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"Virtual" Contacts and Patent Cases: How Should Internet-Related Activity in Patent Cases Affect the Personal Jurisdiction Analysis?

By Megan M. La Belle

In the 1990s, when the Internet was still considered novel, courts struggled with the question of how Internet-related contacts should be treated in the personal jurisdiction analysis. So when *Zippo Manufacturing v. Zippo DOT Com*[1] established an apparently easy-to-apply test for deciding whether a defendant's virtual contacts are sufficient for personal jurisdiction, many courts embraced it.[2] To date, however, the Federal Circuit has neither adopted nor rejected the *Zippo* approach, leaving litigants and lower courts in patent cases with little guidance on the issue. Although a recent decision suggests that the Federal Circuit recognizes the limitations of *Zippo*,[3] it is time for the court to set forth clear guidelines for analyzing questions of personal jurisdiction in patent cases when the defendant's contacts with the forum state are limited to Internet activity.

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PERSONAL JURISDICTION IN PATENT CASES

In patent cases, Federal Circuit law governs substantive patent law issues, while the law of the regional circuits generally applies to procedural questions. The Federal Circuit has fashioned an exception, however, when the procedural question is "intimately involved in the substance of enforcement of the patent right."[4] Because the Federal Circuit has determined that questions of personal jurisdiction fall within these parameters, its law is controlling on personal jurisdiction.[5]

Like in other contexts, the test for personal jurisdiction in patent cases involves a two-step inquiry: (1) Does the forum's long-arm statute permit service of process? and (2) Would the exercise of jurisdiction be inconsistent with due process?[6] Because most state long-arm statutes are co-extensive with the limits of due process, the two inquiries frequently collapse into one: whether the assertion of personal jurisdiction comports with due process. Due process allows defendants to be sued only where they have meaningful "contacts, ties, or relations" with the forum state and thus could reasonably anticipate being haled into court there.[7] In other words, a court cannot force a party to defend a lawsuit in a state unless the defendant has the requisite "minimum contacts" with that state.

Courts use various tests to determine whether, in a given case, there have been sufficient minimum contacts to subject the defendant to jurisdiction in the forum state. The nature of conduct required to meet the "minimum contacts" threshold depends on whether plaintiff asserts a general

or specific jurisdiction theory. To be subject to a court's general jurisdiction, the defendant must have "continuous and systematic" contacts with the forum state.[8] Assuming such contacts exist, courts may exercise jurisdiction over the defendant with respect to any type of lawsuit, even if the action is not related to the defendant's contacts with the forum state.

Specific jurisdiction, on the other hand, requires less pervasive contacts between defendant and the forum state. But under this doctrine, courts are permitted to exercise jurisdiction over a defendant only if the lawsuit arises out of or is related to the defendant's contacts with the forum.[9] In this situation, the "'relationship among the defendant, the forum, and the litigation,' is the essential foundation of *in personam* jurisdiction."[10]

In assessing whether this relationship among the defendant, the forum, and the litigation supports the exercise of specific jurisdiction in patent cases, courts consider three factors:

1. Whether the defendant purposefully directed its activities at residents of the forum;
2. Whether the claim arises out of or relates to the defendant's activities within the forum; and
3. Whether the assertion of personal jurisdiction is reasonable and fair.[11]

The purposeful direction requirement ensures that parties will not have to defend against lawsuits in different states based solely on random, fortuitous, or attenuated contacts or based on the unilateral activity of a third party.[12] Yet even a single contact may be sufficient for specific jurisdiction if it is directly and substantially related to the plaintiff's claims.[13]

Applying this three-part specific jurisdiction test in patent cases often means that alleged infringers—most of whom are corporations that engage in interstate and international commerce—are subject to jurisdiction in practically any federal court in the country because: (1) the alleged infringer purposefully directs its activities at residents of the forum state by selling or offering to sell the accused product there; (2) the claim—patent infringement—arises out of or relates to the defendant's activities within the forum; and (3) the assertion of personal jurisdiction is reasonable and fair.[14] Questions arise, however, when the alleged infringer's products reach the forum state indirectly, either via the Internet or through more traditional streams of commerce.

