

Coping with Personal Jurisdiction in Cyberspace
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Until the Internet's advent, a business operating within one state was subject to suit only in that state. Only a business developing a national or international focus had to assess the risk of becoming subject to suit in other states or countries. Performing that risk assessment was usually simple. Traditionally, whether a particular court can exercise control over a particular defendant depends on their physical locus, described in such terms as residence, domicile or place of business. For example, a corporation can generally be sued in any state where it maintains a place of business. The Internet introduces a new dimension towards the question of where a party is subject to suit. If a company has a Web site, it has a presence everywhere that Web site can be accessed. In short, across the entire world. Over the Internet, an individual can have the same impact on entities in other states and countries as can a multi-national corporation. Now, even smaller businesses must assess the risk, arising from use of the Internet, of becoming subject to suit in other states or countries. The location of a company's cyberassets, its maintaining a Web site, or its use of the Internet can all effect where it is subject to suit.

Already, numerous courts have examined the question of when a defendant's operation of a Web site creates personal jurisdiction. The decisions of these courts are not always consistent, but they are starting to reflect some common themes. This paper's purpose is not to review the body of decisional law,^[2] but to examine the emerging themes and discuss their application to actual business planning.

Personal Jurisdiction Basics

The judicial decisions to date in the United States, regardless of their result, are based upon well-developed and long established personal jurisdiction doctrines. Understanding these doctrines is essential to analyzing the emerging decisional law related to Internet use. Personal jurisdiction is based on the interaction between an affirmative statutory or common-law source law dictating the scope of the court's jurisdiction, and limitations imposed by constitutional due process rights. State courts can always assert jurisdiction over an entity or things physically present in the state.^[3] State courts also assert personal jurisdiction over entities located outside of the state using "long-arm statutes." Long-arm statutes differ from state to state, but tend to be similar. The Uniform Interstate and International Procedure Act is typical.

§1.02 [Personal Jurisdiction Based upon Enduring Relationship]

A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, this state as to any [cause of action].

§1.03 [Personal Jurisdiction Based on Conduct]

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] arising from the person's:

(1) transacting any business in this state;

(2) contracting to supply services or things in this state;

(3) causing tortious injury by an act or omission in this state; [or]

(4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state...

(b) When jurisdiction over a person is based solely upon this section, only a [cause of action] arising from acts enumerated in this section may be asserted against him.[4]

In determining whether the court has jurisdiction, the first step is to examine the applicable long-arm statute, or common-law equivalent, to determine whether the statute grants the court jurisdiction over the out-of-state defendant. The second step is to evaluate whether the exercise of jurisdiction in the particular case violates due process rights granted under the United States Constitution.[5] Constitutional due process is satisfied if the defendant has "minimum contacts" with the forum state so that subjecting the defendant to suit in that state satisfies considerations of "fair play and substantial justice." [6] In determining whether "minimum contacts" exist, the court should consider "the relationship among the defendant, the forum, and the litigation." [7] In determining whether exercising jurisdiction will satisfy "traditional notions of fair play and substantial justice" the court should focus on the contacts in light of other factors such as:

1. the burden on the defendant;
2. the forum state's interest in adjudicating the dispute;
3. the plaintiff's interest in obtaining the most efficient resolution of the controversy;
4. the interstate judicial system's interest in most efficient resolution of controversies; and
5. the shared interest of the several states in furthering fundamental substantive social policies.[8]

Establishing jurisdiction requires "some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." [9] Activities within a state that can result in a party subjecting itself to suit in that state include purposefully selling goods in the state, [10] maintaining a physical office or store in the state, entering into a contract with someone in the state, [11] or committing a tortious act within the state. In general, the more passive the defendant was with respect to a transaction, and the fewer events related to the transaction occurred within the forum state, the less likely the court will exercise jurisdiction over the defendant. The difficulty arises in determining when maintaining a Web site, accessible to people in a state, is an activity directed at a state sufficient to allow the state to exercise personal jurisdiction over the Web site owner.

Personal Jurisdiction, Multimedia and Broadcasting

In evaluating the ability to obtain personal jurisdiction over a defendant due to operation of a Web site, a parallel can be drawn to print publications. Print publications, like Web sites, come into contact with several jurisdictions, based on conduct that occurs primarily in one location. Print publications are created by conduct concentrated at the location of the author and publisher. The activity creating a Web site occurs in the state in which the Web site is developed, and the locus of the Web server. However, like a broadly distributed magazine or broadcast, a Web site is accessible everywhere.

The United States Supreme Court has held that a state can exercise personal jurisdiction over a publisher accused of publishing libelous material about a resident of that state when the publisher targets its economic activity at that state. In *Keeton v. Hustler Magazine, Inc.*[12], the United States District Court for the District of New Hampshire was able to exercise personal jurisdiction over an Ohio corporation because the defendant's magazine circulation in the state of New Hampshire created minimum contacts with that state. Jurisdiction was appropriate because of the state's interest in discouraging libel by the defendant against its citizens.

In a companion case, *Calder v. Jones* [13], the Supreme Court held that a California court could exercise personal jurisdiction against an author and editor, both resident in Florida, who had libeled a California resident in an article published in the National Enquirer newspaper. The court determined that the defendants had purposefully targeted their libelous activity at California by publishing their article containing libelous material about a California resident in a magazine which they knew was sold and circulated in California and "must reasonably anticipate being haled into court" in California.

