The Catholic Lawyer

Volume 42
Number 1 *Volume 42, Summer 2002, Number 1*

Article 5

November 2017

New Wine, Old Wineskins: Emerging Issues In Internet-Based Personal Jurisdiction

Jeffrey Hunter Moon, Esq.

NEW WINE, OLD WINESKINS: EMERGING ISSUES IN INTERNET-BASED PERSONAL JURISDICTION

JEFFREY HUNTER MOON, ESQ.*

In the Internet context, the issue of personal jurisdiction arises most often in cases claiming trademark or copyright infringement, consumer or business fraud, and defamation, although there are a number of personal injury cases that address Internet-based personal jurisdiction questions.[1] This is an emerging area of the law—virtually none of the cases discussed below is more than five years old. Consider a hypothetical scenario: suppose someone sues your church-related organization saying that it has infringed his copyright, or perhaps defamed him. Suppose further that he sues in federal district court in Alaska. What if your church-related organization had never sent any officers or employees to Alaska, had no offices in Alaska, and had no programs in Alaska, and never had? Would you anticipate that your organization and its individual managers could be forced to defend litigation in Alaska, hire lawyers there, try a lawsuit there, and potentially be subject to the substantive law of the state of Alaska, laws that you aren't even aware of? The answer is that if certain contacts existed, even if they were created only over the Internet, you certainly could. This raises issues that are tremendously important to everyone managing an organization doing virtually anything over the Internet, all the more so when doing it for a charitable or religious organization that cannot simply "pass on all the costs of doing business" to its "customers" the way Dell Computers or General Motors can.

The jurisdictional issue itself—leaving aside for the moment the merits of such a suit—has the potential to negatively affect

* Solicitor, United States Conference of Catholic Bishops.

[1] *See, e.g.*, Dagesse v. Plant Hotel N.V., 113 F. Supp. 2d 211 (D.N.H. 2000).

costs, damage your business operations, and therefore the important social, educational, and religious programs that your clients are responsible for conducting, and it may disadvantageously affect the substantive legal rules applicable to you, including what sanctions or penalties can be imposed against your clients.

Of course this raises the issue of "choice of laws"—the question of what substantive law is going to be applied. This issue is beyond the scope of this presentation, but obviously, just because a federal court in a given state decides it has personal jurisdiction over all of the players in a lawsuit does not necessarily mean that it could apply that state's substantive law to the claims. However, if no issue is made about that by one of the parties, the trial court will generally apply the substantive law of the forum state.

The question whether your organization can be held subject to the personal jurisdiction of a court system in another state, requires an affirmative answer to two questions: first, does the forum state have a statute that says that you can be held subject to that state's jurisdiction? Second, does the Due Process Clause of our Federal Constitution permit that exercise of jurisdiction?

The first of these two questions is answered by reference to the putative forum state's "long arm" statute. In practice, this is not usually a complex question. Some states—most particularly Florida, Georgia, Massachusetts, New Mexico, and New York—have meaningful limits, restricting jurisdiction over out-of-state actors to specific enumerated acts, or particular time periods, or impose other limits. Other states either have a "long arm statute" that permits the exercise of personal jurisdiction just as far as the Constitution's Due Process Clause permits, or have specific enumerated areas of jurisdiction plus a so-called "catch-all" provision that practically speaking extends up to the limits of the Federal Constitution. So one looks first to the putative forum state's long-arm statute to answer that first, state-law, question.

As to the second question, if the forum state cannot exercise personal jurisdiction over a defendant consistent with our constitutional notions of "Due Process," then it may not do so at all. The essential Due Process question has not changed: are there sufficient "minimum contacts" on the part of the defendant, with the "forum state," such that it accords with

traditional notions of fair play for the defendant to be forced to defend itself, in court, there?[2] There is a "foreseeability" component to this: the defendant's conduct and connection with the forum state must be such that it should reasonably expect to be "haled into court" there.[3] Personal jurisdiction is not, therefore, to be based on "random, isolated, or fortuitous" contacts.[4] And the defendant's own actions must have created those contacts.[5] Personal jurisdiction must either be "specific" or "general."