THE STREAM OF COMMERCE AND PERSONAL JURISDICTION

Even outside of the Internet context, it is often the case that a defendant's only relevant contacts with a forum state are that its products have been placed into the stream of commerce and ultimately sold there. Under those circumstances, the question is whether the forum state may assert jurisdiction over an entity that "delivers its products into the stream-of-commerce with the expectation that they will be purchased by consumers in the forum state."[15]

Unfortunately, the parameters of the stream-of-commerce doctrine have not been well defined by the Supreme Court. In *Asahi Metal Industry v. Superior Court*, a majority of the justices could not agree as to the requirements for personal jurisdiction under a stream-of-commerce theory.[16] One opinion, authored by Justice O'Connor, found that "[t]he placement of a product into the stream-of-commerce, without more, is not an act of the defendant purposefully directed toward the forum State," and that the requisite something "more" might be marketing, advertising, service, or design done with the forum in mind.[17] Justice Brennan opined, by contrast, that placing a product in the stream of commerce with an awareness "that the final product is being marketed in the forum State" is all that is necessary to subject a defendant to jurisdiction.[18]

While some appellate courts have adopted either the O'Connor or Brennan approach to stream-of-commerce jurisdiction, the Federal Circuit has not yet taken a position on the issue.[19] In patent infringement cases, therefore, district courts frequently are forced to look to the law of the regional circuit in which they sit. Consequently, the law in patent cases with respect to personal jurisdiction based on the stream-of-commerce theory is all over the map. In some states, a defendant will be subject to jurisdiction because its allegedly infringing product was placed into the stream of commerce and ultimately reached the forum state, while placing the product into the stream of commerce will not suffice for personal jurisdiction in other states. This makes it very difficult, if not impossible, for patent defendants to regulate their

behavior and predict where they might be subject to suit.

THE *ZIPPO* DECISION

The *Zippo* case arose in the context of a trademark dispute, but it has had far-reaching implications. The question in *Zippo* was whether the defendant, a California corporation whose principal business was an Internet news service that allowed Internet users to access newsgroups through its Web site, was subject to personal jurisdiction in Pennsylvania. The plaintiff conceded that the defendant was not subject to general jurisdiction, so the only question was whether its contacts were sufficient for specific jurisdiction.[20]

In order for a defendant to be subject to specific jurisdiction, the cause of action must arise out of or be related to the defendant's forum-related conduct. The court in *Zippo* found that this requirement was satisfied since a significant amount of the alleged trademark infringement and dilution had occurred in Pennsylvania.[21]

The more difficult question was whether the defendant had purposefully availed itself of Pennsylvania by engaging in electronic commerce with residents of that forum. To answer this question, the court introduced a sliding-scale test that characterizes virtual contacts as falling into three categories.[22] At one end of the scale are "active" Web sites, which are used to conduct business transactions. If, for example, the buyer electronically transmits payment to the defendant that electronically transmits the purchased product to the buyer, the *Zippo* court considered such conduct "purposeful" for the personal jurisdiction analysis. At the opposite end of the spectrum are "passive" Web sites where a defendant simply makes information available on a site that may be accessed by residents of other states. According to *Zippo*, the maintenance of such a passive Web site does not satisfy the purposeful availment requirement. Finally, in the middle of the sliding scale are "interactive" Web sites, which allow for the exchange of information between the Web site's host and non-residents, but where business transactions do not necessarily occur. Interactive Web sites may or may not subject the defendant to personal jurisdiction; that depends on the level of interactivity and the commercial nature of the exchange of information that occurs on the site.

Applying this newly articulated test to the case before it, the *Zippo* court concluded that the Web site at issue was "active" and that defendant was doing business over the Internet. In particular, approximately 140,000 people worldwide had subscribed to defendant's service by completing an online application and then making an electronic payment. Defendant then assigned each subscriber a password that permitted the subscriber to view and download newsgroup messages stored on the defendant's server in California. Of these 140,000 customers, approximately 3,000 were Pennsylvania residents; moreover, defendant had entered into agreements with seven Internet service providers in Pennsylvania to allow these 3,000 customers to access the new service.

