

Personal Jurisdiction and the Internet

Despite some suggestions to the contrary, the rise of the Internet as a business tool does not portend the end of limits on personal jurisdiction. Rather, the courts are continuing to find that the Internet merely provides another vehicle (albeit an electronic one) through which a party may purposely avail itself of the privilege of conducting business in a foreign state and thus subject itself to jurisdiction in that state. In recent cases, the federal courts have continued to analyze the characteristics of this ever expanding technology under the Supreme Court's existing personal jurisdiction precedent. Instead of changing the personal jurisdiction standard, which is grounded in the Constitution, or articulating a new test for Internet contacts, the courts have continued to apply the existing personal jurisdiction standards to Internet activities.

In early cases addressing personal jurisdiction involving Internet contacts with the forum state, some courts found jurisdiction to be present simply because the defendant's website could be accessed in the forum state. See Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996). These cases quickly became the minority and now courts unanimously explicitly or implicitly reject the idea that placing information on the Internet subjects a person or entity to personal jurisdiction in each state in which the information is accessed.

Many circuit courts have adopted and adapted a sliding scale approach to personal jurisdiction that is grounded in the traditional minimum contacts analysis and was first articulated in the seminal case of Zippo Manufacturing, Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). Under Zippo, the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial

activity that an entity conducts over the Internet.@ Zippo Mfg. Co., 952 F. Supp. at 1124. To identify the “nature and quality of commercial activity,@ the Zippo Asliding scale@ model describes generally the two extreme ends of the spectrum and the gray areas in between. A court using this model will identify where along the described spectrum the facts of its case fall. At one end of the spectrum, a defendant is subject to the jurisdiction of the state when it clearly conducts business over the Internet. At the other extreme, a defendant is not subject to the jurisdiction of the Court when its Internet-related activity consists only of posting information on the Internet that may be accessed by users in the relevant jurisdiction. This is the so-called “passive website”. In between these two extremes are interactive websites where a user can exchange information with the host computer. In sum, “the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.” Id. The Zippo sliding scale model is consistent with Supreme Court precedent that requires purposeful conduct directed at the state in order to subject a party to that state=s jurisdiction.

The Zippo Asliding scale@ model, or a version thereof, has also been adopted by the vast majority of the circuits, including the District of Columbia, Federal, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. Gorman v. Ameritrade Holding Corp., 293 F.3d 506 (D.C. Cir. 2002); Trintec Indus., Inc. v. Pedre Promotional Products, Inc., 395 F.3d 1275 (Fed. Cir. 2005); Toys AR@ Us, Inc. v. Step Two, S.A., 318 F.3d 446 (3rd Cir. 2003); ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707 (4th Cir. 2002); Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002); Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883 (6th Cir. 2002);

Jennings v. AC Hydraulic A/S, 383 F.3d 546 (7th Cir. 2004); Lakin v. Prudential Securities, Inc., 348 F.3d 704 (8th Cir. 2003); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Soma Medical Int'l v. Standard Chartered Bank, 196 F.3d 1292 (10th Cir. 1999). District courts in the three remaining circuits that have not yet considered Zippo have also adopted, adapted, or at least acknowledged the Zippo sliding scale approach. Gather v. Gatheroo, LLC, 443 F.Supp.2d 108 (D. Mass. 2006); Best Van Lines, Inc. v. Walker, 2004 WL 964009 (S.D.N.Y. May 5, 2004); Barton Southern Co., Inc. v. Manhole Barrier Sys., Inc., 318 F. Supp.2d 1174 (N.D. Ga. 2004).

Many courts that have considered the Zippo sliding-scale specifically recognize the Supreme Court's cautionary language regarding the effect of technological advances on the limits of personal jurisdiction in Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228 (1958). Simply put, technological advances cannot remove all restrictions on personal jurisdiction or its territorial boundaries. Id., 357 U.S. at 250-51. With this in mind, courts have consistently rejected using or developing a new test for jurisdictional issues involving Internet or electronic contacts. See Winfield Collection Ltd. v. McCauley, 105 F. Supp.2d 746, 750 (E.D. Mich. 2004). The Zippo sliding scale is a useful tool but the courts that have addressed or adopted it wisely recognize that it does not replace the current jurisdictional standards articulated by the Supreme Court nor does it work in every context. See Lakin, 348 F.3d at 712 (Court noted that the sliding-scale model is ill-suited to a general jurisdiction inquiry); see also Hy Cite Corp. v. badbusinessbureau.com, L.L.C., 297 F. Supp.2d 1154, 1159 (W.D. Wisc. 2004)(Court noted that

passive websites may subject defendants to a court=s jurisdiction while highly interactive websites might not based on the intent of the defendant to avail itself of the forum state).