Specific Jurisdiction: The question is, has the defendant purposefully availed itself of the benefits and protections of the forum state in taking the specific actions out of which the litigation arises, so that it could be brought into court there?[6]

General jurisdiction is a broader concept: has the defendant had "systematic and continuous contacts" with the forum state, even leaving aside the acts that led to the litigation, such that it is fair to force the defendant to defend a lawsuit in the forum state.[7] Apropos the title of this presentation, these same jurisdictional concepts all apply to the e-commerce or e-communication framework, just as they do to conduct and actions that have no connection at all to the Internet. The ways in which these concepts have been interpreted and applied in practice, however, lead to some generally-applicable guidelines that are, indeed, peculiar to the Internet and e-mail context.

The bottom line, generally, is that personal jurisdictional questions are answered by reference to a "sliding scale" that looks at the number, quality, and types of contacts that a putative defendant has had with the forum state. The two key cases are *Zippo Manfacturing Co. v. Zippo Dot Com, Inc.*,[8] and a case from two years later, *Mink v. AAAA Development*.[9]

Zippo involved a suit by the famous Zippo cigarette lighter company. It sued Zippo Dot Com, a computer news service

---

[2] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

[3] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[4] *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984).

[5] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

[6] *See* Mellon Bank (East) PSFS, N.A. v. Farino, 960 F.2d 1217 (3d Cir. 1992).

[7] *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

[8] 952 F. Supp. 1119 (W.D. Pa. 1997).

[9] 190 F.3d 333 (5th Cir. 1999).

which used several domain names including "zippo.com," "zippo.net," and "zippo-news.com." The lighter company believed itself aggrieved, and it sued alleging trademark dilution, trademark infringement, false designation under the Federal Trademark Act, 15 U.S.C. §§ 1051–1127 (1994), and making a state law "trademark dilution" claim. Zippo Manufacturing sued in the Western District of Pennsylvania, and Zippo Dot Com moved to dismiss for lack of personal jurisdiction. Zippo Dot Com "existed," in the conventional sense, only in California, in that all its offices, employees, and Internet servers were located there. It had no offices, employees, or agents in Pennsylvania. Its only relationship to Pennsylvania was that its webpage was available to people in Pennsylvania, and that out of 140,000 subscribers, 3,000 were Pennsylvania residents. Subscribers had agreed, over the Internet, to pay fees for Zippo Dot Com's news services, and many had made their payments for these subscriptions via the Internet.

The court held that Zippo Dot Com's conduct of electronic business with Pennsylvania residents constituted the purposeful availment of the privilege of doing business in Pennsylvania. Zippo Dot Com did not merely advertise over the web, and its contacts with Pennsylvania residents were not, from its standpoint, "fortuitous" at all. Rather, it had made a conscious choice to do business with residents of the forum state and a significant amount of the alleged dilution and infringement occurred in Pennsylvania. Thus, specific personal jurisdiction was found to exist in Pennsylvania.

From *Zippo*, we get this basic formulation: that Internet-based personal jurisdiction is a "sliding scale" issue, and that it turns upon the "nature and quality of commercial activity" that the defendant conducts over the Internet.[10]

Zippo's standards were further refined three years later by the Court of Appeals for the Fifth Circuit, in *Mink*. In *Mink*, the court rejected the argument that a federal court in Texas could assert personal jurisdiction over a Vermont corporation by way of its website. That website provided a downloadable order form which prospective customers could print out and mail in with payment, to do business with AAAA. No orders were taken through the website, though it provided advertisements, an e-

[10] *See Zippo*, 952 F. Supp. at 1124.

mail address, a mailing address, and a toll-free telephone number. Because of this, the court said that the website functioned as a passive advertisement only, and could not be the basis for personal jurisdiction in Texas.

From *Mink*, we get a refinement of the *Zippo* rule. The Fifth Circuit held that personal jurisdiction would be determined by the "level of interactivity" that the Internet contacts between plaintiff and defendant involved, and the "commercial nature of the exchange of information" that occurred on the website.