Finally, the *Zippo* court rejected defendant's argument that the exercise of jurisdiction would be unreasonable given Pennsylvania's strong interest in adjudicating trademark disputes involving its residents, the fact that plaintiff chose to seek relief in Pennsylvania, and the lack of evidence that litigating in Pennsylvania would impose a significant burden on defendant. Accordingly, the *Zippo* court denied the motion to dismiss and allowed the case to proceed in Pennsylvania.

POST-*ZIPPO* PATENT CASES

Many courts have adopted some permutation of the *Zippo* test since it was announced more than a decade ago. At least in theory, the use of such a well-defined test should provide some benefits; namely, it should increase predictability for litigants and ease the burden on the courts in deciding these difficult jurisdictional questions. But this one-size-fits-all approach contradicts the Supreme Court's mandate that personal jurisdiction be decided on a case-by-case basis.[23] Moreover, many courts have reflexively followed the *Zippo* test without regard to either the basic tenets of the personal jurisdiction doctrine or the particular factual circumstances of the case. Thus, in reality, the *Zippo* test has contributed to the creation of a body of case law on Internet-related personal jurisdiction that is confusing, inconsistent, and sometimes even inaccurate. This is particularly problematic in patent cases where district courts are supposed to follow Federal Circuit law on personal jurisdiction, but have

resorted to relying on the regional circuit courts for guidance given the Federal Circuit's silence on the issue.

General Jurisdiction vs. Specific Jurisdiction

In *Zippo*, the court made clear that it was considering only whether defendant was subject to specific, rather than general, jurisdiction and that the sliding scale test was applicable to the purposeful availment prong of the specific jurisdiction test. Nonetheless, a common mistake that district courts have made is that they have misapplied the *Zippo* sliding-scale test to assertions of general jurisdiction. As noted earlier, a court may exercise general jurisdiction when a defendant has continuous and systematic contacts with the forum state. In assessing general jurisdiction, courts must consider all of the defendant's activities within the forum state and then determine whether those contacts, in their totality, essentially equate to "presence" in the state.[24] Thus, the fact that the defendant maintains a Web site—whether active, passive, or interactive in nature—should be factored into the general jurisdiction calculation, but it rarely should be determinative.

More troubling is the inconsistency among lower courts deciding patent cases as to the characterization of a Web site as active, interactive, or passive.

Yet courts often overlook the fact that *Zippo* was a specific jurisdiction case and rely on the sliding-scale test to decide whether a defendant charged with patent infringement should be subject to general jurisdiction in the forum state. In *Enlink Geoenergy Services, Inc. v. Jackson & Sons Drilling & Pump, Inc.*,[25] for example, the plaintiff patent holder argued that the alleged infringer was subject to general jurisdiction in California because it maintained a Web site accessible to California residents that advertised and displayed the allegedly infringing products. The court disagreed with plaintiff, holding that the Web site was merely passive in nature and, therefore, insufficient to establish general jurisdiction.[26] The opinion suggests, however, that the court might have reached a different result had the Web site been more interactive.

Active, Interactive, or Passive Web Site

Even more troubling is the inconsistency among lower courts deciding patent cases as to the characterization of a Web site as active, interactive, or passive. In these cases, the courts are properly considering the *Zippo* sliding-scale test to evaluate whether the defendant has satisfied the purposeful availment prong of the specific jurisdiction test; yet their conclusions vary dramatically.

