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PERSONAL JURISDICTION IN CYBERSPACE: Where Can You Be Sued, And Whose Laws Apply

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PERSONAL JURISDICTION IN CYBERSPACE
Where Can You Be Sued, And Whose Laws Apply?

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Summary

The development to date of the law of personal jurisdiction based on Internet and World Wide Web contacts is evolving in a way that could pose a legal threat to all Web site operators, and in particular the smaller independent site operators who can least afford it, by making them subject to being sued in virtually every state in the country. This article reviews the recent case law and concludes that, notwithstanding good policy reasons to do otherwise, some courts are finding personal jurisdiction to exist in circumstances that appear to go beyond the U.S. Supreme Court's admonition that the exercise of such jurisdiction should not offend "traditional notions of fair play and substantial justice." The article concludes by suggesting some precautions to Web site operators that may mitigate this growing risk.

Introduction

Throughout history, laws have been based on politically-created physical boundaries, seeking to protect and govern the actions of people who live or act within them. Since there is an overlap of political boundaries even in the United States, each of us is subject at any given time to several different sets of laws: those of the city in which we live; the county in which our city is located; the state in which the county is located; and the nation in which our state is located. For example, a resident of Albany, New York and a resident of San Francisco, California are subject to some of the same laws (those enacted by the Federal government), but most of the laws that govern their daily lives are not the same (state and city laws).

The broad array of laws to which each of us is subject change constantly depending upon a variety of circumstances. This state of flux highlights the importance of being able to determine which political body can assert authority, or "jurisdiction," over a person or entity with respect to any particular course of conduct. Since the judiciary is the ultimate enforcer of our legal system, the determination usually begins with the question of which court has "jurisdiction," that is, the power to render a judgment against a person or entity that is enforceable in other states under the Full Faith and Credit Clause of the U.S. Constitution. Where an individual or company might be forced to litigate is important not only because it

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may be extremely inconvenient and costly to litigate outside one's home jurisdiction, but also because in many cases the laws of the political subdivision in which the court is situated will be applied to the substantive issues being litigated. Not surprisingly, therefore, a large body of law has developed in this country relating to the circumstances under which a court of any given political subdivision can assert "personal jurisdiction" over a person or company. As use of the Internet[2] expands, applying this body of law to "electronic commerce" in cyberspace[3] has proven problematic. Web site operators now must ask themselves: Is having a Web site viewable in a state enough to confer jurisdiction by that state over the site operator? What if the Web site promotes a product or service? Generates qualified leads? Takes orders?

This article briefly reviews the background of the law of "personal jurisdiction" and then reviews, in the context of that background, a flurry of judicial decisions within the past few years dealing with the impact of the use of the Internet and the World Wide Web on the imposition of personal jurisdiction. It concludes with commentary on these decisions and some thoughts on how to mitigate the potential of being brought before the courts outside one's home jurisdiction as a result of Internet activities.

Background -- Personal Jurisdiction

There are two types of personal jurisdiction. The first, called "general" jurisdiction, subjects a person to the power of the applicable court with respect to any cause of action that might be brought. General jurisdiction has historically relied on very close contacts of the person with the state, such as residency or domicile within the state, physical presence in the state at the time of service of process, or some other substantial "continuous and systematic" contact with the forum state.[4] The second, called "specific" or "limited" jurisdiction, refers to the power of the applicable court with respect to a particular cause of action based upon some set of "minimum contacts" with the forum state that relate to that cause of action. Although courts rely primarily upon U.S. Supreme Court decisions as the foundation for jurisdictional analysis, the circuit courts have begun developing their own approaches to determining minimum contacts for personal jurisdiction regarding electronic commerce.[5]

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[2] The Internet is an international network of computers and computer networks connected to each other through routers using a standard protocol. The World Wide Web is an Internet application for standardized access for most Internet users and has become so pervasive that the terms "the Internet" and "the Web" are often used interchangeably. In this article, the broader term, the Internet, is used to encompass all forms of computer driven electronic communication and commerce.