One end of the "sliding scale" spectrum then, is represented by the entirely passive website that involves no sales over the Internet, no interactivity, and no particularized solicitations of business (or of contributions, for example) in the putative forum state. Absent additional contacts or activities by you in the forum state, this almost certainly is not sufficient for courts in that state to exercise jurisdiction over you or your organization.

A case on point is *Lofton v. Turbine Design, Inc.*.[11] In *Lofton*, an aircraft parts manufacturer claimed that another company, located in Florida, had defamed it and one of its individual owners, and had stolen trade secrets from it. The defendant had a passive web-site that explained and advertised its products and described why its products were superior to Lofton's. This website was also supposedly used to defame Lofton. The web-site was viewed in Mississippi, where Lofton operated its business, but no ordering, or even price quotes, were available online. Lofton sued in Mississippi, claiming that courts in Mississippi had personal jurisdiction over Turbine Designs, based on this website.

The defendants, Turbine Design and its officers, were a business and individuals in Florida. They were residents there, and had their principal place of business there. Turbine Design had no place of business, and did no business, in Mississippi. There was no evidence of further contact with Mississippi by the defendants, or evidence that anyone other than Lofton had accessed the site in Mississippi, though certainly everyone with Internet access in the state of Mississippi could have done so, and some probably did. There was no proof of any particular harm caused by Turbine Design oriented to Mississippi. The court in Mississippi granted Turbine Design's motion to dismiss

[11] 100 F. Supp. 2d 404 (N.D. Miss. 2000).

because it did not have personal jurisdiction over Turbine Design or its officers.

Although Mississippi state law did permit the exercise of jurisdiction over Turbine Design, constitutional due process requirements did not. The Mississippi court held that it had no "general" jurisdiction over Turbine Design because it had no "continuous and systematic" contact with Mississippi. And the court had no "specific jurisdiction" over the company because Turbine Design did not establish any contacts with the state of Mississippi which were directly related to the reasons for the lawsuit. In fact, apart from the simple existence of the passive website that could be accessed in Mississippi, the defendants had had no contact with Mississippi at all. So the action was dismissed.

Next let's deal with a little different example, a case called *Bensusan Restaurant v. King*.[12] There, a Missouri resident, King, operated a nightclub business in Missouri called "The Blue Note"—the same name as the trademarked name of a famous jazz club in New York. King advertised his club on a website created in Missouri, which was seen in New York. The original Blue Note's owner sued in Federal District Court in New York claiming trademark infringement and unfair competition in violation of New York's laws. The question was whether the court in New York had personal jurisdiction over this Missouri corporation. The Missouri Blue Note hadn't done any business in New York, was never physically present there, and New York's long arm statute generally required a defendant to have been physically present in, and do some act in New York, for its courts to have jurisdiction. Though the New York club claimed that it was injured in New York, the dismissal of its case in New York against the Missouri club was affirmed based on the lack of personal jurisdiction. Courts in New York could not exercise their power over this defendant, which had its offices in, and did business in, Missouri only.

Now let's turn to the other end of the spectrum: interactive web-sites and repeated communications with the forum state, via Internet, as a way of conducting business. Typically, there is personal jurisdiction over the out-of-state person or organization in such a case, even if that person or organization had never had

---

[12] 126 F.3d 25 (2d Cir. 1997).

any other contact with that state.

Consider *CompuServe, Inc. v. Patterson*,[13] one of the most significant recent cases in the law of federal jurisdiction. CompuServe sued a Texas company called Flashpoint, seeking a declaratory judgment that CompuServe had not violated Flashpoint's copyrights. CompuServe sued in Ohio, where it is located. One reason for doing that, of course, was to gain tactical advantage by forcing Flashpoint to come to Ohio to defend, and another was to try to use Ohio's more favorable laws, not Texas' laws, to test Flashpoint's conduct.

