 1084–85.

66. *Id.* at 1085.

67. *Id.* at 1088.

68. Zidon v. Pickrell, 344 F. Supp. 2d 624, 630 (D.N.D. 2004).

North Dakota residents, to conclude the defendant established minimum contacts with the state.[69]

The Seventh Circuit recently reviewed *Calder* in an online dispute between dog breeders.[70] In *Tamburo v. Dworkin*, the plaintiff created an online dog pedigree database using information from the defendants' websites.[71] In response, the defendants posted statements on their websites accusing the plaintiff of theft and hacking, encouraged others to boycott his products, and then posted his home address in Illinois and encouraged others to harass him.[72] The court found that while the defendants had never been to Illinois, the "express aiming" prong of *Calder* is met when an intentional tort is directed at an Illinois resident with the express goal of inflicting harm in Illinois and harm is felt in the state.[73] Because one of the defendants did not know the plaintiff lived in Illinois, the intentional tort committed by that defendant could not have been aimed at Illinois and thus personal jurisdiction over that defendant was improper.[74]

2. "If You Pick a Fight in Missouri . . ."

Missouri addressed personal jurisdiction of a nonresident defendant in an Internet libel case for the first time in 2010, when the Court of Appeals decided *Baldwin v. Fischer-Smith*.[75] Plaintiff Baldwin ran the Whispering Lake Dog Kennel in Missouri, which not only breeds, sells, boards and shows dogs for clients, but also exhibits them in American Kennel Club shows.[76] Defendants Fischer-Smith, of Arizona, and Hall, of Pennsylvania, were competitors of Baldwin both in American Kennel Club shows and in selling Chinese Crested dogs.[77]

Defendant Fischer-Smith created a website, www.stop-whispering lane.com, in 2007 and was the "web master" of the site during its year of

69. *Id.* at 630–31.

70. Tamburo v. Dworkin, 601 F.3d 693, 697 (7th Cir. 2010).

71. *Id.* at 698.

72. *Id.*

73. *Id.* at 707.

74. *Id.* at 708.

75. Baldwin v. Fischer-Smith, 315 S.W.3d 389, 391–92 (Mo. Ct. App. 2010). While *Baldwin* is the first Missouri decision involving jurisdiction in an Internet libel case, federal courts in Missouri have previously addressed Internet jurisdiction, finding jurisdiction was improper under a *Zippo* analysis. *E.g.*, Bell v. Imperial Palace Hotel/Casino, Inc., 200 F. Supp. 2d 1082, 1087, 1090 (E.D. Mo. 2001). Internet jurisdiction was also at issue in *State ex rel. Nixon v. Beer Nuts, Ltd.*, but the court found sufficient minimum contacts to find jurisdiction was proper through a traditional jurisdictional approach. 29 S.W.3d 828, 835 (Mo. Ct. App. 2000). Both parties in *Baldwin* agreed that *State ex rel. Nixon* had little value for their case. *Baldwin*, 315 S.W.3d at 394.

76. *Baldwin*, 315 S.W.3d at 392.

77. *Id.*

operation.[78] On the website, Defendant Hall stated that the Baldwin family moved from Pennsylvania to Missouri "under cover of darkness" to avoid prosecution in Pennsylvania for animal abuse and neglect.[79] The website went on to call Missouri "the Puppy Mill capitol [sic] of the WORLD."[80] In its year of existence, the website attracted 2500 hits worldwide, with 25 of those hits from Missouri residents.[81]

The court ignored the *Zippo* test completely, preferring instead to examine the *Calder* effects test.[82] After reading cases "far and wide," the court determined that cases like *Baldwin* generally turn on the second prong of the effects test as stated by *Tamburo*, or "express aiming."[83] Following *Tamburo*, their inquiry was "whether the conduct underlying the claims was purposely directed at the forum state."[84] Both *Tamburo* and *Baldwin* involved Internet activities within the dog-breeding world; the main concern in each case being whether the nonresident defendant purposefully availed himself of the forum state.[85] Due to these factual similarities, the court followed the reasoning and analysis from *Tamburo* and determined jurisdiction was proper in Missouri.[86] Specifically, the court followed the conclusions from *Tamburo* that *Calder* requires both a forum-state injury and "something more" directed at the state, and that the Internet can provide an "electronic entry" into the state.[87]

The court then expanded on its reasons for concluding as it did.[88] First, the "express aiming" requirement from *Calder* requires only *residents* of the forum to be targeted by conduct, not the state itself.[89] Second, even if *Calder*

78. Appellants' Brief at 6, Baldwin v. Fischer-Smith, 315 S.W.3d 389 (Mo. Ct. App. 2010) (No. SD30235).

79. *Id.* at 7.

80. *Baldwin*, 315 S.W.3d at 398. Whether the Baldwins ran a "puppy mill" or not, even newspapers in Missouri have called the state the "puppy mill capital" of the United States as 40% of puppies sold in U.S. pet stores are bred in the state. Barbara Shelly, *Joe the Plumber Plunges into Missouri Puppy Mills*, KANSAS CITY STAR, Oct. 8, 2010, at A14.

81. *Baldwin*, 315 S.W.3d at 392.

