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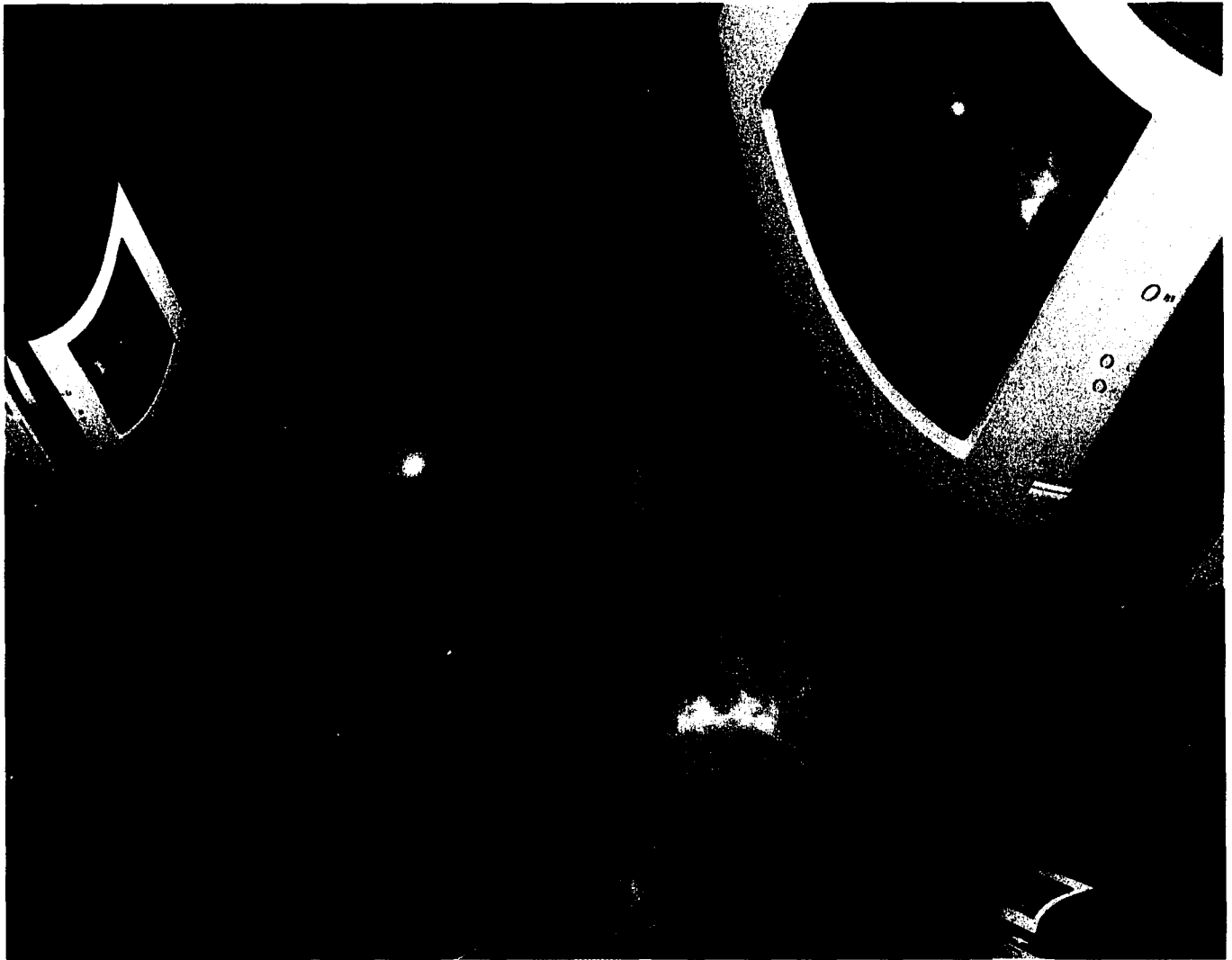
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The Internet and Personal Jurisdiction