The Zippo sliding-scale model is most useful in cases involving defendants who are persons or entities that conduct business or sell products over the Internet. That is, a website like Amazon.com conducts numerous business transactions every day in every state. Therefore, it is reasonable to find that Amazon.com is purposefully availing itself of the jurisdiction of each state. In fact, Amazon.com likely does enough regular business over the Internet to be subject to the more stringent requirements of general jurisdiction.

Perhaps a step beyond the Zippo test is the question of what happens when a person or entity does not maintain a website at all but, rather, conducts its business through a website maintained by a third party. The most obvious example is a seller on eBay. The auction website that has grown from people selling their junk and collectibles to others to a virtual storefront for sophisticated businesses, is accessed by buyers in all fifty states and internationally. Sellers using eBay, however, have typically been found not to have purposely availed themselves of each and every state in which their listings can be accessed because they do not have control over to whom their auctions and advertising are directed. See Machulsky v. Hall, 210 F.Supp.2d 531 (D.N.J. 2002); Winfield Collection, Ltd. v. McCauley, 105 F.Supp.2d 746 (E.D. Mich. 2000); Action Tapes, Inc. v. Weaver, 2005 WL 3199706 (N.D. Tex.); United Cutlery Corp. v. NFZ, Inc., 2003 WL 22851946 (D. Md. 2003).

In a recent case from the Eastern District of Michigan, however, the Court departed from the usual analysis of these cases and found that an eBay seller's activity was sufficient to find personal jurisdiction existed. See Dedvukaj v. Maloney, 447 F.Supp.2d 813 (E.D. Mich. 2006). The Dedvukaj court held that "sellers cannot expect to avail themselves of the benefits of the internet-created world market that they purposefully exploit and profit from without accepting the concomitant legal responsibilities that such an expanded market may bring with it." While this holding appears to be expanding the minimum contacts analysis, and is still clearly in the minority, it is yet another example that while the vehicle by which a party makes minimum contacts is different, the jurisdictional analysis remains largely the same.

Cases that do not involve commercial transactions over the Internet, are not good candidates for using the Zippo sliding scale approach, which focuses on whether a website is interactive or passive. The fact that a website is entirely passive does not guarantee that personal jurisdiction will not be found to be proper. One example is a defamation case. In Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482 (1984), the Supreme Court held that the writing of an allegedly defamatory article in Florida that was published nationwide subjected the defendant to personal jurisdiction in California because the subject of the article was a resident of California and there was evidence that the article was targeted at her in California. This is the so-called Affects test of personal jurisdiction. Therefore if a passive website contains defamatory material, and it is purposefully directed at the forum state, the requirements of personal jurisdiction may be satisfied despite the fact that the website is passive. See, e.g., Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002)(Court held that the posting of a newspaper article

on a website was not sufficient to exercise jurisdiction over the defendant but suggested that a passive website can result in personal jurisdiction if the defendant intentionally directed and targeted the article to the forum state). In such a case, the possibility of a passive website exposing a defendant to jurisdiction in every state is limited by the analysis of the intent of the defendant and the location of the intended target of the defamatory material.

This analysis is especially important as the activity and influence of bloggers continue to rise. A typical web log, or “blog”, is an individual’s online journal on certain topics, political or social. Many blogs sell advertising to either support the blog or to make a profit, while others are much simpler and contain no advertising. Most of the litigation involving bloggers thus far has involved defamation claims, i.e., a blogger posts something allegedly untrue about a person on their blog and the target sues the blogger. In these cases, the blogger is not running an “active” website as defined by the Zippo test, but it is actively distributing information and opinions to the entire country, and the world. Therefore, the same “effects test” as used in Calder v. Jones will be applied in these cases. See e.g. Software Dev. and Inv. of Nevada v. Aaron Wall, 2:05-CV-01109-RLH-LRL, No. 13 (D. Nev. Feb. 13, 2006).

Although the Internet creates new and different ways in which a person or entity can enter a foreign state, the principles of personal jurisdiction and its limits remain largely unchanged. While the sliding-scale model articulated in Zippo can be a useful tool in determining whether a court can exercise jurisdiction over a defendant, courts will still base their

jurisdictional holdings on the constitutional jurisdictional framework previously articulated by the Supreme Court.

Bios:

Benjamin I. Fink is a shareholder in Berman Fink Van Horn P.C. in Atlanta, Georgia. He graduated from Duke University (B.A. 1989) and earned his law degree from Emory University School of Law (J.D. 1992). He may be reached at (404) 261-7711 or at bfink@bfvlaw.com.

Steven A. Wagner is an associate at Berman Fink Van Horn P.C. in Atlanta, Georgia. He graduated from the State University of New York College at Buffalo (B.A., *cum laude*, 1994) and earned his law degree from Emory University School of Law (J.D. 1999). He may be reached at (404) 261-7711 or at swagner@bfvlaw.com.