

## **Personal Jurisdiction and the Internet: An Update**

As set forth in a prior article appearing in the April issue of the *Internet Law & Strategy* newsletter, 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 relatively new and 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.

An example of a circuit court opinion that addressed the question of personal jurisdiction in the Internet context is *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), cert. denied 537 U.S. 1105 (2003). *ALS Scan* addressed whether Digital Service

Consultants, Inc. (“Digital”), a Georgia-based Internet Service Provider (“ISP”), was subject to personal jurisdiction in Maryland based on purely Internet-related contacts. Digital was sued by ALS Scan, Inc. (“ALS”) as an alleged contributory copyright infringer because it provided bandwidth to a co-defendant, Alternative Products, Inc. (“Alternative”), through which Alternative maintained its website. Alternative was posting photographs on its website that allegedly infringed on ALS’s copyrights in those photographs. Alternative sold memberships to access its website and, in turn, the photographs, to people who had access to the Internet, including those in Maryland. In essence, ALS alleged that Digital, as the ISP, “enabled” Alternative to publish the allegedly copyrighted photographs on the Internet.

In the district court, Digital moved to dismiss the claims against it for lack of personal jurisdiction on the grounds that Digital did not engage in any continuous or systematic activities in the forum state. The district court granted the motion to dismiss, and the Fourth Circuit affirmed the lower court’s ruling. In doing so, the Fourth Circuit 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 “sliding 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.

In addition to the Fourth Circuit, the Zippo “sliding scale” model has also been adopted by the vast majority of the circuits, including the District of Columbia, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits. Gorman v. Ameritrade Holding Corp., 293 F.3d 506 (D.C. Cir. 2002); Toys “R” Us, Inc. v. Step Two, S.A., 318 F.3d 446 (3rd Cir. 2003); Revell v. Lidoy, 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)(but holding that the “sliding scale” model is only one factor to consider for purposes of a general jurisdiction analysis); 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. Dagesse v. Plant Hotel N.V., 113 F. Supp.2d 211 (D.N.H. 2000); Best Van Lines, Inc. v. Walker, 2004 WL 964009 (S.D.N.Y. May 5, 2004); Barton S. 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 who 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 704, 712 (Court suggested 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 who 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 hold 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.

Cases that do not involve commercial transactions over the Internet, however, 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 “effects 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); see also Lewis v. King, EWCA Civ. 1329

(July 27, 2004). 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.

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:**

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