INTERNET LIBEL: THE CONSEQUENCES OF A NON-RULE APPROACH TO PERSONAL JURISDICTION

Patrick J. Borchers*

INTRODUCTION

People write lots of nasty stuff about each other and publish it on the Internet. Sometimes the targets of these publications sue for defamation. Usually the targets want to sue at home and most of the time the defendants live elsewhere. Those who then find themselves defending libel actions brought in other states often move to dismiss on the ground that the court lacks personal jurisdiction. This basic scenario has been played out in dozens of reported cases.

One might think that by now there would have emerged a clear rule on whether the target can sue at home or not. However, there is no clear rule; in fact, there is not even really a clear majority position. Rather, about the only honest assessment that a lawyer can give as to whether a court in the target’s home state has jurisdiction is: “It depends.” Moreover, the variables on which the outcome depends seem to vary from court to court and case to case.

So, for example, when a Virginia prison warden claimed to have been defamed by the Web versions of articles published by two local Connecticut newspapers, the court held that the Virginia courts did not have jurisdiction over the newspapers. The court’s rationale was that the newspapers were largely concerned with local matters. Thus, even though some Virginians probably read the statements, because they were accessible over the Internet, most of the readership was in Connecticut.

While this approach may make some sense intuitively, it is hard to square with United States Supreme Court precedent. In Keeton v. Hustler Magazine, Inc., the plaintiff sued a nationally circulated magazine for libel.

* Dean and Professor of Law, Creighton University.

1 See, e.g., Christopher Paul Boam, When Cyberspace Meets Main Street: A Primer for Internet Business Modeling in an Evolving Legal Environment, 22 HASTINGS COMM. & ENT. L.J. 97, 111 (1999) (noting that in most countries the application of the minimum contacts test to Internet-based cases is "anything but a settled issue").

2 Young v. New Haven Advocate, 315 F.3d 256, 258 (4th Cir. 2002).

3 Id. at 259-60.

She brought suit in New Hampshire, a state in which she had never lived and probably very few people knew her. Her choice of the Granite State was not an accident as it was the only one in which the limitation period had yet to run. Despite all this, the Supreme Court held that the New Hampshire courts had jurisdiction. Although *Keeton* was a non-Internet case, it and its companion case of *Calder v. Jones* established a heavy presumption that libel plaintiffs may sue in a forum in which the offending statements are published. Nonetheless, *Young v. New Haven Advocate* and indeed most of the reported Internet libel cases refuse to find jurisdiction in the plaintiff's chosen forum.

I have two purposes in writing this Article. One is to catalog most of the reported Internet libel cases to learn what factors influence the results in those cases. The second is more general. In most of these cases, there are only two realistic solutions: either the plaintiff can force the defendant to come to the plaintiff's home state to defend the case, or the plaintiff must go to the defendant's home state to bring the action. It is debatable which is the preferred solution, but what seems beyond debate is that there ought to be some relatively clear answer so that litigants can direct their resources to resolving the merits of the case rather than the preliminary question of jurisdiction. The failure of American jurisdictional standards to settle upon reasonably clear solutions even in simple scenarios is a consequence of the constitutionalization of jurisdictional standards. While I have argued at length elsewhere that absorbing the common law of in personam jurisdiction into the Due Process Clause was an undesirable mistake, it is a mistake that seems likely to continue to perpetuate itself for some time. One unfortunate side effect of this constitutionalization has been that jurisdictional statutes, so-called "long-arm statutes," have atrophied. Most jurisdictional statutes either expressly or impliedly incorporate by reference the constitutional limits on jurisdiction and thus abdicate any meaningful role in setting jurisdictional standards. This need not be so, however. At least one state, New York, excludes defamation claims from the furthest reach of its long arm. While New York's statute may not be a model, it does serve as

---

5 *Id.* at 773.
10 See, e.g., *CAL. CIV. PROC. CODE* § 410.10 (1973).
a reminder that legislation, both state and federal, may have a role to play in ultimately setting clear jurisdictional standards in the post-Internet era.

Part I discusses the general parameters of personal jurisdiction in libel actions. Part II summarizes the approach taken by lower courts in applying jurisdictional principles to Internet cases. Part III evaluates the confluence of libel jurisdiction and Internet jurisdiction and concludes that the consequence has been inconsistency in results and uncertainty in application. Part IV offers some possible solutions including more faithful adherence to the Supreme Court's precedents and state or federal legislation.

I. LIBEL JURISDICTION

The world is not in need of another summary of the development of United States jurisdictional principles from the common law through the more modern development of the "minimum contacts" doctrine, first announced in the Supreme Court's 1945 decision in International Shoe Co. v. Washington. The interested reader is invited to consult one of the hundreds of available résumés.