by Michael Lampert

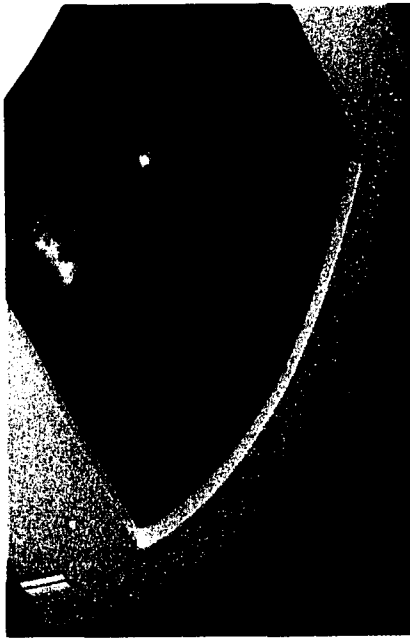


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Although, as one court has noted, “attempting to apply established ... law in the fast developing world of the Internet is somewhat like trying to board a moving bus...,” those who don’t will be left behind and miss the party.¹ The recent popularity of the Internet has created a disparate body of law regarding its effects on personal jurisdiction. Courts across the country vary in their treatment of Internet communications.² While courts have taken differing approaches, most have applied the traditional

factors concerning personal jurisdiction to the particular characteristics of the involved website. Among the factors considered are: the website’s level of interaction with a user, the intent of the site’s creator, the benefits gained by posting the Internet site and any other non-electronic contacts with the forum state.

Courts in New Jersey have faced the issue of the Internet and personal jurisdiction and have sought to balance the new nature of Internet communications with the historic demands



and protections of personal jurisdiction. The state's courts have been consistent in considering the individual characteristics of the website as well as the purpose, intent and benefits gained from the site, and have not asserted personal jurisdiction for Internet activities when they have found it would not be just or fair.

Satisfying the Standards for Personal Jurisdiction

Internet websites are different from mass mailings or other forms of contacts with a forum state. Considering their specialized nature, courts focus on the defendant's activities rather than the global nature of the Internet itself, just as they focus on where a defendant ships goods, not on where the interstate highway system runs.

Courts generally assess the particular facts of a case against the traditional three-tiered analysis.

First, the defendant must have the requisite minimum contacts with the forum state so as to not violate the traditional notions of fair play and substantial justice.³

Second, either the plaintiff's claim must arise out of the defendant's contacts with the state or the defendant must have purposefully availed him or herself of the benefits and protections of the forum state.⁴

Last, the assertion of personal jurisdiction must be reasonable in that the defendant could foresee being haled into court in the forum state.⁵

Courts also consider the forum state's interest in asserting personal jurisdiction and providing a convenient and efficient remedy for its citizens.

In New Jersey, personal jurisdiction over non-residents is as broad as the reach of the due process of law.⁶ Therefore, there must be such minimum contacts that the maintenance of the suit does not offend the traditional notions of fair play or substantial justice.⁷

New Jersey courts recognize two types of personal jurisdiction: specific and general. For specific jurisdiction, the plaintiff's cause of action must arise out of the defendant's contacts with the forum state. If a cause of action is "related to the defendant's contacts with the forum state, an isolated act may be sufficient to subject the defendant to the jurisdiction of the forum."⁸ Most contested cases of personal jurisdiction involve whether there is specific jurisdiction. For general jurisdiction, the level of interaction with the forum state must be systematic, continuous and of such quality and nature that it is fair and reasonable to uphold jurisdiction in state for any claim. The quantity of contacts is not the sole determinative factor and does not defeat the jurisdiction of the court. A limited amount of interaction may be sufficient to uphold jurisdiction if the defendant purposefully used the forum and reaped benefits from the interactions.⁹

New Jersey's Application of Personal Jurisdiction to the Internet: Recent Decisions

The New Jersey courts have looked for analogies when applying the requirements of personal jurisdiction to the Internet. While other jurisdictions use analogies to television and radio advertisements, New Jersey courts tend to compare a corporate website to a company's print advertisement in a national magazine to determine purposeful availment and sufficient minimum contacts. Overall, New Jersey courts will not uphold jurisdiction based solely on the existence and accessibility of the defendant's website.