82. *Id.* at 392–93. While *Baldwin* fails to mention *Zippo*, it does adopt the analysis of the Seventh Circuit from *Tamburo v. Dworkin*. *Id.* at 395–98. The Seventh Circuit mentions *Zippo* briefly in a footnote, stating that the test has limited relevance in intentional tort cases and sharing its hesitation to fashion a special jurisdictional test for Internet cases. Tamburo v. Dworkin, 601 F.3d 693, 703 n.7 (7th Cir. 2010).

83. *Baldwin*, 315 S.W.3d at 394.

84. *Id.* at 396 (quoting *Tamburo*, 601 F.3d at 702).

85. *Id.* at 396; *Tamburo*, 601 F.3d at 698, 702.

86. *Baldwin*, 315 S.W.3d at 397.

87. *Tamburo*, 601 F.3d at 706.

88. *Baldwin*, 315 S.W.3d at 397–98.

89. *Id.* at 397. The court relies here on language from *Burger King*, which states that a defendant receives "fair warning" that he may be subject to suit in a forum when he purposefully directs conduct toward *residents* of that forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462,

were interpreted to require targeting of the state, comments on the website established that the defendants targeted Missouri itself when they called the state the "Puppy Mill capitol [sic] of the WORLD."[90] Third, the court was not concerned with the possibility that an Internet defendant might be pulled into any jurisdiction where their conduct caused harm.[91] Fourth, in looking at a recent Missouri Supreme Court decision, the court concluded that when the content of a communication into Missouri gives rise to an intentional tort claim, the defendant has purposefully availed himself of Missouri and jurisdiction is proper.[92] Finally, the court paraphrased the Fifth Circuit in *Revell v. Lidov* and warned that "if you pick a fight in Missouri, you can reasonably expect to settle it here."[93]

As *Baldwin* was a case of first impression, the court could have developed a specific jurisdictional framework for Internet defamation cases, thereby setting precedent for other Missouri courts to follow. However, the court specifically mentioned that its decision in *Baldwin* is not meant to create a universal rule regarding personal jurisdiction for Internet defamation cases in Missouri.[94] The court did not specify whether it believed there should be a specific framework for the Internet, in essence creating separate tests for Internet defamation and defamation by other means, but simply left the task to others to "ponder the grand scheme of things."[95]

As cases involving the Internet will only increase in frequency, *Baldwin* provides the opportunity to begin Missouri's discussion on jurisdictional concerns associated with the evolving technology. In the next section, the *Baldwin* approach will be compared to tests from other courts and scholars to determine which jurisdictional approach would work best for Missouri.

II. EVALUATING JURISDICTIONAL PROPOSALS

There are three good jurisdictional options in *Baldwin* and in most Internet defamation cases: the plaintiff's home state, the defendant's home state, and

472 (1985). The defendants wanted the plaintiff to also show they targeted the State of Missouri itself. *See Baldwin*, 315 S.W.3d at 397.

90. *Baldwin*, 315 S.W.3d at 397–98.

91. *Id.* at 398.

92. *Id.* Where the defendant corresponded with plaintiff by sending fraudulent documents regarding a New York apartment to plaintiff's Missouri residence, the content of the communication giving rise to a fraud claim was in Missouri and therefore the defendant purposefully availed himself of Missouri. Bryant v. Smith Interior Design Grp., Inc., 310 S.W.3d 227, 229–30, 235 (Mo. 2010).

93. *Baldwin*, 315 S.W.3d at 398.

94. *Id.* at 398.

95. *Id.* at 395.

the location of the Internet server where the libelous statement was posted.[96] A plaintiff can always choose to bring suit in the defendant's home state to avoid jurisdictional concerns.[97] While a few plaintiffs have brought suit in the jurisdiction where the Internet server is located, the issue in *Baldwin* and discussed here is whether a nonresident defendant in an Internet defamation case can be brought into Missouri courts.[98] Before discussing the various tests used by the courts and suggested by scholars, a brief review of Missouri's long-arm statute is needed.

A. The Missouri Long-Arm Statute: Is Internet Defamation "Committed Within the State"?

Missouri's long-arm statute states in part that a person subjects himself to the jurisdiction of Missouri courts for "[t]he commission of a tortious act within this state."[99] Because defamation is a tort under Missouri law,[100] a defendant is subject to Missouri courts when he commits defamation in Missouri.[101] The statute has been read to extend to the bounds of due process, so a defendant can be haled into Missouri courts when (1) he commits a tortious act within the state and (2) the defendant has minimum contacts such that it does not offend traditional notions of fair play and substantial justice to meet the requirements of due process under the Fourteenth Amendment to the United States Constitution.[102] The defendants in *Baldwin* did not challenge the trial court's ruling that they committed a tortious act in Missouri, so the court focused solely on minimum contacts to establish jurisdiction.[103] However, because Missouri's long-arm statute permits jurisdiction to the extent of due process, the statutory inquiry and constitutional inquiry are the same.[104] Even if the defendants in *Baldwin* had challenged whether the alleged defamation occurred in Missouri, the court's analysis would likely not have changed.[105]

Missouri follows the common law for libel and slander in that a statement is defamatory if it harms the reputation of another.[106] To meet Missouri's long-arm statute, the plaintiff's reputation must have been harmed in

96. For an example of an Internet defamation case brought in the Internet server's home state, see the "MySpace trial," where the trial between two Missouri residents was in California, where MySpace had its principal place of business. Patrick, *supra* note 8.

97. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 720 (1877).

98. *See Baldwin*, 315 S.W.3d at 391–92.

99. MO. REV. STAT. § 506.500 (2000).

100. *See* Nazeri v. Mo. Valley Coll., 860 S.W.2d 303, 308 (Mo. 1993).

101. *See id.*

102. *See Baldwin*, 315 S.W.3d at 392.

103. *Id.* at 392 n.3.

104. *See* COLLINS, *supra* note 4, ¶ 32.01.

105. *See id.*

106. Henry v. Halliburton, 690 S.W.2d 775, 779 (Mo. 1985).

Missouri.[107] If, under the *Calder* effects test, the defendant expressly aimed his conduct at the forum state, then the harm to reputation would occur in the forum state as well.[108] Therefore, when the plaintiff shows the defendant expressly aimed his activities at the forum state, Missouri's long-arm statute is satisfied.[109]

B. Missouri and the Zippo *Test*

Only two cases in Missouri state courts have addressed Internet jurisdiction, and only *Baldwin* addresses jurisdictional concerns for Internet defamation.[110] The other case, *State ex rel. Nixon v. Beer Nuts, Ltd.*, involved business contacts for a beer of the month club.[111] While neither of these cases even acknowledged *Zippo*, United States District Courts operating under Missouri law have addressed its "sliding scale" test.

In *Uncle Sam's Safari Outfitters, Inc. v. Uncle Sam's Army Navy Outfitters-Manhattan, Inc.*, the Eastern District of Missouri examined a website which fell in the middle of the *Zippo* spectrum.[112] Focusing solely on the interactivity of the website and the number of visits by Missouri residents, the court found that jurisdiction was not proper.[113]

Similarly, in *Enterprise Rent-A-Car, Co. v. Stowell*, the Eastern District of Missouri found another website in the middle of the *Zippo* spectrum and found that, while Missouri residents could visit the website, their inability to do business over the website made jurisdiction improper.[114] To hold otherwise, the court said, "would not comport with traditional notions of what qualifies as purposeful activity invoking the benefits and protections of the forum state."[115]

In *Bell v. Imperial Palace Hotel/Casino, Inc.*, the Eastern District of Missouri used Missouri law in examining a slip-and-fall case in a Las Vegas casino where the casino's website fell in the middle of the *Zippo* spectrum.[116] The court found that the interactive website operated by the casino did not permit specific jurisdiction because the cause of action did not arise out of the

107. *See id.*

108. Calder v. Jones, 465 U.S. 783, 788–89 (1984).

109. *See* MO. REV. STAT. § 506.500 (2000).

110. State *ex rel.* Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828, 833–36 (Mo. Ct. App. 2000); Baldwin v. Fischer-Smith, 315 S.W.3d 389, 391–92 (Mo. Ct. App. 2010).

111. *Beer Nuts*, 29 S.W.3d at 833.

112. Uncle Sam's Safari Outfitters, Inc. v. Uncle Sam's Army Navy Outfitters-Manhattan, Inc., 96 F. Supp. 2d 919, 923 (E.D. Mo. 2000).

113. *Id.* at 924.

114. Enter. Rent-A-Car Co. v. Stowell, 137 F. Supp. 2d 1151, 1157–58 (E.D. Mo. 2001).

115. *Id.* at 1159.

116. Bell v. Imperial Palace Hotel/Casino, Inc., 200 F. Supp. 2d 1082, 1084, 1087 (E.D. Mo. 2001).

website.[117] Further, when addressing whether the website gave rise to general jurisdiction, the court found that their analysis could not "begin and end with the 'active' and 'passive' labels."[118] Instead, because the plaintiffs failed to show the website was "targeted to users from Missouri," general jurisdiction was not proper.[119]

While these cases involving Internet business with Missouri residents all considered *Zippo*, courts across the country have moved away from *Zippo* and toward a targeting test for Internet defamation cases.[120] Considering the Southern District's failure to mention *Zippo's* "sliding scale" test in *Baldwin*, focusing on the targeting itself rather than the technological means,[121] Missouri is unlikely to adopt *Zippo* to analyze any future Internet defamation cases.

C. "Express Aiming": Targeting the State or its Residents (or Both)?

1. Targeting the Residents of a State

Assuming for the moment that *Calder* is an appropriate test to evaluate minimum contacts in Internet defamation cases, disagreement will arise over exactly who or what the defendant must target. In *Baldwin*, the court read *Calder* to require express aiming at the residents of the forum state.[122] Therefore, because the defendants targeted residents within Missouri, they expressly aimed their conduct at Missouri and jurisdiction was proper.[123] However, the court also acknowledged that *Calder* may require express aiming at the forum state itself, and not the residents of that state.[124] This conclusion comes from a literal reading of *Calder*, which states that jurisdiction is proper because "*California* is the focal point both of the story and of the harm suffered."[125] Finally, the defendants in *Baldwin* argued that *Calder* requires express aiming toward both residents of the state *and* the forum state itself.[126]