Some features of this development are, however, particularly relevant to the question of Internet libel jurisdiction. One is that in personam jurisdiction still operates in a common law world in the sense that the traditional bases of jurisdiction have a nearly conclusive presumption of constitutionality. Although the minimum contacts rubric is more flexible than the application of the common-law concepts of consent and power, American jurisdictional principles have undergone a fairly gradual evolution. The modern foundation of United States jurisdiction lies in perhaps ten or so post-1945 Supreme Court decisions that extensively discuss the "minimum contacts" test. The last major Supreme Court effort at explaining the test occurred in 1987. The first reported case that I can find using the term "Internet" is a 1991 federal appellate decision affirming the criminal con-

---

14 326 U.S. 310 (1945).
15 My own tedious effort appears at Borchers, supra note 8, at 56–87. An extensive recent summary can be found in LUTHER L. MCDouGAL, III ET AL., AMERICAN CONFLICTS LAW 41–143 (5th ed. 2001).
16 See, e.g., Burnham v. Super. Ct., 495 U.S. 604, 621 (1990) (plurality opinion) (stating that the rule of in-state service for establishing in personam jurisdiction is validated by its historical "pedigree").
18 McDonald v. Mabee, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power.").
20 Asahi, 480 U.S. at 108–13 (plurality opinion).
viction of Robert Tappan Morris, a Cornell graduate student who launched one of the first Internet viruses (technically a worm) with spectacular results.21

It is thus not surprising that some aspects of jurisdictional jurisprudence are ill-adapted to the Internet era. In principle, of course, there is nothing wrong with putting new wine into old bottles. But the constitutional character of jurisdictional principles, coupled with vacillating Supreme Court jurisprudence,22 has left us with an unwieldy apparatus for dealing with new jurisdictional problems. For the most part, states do not play a meaningful role in determining the territorial reach of their courts. The large majority of state long-arm statutes expressly or impliedly adopt the constitutional test and leave it at that.23 Even Congress’s power to define the reach of courts in such matters is somewhat in doubt because of the constitutional character of jurisdictional principles.24

Thus, for the most part, lower courts, lawyers, and commentators attempting to evaluate jurisdictional arguments in Internet cases are left trying to extrapolate from Supreme Court decisions in the pre-Internet era. Internet libel might appear to be one of the more manageable problems, however, because at least the Supreme Court has decided two relatively recent libel jurisdiction cases.

In Keeton v. Hustler Magazine, Inc.,25 the plaintiff—a New Yorker named Kathy Keeton—sued the nationally distributed magazine Hustler claiming that she had been libeled in several of its issues. Keeton originally brought her action in Ohio (the defendant’s state of incorporation) but found herself barred by the statute of limitations.26 She then brought the action in New Hampshire to take advantage of that state’s “unusually long” six-year statute of limitations.27 Keeton had essentially no connection to the forum state other than a desire to take advantage of its generous limitation period.28 The defendant’s connection with New Hampshire was that between ten and fifteen thousand of its magazines (including the issues in

21 United States v. Morris, 928 F.2d 504 (2d Cir. 1991).
22 Compare World-Wide Volkswagen, 444 U.S. at 294 (“[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”), with Ins. Co. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982) (reasoning that the Due Process Clause “is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns”).
23 Jeffrey J. Utermobile, Maryland’s Diminished Long-Arm Jurisdiction in the Wake of Zavian v. Foudy, 31 U. BAL T. L. REV. 1, 6–7 (2001) (“[T]he overwhelming majority of states . . . extend personal jurisdiction to the full extent permitted by the due process decisions of the Supreme Court.”).
26 Id. at 772 & n.1.
27 Id. at 773.
28 Id. at 772. The Court noted that Keeton’s only connection with the state was that she assisted in producing another magazine (actually a rival of the defendant’s) that was circulated in New Hampshire.
Id.
which the plaintiff claimed she was libeled) circulated monthly in the Granite State.\textsuperscript{29}

Despite these relatively slender connections to the forum, the Court held that the defendant was subject to jurisdiction. In fact, the Court summarized its holding in something akin to a general rule: “[Defendant’s] regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine.”\textsuperscript{30} As the Court noted, there was nothing “random, isolated, or fortuitous” about the defendant’s distribution of the magazines in the forum\textsuperscript{31} even though they represented only a “small portion” of the magazine’s total distribution.\textsuperscript{32} The Court also specifically rejected the defendant’s proposed justifications for rejecting jurisdiction. The fact that the plaintiff was obviously shopping for a forum based upon the long statute of limitations and that under the “single publication rule” could recover the totality of her damages were thought by the Court to be of little significance.\textsuperscript{33} The Court also discounted the plaintiff’s lack of a connection to the forum. The fact that the plaintiff suffered at least some of her injury (though obviously only a small part of it) in New Hampshire gave the forum “a significant interest” in adjudicating the matter.\textsuperscript{34}

Keeton’s companion case was Calder v. Jones.\textsuperscript{35} In one sense, at least intuitively, Calder was a better case for jurisdiction than Keeton because the Calder plaintiff was not engaged in obvious forum shopping. In Calder, the plaintiff was the actress Shirley Jones. She sued in her home state of California and claimed to have been libeled by an article in The National Enquirer.\textsuperscript{36} Two individual defendants, Florida residents who were the author and the editor of the article, objected to jurisdiction in California. Aside from unrelated trips, their relevant connections to California consisted of the writing of the article which was circulated widely in California (about 600,000 copies) and the injury to the plaintiff’s reputation suffered by her in California.\textsuperscript{37}

Had Jones been attempting only to assert jurisdiction over a corporation responsible for publishing the magazine, it would have been an easy case and obviously controlled by Keeton. The circulation of The National Enquirer in California was roughly forty times the circulation of Hustler in New Hampshire and, of course, Jones’s claim to having had her reputation

\textsuperscript{29} Id.
\textsuperscript{30} Id. at 773–74.
\textsuperscript{31} Id. at 774.
\textsuperscript{32} Id. at 775.
\textsuperscript{33} Id. at 773–74, 778.
\textsuperscript{34} Id. at 776.
\textsuperscript{36} Id. at 784–85.
\textsuperscript{37} Id. at 784–86.
injured in the forum state was much less tenuous than Keeton’s claim, because Jones lived in the forum state. But the complicating factor in Calder was that the defendants were individual defendants, not the publishing corporation itself. Interestingly, in Keeton the Court left open on remand the question of jurisdiction over the individual defendants.\(^{38}\) But, as in Keeton, jurisdiction was upheld in Calder.