[3] The term "cyberspace" was apparently first coined by science fiction writer William Gibson in his 1980 novel *Neuromancer*. It was used to describe a computer generated "virtual" space that looked and felt like physical space.

[4] See generally, *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

[5] For example, the Ninth Circuit takes a seven-factor approach in *Panavision International, L.P v. Toeppan*, 938 F.Supp. 616 (C.D. Cal. 1996); whereas the First Circuit selected a five-factor approach in *Digital Equipment Corp. v. Altavista Technology, Inc.*, 960 F.Supp. 456 (D. Mass. 1997).

Until after World War II, personal jurisdiction by a court over a non-resident defendant was based largely on physical presence in the state at the time of service of process. If a California resident wanted to sue a New York resident, the suit usually had to either be: (1) brought in New York (thereby subjecting the California resident to jurisdiction in New York); or (2) the defendant had to be served while physically in the state of California.

With the growing nationalization of commerce and the advent of modern travel and communications technologies, which on the one hand increased the instances of conflict between parties in different states, and on the other decreased the burden of having to litigate outside one's home state, the law of specific personal jurisdiction began to change. Most states have enacted so-called "long-arm" statutes, which confer personal jurisdiction on their courts under circumstances that may involve very little contact with the state. In some cases, these statutes specify particular categories of actions or effects that will confer personal jurisdiction on courts in the state.[6] In others, such as California, the statute simply confers jurisdiction on "any basis not inconsistent with the Constitution of this state or of the United States."[7]

The U.S. Supreme Court has established standards beyond which the use of these long-arm statutes will be deemed to violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Viewed from the highest level, a state court may acquire valid specific personal jurisdiction over a non-resident defendant only if: (1) the state's long-arm statute provides for jurisdiction under the factual circumstances; and, (2) the defendant has had sufficient "minimum contacts" with the state such that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice,"[8] violating the Due Process Clause. As one might expect with such a broad starting point, there remains a great deal of interpretation of what "fair play and substantial justice" entails. However, the U.S. Supreme Court has provided some additional rough guidelines, centered around the concepts of the "purposefulness" of the defendant's actions in availing himself of the "privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws . ."[9] and the "foreseeability" by the defendant that he might be called to answer for his actions in a court outside his state of residence. In one of the current leading cases, the Court stated the foreseeability criteria this way: "[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[10] In the years prior to electronic commerce, courts determined that mailed correspondence and telephone calls were not sufficient contacts by

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[6] The New York long-arm statute is examined in *Hearst Corporation v. Goldberger*, discussed *infra*. The court noted that New York Civil Practice Law and Rules (N.Y. CPLR) §301(a)(1) provides that a "court may exercise jurisdiction over persons, property, or states as might have been exercised heretofore." The court also examined N.Y. CPLR §302(a)(2), which gives the court jurisdiction over tortious acts (such as trademark infringement) that are committed within the state.

[7] Calif. Code of Civ. Proc. §410.10.

[8] *International Shoe v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945).

[9] *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958).

[10] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

themselves to establish personal jurisdiction.[11] However, an appellate court in California recently held that e-mail and telephone communications between a software provider in California and a company integrating a module of the California software in New York were sufficient minimum contacts (albeit primarily electronic) to subject the New York defendant to personal jurisdiction in California.[12]

Personal Jurisdiction in Cyberspace

With that brief but necessary background, we now turn to several cases decided in the past few years that have begun to blaze a legal path that could be very troublesome to all who use the Internet and the World Wide Web. These cases illuminate the inherent conflict between the nature of the Internet, the major strength of which lies in the fact that it neither relies on nor recognizes physical boundaries, and the formulation and enforcement of laws that are, in virtually all instances, predicated on physical boundaries.