The view taken by the Southern District in *Baldwin*, that the "express aiming" prong of the *Calder* effects test requires the targeting of residents of the forum state, is widely supported by precedent.[127] The court finds support

117. *Id.* at 1089.
118. *Id.* at 1091.
119. *Id.* at 1092.
120. *See* GEIST, *supra* note 49, at 99–100.
121. Baldwin v. Fischer-Smith, 315 S.W.3d 389, 393–94 (Mo. Ct. App. 2010).
122. *Id.* at 393.
123. *Id.* at 397–98.
124. *Id.*
125. Calder v. Jones, 465 U.S. 783, 789 (emphasis added).
126. *Baldwin*, 315 S.W.3d at 397.
127. *See, e.g.*, Tamburo v. Dworkin, 601 F.3d 693, 706–07 (7th Cir. 2010); Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1077–78 (10th Cir. 2008); Finley v. River N. Records, Inc., 148 F.3d 913, 916 (8th Cir. 1998).

from *Burger King Corp. v. Rudzewicz*, where the Supreme Court stated, "a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward *forum residents*."[128] In *Baldwin*, the defendants targeted the plaintiff with their defamatory statements and sought readers in Missouri, and this targeting was found to be sufficient to establish jurisdiction.[129]

2. Targeting the Community

Even courts concluding that a forum's residents must be targeted will disagree over which residents must be targeted for jurisdiction to be proper.[130] Professor Amy Kristin Sanders suggests that, in defamation cases, defining the community to which the plaintiff belongs is important and offers a number of solutions.[131] First, Professor Sanders suggests a "mixed-methods" four-factor approach to determine community in Internet defamation cases, looking at (1) where a plaintiff lives, (2) where a plaintiff works, (3) where the statements were published, and (4) who was intended as the target audience.[132] While this approach will more accurately provide protection to a plaintiff when warranted, Professor Sanders does acknowledge the inherent risk of inconsistent results in a fact-based factors test.[133] Had this test been used in *Baldwin*, the court likely would have found jurisdiction was proper as the plaintiff lives and works in Missouri, the statements were published in Pennsylvania, and the target audience was dog owners/buyers in Missouri and dog breeders nationwide.[134]

Second, Professor Sanders suggests a "specific community" approach where the jurisdictional decision is made by looking at a subset of the general public—the "art community" for example.[135] By determining specific jurisdictional rules for each specific community, future litigants would easily know where they stand and could better determine their liability for a statement before litigation commences.[136] For example, in *Baldwin*, the "dog-

128. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (emphasis added).

129. *Baldwin*, 315 S.W.3d at 397–98.

130. *Compare* Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1087 (9th Cir. 2000) (finding that knowledge that the plaintiff lived in the state was sufficient for jurisdiction), *with* Young v. New Haven Advocate, 315 F.3d 256, 263 (4th Cir. 2002) (finding "something more" than posting a newspaper article online where the forum state's residents could read it was required for jurisdiction).

131. Amy Kristin Sanders, *Defining Defamation: Community in the Age of the Internet*, 15 COMM. L. & POL'Y 231, 233 (2010).

132. *Id.* at 259.

133. *Id.* at 260.

134. *See Baldwin*, 315 S.W.3d at 392, 398.

135. Sanders, *supra* note 131, at 260.

136. *Id.* at 261.

breeder community" would be examined and rules developed in *Baldwin* and *Tamburo v. Dworkin*, a dog-breeding case from the Seventh Circuit, would establish the jurisdictional basis for that community going forward.[137] However, Professor Sanders acknowledges that defining a plaintiff's community would become increasingly difficult and this could impact other aspects of the defamation tort.[138] Within a small community, a person is more likely to be considered a "public figure" and therefore the burden of showing actual malice may be unfairly required when using this approach.[139]

This problem of defining the community would present a struggle for early litigants under such a framework as parties would not know whether they belong to a large community or a small community. Perhaps in response to this concern, Professor Sanders suggests a plaintiff-centered approach, where a plaintiff has the burden of showing what community he or she belongs to and the harm to reputation suffered within that community.[140] The plaintiff's choice of community would narrow the court's review as to the harm incurred as a result of the defamatory statement and could help define damages as well.[141] In *Baldwin*, if the plaintiff suggested a community of "Missouri dog breeders," jurisdiction would be practically assured because the plaintiff would easily be able to show his reputation was harmed among Missouri dog breeders. However, the plaintiff's damages would then be limited to that harm attributed to the plaintiff's reputation among Missouri dog breeders alone.[142] Alternately, the plaintiff could suggest a community of United States dog breeders, Missouri general public, or United States general public, each reducing the chances of proving personal jurisdiction in Missouri, but increasing potential damages.[143]

Professor Sanders does not discuss how the plaintiff-centered approach would impact the "single publication" rule for defamation cases. While the "multiple publication" rule allows a plaintiff to bring a cause of action in every state where his reputation is harmed, the "single publication" rule, followed by Missouri courts for almost one hundred years,[144] allows the plaintiff to bring

137. *See id.*

138. *Id.*

139. *Id.* at 262.

140. Sanders, *supra* note 131, at 262.

141. *Id.* at 263.