Calder, like Keeton, is notable for making relatively categorical announcements about the availability of jurisdiction in such cases. In essence, the Court’s rationale boils down to the following two sentences: “In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the ‘effects’ of their Florida conduct in California.”\(^{39}\)

Taken together, Keeton and Calder do not quite announce a rule. But they do, at a minimum, establish what seems to be a heavy presumption that a libel plaintiff can obtain jurisdiction over any libel defendant (whether corporate or individual) in any state in which the offending publication has substantial circulation. Certainly the cases do not allow for jurisdiction in cases of a trivial (and perhaps accidental) circulation in the forum.\(^{40}\) But with that caveat, the principle appears to be one of a rough sort of justice: “You said it there, you defend it there.”

II. INTERNET JURISDICTION

When the Internet had only recently entered the consciousness of the general population, a fair amount of the decisional law and commentary attempted to create a unitary rubric for cases in which the defendant’s contacts with the forum state occurred over the Internet. The origin of these efforts at a unitary approach is undoubtedly an opinion of the Western District of Pennsylvania in Zippo Manufacturing Co. v. Zippo Dot Com, Inc.\(^{41}\) Zippo has earned a place in history as one of the most-cited district court opinions ever. As of October 2, 2003, Zippo had been cited an astonishing 570 times, including 67 opinions that are described as following it and 320 times by law review articles.\(^{42}\)

Zippo is factually, however, a bit removed from the Internet libel cases. Zippo involved a dispute over an Internet domain name.\(^{43}\) The plaintiff was a Pennsylvania-based manufacturer of cigarette lighters; the defendant a


\(^{39}\) Calder, 465 U.S. at 789.

\(^{40}\) See, e.g., Noonan v. Winston Co., 135 F.3d 85 (1st Cir. 1998) (noting that only a small number of publications entered the forum and all were in the French language).


\(^{43}\) Zippo, 952 F. Supp. at 1120.
California-based company running a Web site and an Internet news service. The defendant registered three domain names all of which used “zippo” as a significant part of the address. The plaintiff, unhappy with what it saw as the dilution of its trademark, brought suit in its home state of Pennsylvania.

The defendant’s only significant connection to Pennsylvania was that its new service was, of course, accessible over the Internet and that about 3,000 of its 140,000 paying customers were Pennsylvanians. The court described the law of Internet jurisdiction as being in its “infant stages,” but then offered a three-part structure for evaluating the jurisdictional significance of Internet contacts. It is the following synthesis that earned Zippo such a devoted following:

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

Applying this test, the court concluded that the defendant’s availing itself of roughly three thousand Pennsylvania customers evidenced a sufficient level of interactivity to subject it to jurisdiction.

While the result in Zippo seems unobjectionable, much of its significance rests in its dictum that a “passive” Web site cannot create minimum contacts. At a technical level, there are good reasons to doubt whether the Zippo framework really makes much sense. Creating a Web page always

---

44 Id. at 1121.
45 Id.
46 Id. Like many sites, some information is free but premium access requires payment of a fee by credit card. Id.
47 Id. at 1123.
48 Id. at 1124 (citations omitted).
49 Id. at 1126.
50 See, e.g., ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002) (holding no jurisdiction where defendant had a “Zippo-passive” Web site); Mink v. AAAA Dev. LLC, 190 F.3d 333, 337 (5th Cir. 1999) (citing Zippo, 952 F. Supp. at 1124, for its “passive” Web site discussion). Probably the case that gave the Zippo dictum the greatest boost was Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997), which like Zippo was a trademark infringement case. Cybersell refused to find minimum contacts based upon what it considered to be a passive Web site as described by Zippo. Id. at 418–20 (citing Zippo, 952 F. Supp. at 1124).
51 Robert M. Harkins, Jr., The Legal World Wide Web: Electronic Personal Jurisdiction in Commercial Litigation, or How to Expose Yourself to Liability Anywhere in the World with the Press of a
requires a certain amount of interaction in that it has to be uploaded to a server, which makes the content available to anyone with Internet access. Establishing some further level of "interactivity" can be a trivial matter. For instance, even those with rudimentary technical skills can add a "mailto" link on a Web site or create a form that allows the user to transmit information back to the author of the Web page.

But even leaving aside the technical questions, there remains the question of whether the interactivity criterion makes much sense jurisdictionally. It is true, of course, that the sine qua non of claim-related jurisdiction is establishing "purposeful" contacts by the defendant. Establishing that a defendant initiated and maintained a connection with forum residents to the defendant's perceived commercial advantage certainly ought to weigh in favor of establishing jurisdiction. But the converse proposition that failing to "interact" as Zippo and its progeny use those terms ought to essentially insulate the defendant from jurisdiction is not so obvious.