In the first line of cases, courts have interpreted the purposeful availment requirement rather liberally and have subjected defendants to jurisdiction even where no Internet sales of the allegedly infringing products have occurred. In *O'Donnell v. Animal Matters, Inc.*,[27] the patent holder sued for patent infringement in North Carolina asserting that defendant was subject to jurisdiction as a result of its Web site. Although defendant did not sell the accused products over the Internet, its site listed retailers that sold the products, including two in North Carolina, along with name and contact information for those retailers. The court held that this activity amounted to "purposeful direction" and that exercising jurisdiction based on such virtual contacts would comport with due process.[28]

Similarly, in *Litmer v. PDQUSA.com*,[29] the court held that defendant's Web site was sufficiently "interactive" to satisfy the purposeful prong of the specific jurisdiction test. In that case, the defendant offered the allegedly infringing product for sale over its Web site, which was accessible in every state, including Indiana where the patent holder ultimately sued. Unlike most commercial Web sites, however, sales could not be completed over the Web site. Instead, the purchaser would provide certain information over the Internet, such as name, address, and number of products that it wished to order, and then the seller would follow up with a telephone call to collect payment. The court nevertheless concluded that, under the *Zippo* test, the Web site was highly interactive and that defendant's activities "were purposefully directed at other forums, including Indiana."[30]

At the opposite end of the spectrum are the courts in the second line of cases. These courts have held that selling goods over the Internet does not necessarily subject a defendant to the jurisdiction of the purchaser, even when that sale gave rise to the cause of action. In *Shamsuddin v. Vitamin Research Products*,[31]

for example, plaintiff brought a patent infringement action in Maryland against Vitamin Research Products (VPR), a Nevada corporation that was selling a dietary supplement over the Internet that allegedly infringed plaintiff's patent. It was undisputed that VPR operated a commercial Web site and that at least two Maryland residents had purchased the accused products through that site. But the court held that such contacts did not amount to purposeful availment because "[n]othing on VPR's website suggests that VPR intended to target Maryland residents any more than it intended to target residents of other states."[32]

The time has come for the Federal Circuit to take a position and explain to lower courts how Internet-related activity should affect the personal jurisdiction analysis in patent cases.

The *Shamsuddin* court seemed to require "something more" for jurisdiction just like Justice O'Connor did in *Asahi* with respect to the more traditional stream of commerce. And in recent years, several other district courts presiding over patent cases have imposed this "something more" or "targeting" requirement in order for a Web site to subject a defendant to personal jurisdiction.[33] These courts posit, in other words, that "[c]reating a site, like placing a product into the stream-of-commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state."[34]

Finally, in the third line of cases, which can be seen as a sort of middle ground, courts have held that a defendant purposefully avails itself by maintaining a Web site through which it has sold the allegedly infringing products to residents of the forum state. In *3M Company v. Mohan*,[35] for example, defendant Pradeep Mohan, a California resident, was selling his line of stethoscopes on various Internet sites. Plaintiff 3M Company believed that the stethoscopes infringed its patents and sued Mohan in district court in Minnesota, contending that he was subject to specific jurisdiction there. The court found that Mohan had sold the allegedly infringing products to Minnesota residents over the Internet and that those sales totaled approximately $400 or 2 percent of his Web sales.[36] The court then determined that these sales, albeit minimal, were sufficient for purposeful availment under *Zippo*.

Several other district courts have followed the *Mohan* line of reasoning in patent cases.[37] For example, in *Tristrata Technology, Inc. v. Emulgen Laboratories, Inc.*,[38] the defendant conducted a nationwide email campaign to advertise the allegedly infringing products. As a result of this campaign, defendant received orders from and shipped the accused products to four Delaware residents. After being sued for patent infringement in Delaware, defendant moved to dismiss for lack of personal jurisdiction on the ground that it should not be subject to specific jurisdiction in Delaware because its sales there were *de minimis*. The court rejected this argument, explaining that, "[b]ecause [defendant's] forum-related conduct forms the basis of the injuries alleged by [plaintiff], [defendant's] contacts do not need to be continuous and substantial."[39] In sum, courts in this third line of cases have held that, "where a defendant infringer is shown to have sold the allegedly infringing product in the forum state, the forum may exercise personal jurisdiction over defendant."[40]

THE FEDERAL CIRCUIT AND INTERNET-RELATED PERSONAL JURISDICTION

The previous discussion demonstrates some of the inconsistencies that have arisen in patent cases with respect to Internet-related personal jurisdiction. The Federal Circuit was created in 1982 in order to avoid such problems; it was to bring uniformity and consistency to our patent system. Yet, despite the frequency with which personal jurisdiction is challenged in patent cases and despite that district courts have been grappling with this question for many years now, the Federal Circuit has failed to provide clear guidance on this issue. As discussed in this section, the time has come for the Federal Circuit to take a position and explain to lower courts how Internet-related activity should affect the personal jurisdiction analysis in patent cases.