142. *See* Sanders, *supra* note 131, at 263.

143. *See id.*

144. Missouri adopted the "multiple publication" rule in a case of first impression, *Julian v. Kansas City Star Co.*, 107 S.W. 496, 500 (Mo. 1907).

> It is the publication of the libel, not the printing of it, that gives the right of action. When the publisher gives out his paper to be circulated, not only in one, but in many, counties, and it is circulated as he intended, he is deemed in law to have published it in all the counties, and the act is no less a publication in one county than another.

only one cause of action for "any single publication . . . such as any one edition or issue of a newspaper or book . . . or any one broadcast over radio or television."[145] If the plaintiff in *Baldwin* sought a Missouri court for damages to his reputation among Missouri dog breeders, could he then ask an Illinois court for damages to his reputation among Illinois breeders? Defining the community is an interesting idea and one that may deserve exploration, though Missouri would need to thoroughly examine the potential impact on implementing changes in community.

3. Targeting the State, not its Residents

Perhaps Missouri courts should adopt the literal reading of the *Calder* test, that jurisdiction is only proper when the defendant targets the forum state *itself* with defamatory statements.[146] Currently, defamation in Missouri requires that the plaintiff's reputation be harmed.[147] Therefore, if the forum state itself must be targeted, it would be in addition to the common law requirement in Missouri that residents of the state must be targeted.[148] In *Baldwin*, the court rejects this dual requirement for jurisdiction, though the court did note that the defendant targeted Missouri as well as its residents.[149] Even the language in *Tamburo*, whose analysis was adopted by the court in *Baldwin*,[150] suggests a literal interpretation is misguided as the court concluded that, because the defendants purposefully targeted Tamburo and his business in Illinois, the defendants "'purposefully directed' their activities at Illinois."[151] Therefore, it is sufficient under the *Calder* test to target residents of the forum state.[152] While Missouri could narrow the scope of its targeting test by requiring targeting of both the residents and the state, there is no good reason why

Id. Six years later, the court adopted the dissent from *Julian*, and thus the "single publication" rule, in *Houston v. Pulitzer Publishing Co.*, 155 S.W. 1068, 1070 (Mo. 1913). "[B]ut one suit can be brought on the same libelous publication, no matter in how many places or at how many times it is published[.]" *Julian*, 107 S.W. at 510 (Graves, J., dissenting). After 1913, the entirety of the claim could be brought in either the county of publication or the county of the plaintiff's residence. *Houston*, 155 S.W. at 1070.

145. COLLINS, *supra* note 4, ¶ 30.16.

146. *See* Calder v. Jones, 465 U.S. 783, 789 (1984) ("California is the focal point both of the story and of the harm suffered.").

147. *See, e.g.*, Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 70 (Mo. 2000). The six elements of defamation in Missouri are (1) publication (2) of a defamatory statement (3) that identifies the plaintiff (4) that is false (5) that is published with the requisite degree of fault and (6) damages the plaintiff's reputation. *Id.*

148. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) (finding the defendant must purposefully direct his activities at the residents of the forum for jurisdiction to be proper).

149. Baldwin v. Fischer-Smith, 315 S.W.3d 389, 397–98 (Mo. Ct. App. 2010).

150. *Id.* at 397.

151. Tamburo v. Dworkin, 601 F.3d 693, 707–08 (7th Cir. 2010).

152. *See id.*

Missouri would choose to take this action. States seek to protect the rights of their citizens and narrowing the targeting requirement would remove protections already in place. Missouri is much more likely to expand the targeting test discussed in *Baldwin* than it is to narrow that test.

D. Should Targeting Be Expanded?

Dr. Michael Geist suggests that targeting is the "litmus test for Internet jurisdiction" and offers a three-factor test for increased consistency in determining jurisdiction: contracts, technology, and actual or implied knowledge.[153] Dr. Geist notes that his test is not intended to find the most appropriate jurisdiction for a cause of action, but merely identifies whether the jurisdiction in question has been sufficiently targeted.[154] The first factor, contracts, asks "whether either party has used a contractual arrangement to specify" the appropriate jurisdiction.[155] Defamation, among other intentional torts, is unlikely to have a contractual arrangement as this factor is geared toward business-related Internet actions.[156] The second factor, technology, examines whether jurisdictions are targeted or avoided based solely on the technology used.[157] However, while Google and other sophisticated websites can limit where information is accessible using geographic mapping and identification technologies, many defendants, including those in *Baldwin*, do not have the ability or desire to restrict where the statement is read.[158]

Therefore, the final factor, actual or implied knowledge, bears the full weight of Dr. Geist's targeting analysis for Internet defamation cases.[159] This factor would have courts assess the knowledge a defendant has (or should have had) about the geographic location of the online activity.[160] Knowledge directly relates to Internet defamation cases as "defaming parties are or should be aware that the injury inflicted by their speech would be felt in the jurisdiction of their target."[161] The effect of this test in Internet defamation cases would be to subject a defendant to jurisdiction in the forum state not only

153. GEIST, *supra* note 49, at 107.

154. *Id.* at 108.

155. *Id.*

156. *See id.* at 108–12.

157. *Id.* at 112.