Flashpoint is in Texas and its owner never visited Ohio, but entered into two contracts with CompuServe that stated they were entered into in Ohio. These two contracts were agreed to by Flashpoint's owner in Texas, who typed by computer in Texas his agreement to the contracts. Note here, parenthetically, that there is important federal legislation bearing on this area, in the so-called Electronic Signatures In Global And National Commerce Act, Public Law 106–223. Flashpoint sold its software products over the Internet, using CompuServe. Only 12 people in Ohio bought those products, a total of $640 in sales.

CompuServe thereafter developed a similar software product, after which Flashpoint complained, and CompuServe sued Flashpoint in Ohio to secure a declaratory judgment.

The court found that Flashpoint had taken actions that created a substantial connection with Ohio. It entered into contracts that were explicit about the fact that they were entered into under Ohio Law. Its owner sent his computer software to CompuServe in Ohio, and communicated with CompuServe in Ohio by e-mail and mail, and Flashpoint sold its products in Ohio, on an ongoing basis, doing business over the Internet, via CompuServe's computer facilities in Ohio.

The case also "arose out" of Flashpoint's activities in Ohio, because Flashpoint advertised and sold its software from CompuServe's Ohio-based Internet system. The court held that Flashpoint did have sufficient contacts with Ohio to justify the exercise of personal jurisdiction. This was the case even though Flashpoint had only $640 worth of sales in Ohio; in my view the decision would have been the same even if Flashpoint had sold no products in Ohio at all.

---

[13] 89 F.3d 1257 (6th Cir. 1996).

Note that for future reference the issue of a server's physical location is a factor one sees noted more and more frequently in the cases over the last 18 months or so. I do not, however, know of any cases in which a forum state exerted personal jurisdiction over an out-of-state entity solely because of a server's location. In fact, this factor seems to cut a variety of ways. A server's presence in California did not prevent a court in Texas from exercising personal jurisdiction in *Thompson v. Handa-Lopez, Inc.*,[14] nor did it prevent the court in Pennsylvania from exercising personal jurisdiction over a California corporation whose servers were in California, in *Zippo*, discussed earlier. But, it seemed to have something positive to do with the exercise of personal jurisdiction in Ohio (the server's location) in *CompuServe*, and with the court's refusal to exercise personal jurisdiction in D.C. in *GTE New Media*, discussed below, when the server was in Maryland. As a freestanding fact, in my view it has no pivotal significance. But, it is very clear that the mere fact that the server in question is outside the putative forum state will not automatically prevent a court in the forum state from exercising either specific or general jurisdiction in the appropriate case. One clever idea is to claim general jurisdiction wherever the defendant's servers are, on the basis that that proves continuous and systematic Internet contacts with whatever that state is. To my knowledge, however, that has neither been tried or decided.

My conclusion is that wherever, as is the case with many consumer oriented e-commerce sites, products or services can be selected, purchased, and actually paid for over the Internet, that will be sufficient for the exercise of personal jurisdiction in the state where the plaintiff is a resident, at least if that company does any substantial amount of business with residents of that forum state. But be aware that in *Molnlycke Health Care AB v. Dumex Medical Surgical Products Ltd.*,[15] the court reached a contrary conclusion. It wrote: "To hold that the possibility of ordering products from a website establishes general jurisdiction would effectively hold that any corporation with such a website is subject to general jurisdiction in every state. This court is not willing to take such a step." In my view, this decision turns on

---

[14] 998 F. Supp. 738 (W.D. Tex. 1998).

[15] 64 F. Supp. 2d 448 (E.D. Pa. 1999).

the fact that the defendant was a Canadian company, there was no specific jurisdiction, and it was a patent infringement case. The action had nothing to do with Pennsylvania, and did not arise out of any products purchased from Pennsylvania over the Internet. It appeared that plaintiffs were simply trying to find an advantageous place in the United States to sue the Canadian company.