In *Blakey v. Continental Airlines*, the Appellate Division affirmed the trial court's dismissal of defamation claims for statements published electronically because there was no personal jurisdiction in New Jersey.¹⁰

After canvassing cases across state lines, the Appellate Division concurred with the trial court's synthesis that

the common thread ... is that non-resident defendants may be subject to personal jurisdiction solely on the basis of their electronic contacts only when they specifically direct their activities at the forum, the plaintiff is a resident of the forum, and the brunt of the injury is felt in the forum state.

Like the trial court, the Appellate Division,

located no case in which a court has found personal jurisdiction over a non-resident defendant for allegedly defamatory remarks communicated electronically when the plaintiff did not reside in the forum state, plaintiff's employment was not based in the forum state, and defendant's electronically transmitted remarks were not specifically targeted at the forum state. Indeed to do so would go beyond the outer limits of due process.

Essentially a Continental pilot living in Seattle, based out of Houston, could not complain about electronic statements on the employee network because Continental was headquartered in New Jersey.

The Law Division held in *Ragonese v. Rosenfeld*,¹¹ that a toll-free number and a passive web page were not sufficient to support personal jurisdiction over a foreign corporation based in Argentina. The plaintiff had purchased tickets from the defendant through an in-state travel agency and the tickets were delivered from an authorized agent in New York. The plaintiff did not transact her business over the defendant's website, and the site did not target or solicit business specifically from New Jersey residents. The court held that a "passive web-site that does little more than make information available to those who are interested in it is not grounds to exercise personal jurisdiction."¹²

In *Weber v. Jolly Hotels*,¹³ the United States Court for the District of New Jersey, applying New Jersey personal jurisdiction law, found an Internet advertising site insufficient to

confer personal jurisdiction upon the defendant, an Italian hotel. Comparing the hotel's website to an advertisement in a national publication, the court held that "advertising on the Internet is not tantamount to directing activity at or to purposefully availing oneself of a particular forum."¹⁴ The advertisements were not substantial or continuous in nature to satisfy personal jurisdiction requirements.

Also in New Jersey, in *Decker v. Circus Circus Hotel*,¹⁵ the district court found no personal jurisdiction over a Las Vegas casino because its national advertising via the casino's Internet website did not create the necessary minimum contacts. Although the defendant had placed his product in the stream of commerce and a New Jersey resident could make hotel reservations over the Internet, the defendant's lack of minimum contacts and a Nevada state forum selection clause on its web site made it unreasonable to maintain jurisdiction. The plaintiffs' unilateral act of going to Nevada was inadequate to force the casino to defend in state.

Finally, in an "early" unreported decision, Judge Lintner found jurisdiction over a Florida franchiser that advertised through a franchiser on the Internet, obtained the benefits of that advertising in New Jersey and had other telephone conversations with New Jersey companies.¹⁶

Type of Internet Activity

The courts have evaluated websites based on their interactive nature, have considered the defendant's use of Internet technology and the underlying purpose for the electronic activities to determine minimum contacts. New Jersey courts have considered: Whether the defendant intended to solicit business in-state, *i.e.*, was the website directed to the state, or was the site simply informative? Overall, the courts have found it more reasonable to assert personal jurisdiction over websites that intend to reach a national audience rather than focus on a more limited region.

Television, radio and telephone contacts with a state have also been analyzed to determine personal jurisdiction. Electronic mail (e-mail) is sometimes analogized to contacts with a state stemming from transmission or receipt of a first-class letter and because personal computers often access the Internet through telephone lines, the "call" from one computer to

another may also be viewed as a telephone contact with a forum state. *ACLU v. Reno*¹⁷ contains a glossary of many Internet terms.