158. *See* GEIST, *supra* note 49, at 114–15. As the Internet continues to evolve, the ability to restrict what information is accessible in various locations may become more commonplace. At that time, this issue might need to be revisited. For now, however, it is an issue more important in business cases than in defamation cases.

159. *See id.* at 116.

160. *Id.*

161. *Id.*

when he "expressly aims" his defamatory statement there, but also when he *should be* aware that the statement will cause harm in the forum state.[162]

If the court had followed this rule in *Baldwin*, the opinion may have instead warned "If you pick a fight, and you knew or should have known that fight was in Missouri, you can reasonably expect to settle it here." However, Dr. Geist's three-factor test is clearly aimed to resolve jurisdictional issues for cases involving business conducted over the Internet.[163] While it was not intended for use in Internet defamation cases, following Dr. Geist's three-factor test and expanding *Calder* to allow for implied knowledge of the forum state is an option available to Missouri courts.

E. Legislative Solutions

Professor Patrick Borchers suggests in a 2004 article that jurisdictional concerns in Internet libel cases might require legislative intervention.[164] Professor Borchers argues that courts' reliance on the "express aiming" prong of *Calder* is misplaced, as is the courts' refusal to distinguish (or even cite) *Calder*'s companion case of *Keeton.*[165] One solution Professor Borchers offers is state legislative action; that is, the Missouri legislature could amend the long-arm statute to prevent Missouri courts from exercising jurisdiction over nonresident libel defendants.[166] A less drastic solution, he suggests, is to amend the "single publication" rule so that a Missouri resident could only recover for damages suffered in Missouri, not damages suffered out of state.[167] To recover for nationwide damages, the plaintiff would need to sue in the defendant's home forum.[168] A third suggestion is to require courts to make a preliminary determination of the merits before deciding if jurisdiction over the nonresident defendant is proper.[169]

State legislative action is unlikely, however. The Missouri legislature would not voluntarily restrict its long-arm statute or the single publication rule as these actions would put Missouri residents at a disadvantage to residents of other states.[170] The Missouri legislature has shown an interest in expanding

162. *See id.*
163. *See* Geist, *supra* note 49, at 117–18.
164. Borchers, *supra* note 48, at 490–92.
165. *Id.* at 485–88.
166. *Id.* at 490.
167. *Id.* at 491.
168. *Id.*
169. Borchers, *supra* note 48, at 491.
170. All fifty states plus the District of Columbia have a long-arm statute in some form. Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496 (2004). California has perhaps the broadest, as it permits jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 2004).

court access to its residents, not restricting access.[171] Professor Borchers mentions that Congress could also take these steps and apply a jurisdictional framework nationwide, and this approach may be more realistic considering the reluctance of states to reduce court access to their own citizens.[172] If Congress created a nationwide jurisdictional framework for Internet defamation cases, Missouri residents would not be at a jurisdictional disadvantage because the residents of every state would be treated equally under a new national framework.[173] While this Congressional solution may be the most effective and produce the most consistent judgments, it does not provide insight into how future Missouri courts will decide jurisdiction in Internet defamation cases.

F. International Solutions

Perhaps the simplest framework for Internet jurisdiction is the one used in the United Kingdom and Australia, among other countries. There, the publication of defamatory material within the jurisdiction of the court subjects the defendant to that court.[174] However, unlike many U.S. courts, which follow the single publication rule, material is considered "published" anywhere it is read, heard, or seen in the United Kingdom and Australia.[175] The result, then, is that these courts can authorize service abroad whenever an offending publication is read, heard, or seen anywhere in the forum country.[176] The only real limit to jurisdiction is discretion, as courts can refuse to hear a case because it is inconvenient for the parties.[177]

An early Internet case in the U.S. District Court for the Eastern District of Missouri followed similar logic to find jurisdiction over a nonresident defendant.[178] In *Maritz, Inc. v. Cybergold, Inc.*, the court found that the defendant, simply by operating a website that could be accessed nationwide, was subject to jurisdiction in Missouri.[179] Further, bringing the defendant into the court did not offend the traditional notions of fair play and substantial

171. *See* State *ex rel.* Deere & Co. v. Pinnell, 454 S.W.2d 889, 891–92 (Mo. 1970) ("[The Missouri long-arm statute was] adopted by the legislature of this state . . . with the designed purpose of extending the jurisdiction of the courts of Missouri to [the limits of due process].").

172. Borchers, *supra* note 48, at 492.

173. For example, Professor Borchers mentions the Parental Kidnapping Prevention Act as an example of Congress limiting jurisdiction to further its own policy goals. *Id.* Under the Act, a state cannot modify another state's child custody decree and is thus denied jurisdiction under the Act where they would otherwise be able to hear the case. 28 U.S.C. § 1738A (2006).

174. COLLINS, *supra* note 4, ¶ 18.70–.71.

175. *Id.* ¶ 18.71.

176. *Id.* ¶ 26.26.

177. *Id.* ¶ 26.29.

178. Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1334 (E.D. Mo. 1996).