Consider the analogy to Calder and Keeton, neither of which was cited by Zippo. In Keeton, for instance, the publisher subjected itself to jurisdiction in the forum because between ten and fifteen thousand of the offending publications were sold in the forum. Beyond taking the affirmative steps to deliver the magazines to the forum, the defendant there did not need to "interact" further with any forum residents. The harm to the plaintiff's reputation in the forum presumably occurred because New Hampshire residents read the libelous statements and thereby formed a lower opinion of Kathy Keeton. Even the most passive of Web pages has exactly the same effect. Suppose that Hustler were a free, virtual magazine subsisting on advertising revenue and it could be shown from the hit rate that the page in question had been viewed enough times to make it a statistical certainty that it had been seen by thousands of forum residents. To say that jurisdiction exists when the publication is in the physical form and not over the Internet would be to attribute constitutional significance to the difference between making the information appear in printed form versus on a computer screen. Perhaps because of this tension, the Zippo interactivity test is frequently considered to be a rival of the effects-based rationale of Calder and Keeton.

---


Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).


Zippo has come in for its fair share of criticism, both from commentators and courts. But the idea that all Internet jurisdiction cases can be handled under a unitary rubric continues to have a powerful hold on the way cases are actually decided. In fact, it appears that a larger number of Internet libel jurisdiction cases cite Zippo than Keeton. When one stops to consider that in these cases a district court opinion in a trademark dispute is commanding more attention than a Supreme Court opinion on libel jurisdiction, one sees that there is fertile soil for confusion.

III. INTERNET LIBEL JURISDICTION

Internet libel cases are thus subject to two powerful cross currents. One is the Zippo line of cases suggesting that the interactivity of the form of the publication is critical. The other is driven by the Calder and Keeton holdings suggesting that any significant, knowing publication of the defamatory material in the forum creates minimum contacts.


Thus, of the cases I have located that involve Internet libel jurisdiction and cite either Zippo or Keeton, five cite both cases, twelve cite only Zippo, and three cite only Keeton.

Another crude measure of the relative influence of the cases is that, as of October 2, 2003, Zippo is listed by LEXIS's Shepards as having been cited 570 times. Thus, it is being cited at a rate of about 7.04 times per month in the 81 months since it has been decided. Keeton has been cited 1,545 times in the 234 months since it was decided, or at a rate of 6.60 citations per month. Of course, there are limitations to such comparisons, but the fact that a district court opinion is being cited at a rate even approximating a Supreme Court decision is astonishing.
These current cross currents have produced an impressive volume of reported decisions on the subject. I have been able to identify thirty-two reported decisions\(^59\) on the subject of Internet libel jurisdiction, of which thirteen conclude that jurisdiction exists\(^60\) and nineteen dismiss for lack of jurisdiction.\(^61\) At least at first blush, this relatively low success rate for plaintiffs seems surprising, given the pro-plaintiff tilt of the Supreme Court’s decisions in Keeton and Calder.

Of course, there is relatively little to be learned simply by counting results in the universe of reported cases. Reported opinions tend to appear in closer cases. It could be, for example, that there are large numbers of Internet libel cases in which a motion to dismiss for lack of personal jurisdiction is summarily denied and no opinion of any sort is reported. And, of course, Keeton and Calder leave some room for a court to conclude that minimum contacts are wanting in a libel case.

Nevertheless, the reported cases leave open the substantial possibility that courts facing Internet libel jurisdiction cases are striking out in their own direction with relatively little regard for the Supreme Court’s guidance. Consider the following reported decisions, each of which is very hard to square with Calder and Keeton.

In Young v. New Haven Advocate,\(^62\) the plaintiff was a Virginia prison warden and the defendants were two Connecticut newspapers and various individuals on their staffs. The controversy began when the State of Connecticut was faced with an overcrowding problem in its maximum security...
prisons. Virginia had available space and, starting in 1999, Connecticut transferred about five hundred prisoners to the Wallens Ridge State Prison, where Stanley Young—ultimately the plaintiff in the action—was the warden. The transfers faced some opposition in Connecticut because of the difficulties imposed on families of the prisoners in making visits and the apparently harsh conditions in the Virginia facility.

The two newspaper defendants, the New Haven Advocate and the Hartford Courant, thought the controversy sufficiently newsworthy to deserve substantial attention. One article published in the Advocate reported on a class action that had been filed regarding the conditions at the prison and on the concern expressed by a Connecticut state senator regarding the presence of Confederate Civil War memorabilia in Young's office. Three columns that appeared in the Courant were critical of the transfer policy and one referred to the Virginia facility as a "cut-rate gulag." The relevant articles and columns appeared on the newspapers' Web sites.

Young filed a diversity libel action in the U.S. District Court for the Western District of Virginia. The Fourth Circuit held that the defendants did not have minimum contacts with Virginia. The court's primary rationale appeared to be that both newspapers primarily directed their content to a Connecticut readership. Very few physical copies of either newspaper ever reached Virginia; the Advocate is a free newspaper distributed only in Connecticut and the Courant had only eight Virginia subscribers. Most of the advertising in both the physical and Internet versions of the newspapers was clearly aimed at Connecticut residents.

In principle, perhaps, there might not be anything wrong with requiring the warden to come to the newspapers' forum instead of the other way around. The case, however, seems like at least as good of a candidate for jurisdiction as Calder and a better one than Keeton. In Keeton, the physical number of copies of the offending population circulating in the forum was clearly higher than in Young. But if the question, as the Young court seems to imply, is whether any substantial number of forum residents were likely to have actually read and paid attention to the statements, then Young's facts demonstrate a stronger connection to the forum than Keeton's. Recall that Kathy Keeton was not a New Hampshire resident. In fact, it seems like a safe bet that she was unknown to almost everyone in the Granite State.