One of the earliest of these cases was *CompuServe, Inc. v. Patterson*,[13] in which CompuServe, an Ohio corporation with its main offices and facilities in Ohio, sued one of its commercial shareware providers, a resident of Texas. The suit was filed in Ohio and the defendant asserted that the Federal District Court in Ohio lacked jurisdiction over him, claiming never to have set foot in Ohio. The trial judge agreed with the defendant, but was reversed on appeal. The appellate court measured the defendant's "contacts" with Ohio (which were concededly entirely electronic) against the "traditional notions of fair play and substantial justice" standard and concluded that jurisdiction was proper because: (a) the defendant had "purposefully availed" himself of the privilege of doing business in Ohio by subscribing to CompuServe and subsequently accepting online CompuServe's Shareware Registration Agreement (which contained an Ohio choice of law provision) in connection with his sale of shareware programs on the service, as well as by repeatedly uploading shareware programs to CompuServe's computers and using CompuServe's e-mail system to correspond with CompuServe regarding the subject matter of the lawsuit; (b) the cause of action arose from Patterson's "activities" in Ohio because he only marketed his shareware through CompuServe; and (c) it was not unreasonable to require Patterson to defend himself in Ohio because by purposefully employing CompuServe to market his products, and accepting online the Shareware Registration Agreement, he should have reasonably expected disputes with CompuServe to yield lawsuits in Ohio.

The *Patterson* court, while finding jurisdiction in the case, went out of its way to recite several factual circumstances that it was not ruling on, including whether Patterson would be subject to suit in any state where his software was purchased or used; whether another party from a third state could sue Patterson in Ohio for some malfunction of the software; and whether

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[11] *Far West Capital, Inc. v. Towne*, 46 F.3d 1071 (10th Cir. 1995).

[12] *Hall v. Laronde*, 56 Cal. App. 4th 1342 (2d Dist. 1997), *review denied*, 1997 Cal. Lexis 6619 (Oct. 22, 1997).

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

CompuServe could obtain personal jurisdiction in Ohio over a regular subscriber from another state. Thus, the case represented a very narrow holding of personal jurisdiction over an individual user of an online service under a particular set of seemingly unique circumstances.

In *EDIAS Software International v. BASIS International, Ltd.*,[14] an Arizona software distributor brought suit in Arizona against a New Mexico software development company arising out of the termination of an agreement between the companies and public statements made by the defendant about the termination. The defendant had no offices in Arizona. Following the defendant's termination of the agreement, it sent statements to its employees and regular European customers and posted a "press release" on its CompuServe Web site explaining the reasons for the termination, which the plaintiff claimed constituted defamation and a violation of trademark laws. The defendant's contacts with Arizona analyzed under the "purposeful availment" test consisted of: (a) a contract with the plaintiff (executed in New Mexico with a New Mexico choice of law provision); (b) phone, fax and e-mail communications with plaintiff in Arizona; and (c) sales of software products to the plaintiff and other Arizona residents; and visits to Arizona by officers of the defendant. The court upheld the plaintiff's claim of personal jurisdiction over the defendant, noting among other things that the defendant "directed" the allegedly defamatory e-mail, Web page and CompuServe forum messages "at Arizona."

In a case decided in early 1997, *Cody v. Ward*,[15] a Connecticut resident brought suit in Connecticut against a California resident, claiming reliance on fraudulent representations by the defendant regarding a particular stock investment gone sour. The court held that it had valid jurisdiction over the defendant based solely upon bulletin board messages posted by the defendant on an online service's "Money Talk" bulletin board and e-mail messages and telephone conversations from the defendant in California to the plaintiff in Connecticut. In its analysis of the due process issue, the court simply concluded that the "purposeful availment" requirement was satisfied by the defendant's electronic contacts with the plaintiff and that the defendant "should reasonably have anticipated being sued here."

It should be noted that, like the *Patterson* and *EDIAS* cases, the court in *Cody* found in favor of personal jurisdiction over an individual user of an online service based upon electronic contacts by the defendant. While all of the contacts with Ohio in *Patterson* could be viewed as active and affirmative (entering into an agreement by "clicking" his assent; uploading the shareware for sale; and engaging in e-mail and snail-mail correspondence), the contacts in *EDIAS* and *Cody* consisted of both active, affirmative contacts (e-mail and telephone calls) and more "passive" and indirect contacts through bulletin board messages. However, since the courts did not distinguish between these two types of contact, it is not possible to know whether personal jurisdiction would have been upheld if, for example, the contacts had been limited to the more passive bulletin board notes.