Now let's look at the more problematic cases, those in the middle of the spectrum; an interactive website alone, but without any other contacts by defendant with the forum state. In such a case, there is probably no personal jurisdiction over the out-of-state defendant, so long as there is no physical contact with the putative forum state, and no business is actually done by Internet. Note, however, that when I say "business" I do not mean only the buying and selling of products and services, but also other business-related processes. Please keep that in mind when I reach the *Maritz* case in a moment.

Let's look at *GTE New Media Services, Inc. v. BellSouth Corp.*,[16] where GTE sued BellSouth, Netscape, and Yahoo claiming anti-trust violations because the defendants had terminated subscribers' internet access to GTE's Yellow Pages. GTE said the defendants had agreed to certain acts, outside the District of Columbia, that hurt GTE in D.C. by orienting Internet users in the District of Columbia to their "Yellow Pages"-type sites, rather than to GTE's. But GTE did not show any contractual relationship (unlike *CompuServe*) that made the defendants subject to District of Columbia law, and did not show the defendants had specifically directed their activities to the District of Columbia at all, or had any physical contacts with it. Also, unlike *CompuServe*, GTE did not show that the defendants conducted their business dealings with GTE *in D.C.*, either over the Net or otherwise.

The court held that personal jurisdiction cannot legitimately be based only on D.C. residents' ability to access defendants' web-sites from D.C., saying that reflects no more than a phone call *from* D.C. to defendants' servers, and those servers were all *outside* D.C.. The court also held that just because D.C. residents could access the defendants' "Yellow Pages"-type websites and use them in D.C., that does not mean the

[16] 199 F.3d 1343 (D.C. Cir. 2000).

defendants were "doing business" in D.C.

This "middle of the spectrum" is also where I would locate the cases where a high level of interactivity has led to a finding of personal jurisdiction, even absent any purchases, contracts, or agreements being effected over the Internet.

Maritz, Inc. v. Cybergold, Inc.,[17] is such a case. The defendant, Cybergold, was in the process of creating an Internet service business, and it put up a website to promote it. The defendant's business model called for advertisers to pay Cybergold for the privilege of being included in selective electronic "mailings" to narrowly-focused groups of subscribers. There was no such service yet, but the promotional site asked those interested in subscribing to send in their e-mail addresses to a mailing list over the Internet, so as to get updates about this product. Obviously, Cybergold later intended to use these lists of likely subscribers when it came time to sell its services. The plaintiff's claims against Cybergold were based on theories of trademark infringement related to this business idea. Even though the plaintiff, a Missouri resident, had never bought anything over the net from Cybergold, or entered into any contracts or agreements with it, the court held Cybergold subject to personal jurisdiction in Missouri, where plaintiff had sued. The court said that Cybergold was engaging, on the Internet, in active solicitation and promotion intended to develop a mailing list of Internet users interested in a particular sort of Internet service, a valuable commercial commodity. Cybergold was doing this in a heavily interactive way. Thus, it was doing far more than merely advertising an upcoming service; it was doing its business, over the Internet, in Missouri.

Now let's look at a variation on the theme: a passive web-site, plus a toll-free number provided for further contacts. Usually there is no personal jurisdiction anywhere other than where the defendant is actually located, in such a case. In fact, such a case sounds like the defendants have substantially *less* contact with the forum state, than was the case in *GTE*, discussed above. But, there is a "minority view" that says this can be the basis for personal jurisdiction in a distant forum state, in some particular circumstances. I stress that this is a minority view, what the *Zippo* opinion called the "outer limits" of

---

[17] 947 F. Supp. 1328 (E.D. Mo. 1996).

Constitutionally-permissible personal jurisdiction.

The case I want to discuss in this regard is *Inset Systems, Inc. v. Instructional Set, Inc.*,[18] Inset is a Connecticut company, which found that a Massachusetts company calling itself "Instructional Set, Inc.," had obtained the Internet domain name "Inset.com," although Inset owned the trademark on "Inset." This is a so-called "cyber-squatting" case. Inset sued in Connecticut to stop Instructional from using that trademark or domain name, claiming that the federal court in Connecticut had personal jurisdiction over Instructional, a Massachusetts corporation with all its offices and places of business in Massachusetts. Instructional advertised on the Internet and provided an 800-number to a Massachusetts office, which customers in Connecticut and elsewhere could use to reach it. It did not, however, contract for or sell its services over the net, either to residents of Connecticut, or residents of any other state.