63 Id. at 259.
64 Id.
65 Id.
66 Id.
67 Id.
68 Id. at 259–60.
69 Id. at 259.
70 Id. at 259–60.
71 Id. at 260.
The offending statements (actually cartoons) implied that she had contracted a sexually transmitted disease.\textsuperscript{72} Realistically, it seems doubtful that more than a handful of people in New Hampshire were likely to have changed opinions of her based upon the statements in question. Almost certainly she could have wandered around New Hampshire without being whispered about behind her back.

The chance of realistic damage to Stanley Young's reputation in the forum seems much higher, however. The fact that few physical copies of the offending publications reached the forum was likely of little consequence. Taking Young's allegations as true, the articles falsely and maliciously implied that he was a racist.\textsuperscript{73} Given the universal availability of information on the Internet, almost any interested Virginian could have found the articles in a matter of minutes. Given Young's relative prominence (the head of one of the largest employers in that corner of Virginia),\textsuperscript{74} the chance of actual damage to his reputation in the forum was considerably higher than it was for Kathy Keeton.

Despite the clear relevance of the Keeton opinion, however, the Young court did not cite it, let alone convincingly distinguish it. The Young court did devote substantial attention to Calder and its “effects” test. The Young plaintiff argued that his case fit within the “effects” rubric of Calder because, like the Calder plaintiff, he was domiciled in the forum state and felt the brunt of the impact there.\textsuperscript{75} The Young court, however, conceived of the Calder test as being one of express targeting. As the court put it: “We thus ask whether the newspapers manifested an intent to direct their website content—which included certain articles discussing conditions in a Virginia prison—to a Virginia audience.”\textsuperscript{76} Because most of the content would have been of no interest to most Virginians, the court concluded that the case failed to meet the requirements for minimum contacts. But conceived of this way, it is hard to see how jurisdiction could exist under either the Calder or Keeton factual scenarios. There was nothing about the National Enquirer that was particularly directed at Californians, except that it was known to be read in California and the article in question concerned a Californian. Thus, in Calder the only real “targeting” of California was that the plaintiff resided there, but, of course, that same connection was present in

\textsuperscript{72} Alan Cooper, Falwell Emotional-Distress Claim Upheld: Two Losses for Hustler Publisher, NAT'L L.J., Aug. 25, 1986, at 3.

\textsuperscript{73} Young, 315 F.3d at 259. Of course, whether or not Young could prove the substantive elements of libel is another question. Taking the Fourth Circuit's description of the statements at face value, it certainly seems like Young would have an uphill climb on the merits. The columns in the Courant did not even mention Young by name. \textit{id}.

\textsuperscript{74} The Wallens Ridge facility was located in relatively undeveloped southwestern Virginia largely because it would provide employment opportunities there. See Claire Schaffer-Duffy, Prolonged Solitary Confinement Becomes Corrections Staple, NAT'L CATH. REP., Dec. 8, 2000, at 3.

\textsuperscript{75} Young, 315 F.3d at 262.

\textsuperscript{76} \textit{Id}. at 263.
Young. *Keeton* lacked even this modest connection; the only connection there was that distribution of about one percent of the magazines in question might have inflicted some tangential reputational injury on the plaintiff.

*Young* is hardly alone, however, in granting what amounts to a jurisdictional preference to defendants in Internet libel actions. Consider the Fifth Circuit’s opinion in *Revell v. Lidov.* In that case, the plaintiff was Oliver “Buck” Revell, a Texas resident and a former associate deputy director of the F.B.I. The defendants were Hart Lidov, an assistant professor at Harvard Medical School, and Columbia University in New York. Lidov wrote an article claiming that Revell and others in the F.B.I. had advance knowledge of the Pam Am 103 bombing—in which a plane filled mostly with college students exploded over Lockerbie, Scotland in 1988—but failed to prevent it. This article was posted on an Internet bulletin board maintained by the Columbia School of Journalism.

Revell brought a diversity libel action in his home state of Texas. Relying heavily on the *Zippo* framework, the Fifth Circuit found minimum contacts wanting. The court rejected the district court’s conclusion, however, that the Columbia bulletin board ought be considered an entirely “passive” site because of the ability of users to both send (i.e., post) and receive information. The court then endeavored to distinguish the case from *Calder.* Much in the vein of *Young,* the court focused on particular aspects of the article and the publication. It noted that the article in question made no specific reference to any of the plaintiff’s Texas activities (all references were to his activities while with the F.B.I. in Washington, D.C.). The court pointed out that, in *Calder,* California was the state of the publication’s largest circulation and undoubtedly, therefore, had a larger readership there than the Columbia bulletin board had in Texas.