Most courts, including New Jersey, have denied jurisdiction based solely on telephone, mail, or fax communications with the forum state unless the defendant actively solicited business in-state and purposefully availed him or herself of the market. "The use of interstate facilities, such as telephones or mail, is a 'secondary or ancillary' factor and cannot alone provide the minimum contacts required by due process."¹⁸ In *Pfundstein v. Omnicom*, the Law Division refused to uphold jurisdiction over a New York defendant in breach of contract claim when the defendant's only contacts with the state were telephone and mail negotiations.¹⁹

However, a combination of a website with telephone, e-mail and fax communications in state may combine to provide an adequate basis to assert proper jurisdiction.²⁰ In *Jacobs v. Walt Disney World Co.*,²¹ the court upheld jurisdiction over the defendant corporation based on advertisements on New Jersey television and newspapers, sales of products and services in New Jersey, broadcasts of the Disney Channel in New Jersey and availability of a toll-free number for use by New Jersey residents and employee telephone calls to the plaintiff in New Jersey. The court stated that "national media campaigns may well result in the expansion of personal jurisdiction over those who negligently perform services."²²

Also, courts may analogize websites to advertisements in national publications. National advertisements are usually insufficient, standing alone, to create personal jurisdiction.²³ New Jersey courts have been reluctant to assert personal jurisdiction based solely on national media campaigns that inform the general public. The district court in *Giangola v. Walt Disney World*²⁴ upheld the proposition that national media campaigns that simply inform the public should not be the basis for personal jurisdiction.

However, some non-New Jersey courts have upheld personal jurisdiction based mainly on the in-state accessibility of a defendant's website that is aimed at a national market. In *Digital Equipment Corp. v. Altavista Technology, Inc.*²⁵ and *Inset Systems Inc. v. Instruction Set, Inc.*,²⁶

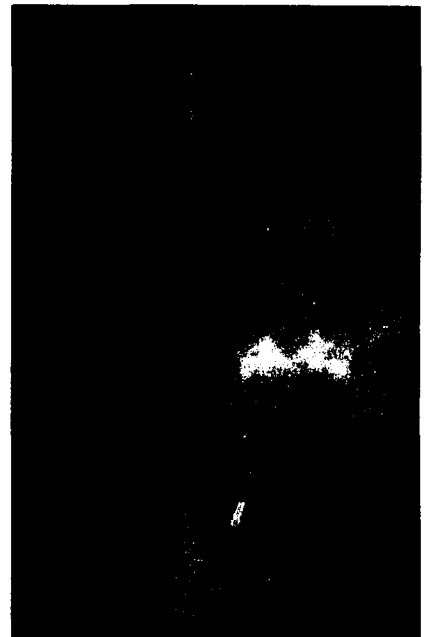
the courts found it reasonable to uphold personal jurisdiction because the websites targeted a national audience and solicited business in the forum state. On the other hand, in *Bensusan Restaurant Corp. v. King*,²⁷ the localized nature and intended audience of the disputed website worked against the assertion of personal jurisdiction.

Website Continuum

At one end of the continuum are websites with the main purpose of actively soliciting and conducting business via the Internet. In this situation, the courts have found personal jurisdiction appropriate based on the defendant's purposeful availment and systematic and continuous interactions with the state.²⁸ For example, in *Maritz Inc. v. Cybergold, Inc.*, the Eastern District Court for Missouri held that a corporation's Internet site that actively solicited subscribers to its mailing list and automatically and indiscriminately responded to site accessors, created sufficient contacts to support personal jurisdiction over the defendant.²⁹

At the other end of the spectrum lie those Internet sites that merely supply information. Here, most courts have been less willing to find grounds to assert personal jurisdiction due to a lack of purposeful availment, the nature of the contact, unpredictability and unreasonableness of a suit in state.³⁰