179. *Id.*

justice because the defendant availed himself of Missouri through its online activity.[180] While U.S. courts quickly moved away from this line of reasoning, *Maritz* has never been overruled.[181]

Professor Borchers agrees, suggesting that the *Zippo* test should no longer be used in Internet libel cases and, following *Keeton*, concludes that "fifty-state jurisdiction is not necessarily unconstitutional in defamation cases."[182] The court in *Baldwin* was similarly unconcerned with the possibility that a defendant could be haled into the courts of any state.[183] Quoting Professor C. Douglas Floyd and Shima Baradaran-Robison, the court noted that:

> [a] tortfeasor who mails a thousand bombs to recipients in one state, and one to recipients in each of the other forty-nine states, should not be relieved from geographic responsibility for the consequences of his actions in each of those states simply because he is subject to suit everywhere, or because his conduct has a uniquely intensive relationship with a single state.[184]

As courts and scholars alike seem unconcerned with exposing an Internet defamation defendant to fifty-state jurisdiction, perhaps Missouri courts should revisit *Maritz* and re-introduce jurisdiction whenever the defamatory statement can be read, seen, or heard in Missouri. The Missouri Supreme Court, however, may find it difficult to explain how fifty-state jurisdiction complies with the Due Process Clause.[185] In the next section, the various approaches are evaluated against recent decisions of the Missouri Supreme Court in an attempt to predict Missouri's future approach to personal jurisdiction in Internet defamation cases.

III. PREDICTING A MISSOURI SOLUTION

The main issue for Missouri to decide is whether to create a completely new jurisdictional framework for Internet defamation cases, to use the same framework available to non-Internet defamation cases, or to slightly alter the existing framework. A new framework is unlikely for Internet defamation cases, however.

180. *Id.*

181. *Maritz* has not been overruled despite two thorough examinations by the Eastern District of Missouri, most recently in 2000 in *Uncle Sam's Safari Outfitters v. Uncle Sam's Army Navy Outfitters-Manhattan, Inc.*, 96 F. Supp. 2d 919, 924 (E.D. Mo. 2000) (distinguished on factual grounds).

182. Borchers, *supra* note 48, at 489–90.

183. Baldwin v. Fischer-Smith, 315 S.W.3d 389, 398 (Mo. Ct. App. 2010).

184. *Id.* (quoting C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 659 (2006)).

185. *See supra* text accompanying notes 99–109.

Zippo and other Internet tests may be relevant for determining minimum contacts for business torts, but when one person defames another, the means are not as important. In *Lakin v. Prudential Securities, Inc.*, the Eighth Circuit noted "it is possible for a Web site to be very interactive, but to have no quantity of contacts."[186] While this may be true for websites conducting business, defamation cases are different.[187] Unlike business-related claims, where the Internet introduces a new medium for evaluating minimum contacts, defamation is an intentional tort. The court must determine whether the defendant's conduct was committed within the forum state, and this can be determined through the existing *Calder* effects test or another targeting test. Therefore, *Zippo* should not impact future defamation cases because the level of interactivity is not as relevant in defamation cases as it is in business contacts cases.[188] Additionally, as all websites become more interactive, the idea of a "passive" website is quickly disappearing.[189] Perhaps the Southern District was wise in reiterating that it did not seek to "tease out any universal rule about personal jurisdiction in internet [sic] cases."[190] Indeed, what works for Internet business contract cases does not work for Internet defamation cases. Missouri is unlikely to use the *Zippo* test or to adopt any new framework to determine future Internet defamation cases.

Missouri will likely keep the existing framework for defamation cases and apply it to Internet defamation cases or slightly alter that existing framework to account for the advances in technology. In enacting its long-arm statute, the Missouri legislature intended "to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States."[191] Therefore, Missouri courts should look to bring any nonresident defendant into the state when that defendant has purposefully availed him or herself of the laws of Missouri, including when a nonresident defendant has deliberately committed some defamatory act that impacts a Missouri resident.[192] Missouri will need to determine the extent to which *Calder* or another targeting test allows its courts to hale nonresident defendants into the state.

186. Lakin v. Prudential Sec., Inc., 348 F.3d 704, 712 (8th Cir. 2003).

187. *Compare* Bell v. Imperial Palace Hotel/Casino, Inc., 200 F. Supp. 2d 1082, 1088–89 (E.D. Mo. 2001) (website in Nevada allowing Missouri residents to make hotel reservations in Nevada did not establish minimum contacts in Missouri), *with* Tamburo v. Dworkin, 601 F.3d 693, 697, 707 (7th Cir. 2010) (websites in Colorado, Michigan, and Ohio which contained defamatory statements about Illinois resident sufficient to establish minimum contacts in Illinois).

188. *Tamburo*, 601 F.3d at 703 n.7.

189. *See supra* text accompanying notes 49–51.

190. Baldwin v. Fischer-Smith, 315 S.W.3d 389, 398 (Mo. Ct. App. 2010).

191. State *ex rel.* Deere & Co. v. Pinnell, 454 S.W.2d 889, 892 (Mo. 1970).

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

Other state courts are also looking to bring in all nonresident defendants that they can without violating due process.[193] The Missouri Supreme Court, then, could look to those courts to see just how far due process can bend before breaking.[194] This approach would increase the protections available to Missouri residents, but Missouri courts likely would balk at the idea of bending due process until it breaks.