It seems doubtful that this amounts to a convincing effort to distinguish *Calder.* *Calder*’s “effects” test creates, at a minimum, a very heavy presumption that a plaintiff’s residence in the forum, coupled with publication of the statements in the forum, creates minimum contacts. But even assuming that *Calder* can be successfully distinguished on these grounds, this analysis does nothing to bypass *Keeton.* In *Keeton,* of course, the offending statements in no way concerned Kathy Keeton’s New Hampshire activities, which were either literally or virtually non-existent, and New Hampshire

---

77 317 F.3d 467 (5th Cir. 2002).
78 Id. at 469.
79 Id.
80 Id.
81 Id. at 470.
82 Id. at 472.
83 Id. at 473.
84 Id. at 473, 475.
had only a very small fraction of the total circulation. Under the Revell court’s formulation, Keeton clearly should have come out the other way. The Revell court dealt with the apparent inconsistency with Keeton in much the same way as the Young court did, which was by ignoring it. Young did not cite Keeton at all and Revell cited it only once in a footnote, with a parenthetical that would apparently point towards finding jurisdiction on these facts.

A final example is the Minnesota Supreme Court’s decision in Griffis v. Luban. Griffis involved a collateral attack on a default judgment rendered in the Alabama state courts. The Alabama judgment awarded $25,000 and an injunction to the plaintiff Katherine Griffis against defendant Marianne Luban. The plaintiff Griffis was an Alabama resident and a part-time instructor in ancient Egyptian history and culture at the University of Alabama, Birmingham. Defendant Luban, a Minnesotan, was an amateur buff on the same subjects. Both parties were devotees of a public newsgroup on archeology. Something of a disagreement erupted between the two and during one exchange defendant Luban posted a message on the newsgroup challenging Griffis’s credentials and asserting that her degree must have come from a “box of Cracker Jacks.” Griffis’s attorney wrote Luban and demanded a retraction and that Luban refrain from posting further messages of this sort.

Some months later, Griffis brought suit against Luban in an Alabama state court. In addition to the “Cracker Jacks” statement, Griffis alleged in her complaint that Luban had posted messages accusing her of not having the degrees that she claimed, misrepresenting her qualifications to the International Association of Egyptologists, and having a phony consulting business. On the advice of counsel, Luban allowed her default to be taken in Alabama and then collaterally attacked the judgment in Minnesota. This risky strategy looked to be doomed when both the trial court and the Minnesota court of appeals held that Luban had minimum contacts with Ala-

---

86 The lone citation to Keeton appears at the end of footnote 40 after a “see also” flag. The parenthetical summarizes Keeton as “noting that the harm of a libelous publication is felt where it is distributed.” Revell, 317 F.3d at 473 n.40.
87 646 N.W.2d 527 (Minn. 2002).
88 Id. at 529.
89 Id. at 530.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
95 Id.
bama, but fortunately for Luban and her counsel the Minnesota Supreme Court reversed and held that Alabama lacked jurisdiction.

The Minnesota Supreme Court's analysis was remarkably similar to that of the Young and Revell courts. Like those courts, the Minnesota Supreme Court ignored Keeton and focused on Calder. The court seemed to acknowledge that the "effects" test of Calder would point towards finding jurisdiction, because—as in that case—the plaintiff resided in the forum state. The Griffis court, however, sought to join other courts that it saw as having adopted a narrower view of the "effects" test and thus rejected the "expansive view that Calder supports specific jurisdiction in a forum state merely because the harmful effects of an intentional tort committed in another jurisdiction are primarily felt in the forum." Like the Young and Revell courts, the Griffis court sought to limit the effects rationale to one of "express targeting" of the forum.

The court then concluded that the statements here failed the reformulated "express targeting" test. Essentially, the court's rationale and its efforts to take the case outside of the rule of Calder are contained in the following passage:

While the record supports the conclusion that Luban's statements were intentionally directed at Griffis, whom she knew to be an Alabama resident, we conclude that the evidence does not demonstrate that Luban's statements were "expressly aimed" at the state of Alabama. The parties agree that Luban published the allegedly defamatory statements on an internet newsgroup accessible to the public, but nothing in the record indicates that the statements were targeted at the state of Alabama or at an Alabama audience beyond Griffis herself.

It is doubtful whether this is a fair summary of the record in Griffis because, as the Minnesota court observed in a footnote, some of the exchanges centered around the plaintiff's employment by the University of Alabama. But even assuming that it is a fair summary of the facts, the distinction from Calder is a very narrow one. It is hard to see how statements could be more clearly "aimed" at a state than those pertaining to the activities and characteristics of a state resident and her professional activities there. The Minnesota court, however, reasoned that the forum (California) in Calder had a "close relationship" with the plaintiff's profession.

96 Id. at 531 (citing Griffis v. Luban, 633 N.W.2d 548, 553 (Minn. Ct. App. 2001)).
97 Id. at 532. The court's lone citation to Keeton is a quote from Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985), which quoted Keeton's formulation of the "purposeful direction" test.
98 Griffis, 646 N.W.2d at 533.
99 Id.
100 Id. at 534 (quoting Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 266 (3d Cir. 1998)).
101 Id. at 535.
102 Id. at 535 n.3.
But even assuming that Calder can be distinguished on the basis invoked by the Griffis court, Keeton still waits impassively as a block on this analytical road. Keeton's result simply could not be justified on the theory offered by Griffis because New Hampshire had essentially no relationship to Kathy Keeton or her profession, let alone the "close relationship" that the Minnesota court found wanting in the case before it.