In *Bensusan Restaurant Corp. v. King*,³¹ the court held the mere posting



of information on a passive website and additional contacts with the forum state inadequate to prove purposeful availment and insufficient to support personal jurisdiction in a suit for trademark infringement. The user of the defendant's website had to engage in several affirmative acts to obtain the information posted on the site. The court stated that "the mere fact that a person can gain information on an allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York."³² Basically, the court found the website functioned as a local newspaper and was not intended to reach a national market. The court concluded that the defendant could not reasonably anticipate suit in the forum and asserting personal jurisdiction would violate due process.³³

Recently, the Court for the Eastern District of Pennsylvania held that a law firm that advertises through a non-interactive website is not subject to suit in the forum based solely on that connection with the state.³⁴ In *Resnick v. Manfredy*, the plaintiff attempted to assert jurisdiction over a Chicago law firm that maintained an informative website and had serviced 54 Pennsylvania clients.³⁵ The court held that a passive website was insufficient alone, but there was general jurisdiction based on the defendant's purposeful availment of business in state.³⁶

In the middle of the spectrum lie interactive websites. On these sites a user can choose to access information that the host computer has made available through an exchange of information, for example by searching. There are various levels of interaction and a court must look at the individual characteristics of the website to see if it is more passive or a more active and aggressive website. In these cases, the level of activity and commercial nature of the electronic exchange determine personal jurisdiction and it is more likely to produce disparate results in different jurisdictions.³⁷

The court found purposeful availment through Internet activities in *CompuServe Inc. v. Patterson*.³⁸ There, an Ohio court upheld personal jurisdiction over a Texas Internet user who subscribed to an Internet network based in Ohio and entered into separate agreements to sell and advertise his software over the Internet. The court

did not rely on a stream of commerce argument, but found the defendant's actions indicative of a purposeful availment of the Ohio market and that he "reached out, originated and maintained contacts with Ohio."³⁹

Also, in *Zippo Manufacturing Co. v. Zippo Dot Com. Inc.*,⁴⁰ a district court in Pennsylvania sustained personal jurisdiction based on the totality of the defendant's electronic commerce, not its website alone. Through its interactive website, the defendant sold passwords to 3,000 Pennsylvania residents and contracted with seven in-state Internet access providers. While the defendant asserted a defense based on the unilateral activities of those accessing the site, the court rejected that argument and held that the defendant's repeatedly and consciously choose to conduct business in the forum and had clear notice that it could be subject to suit in Pennsylvania.⁴¹

Subscriptions to specific websites usually fall in the middle range categorization of inter-action. For example, in *Inset Systems Inc. v. Instruction Set Inc.*,⁴² the District of Connecticut court upheld personal jurisdiction based on a toll free number that was accessible to state residents via the defendant's website while a New Jersey court refused to uphold jurisdiction on similar facts.⁴³

The assertion of personal jurisdiction over a foreign entity based on electronic activity was also addressed in *Playboy Enterprises v. Chuckleberry Publishing*,⁴⁴ where the court analyzed the use of an interactive website as a possible violation of a New York court injunction. Although the producers of the site could have complied with the injunction by denying access to individuals in the United States, the defendant's failure to do so was insufficient to create personal jurisdiction in New York. However, when considered along with the soliciting nature of the website, the defendant's sales and interactions with American clients, the court upheld personal jurisdiction in New York.

Overall, the exercise of personal jurisdiction is contingent upon the website involving more than just the maintenance of a home page; it must also allow browsers to interact directly with the website on some level. Also, there usually must be other non-

Internet contacts with the state in order for personal jurisdiction to be reasonable.⁴⁵

Asserting Reverse Jurisdiction

What about the reverse situation when the Internet site producer seeks to assert personal jurisdiction over the individual who accessed the web site? Is the physical location of the host computer a reasonable place to bring a cause of action? So far, only one court has addressed this issue in *Pres-Kap, Inc. v. System One, Direct Access, Inc.*⁴⁶

In *Pres-Kap, Inc.*, the Florida court refused to uphold personal jurisdiction over a New York customer of a Delaware corporation's on-line airline ticketing service whose airline ticketing computer was located in Florida.⁴⁷ The consumer solicited, negotiated and executed the contract in New York. The defendant's only contact with Florida was his logging onto a Florida computer and mailing payments to Florida. There was no indication that the defendant knew the location of the main computer's database.