Instead, Missouri would be wise to simply take the Southern District's decision in *Baldwin* and explicitly adopt it as the jurisdictional framework for Internet defamation cases.[195] Specifically, if a nonresident defendant uses the Internet to purposefully target the resident plaintiff, with the goal of harming the plaintiff's reputation, that nonresident defendant should be haled into the courts of the state.[196] While this solution does not forge new ground or deviate sharply from established case law, it is the responsible approach.

The Internet evolves even faster than the law, so if Missouri tries to create a jurisdictional framework to deal specifically with Internet defamation cases, it likely will not have any lasting impact.[197] As the Internet grows, the number of Internet defamation cases will grow with it.[198] Perhaps the Internet will evolve to the point where specific rules for defamation over the Internet are

193. *See supra* notes 170–173.

194. For example, *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996), has yet to be overruled. It is one of the broadest interpretations of due process in a jurisdictional context since the nonresident's maintenance of a website established a reasonable anticipation that the website could be accessed by residents of Missouri (or elsewhere in the world). *Id.* at 1334. Therefore, personal jurisdiction was held proper under due process. *Id.*

195. Baldwin v. Fischer-Smith, 315 S.W.3d 389, 396–98 (Mo. Ct. App. 2010).

196. *Id.*

197. The Internet has grown so quickly that 2011 marks the year "the internet [sic] has run out of room." Dylan Tweeney, *No Easy Fixes as Internet Runs Out of Addresses*, WIRED.COM (Feb. 3, 2011, 9:58 AM), http://www.wired.com/epicenter/2011/02/internet-addresses/. While the old system of Internet addresses, called IPv4, has expired, the new system, IPv6, has enough web addresses so that every person on Earth could have $5x10^{28}$ (5 followed by 28 zeroes) addresses. *Id.*

198. The "MySpace trial," discussed *supra* note 8, made national news, but many other Internet defamation cases are now appearing before the courts. In January 2011, a Georgia jury awarded over $400,000 to a man who lost his job due to libelous allegations of drug use and pedophilia that appeared online after his fiancée was murdered by her ex-husband. Rhonda Cook, *Ga. Man Awarded $404,000 for Libelous Internet Postings*, AJC.COM (Jan. 20, 2011, 1:05 PM), http://www.ajc.com/news/ga-man-awarded-404-809868.html. While no lawsuit has been filed as of the writing of this Note, Missouri State Representative Donna Lichtenegger was among four Missouri lawmakers who experienced first-hand the effects of Internet defamation as her Facebook page was hacked to indicate that gifts from lobbyists was her favorite job perk. Scott Moyers, *Four Legislators' Facebook Pages Hacked*, SOUTHEAST MISSOURIAN, Feb. 8, 2011, at 1A.

needed.[199] For now, however, defamation by magazine,[200] newspaper,[201] and Internet all involve the same jurisdictional problems.[202]

If Missouri wants to update the defamation jurisdictional framework for Internet-based cases, it can clarify the *Calder* test for those cases. One useful change would be adding Dr. Geist's thoughts on implied knowledge of the forum state.[203] A defendant would be haled into the state as long as he should have known harm would be felt in the state, even if he lacked actual knowledge.[204]

Another consideration would be integrating aspects of Professor Sanders' ideas on community.[205] By combining Professor Sanders's ideas with Dr. Geist's thoughts on implied knowledge, Missouri could ask whether a nonresident defendant knew or should have known the real-world jurisdiction(s) where the targeted community is located. For example, the defendants in *Baldwin* knew or should have known that the dog breeding community (the community where the plaintiff's reputation would be harmed) was located, in part, in Missouri.[206] By defaming a member of that community, Missouri could argue the defendants purposefully availed themselves of Missouri's laws, giving them the minimum contacts required to satisfy due process. Whether the Missouri Supreme Court takes these or similar steps is yet to be seen, but the framework adopted by the Southern District in *Baldwin* provides a strong starting point for Internet defamation cases in Missouri.

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199. For example, with the expansion of mobile web technology, jurisdictional issues have the potential to become even more complicated. In an over-the-top example, consider which state(s) would be able to assert jurisdiction over a Florida defendant, posting a defamatory statement about a Missouri resident, on California-based Facebook.com, on the Facebook wall of an Illinois resident, with a phone by Washington-based T-Mobile USA, while driving across state lines from Georgia to Tennessee. Under *Baldwin*, Missouri would likely be able to hale the defendant into its courts as long as the defendant knew the plaintiff was a Missouri resident. Baldwin v. Fischer-Smith, 315 S.W.3d 389, 397–98 (Mo. Ct. App. 2010).

200. *E.g.*, Calder v. Jones, 465 U.S. 783, 788–89 (1984).

201. *E.g.*, Hugel v. McNell, 886 F.2d 1, 4–5 (1st Cir. 1989).

202. In fact, the United States Supreme Court is reluctant to "grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Calder*, 465 U.S. at 790–91.

203. *See supra* Part II.D.

204. *See supra* Part II.D.

205. *See supra* Part II.C.2.

206. *See* Baldwin v. Fischer-Smith, 315 S.W.3d 389, 392 (Mo. Ct. App. 2010).

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