I do not mean to suggest that in every Internet libel case the plaintiff ought to have an unlimited choice of fora. But Young, Revell and Griffis are instances of respected courts (two federal circuits and the Minnesota Supreme Court) distorting one (Calder) and completely ignoring the other (Keeton) of the two directly relevant Supreme Court opinions. Moreover, these decisions are hardly isolated. A good number of other Internet libel jurisdiction opinions are difficult or impossible to square with Calder and Keeton. The difficulties that courts are facing in handling a relatively

103 Id. at 536.
105 See, e.g., Hydro Eng'g, Inc. v. Landa, Inc., 231 F. Supp. 2d 1130 (D. Utah 2002) (libel action based on mass email, some of which were received in the forum that was also the plaintiff's principal place of business); Machulsky v. Hall, 210 F. Supp. 2d 531 (D.N.J. 2002) (plaintiff claimed to have been libeled on the national auction site of eBay and brought an action in the forum where plaintiff resided); Oasis Corp. v. Judd, 132 F. Supp. 2d 612 (S.D. Ohio 2001) (plaintiff sued in the forum of its principal place of business over a "gripe" Web site that it claimed libeled the plaintiff in its business capacity); Lofton v. Turbine Design, Inc., 100 F. Supp. 2d 404 (N.D. Miss. 2000) (plaintiffs sued in the forum where their company had its registered office and was incorporated, alleging that the defendants had made disparaging Internet statements about the plaintiffs' business); Barrett v. Catacombs Press, 44 F. Supp. 2d 717 (E.D. Pa. 1999) (plaintiff sued in the forum where he resided regarding repeated statements on a usenet newsgroup regarding his competence as a physician); Kovacs v. Jim, No. 02 C 7020, 2002 U.S. Dist. LEXIS 21787 at *1 (N.D. Ill. Nov. 8, 2002) (action brought in forum where plaintiff resided; the plaintiff alleged that the defendant posted false accusations on a Web site that said that the plaintiff was pirating software; the court tentatively determined that the defendant did not have minimum contacts with the forum); English Sports Betting, Inc. v. Tostigan, No. 01-2202, 2002 U.S. Dist. LEXIS 4985, at *1 (E.D. Pa. Mar. 15, 2002) (action brought in forum where plaintiff's home was located; defendants allegedly posted articles on a sports betting Web site suggesting criminal activities by the plaintiff in connection with his gambling activities); U-Haul Int'l, Inc. v. Osborne, No. CIV 98-0366
straightforward problem are suggestive of deep, underlying difficulties with the structure of analysis for jurisdictional problems.

IV. A FEW MODEST SUGGESTIONS

A. Forget about Zippo

Young, Revell, Griffis, and several other Internet libel cases\(^\text{106}\) are wrong in their efforts to apply Calder and Keeton. However, one cannot help but to have some sympathy for the struggles of these courts. The highly fact-specific nature of the Supreme Court’s jurisdictional jurisprudence invites the drawing of narrow distinctions.\(^\text{107}\) The largely judicially-created nature of jurisdictional principles in the United States inevitably produces the sort of uncertainty that has emerged in this area.

Zippo should be ignored, at least in libel cases. Courts have been attracted to applying Zippo in Internet libel actions as a way to help avoid the possibility that plaintiffs might have fifty or more potential fora in such actions.\(^\text{108}\) Zippo’s three-part structure is, however, not a satisfactory way of addressing that concern. At least in libel cases, the degree to which the reader can interact with the producer of the allegedly libelous statements has little relevance. The essence of the tort of libel is the producing of defamatory statements in some fixed form that are then published to third parties, thereby injuring the plaintiff’s reputation.\(^\text{109}\) Further interaction between the reader and the writer is entirely collateral to any issues relative to liability. To draw an analogy to Keeton and Calder, the Supreme Court did not inquire in those cases into the marketing efforts of the magazines that carried the libelous statements. The fact that both were available in the forum was enough to carry the day. Even the most completely passive of Web sites is perfectly adequate to carry a poisonous message to the forum. Injecting the Zippo test into the mix would be to have jurisdiction in such cases turn on tangential questions of whether the reader could also, for example, order products from the Web site.

---

\(^{106}\) See supra cases cited note 105.

\(^{107}\) See, e.g., Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102 (1987) (plurality opinion would hold that component resale of a product in the forum alone is insufficient to establish minimum contacts in a products liability action and that additional indicia of efforts to serve the forum are required; concurring opinion would hold that component resale alone is sufficient).

\(^{108}\) See, e.g., Revell v. Lidov, 317 F.3d 467, 472–75 (5th Cir. 2002).

\(^{109}\) See, e.g., CAL. CIV. CODE § 45 (1982) (“Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”).
As to the specter of fifty-state jurisdiction, it seems doubtful that this problem (if indeed it is a problem) can be solved easily through the constitutional law of personal jurisdiction. The clear message of *Keeton* is that fifty-state jurisdiction is not necessarily unconstitutional in defamation cases. One could hardly imagine in *Keeton* a more marginal state for asserting jurisdiction than New Hampshire; that jurisdiction was constitutional there suggests it would have been permissible anywhere in the United States.

The evident concern of courts is that the Internet allows for nearly frictionless transmission of information throughout the United States and the rest of the world. This concern, however, presents a two-edged sword. Publishers use Internet media precisely because they will increase the dispersal of their publications. Consider, for example, the two Connecticut newspapers in *Young*. The *Young* court made much out of the fact that the content of those publications was likely to have been of primary interest to Connecticut readers, and this may have been so. But if there were nothing to be gained by making their content available beyond the range of their physical distribution, why bother with putting some content on the Web? Newspapers and other publishers choose the medium of the Web because it allows them to reach farther than their physical publications can stretch. The same is undoubtedly true of the defendants in *Revell* and *Griffis*. Undoubtedly they chose to disseminate their views through the Internet medium precisely because they could reach more readers more quickly than they could through any mode of physical distribution.