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[14] 947 F.Supp. 413 (D. Ariz. 1996).
[15] 954 F.Supp. 43 (D. Conn. 1997).

These cases did not speak directly to the question of whether the operation of a Web site would, by itself, confer specific jurisdiction over the site operator by courts in states in which the site is accessible. However, there began in late 1996 a series of cases dealing with personal jurisdiction over Web site operators which are cause for considerable concern that, at least at the lower judicial levels, the due process analysis of "purposefulness" and "foreseeability" has become all but non-existent in the context of activities in Cyberspace.[16]

The first of these was *Inset Systems, Inc. v. Instruction Set, Inc.*,[17] where a Connecticut corporation sued a Massachusetts corporation in Connecticut claiming trademark infringement by the defendant's domain name. The defendant had no offices or employees and conducted no regular business in Connecticut. The court upheld personal jurisdiction of the defendant, based upon a provision of the Connecticut long-arm statute that grants jurisdiction over non-resident defendants in any cause of action arising "out of any business solicited in this state by mail or otherwise if the corporation repeatedly so solicited business, whether the orders or offers related thereto were accepted within or without the state . . . ."[18] The court found that "advertising via the Internet is solicitation of a sufficient repetitive nature to satisfy . . . the . . . long-arm statute . . . ," noting that Web advertising is continuously available to a large number of people and, unlike print advertisements, which are quickly disposed of and reach a limited number of people, Web advertising can be accessed by many more potential consumers. On the "minimum contacts" issue, the court concluded that the defendant's Web advertising and the toll free number provided on the Web site were "directed" to consumers in all states, including Connecticut, thereby meeting the "purposefully availed" test.[19]

In *Maritz, Inc. v. Cybergold, Inc.*,[20] the plaintiff brought action in Missouri against a California company alleging trademark infringement based on the defendant's Web site. The court framed the due process issue as whether ". . . maintaining a website . . . which can be accessed by any internet user, and which appears to be maintained for the purpose of, and in anticipation of being accessed and used by any and all internet users, including those residing in Missouri, amounts to promotional activities or active solicitations such as to provide the minimum contacts necessary for exercising personal jurisdiction over a non-resident . . . ."[21] The court concluded that because the maintenance of a Web site is a more efficient and faster means of reaching a global audience, it is clearly different than other means of contact, such as mass mailings of solicitations or the advertising of an 800 number in a national publication. "Through its website, CyberGold has consciously decided to transmit advertising information

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[16] In an early case arising in California, the Federal District Court found that the operation of a Web site was not sufficient to confer *general* personal jurisdiction, noting that: "Because the web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish [general] jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists." *McDonough v. Fallon McElligott, Inc.*, 40 U.S.P.Q.2d 1826, 1996 U.S. Dist. Lexis 15139 (SD Cal 1996).

[17] 937 F.Supp 161 (D.Conn. 1996).

[18] *Id.* at 164.

[19] *Id.* at 165.

[20] 947 F.Supp. 1328 (E.D.Mo. 1996).

[21] *Id.* at 1332.

to all internet users, knowing that such information will be transmitted globally. Thus, CyberGold's contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal jurisdiction over the defendant."[22] It is interesting to note that while in *Inset Systems* the court used the existence of an advertised 800 ordering number to help justify the assertion of personal jurisdiction, the *Maritz* court felt obliged to distinguish the character of a Web site from the mere advertising of an 800 number in a national publication.

In *Heroes, Inc., v. Heroes Foundation,*[23] the court found valid specific personal jurisdiction where the only contacts of the defendant with the District of Columbia consisted of (a) an advertisement placed in the local newspaper (the *Washington Post*) and (b) a Web site seeking charitable donations through an 800 number. The court placed heavy emphasis on the *Inset Systems* and *Maritz* cases, but also noted that because the Web site was not the only contact before the court, "the Court need not decide whether the defendant's home page by itself subjects the defendant to personal jurisdiction in the District."[24] Nevertheless, the clear implication left by the court was that it would.