TRINITEC

In a recent decision, *Trinitec Industries, Inc. v. Pedre Promotion Products, Inc.*, the Federal Circuit

considered whether a defendant should be subject to personal jurisdiction based on virtual contacts. In that case, though, the analysis focused on the long-arm statute, not on the question whether the exercise of jurisdiction would comport with federal due process. Nevertheless, the *Trinitec* opinion is relevant because it provides some insight as to how the Federal Circuit might rule when confronted with this issue head on.

In *Trinitec*, the plaintiffs sued a New York corporation for patent infringement in the District of Columbia. Defendant moved to dismiss for lack of personal jurisdiction on the ground that the exercise of jurisdiction would violate both the District of Columbia long-arm statute and due process. With respect to the long-arm statute, plaintiffs had to demonstrate either that the claims arose from defendant's transacting business in the District of Columbia or that the defendant had caused tortious injury in the District.

To demonstrate that defendant was transacting business in the District, plaintiff pointed to defendant's Web site on which it was advertising and selling the allegedly infringing products. The Federal Circuit acknowledged that, some cases, including *Zippo*, "have suggested that the availability and use of a highly interactive, transaction-oriented website . . . by itself may support long-arm jurisdiction wherever the site is available to potential customers for the purpose of doing business."[41] In this case, however, the court concluded that the existence of a Web site alone, even a commercial one, is insufficient to prove that defendant was transacting business in the District of Columbia because "the website is not directed at customers in the District of Columbia, but instead is available to all customers throughout the country who have access to the Internet."[42]

Nor was the *Trinitec* court able to determine whether defendant had caused tortious injury in the District via its Internet activity. It is well established that the sale of an infringing product within a forum causes tortious injury there since patent infringement is a tort. But in this case, plaintiff merely established that defendant maintained a Web site *capable of selling infringing products to residents of the District*, not that any District residents had ever actually purchased the accused products over the Web site. This was not enough, in the court's opinion, to satisfy the tortious injury provision of the long-arm statute that required actual sales to District residents.

Under these circumstances, the *Trinitec* court held that the record was not sufficient to decide whether the District of Columbia long-arm statute was satisfied, so it remanded the case for further proceedings. The court never discussed the due process portion of the personal jurisdiction analysis. Indeed, the court explicitly stated that it was expressing no opinion as to whether the exercise of jurisdiction in this case would be constitutional. As discussed later, however, *Trinitec* may very well foreshadow the approach the Federal Circuit is likely to take with respect to the due process inquiry of the personal jurisdiction test.

THE FEDERAL CIRCUIT'S APPROACH

The Federal Circuit has so far refused to take a position with respect to two very important issues related to personal jurisdiction that arise in patent cases: (1) whether a defendant is subject to personal jurisdiction because the accused products reached the forum state through the stream-of-commerce, and (2) whether a defendant subjects itself to jurisdiction by maintaining an interactive Web site accessible in the forum state. These issues are closely related, and patent litigants and lower courts certainly need guidance on both. This article, however, focuses on the latter and explores the Federal Circuit's likely approach to questions of Internet-related personal jurisdiction.

***Trinitec* may very well foreshadow the approach the Federal Circuit is likely to take with respect to the due process inquiry of the personal jurisdiction test.**

Although the Federal Circuit's delay in addressing this jurisdictional question has caused frustration and confusion, the flip side is that the Federal Circuit will have the benefit of substantial case law and commentary when it ultimately resolves the split among the lower courts. Thus, the Federal Circuit should be able to avoid some of the mistakes that other courts have made in this context, such as misapplying *Zippo* to general jurisdiction and treating the *Zippo* test as a categorical rule. Rather, the Federal Circuit likely understands by now that the *Zippo* sliding-scale analysis should be used only in the specific jurisdiction context "as a tool to determine the purposeful

availment of a defendant to a forum."[43] So the Federal Circuit's first priority should be to make this clear for lower courts and litigants.