The court held that "when a consumer logs onto a server in a foreign jurisdiction, he or she is engaging in a fundamentally different type of contact than an entity that is using the Internet to sell or market products or services to residents of a foreign jurisdiction."⁴⁸ In addition, the court stated that even if the defendant had been aware of the location of the main computer base, it would not have created the level of reasonable foreseeability of suit necessary to justify personal jurisdiction.⁴⁹

Conclusion

The bulk of law concerning the Internet and personal jurisdiction has varied as courts struggle to apply traditional concerns to the developing technology. If confronted with a questionable issue of personal jurisdiction based on Internet activity, one should consider the situation under traditional personal jurisdiction and due process analysis. Where would the subject website fall on the continuum? In addition, the primary purpose of the website and any electronic interactions should be analyzed in addition to any non-electronic contacts and purposeful availment. Also, it is important to consider the weight the courts of each

state give to fundamental fairness and reasonableness in relation to the strict letter of the law.

Currently, a website owner cannot accurately predict whether a court in a particular state will uphold a suit brought against him or her in the forum. If a company knows that it is amenable to suit within a state simply for placing an advertisement on a website or responding to inquiries by in-state residents, the corporation will factor these risks into the costs of business. Then, the corporation can make a calculated determination if the benefits outweigh the costs of pursuing a specific course of action. If a corporation determines that the risk of being subject to personal jurisdiction in a particular forum is too great, it can choose to sever its connection to the state.⁵⁰ In the reverse scenario, individual Internet accessors would be aware of the possibility of suit in a foreign jurisdiction based on its Internet activities. The user may alter online behavior, become more aware of choice of law and forum provisions on websites and may seek out information regarding the location of

host computers to determine where the user would be hauled into court. ◊

Endnotes

1. *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997) (holding a website promoting Missouri jazz club "The Blue Note" did not subject it to suit in New York by the registered federal trademark holder there).
2. Some courts have analogized to print advertisements in national magazines. See *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J.1997). Other courts have viewed the creation of Internet sites as placing an item in the stream of commerce. See *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997).
3. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).
4. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).
5. *World Wide Volkswagen*, 444 U.S. at 297.
6. See *Jacobs v. Walt Disney World, Co.*, 309 N.J. Super. 443, 452 (App. Div. 1998).
7. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945).

8. *Charles Gender Co. v. Telecom Equipment Corp.*, 102 N.J. 460, 471 (1986).
9. See *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 327 (1989).
10. 1999 N.J. Super. LEXIS 206 (App. Div. June 9, 1999). Technically, a private, proprietary, electronic network, not the Internet, was involved, but this seemed not to matter to the court.
11. 318 N.J. Super. 63 (Law Div. 1998).
12. *Id* at 67.
13. 977 F. Supp. at 327.
14. *Id* at 332.
15. 97-1848 (D.N.J.1999).
16. *Noyo Nordisk Pharmaceuticals, Inc. v. Parke Davis Company, Inc. et al.*, Docket No. C-0093-97 (June 13, 1997).
17. See generally, *American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D.Pa. 1996) (Three Judge Court) (describing in detail the complexity and use of modern Internet technology.)
18. *Bell Paper Box, Inc. v. Trans Western Polymers, Inc.*, 53 F.3d 920, 923 (8th Cir. 1995); see also *Digi-Tel Holdings, Inc. v. Proteq Telecommunications (PTE), Ltd.*, 89 F.3d 519, 523 (8th Cir. 1996).
19. 285 N.J. Super. 245 (App. Div. 1995).

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