In *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*,[25] the issue of specific personal jurisdiction arose again in the context of a trademark infringement action. The defendant, a California corporation, was sued in Pennsylvania. Its contacts with Pennsylvania "occurred almost exclusively over the Internet." However, in addition to providing free news services through its Web site, the defendant also provided a fee based service, and approximately 3,000 of its subscribers were Pennsylvania residents. In addition, it had contracted with several Internet access providers in Pennsylvania to permit the Pennsylvania subscribers to access the new service. Not surprisingly, the court concluded that this level of contact with the state justified the exercise of specific personal jurisdiction. In doing so, however, it reviewed the growing number of cases in the *genre* and tried to provide some synthesis of the varying approaches. The court noted that the cases reveal a "sliding scale," in which:

> "At one end of the spectrum are situations where a defendant clearly does business over the Internet. 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. [Citing *Patterson.*] At the opposite end 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. [Citing *Bensusan*, discussed *infra.*] *The middle ground is occupied by interactive Web sites where a user can exchange*

[22] *Id.* at 1333.
[23] 958 F.Supp. 1 (D.D.C. 1996).
[24] *Id.* at 5.
[25] 952 F.Supp. 1119 (W.D.Pa 1997).

> *information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and [the] commercial nature of the exchange of information that occurs on the Web site.* [Citing *Maritz*]"[26]

The *Zippo* court opined that *Inset Systems* "represents the outer limits of the exercise of personal jurisdiction based on the Internet."[27] However, two cases decided in late 1997 belie that view and indicate that the trend toward finding personal jurisdiction based upon the slightest Internet "contact" with a state continues unabated, at least at the Federal District Court level in some judicial circuits.

In the first of these cases, *Telco Communications v. An Apple A Day,*[28] the defendant, a Missouri corporation, was sued in Virginia for defamation arising out of press releases that the defendant provided to a commercial Internet business wire distribution firm. The defendant paid for a limited distribution of the press releases in Connecticut, New York and New Jersey. However, the business wire firm gratuitously provided expanded distribution to other outlets, including some in Virginia, and apparently advertised this fact. Most of the court's analysis goes to the application of the Virginia long-arm statute, since the defendant, inexplicably, did not assert the due process defense. Nevertheless, the court felt compelled to deal with the issue. It summarily declared that conferring jurisdiction in this case would not violate due process because the defendants "should have reasonably known that their press releases would be disseminated" in Virginia, notwithstanding the fact that the distribution they purchased did not include Virginia.

In the second case, *Superguide Corp. v. Kegan,*[29] the court, following a U.S. Magistrate Judge's recommendation, held that personal jurisdiction was proper in a trademark dispute even though the only "contact" by the defendant with North Carolina was a Web site. Although there was no evidence whatsoever as to how many North Carolinians had accessed the site, or for what purpose, the Magistrate opined that "a reasonable inference would be that a large number of North Carolina residents have visited defendant's website, a number of those visitors have utilized defendant's commercial services, and some have even obtained [the defendant's] MACGUIDE credit card."[30]

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[26] *Id.* at 1124. (Emphasis added)

[27] *Id.* at 1125.

[28] 977 F.Supp. 404 (E.D.Va. 1997).

[29] 987 F.Supp 481 (W.D.N.C. 1997).

[30] *Id.* at 486. Another example of a finding of personal jurisdiction where the defendant had no contact with the state other than a Web site containing advertising accessible to state residents was *Minnesota v. Granite Gate Resorts, Inc.,* 568 N.W. 2d 715 (Minn. Ct. App., Sept. 5, 1997) *(aff'd on appeal).* The Minnesota Attorney General brought action in Minnesota against a Nevada corporation for violation of the Minnesota Consumer Protection Laws. The Attorney General's claims were based upon statements made in the Web site advertisement that gambling on the service was "legal," whereas the Attorney General contends that such gambling is illegal under Federal and state laws. The Minnesota court upheld personal specific jurisdiction of the defendant, relying very heavily on the *Inset Systems* court's rationale that advertising on the Web, once posted, can reach people in all states