The federal district court in Connecticut, somewhat surprisingly, found it had personal jurisdiction over Instructional, even though Instructional had no physical contacts with Connecticut, and did not have an interactive website or enter into agreements over the Internet with people in Connecticut. It found this because Instructional provided its toll-free telephone number to numerous Connecticut Internet users, advertised widely on the Internet (which could be accessed by all Internet-connected people in Connecticut), and particularly because the facts showed that Instructional had tried to "orient" and direct its activities on the Web to take business away from Inset, in Connecticut.

Let me conclude with three red flags which I think summarize the state of the law at present: if your activities or dioceses intend to have truly interactive web sites, or to actually complete business transactions over the web, or take actions that reasonably could be seen as having substantial effects intentionally oriented to some other specific state, then please carefully review the situation with a view to what the jurisdictional consequences might be. On the other hand, if you have only a passive website providing information, even with telephone numbers or additional ways of locating information on the Internet, including e-mail addresses, this probably does not

[18] 937 F. Supp. 161 (D. Conn. 1996).

present a substantial risk that you may be forced into court in another state.

Here are some possible prophylactic responses to consider, which should be of use both from a jurisdictional and a choice of law perspective.

1. A restrictive "banner" notification, text statement, or "terms of use."[19]
   a) Indicate an intent to do business only where you are comfortable litigating, or at least not where you are not.
   b) Require entrance of only specified state's mailing addresses, and/or provide toll-free telephone numbers to effect contacts, that only work from within the state you intend to "do business" in.
   c) If you are selling products or services, put explicit language in the purchasing form saying whose law will be applied, and/or what it is.
   d) Note that this may not work unless the language is especially prominent and a reasonable person *would* have noticed it.[20]
2. The "click-through agreement"[21] similar to "shrink wrap agreements."
   a) Include, in the text of the agreement, explicit personal jurisdiction, forum selection, and choice of law provisions. Then make certain that no business is conducted, nor are responses provided, unless the "customer" agrees to these provisions explicitly, by "clicking through" that step in the computer process.
   b) *Caspi v. Microsoft Network, L.L.C.*,[22] upheld a forum selection clause imposed in this way. There are also some state statutes bearing on this issue, and cases enforcing the substantive contract provisions of click-through agreements, like *Hotmail Corp. v. Van$Money Pie, Inc.*.[23]

---

[19] *See* Decker v. Circus Circus Hotel, 49 F. Supp. 2d 743 (D.N.J. 1999).

[20] *See* Thompson v. Handa-Lopez, 998 F. Supp. 738 (W.D. Tex. 1998).

[21] *See* Stomp v. NeatO, L.L.C., 61 F. Supp. 2d 1074 (C.D. Cal. 1999).

[22] 732 A.2d 528 (N.J. Sup. Ct. App. Div. 1999).

[23] 1998 U.S. Dist. LEXIS 10729 (N.D. Cal. Apr. 16, 1998). *But see*, America Online, Inc. v. Mendoza, 108 Cal. Rptr. 2d 699 (2001).

3. In the alternative, or if you use a "click-through" agreement and no agreement is forthcoming, provide only advertising-type information and a downloadable order form.[24]
    a) This causes the customer to mail you an order or inquiry and puts you in the drivers seat.
    b) If used in combination with the click-through agreements described above, this may also be useful to help show that there were practical alternatives to acceptance of the "click-through agreement," and so enforcement of its provisions is not improper, since there was a genuine meeting of the minds. This avoids one of the enforcement problems inherent in "shrink wrap agreements."
    c) If the subsequent dealings are by way of the mails or telephone, then traditional jurisdictional standards applicable in such situations would be used.

[24] *See* Remick v. Manfredy, 52 F. Supp. 2d 452 (E.D. Pa. 1999).