But even assuming that courts understand that *Zippo* applies only in the specific jurisdiction context, other questions about Internet-related jurisdiction need to be resolved. In a typical patent infringement case where jurisdiction is based on Internet activity, the patent owner contends that the defendant is subject to jurisdiction because it was offering to sell the allegedly infringing products over the Internet, including to residents of the forum state. Thus, the question for the Federal Circuit will be whether those types of virtual contacts—namely, offering to sell the infringing products on a Web site accessible nationwide—amount to purposeful availment.

Trinitec suggests that the court would be loathe to find that merely maintaining a Web site advertising the accused product amounts to purposeful availment.

Like the lower courts, the Federal Circuit will have three options for tackling this problem. First, it could interpret the purposeful availment requirement liberally, so that maintaining a Web site that offers to sell the accused products by itself would support jurisdiction. This is similar to Justice Brennan's approach in the traditional stream-of-commerce context where placing a product in the stream of commerce with an awareness that the final product could be sold in the forum state is all that is necessary to subject the defendant to jurisdiction.

Second, the Federal Circuit could decide that a Web site offering to sell the allegedly infringing products is not enough for jurisdiction. Instead, the plaintiff would have to show that the defendant actually sold those products over the Internet to residents of the forum state. Of course, it is important to note in this regard that jurisdiction cannot be manufactured. For example, a plaintiff who resides in California and wants to sue in New York cannot arrange for his New York-based attorney to purchase the allegedly infringing product and then claim that jurisdiction should be based on that single sale to a New York resident.[44]

Third, the Federal Circuit could follow a more restrictive approach to jurisdiction requiring "something more" than Internet sales of the accused products to residents of the forum state. The court might, for instance, require the defendant to "target" forum residents in some way, such as by advertising in the state or designing its products specifically for that state's residents.[45] This approach resembles Justice O'Connor's in *Asahi* where she held that placing a product in the stream of commerce, without more, is insufficient for purposeful availment.

So, which of these approaches is the Federal Circuit likely to take? And perhaps more importantly, is that the approach that the Federal Circuit *should* take? Because of *Trinitec* we know something about the way that the Federal Circuit (or, more accurately, one panel of the court) is thinking about some of these issues. *Trinitec* suggests that the court would be loathe to find that merely maintaining a Web site advertising the accused product amounts to purposeful availment since it concluded that such a Web site was insufficient to satisfy the "transacting business" prong of the D.C. long-arm statute. Instead, when a defendant's Web site is its only contact with the forum state and there's no evidence that any actual sales of the accused products have been made, the Federal Circuit will probably require some additional proof that defendant directed its site at residents of the forum in question.

It is a bit more difficult to predict how the Federal Circuit might rule when the defendant's Web site does not target the forum, but actual sales of the allegedly infringing product have been made to only a few forum residents. On the one hand, the Supreme Court has made clear that the exercise of specific jurisdiction may be supported by a single contact as long as it was related or gave rise to plaintiff's cause of action.[46] This prerequisite would appear to be satisfied in patent infringement cases since the single contact—the sale of an allegedly infringing product—would be directly and substantially related to plaintiff's claim for patent infringement.

In *Trinitec*, however, the court implied that a single sale may not be enough to show that defendant was "transacting business" in the District of Columbia.[47] Specifically, the court said: "Although Trinitec has shown that Pedre's websites contain some interactive features aimed at transacting business, it is unclear how frequently those features are utilized or, indeed, whether any District residents have ever actually used Pedre's website to transact business."[48] Thus,

if the court believes that sales to only a few forum residents would be insufficient to satisfy the long-arm statute, then it may similarly conclude that such limited sales do not amount to purposeful availment for due process purposes.