Not all courts, however, have taken such a narrow view of the constitutional standards of "purposeful availment" and "traditional concepts of fair play and substantial justice." In *Bensusan Restaurant Corp. v. King*,[31] a New York jazz club operator sued a Missouri club owner claiming trademark infringement, dilution and unfair competition over the use of the name "The Blue Note." The defendant maintained a Web site promoting his Missouri "Blue Note" club and providing a Missouri telephone number through which tickets to the club could be purchased. The issue, as framed by the Federal District Court, was whether the existence of the Web site, without more, was sufficient to vest the court with personal jurisdiction over the defendant under New York's long arm statute. The court held that it did not. The court considered whether the existence of the Web site and telephone ordering information constituted an "offer to sell" the allegedly infringing "product" in New York, and concluded it was not. The court noted that, although the Web site is available to any New Yorker with Internet access, it takes several affirmative steps to obtain access to this particular site, to utilize the information contained there, and to obtain a ticket to defendant's club. These steps would include the need to place a telephone call to Missouri and to physically travel to Missouri to pick up the tickets ordered. Therefore, the court concluded that any infringement that might occur would be in Missouri, not New York. "The mere fact that a person can gain information on the 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] Having so concluded, the court went on to say that even if the long-arm statute did permit jurisdiction, asserting jurisdiction in this case would violate the Due Process Clause. It found the defendant did nothing to "purposefully avail" himself of the benefits of New York. There was no evidence of the defendant actively encouraging New Yorkers to visit the site. The court expressly distinguished *Patterson* based on the "vastly different facts" of that case. The District Court decision was upheld by the United States Court of Appeals for the Second Circuit, but unfortunately the court decided the case solely on the basis of finding the New York long-arm statute to be inapplicable to the facts at issue, thus not reaching the critical due process issues involved.[33]

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and is available continuously. Therefore, the court concluded, the defendant can be held to have "purposefully availed" itself of the privileges of doing business in Minnesota. The court flatly rejected the argument that the defendant did not purposefully transmit information into the state, but rather responded to requests made by individuals to its server located in Nevada. This case may be distinguishable on the basis that it dealt with a state's power to enforce a quasi-criminal statute involving consumer protection, rather than the authority of the court in the context of private litigation.

[31] 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997).

[32] *Id.* at 299.

[33] Two cases have denied personal jurisdiction in the context of a Web site operator under circumstances in which the real issue was *general* personal jurisdiction, but where the analysis, unfortunately, did not make the distinction between general and specific jurisdiction. In the first of these, *Smith v. Hobby Lobby Stores, Inc.*, 968 F.Supp. 1356 (W.D.Ark. 1997) the litigation arose out of a personal injury in Arkansas. The Court held that the defendant's advertisement in a trade publication appearing on the Internet was not sufficient to justify personal jurisdiction. In the second, *Weber v. Jolly Hotels*, 977 F.Supp 327 (D.C.N.J. 1997), an Italian corporation was sued in New Jersey, based upon a personal injury suffered at the defendant's hotel in Italy. The Court held that the operation by the defendant of a Web site which provided information about the hotel was insufficient to confer personal jurisdiction. At their core, both *Smith* and *Weber* are cases of *general* personal jurisdiction, since the

In *The Hearst Corporation v. Goldberger*,[34] also decided by the U.S. District Court for the Southern District of New York, the Magistrate Judge found that where the defendant:

> "has not contracted to sell or actually sold any goods or services to New Yorkers, a finding of personal jurisdiction in New York based on an Internet web site would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law nor acceptable to the Court as a matter of policy."[35]

In reaching this conclusion, which strongly suggests that nothing short of a sale or contract to sell from a Web site into a foreign jurisdiction will satisfy the constitutional basis for jurisdiction, the court noted that other courts that have addressed the issues have "reached conflicting results." The *Bensusan* case was relied upon heavily, while others such as the *Patterson* and *EDIAS* cases[36] were distinguished by the fact that there had been more traditional "contacts" involved. However, the Court specifically declined to follow the *Inset Systems, Maritz* and *Heroes* cases,[37] noting that to follow those cases "would be tantamount to a declaration that this Court, and every other court throughout the world, may assert [personal] jurisdiction over all information providers on the global World Wide Web. Such a holding would have a devastating impact on those who use this global service."[38]