Most of these cases present essentially a binary problem: either the plaintiff must go to the defendant’s forum or the defendant can be forced to go to the plaintiff’s forum. Perhaps there are good policy reasons for preferring one solution to the other, but *Calder* and *Keeton* hold that either solution is constitutional.

B. State Legislative Action

Accepting my contention that the Constitution generally does not prevent the plaintiff from having a choice of forums in Internet libel actions does not mean that forum selection need be left entirely to plaintiffs. One obvious solution would be for long-arm statutes to be modified to prohibit the exercise of long-arm jurisdiction over non-resident libel defendants. New York comes fairly close to doing so by excluding defamation actions from the furthest reaches of its statute. While some hardship would be imposed on libel plaintiffs in requiring them to go to the defendant’s forum in all circumstances, at least such a solution would have the virtue of clearly

---

110 Young v. New Haven Advocate, 315 F.3d 256, 263 (4th Cir. 2002).
resolving the question and avoiding the expenditure of resources by the litigants on the preliminary question of jurisdiction.

Less drastic state law solutions are also available. One route would be to restrict plaintiffs who sue non-resident defendants in defamation actions to the damage actually suffered to their reputation in the forum. Under the so-called "single publication rule," plaintiffs are generally entitled to recover damages for the entirety of the damage to their reputation whether or not that damage occurred in the forum. The single publication rule, however, is a rule of state law, not constitutional necessity, and thus could be modified. For example, the Court of Justice of the European Communities has restricted plaintiffs' actions, holding that a plaintiff bringing a multinational defamation action in a state may recover only for injuries sustained in that state, unless the plaintiff sues where the publisher was established. Interestingly, the defendants in the Keeton case unsuccessfully argued for this approach on remand. If this approach were taken, libel plaintiffs still might prefer to sue at home because presumably the bulk of the damage to their reputation would occur there. But at least such an approach would effectively avoid the sort of obvious forum shopping that occurred in Keeton and that has perhaps been attempted in some Internet libel cases where plaintiffs chose forums with no apparent connection to either party.

Another possibility would be to create a mechanism requiring courts to engage in a preliminary investigation of the merits of the action. Because libel involves a fixed representation (usually a writing) of the defamatory statements, there is likely to be relatively little dispute about the content of the statements. In many cases, a court could make an early determination as to whether the plaintiff had established a probability of success on the merits and, in the absence of such a finding, could refuse to exercise jurisdiction over out-of-state defendants. Again, foreign practice provides a model here. Order 11 of England's Rules of the Supreme Court allows courts to make a preliminary examination of the merits before deciding whether to exercise jurisdiction over non-resident defendants.

---

114 Keeton v. Hustler Magazine, Inc., 549 A.2d 1187 (N.H. 1988) (responding to certified questions from the First Circuit after the Supreme Court remand and concluding that New Hampshire's statute of limitations should apply to all aspects of the claim, including recovery for injuries suffered outside of the forum).
116 See supra note 109.
117 See Steven Lobel, Jurisdiction and Evidence—An English Perspective, 4 ILSA J. OF INT’L & COMP. L. 489, 493 (1998) ("The Court has discretion over decisions to grant leave to serve proceedings out of the jurisdiction and will only do so if the applicant for such leave shows that he has a good, arguable case on the merits.").
C. Congressional Action

Any of the reforms that could be adopted by state law could also be adopted nationally as well. The Parental Kidnapping Prevention Act\textsuperscript{118} is one example of Congress limiting the exercise of personal jurisdiction by state and federal courts to further other policy goals. Moreover, Congress probably has somewhat more leeway than does any individual state. Because federal legislation is subject to scrutiny under the Fifth Amendment's, but not the Fourteenth Amendment's, Due Process Clause, the majority position is that minimum contacts with the United States as a whole are sufficient to make jurisdiction presumptively constitutional.\textsuperscript{119} Thus, to the extent that there is a perceived obstacle to jurisdiction in the plaintiff's home state in Internet libel cases, Congress could remove that perceived obstacle.

CONCLUSION

In one sense, Internet libel jurisdiction is a narrow problem. But in and of itself, it is a significant problem as evidenced by the steady flow of reported opinions since the issue's emergence in the late 1990s. At another level, however, it is representative of the kinds of problems that are likely to dot the procedural landscape for the foreseeable future. It is probable that courts will struggle, as they have in Internet libel cases, to adapt the existing jurisdictional framework to fit new realities. Internet libel should seemingly be one of the easier projects because at least courts can draw on two fairly recent Supreme Court opinions regarding libel jurisdiction. The fact that respected lower courts have frequently contorted one of those opinions, \textit{Calder v. Jones}, and often ignored the other, \textit{Keeton v. Hustler Magazine, Inc.}, should give commentators and policymakers pause in assessing the likelihood that judicial innovation will reasonably solve jurisdictional problems in the virtual world. Predictability demands, if not iron-clad rules, at least reasonably clear standards, and the best hope is either state or federal legislation.


\textsuperscript{119} See \textit{Scoles et al.}, \textit{supra} note 24, at 415–19 (describing three approaches taken by courts in which national contacts at least presumptively allow for jurisdiction under the Fifth Amendment).