For courts that have adopted either Justice Brennan's or Justice O'Connor's approach to stream-of-commerce jurisdiction, the decision as to Internet jurisdiction may appear to be a simple one. If "something more" is required under the stream-of-commerce theory, then there also must be "something more" for a Web site to subject a defendant to personal jurisdiction. Conversely, in a jurisdiction following Justice Brennan as to the stream-of-commerce theory, the courts may very well adopt a more liberal approach with respect to the Internet as well.

Unlike most of the regional circuit courts, however, the Federal Circuit has not yet taken a position on the stream-of-commerce theory of personal jurisdiction; thus, it cannot simply transpose that rule to the Internet context. Interestingly, this places the Federal Circuit in an advantageous position because the court will write on a clean slate. So, in deciding which approach to follow, the Federal Circuit should consider that, although similarities between the traditional stream-of-commerce and Internet-based jurisdiction certainly exist, there are important distinctions too.

With respect to the traditional theory, the defendant places its products into the stream of commerce, those products make their way to the forum state, and then eventually are sold in the forum state by a third party. In the Internet context, by contrast, the defendant itself creates a Web site and the defendant itself sells those products over the Internet to residents of the forum state. Since the purposeful availment requirement is satisfied when the defendant's contacts with the forum state "proximately result from actions by the defendant himself that create a substantial connection with the forum State,"[49] there is a much stronger basis for exercising jurisdiction over defendants who sell their products directly over the Internet than those who place products into the stream of commerce that eventually are sold in the forum state by a third party.

Finally, in choosing an approach, the Federal Circuit should be mindful of the particular nature of specific jurisdiction. In the general jurisdiction context, it is the quantity of defendant's contacts that matters, that is, are the defendant's contacts with the forum state continuous and systematic? With respect to specific jurisdiction, though, the focus is on the quality of the contacts, namely, did the defendant's contacts with the forum state give rise to the cause of action? As the Federal Circuit itself has acknowledged, "even a single contact with a forum state may suffice for personal jurisdiction if it is directly and substantially related to the plaintiff's claim."[50] Thus, the fact that an alleged patent infringer sold only a few of the accused items in the forum state should not be relevant to specific jurisdiction. The question the Federal Circuit should be asking is whether those contacts gave rise to the plaintiff's claim. In patent cases, where the contact is the sale of allegedly infringing products and the cause of action is patent infringement, the court likely will be able to answer that question in the affirmative, which means the defendant usually will be subject to specific jurisdiction.

CONCLUSION

Personal jurisdiction questions, particularly those concerning Internet-related contacts, arise frequently in patent infringement actions. Federal Circuit law is supposed to govern personal jurisdiction in patent cases, but so far the Federal Circuit has said very little about Internet-related jurisdiction. As a result, lower courts are sharply divided as to the relevance of *Zippo* in patent cases, and potential defendants are left guessing whether their conduct might subject them to jurisdiction in a particular forum.

This is not to suggest that the Federal Circuit should adopt a bright-line rule regarding Internet-related jurisdiction. The Supreme Court has eschewed such definitive rules and has mandated that personal jurisdiction be decided on a case-by-case basis.[51] Yet, given the current inconsistent and confusing state of the law in patent cases, the Federal Circuit needs to provide lower courts and litigants some guidance as to the impact of virtual contacts on personal jurisdiction generally and the *Zippo* sliding-scale test in particular.

NOTES

1. Zippo Manufacturing v. Zippo DOT Com, 952 F. Supp. 1119 (W.D. Pa. 1997).
2. *See, e.g.*, Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003); Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997).