Finally, in the only U.S. Circuit Court decision to date that has dealt with the due process issues relating to whether Web site operations confer specific personal jurisdiction,[39] the Ninth Circuit in *Cybersell, Inc. v. Cybersell, Inc.*,[40] also took a step back from what was becoming a growing list of decisions that have upheld specific personal jurisdiction in Web site cases. In *Cybersell*, the plaintiff brought suit in Arizona against a Florida corporation for trademark infringement. The defendant had no contacts with Arizona other than those associated with the

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personal injuries on which they were based had no relationship to the information contained on the Internet. Viewed as general personal jurisdiction cases, they both could have been easily disposed of by the traditional analysis of whether the defendant had substantial "continuous and systematic" contacts with the forum state. However, the court in both cases erroneously analyzed the *general* jurisdiction issue in the context of the existing *specific* jurisdiction cases, reiterating the *Zippo, supra*, "sliding scale" concept, and citing other specific personal jurisdiction cases. Although the conclusions reached were clearly correct, by confusing the degree of contact required to justify *general* personal jurisdiction with the much less demanding *specific* personal jurisdiction criteria, the *Smith* and *Weber* Courts may have further muddied the personal jurisdiction waters and increased the risk to Web site operators of being "haled into court" in any of the 50 states on virtually any cause of action.

[34] 1997 U.S. Dist. Lexis 2065 (S.D.N.Y. Feb. 26, 1997).

[35] *Ibid.*

[36] *Supra.*

[37] *Supra.*

[38] Quoting from *Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc.*, 939 F.Supp. 1032, 1039-40 (S.D.N.Y. 1996).

[39] The Second Circuit in *Bensusan* did not reach the constitutional issues. See *supra.*

[40] 130 F.3d 414 (9th Cir. 1997).

Web site. The Arizona long-arm statute grants jurisdiction to its courts "to the maximum extent permitted by the Constitution of this state and the Constitution of the United States."[41] The court, noting that this was a matter of first impression for the Ninth Circuit, reviewed all of the relevant cases and, as others had done before, endorsed the *Zippo* sliding scale concept that "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."[42] In an apparent effort to reconcile cases like *Inset Systems, Maritz* and *Heroes*, the court emphasized that "so far as we are aware, no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state . . . . Rather, in each, there has been 'something more' to indicate that the defendant purposefully (albeit electronically) directed his activity *in a substantial way* to the forum state."[43] It concluded, on the facts of this case, that the "something else" was lacking and declined personal jurisdiction over the defendant.

The Indiana Court of Appeals recently applied the Ninth Circuit analysis set forth in *Cybersell* by requiring a review of the level of interactivity of the Web site and the commercial nature of the information exchange. The court held that a reference to a company's registered trademark by itself in a Web site was not enough to bestow personal jurisdiction without something else."[44] In a continuing search to identify the "something else," a U.S. District Court in Texas recently held that defendants from Ohio purposely availed themselves of the privilege of conducting business in Texas by (1) maintaining a Web page containing an allegedly infringing trademark; (2) attending a trade show in Dallas; (3) receiving orders from distributors in Texas; and (4) advertising in a magazine with possible readers in Texas.[45]

Conclusion

There can be little doubt that the present direction of the law of personal jurisdiction based on Internet and Web contacts is, at best, uncertain and unpredictable and, at worst, has the potential of subjecting Web site operators to litigation in the courts of every state in the country (with the possible exception of those in the Second and Ninth Circuits), and potentially in foreign countries as well, with respect to any cause of action that can be even remotely attributed to information found or other actions taken on the Web site. There does seem to be both a logical difference and a policy difference between the due process analysis involved (1) in determining whether specific personal jurisdiction should lie against an individual user of the Internet, such as in the *Patterson*, *EDIAS*, and *Cody* cases, or a Web site operator actively engaged in business in a state, such as in *Zippo*, and (2) in deciding whether the operation of a Web site should, virtually by itself, subject the operator to potential personal jurisdiction in

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[41] Rule 4.2(a), Arizona Rules of Civil Procedure.