3. Trinitec Indus., Inc. v. Pedre Promotion Prods., Inc., 395 F.3d 1275 (Fed. Cir. 2005).
4. GFI, Inc. v. Franklin Corp., 265 F.3d 1268, 1272 (Fed. Cir. 2001).
5. Silent Drive, Inc. v. Strong Indus., Inc., 326 F.3d 1194, 1201 (Fed. Cir. 2003).
6. *See, e.g.*, Autogenomics, Inc. v. Oxford Gene Tech. Ltd., 566 F.3d 1012, 1017 (Fed. Cir. 2009).
7. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).
8. Helicopteros Nacionales de Columbia S.A. v. Hall, 466 U.S. 408, 414-415 (1984).
9. *Id.* at 414 n.8.
10. *Id.* at 414.
11. Hildebrande v. Steck Mfg. Co., 279 F.3d 1351, 1354 (Fed. Cir. 2002).
12. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).
13. *Id.* at 472.
14. *See* Avocent Huntsville Corp. v. Aten Intern. Co. Ltd., 552 F.3d 1324, 1332 (Fed. Cir. 2008).
15. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980).
16. Asahi Metal Industry v. Superior Court, 480 U.S. 102 (1987).
17. *Id.* at 112.
18. *Id.* at 117.
19. Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1566 (Fed. Cir. 1994) (declining to decide which stream-of-commerce theory should prevail).
20. *Zippo*, 952 F. Supp. at 1122.
21. *Id.* at 1127.
22. *Id.* at 1123-1124.
23. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 204 (1977).
24. *See* Campbell Pet Co. v. Miale, 542 F.3d 879, 884 (Fed. Cir. 2008).
25. Enlink Geoenergy Services, Inc. v. Jackson & Sons Drilling & Pump, Inc., 2009 WL 4544694, *1 (N.D. Cal. Nov. 30, 2009).
26. *Id.* at *2-3.
27. O'Donnell v. Animal Matters, Inc., 2007 WL 2781218, *1 (W.D.N.C. Sept. 21, 2007).
28. *Id.* at *1-2.
29. Litmer v. PDQUSA.com, 326 F. Supp. 2d 952 (N.D. Ind. 2004).
30. *Id.* at 958.
31. Shamsuddin v. Vitamin Research Products, 346 F. Supp. 2d 804 (D. Md. 2004).
32. *Id.*at 814.
33. *See, e.g.*, Roblor Marketing Group, Inc. v. GPS Indus., Inc., 645 F. Supp. 2d 1130, 1154-1155 (S.D. Fla. 2009); Roberts v. Paulin, 2007 WL 3203969, *6 (E.D. Mich. Oct. 31, 2007); Xactware, Inc. v. Symbility Solution Inc., 402 F. Supp. 2d 1359, 1364 (D. Utah 2005); Systems Designs, Inc. v New Customware Co., Inc., 248 F. Supp. 2d 1093, 1101 (D. Utah 2003).
34. *Systems Designs*, 248 F. Supp. 2d at 1101.
35. 3M Co. v. Mohan, 2010 WL 786519, *1 (D. Minn. Mar. 5, 2010).
36. *Id.* at *2.
37. *See, e.g.*, TriStrata Tech., Inc. v. Emulgen Labs., Inc. 537 F. Supp. 2d 635, 641 (D. Del. 2008); Netalog, Inc. v. Tekkeon, Inc., No. 05-CV-00980, 2007 WL 534551, at *3 (M.D.N.C. Feb. 15, 2007); Precimed S.A. v. Orthogenesis, Inc., No. 04-1842, 2004 WL 2630596, at *2 (E.D. Pa. Nov. 17, 2004).
38. *TriStrata*, 537 F. Supp. 2d at 635.
39. *Id.* at 642.
40. *Id.* at 641 (internal quotations omitted).
41. *Trinitec*, 395 F.3d at 1281.
42. *Id.*
43. *Roblor*, 645 F. Supp. 2d at 1154 (internal quotations omitted).
44. Krepps v. Reiner, 588 F. Supp. 2d 471, 479 (S.D.N.Y. 2008) ("[P]laintiffs are not permitted to 'manufacture' personal jurisdiction over defendants by orchestrating an in-state web-based purchase of their goods.").
45. *See Systems Designs*, 248 F. Supp. 2d at 1102.
46. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).
47. *Trinitec*, 395 F.3d at 1281.
48. *Id.*
49. *Burger King*, 471 U.S. at 471-475.
50. Red Wing Shoe Co., Inc. v. Hockerson-Halberstadt, Inc., 148 F.3d 1355, 1359 (Fed. Cir. 1998).
51. *Shaffer*, 433 U.S. at 204.

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