[42] 130 F.3d at 419, quoting *Zippo*, 952 F.Supp. at 1124.

[43] *Id.* at 418. (Emphasis added)

[44] *Conseco, Inc. v. Hickerson*, 698 N.E. 2d 816 (Ind. Ct. App. Aug. 14, 1998).

[45] *Telephone Audio Productions, Inv. v. Smith*, 1998 U.S. Dist. Lexis 4101 (U.S. N.D. Tex Mar. 26, 1998).

all 50 states, which is where cases like *Inset Systems*, *Maritz*, *Heroes* and *Telco Communications* seem to be headed. In the former category, the actions of the defendants that led to the finding of the requisite "purposeful availment" to the laws of the forum state were, for the most part, active and affirmative actions (entering into contracts, uploading shareware, sending e-mail, making telephone calls directed into and contracting with individuals in the forum state), whereas in the latter category the activity is fundamentally passive -- the establishment of an advertising Web site, access to which is available to anyone worldwide, but specifically directed to no one. As the District Court in *Bensusan* correctly perceived, it takes the affirmative action of the user, and often several actions, to obtain and use information from a Web site, and absent some specific targeting of users within a specific state, "[c]reating a site, like placing a product into the stream of commerce, may be felt nation-wide -- or even worldwide -- but, without more, it is not an act *purposefully directed* toward the forum state."[46]

There are sound policy reasons for not subjecting Web site operators to specific personal jurisdiction in all 50 states by virtue of the mere existence of the site itself, and in the absence of some substantial commercial activity in the forum state. The Web has emerged in the past few years as a medium with the potential for radically changing not only our means of communication but our methods of engaging in commerce as well. In the process, it has opened the way for literally thousands of small entrepreneurial companies, many with a single proprietor or small number of individual owners, to engage in commerce in ways never before available to them, and to compete with much larger companies on a relatively even footing. Subjecting Web site operators to the risk of having to defend themselves against alleged wrongs suffered by users of their site in any of the 50 states would cast a terrible chill over Web commerce, and may result in leaving commerce on the Web only to those large companies already doing business throughout the country, which are capable of assimilating this additional exposure without significant cost.

Short of closing down one's Web site, is there anything an operator can do to mitigate this risk? One obvious course of action is to minimize the "interactive" nature of the Web site (assuming that does not destroy the reason for its being) by avoiding the inclusion of ordering functionality, 800 telephone numbers, and other ways in which users can make direct contact with the site operator. If there are particular states that represent a greater threat than others, the Web site operator might consider specific language on the site disclaiming any intention of advertising to or soliciting business or orders from the residents of that state, and ensuring that orders and other requests are not accepted or fulfilled to residents of those states.

Another partial answer might lie in the law of contracts. Many Web sites have "conditions of use" or other types of agreements that set forth the conditions upon which the Web site may be accessed. In some sites, the user is required to provide an affirmative assent to the conditions of use such as clicking on "I agree," but, in most sites, the conditions of use are simply made available for users to read, usually accessed through a link on the Home Page.

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[46] 937 F.Supp. at 301. (Emphasis added)

Web site operators should consider placing a provision in their conditions of use or other user agreements that not only establishes the law of their state of domicile as the applicable law for purposes of any disputes arising from the site, but also establishes the courts of the state of domicile as the only courts in which suit may be brought. Whether such a provision would be honored by a court depends upon many factors, including the degree to which it felt there was a true contract between the parties. If it can be shown that the user affirmatively agreed to the provision, rather than merely being invited to read it if she wished, the Web site operator's argument will have a greater likelihood of prevailing. Even if a valid contract can be shown to exist with users, the provision would not be effective against a litigant who is not suing in the capacity of a user of the site. However, even in such a case, the provision might have some favorable influence on the question of whether the Web site operator has "purposefully availed" herself "of the privilege of conducting activities within the forum State" and "should reasonably anticipate being haled into court there."