In these cases, the tortious act is the knowing publication in the state attempting to exercise personal jurisdiction over the defendant. The results differ if the tortious act is unrelated to the act of publication. If, instead of publishing an article in a magazine or newspaper circulated in the forum state, the defendant submits advertising to a nationally circulated magazine or newspaper, the fact of that advertising is generally not sufficient to create jurisdiction, unless the claim arises from the advertising. For example, in *IDS Life Insurance Company v. SunAmerica, Inc.*,[14] the defendant advertised in nationally circulated newspapers and magazines and on national television, and maintained an Internet Web site. The District Court for the Northern District of Illinois held that such advertising did not involve systematic and continuous contact with the forum state, Illinois, and concluded that it did not have personal jurisdiction over the defendant.[15] In *Gaingolo v. Walt Disney World Co.*[16] a district court judge noted that allowing national advertising to make a defendant subject to suit wherever the advertisement appeared would "substantially undermine the law of personal jurisdiction."

Personal Jurisdiction Based on Internet Contacts

Based on the rules expressed in cases like *IDS Life Insurance* and *Gaingolo*, operating a Web site or advertising on the Internet should not, by itself, subject a party to global jurisdiction. But, based on the *Keeton* and *Calder* decisions, a person committing a tortious act using the Internet should expect to be subject to jurisdiction in the state at which the tortious act is directed. Several courts have addressed the issue of whether maintaining a Web site accessible from a state subjects the owner of the Web site to personal jurisdiction in that state.

The developing theme in the cases is to base jurisdiction on the extent to which the activity performed by maintenance of the Web site is directed toward the forum state. Important factors include the level of interactivity in the Web site, whether the Web site content is directed toward an audience including residents of the forum state, whether the Web site has been accessed by residents of the forum state, or

whether a particular activity of the Web site giving rise to the cause of action was directed at the forum state. Some decisions have expressed this analysis as sorting Web sites into three categories.[17] Where the defendant actively does business over the Internet directed at the forum state, the forum state can exercise jurisdiction over the defendant. Where the Web site provides a lower level of interactivity by allowing the defendant to exchange information with customers over the Internet, the court must assess the level of interactivity and commercial nature of the Web site to determine if sufficient contacts exist to warrant the exercise of jurisdiction. Where the defendant passively provides information or an advertisement on a Web site, without other contacts existing with the forum state, the forum state can not exercise personal jurisdiction over the defendant.

Most Internet jurisdiction cases, like that resulting in the *Panavision International, L.P. v. Toepfen* decision, involve trademark disputes involving use of the Web site domain name and hold that the forum state can exercise jurisdiction over the owner of the Web site because the infringing conduct targets the forum state and thus creates a basis for specific jurisdiction.[18] As in the publishing arena, the Web site must knowingly target potential viewers in the forum state. An alleged injury related to the operation of the Web site is insufficient to create jurisdiction where the Web site operation is not directed at the forum state and no other contacts with the forum state are found.[19] Further, when Web site operation is unrelated to the conduct, courts have generally not allowed exercise of general jurisdiction based on the presence of a passive advertising Web site.[20]

One early decision is *Inset Systems, Inc. v. Instruction Set, Inc.*[21] A Massachusetts corporation allegedly used a Connecticut corporation's trademark as its domain name. The defendant advertised its goods for sale using a Web site available through the contested domain name. The Connecticut "long-arm" statute[22] allows personal jurisdiction over a non-resident on any cause of action arising from business solicited within Connecticut, if the solicitation was repeated. The court concluded that advertising using a Web site, by itself, is a sufficiently repetitive contact sufficient to allow Connecticut to exercise personal jurisdiction under its "long-arm" statute. The court then, in addressing the constitutional issues, stated that:

In the present case, Instruction has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states...advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut.

The United States District Court for the Eastern District of Missouri reached a similar result in *Maritz, Inc. v. Cybergold, Inc.*[23] In that case, which also involved a trademark dispute over use of a domain name, a California company advertised on the Internet and received at least 131 hits from Missouri residents. The District Court held that this was sufficient for a Missouri court to obtain personal jurisdiction over the California defendant.

The United States Court of Appeals for the Ninth Circuit reached a different result in another trademark case, *Cybersell, Inc. v. Cybersell, Inc.*[24] because it determined that the Web site was not directed at the forum state. The plaintiff was an Arizona corporation that advertises for commercial services over the Internet. The defendant was a Florida corporation that offered Web site construction services over the Internet under the name "Cybersell." The court found that no part of the defendant's business was sought or achieved in Arizona. The only contact with Arizona was the fact that the defendant's Web site was accessible over the Internet by Arizona residents. The court held that this

contact, constituting mere passive advertising, was insufficient to provide a basis for jurisdiction.

Both the *Inset* and *Cybergold* cases involved a trademark dispute over a domain name being used by the defendant in interstate commerce. Thus, the cause of action was related to the defendant's contact with the forum state. In the *IDS Life Insurance Company v. SunAmerica, Inc.* case, the United States District Court for the Northern District of Illinois addressed the question of obtaining personal jurisdiction over an out-of-state defendant in a tort case where the cause of action was unrelated to the Internet advertising. The Illinois "long-arm" statute allows an Illinois court to exercise personal jurisdiction over an out-of-state defendant if the defendant is doing business in Illinois by carrying on "continuous and systematic" business in the state.[25] The court compared the defendant's advertising on its Web site with the defendant's advertisements in nationally circulated newspapers and magazines and on national television. The court concluded that maintaining advertising on a Web site, although accessible in Illinois, does not constitute an advertisement directed at Illinois and therefore Illinois could not exercise personal jurisdiction over the defendant.

International Personal Jurisdiction

Cases examining whether a Web site maintained outside of the United States can allow a United States court to exercise personal jurisdiction over the Web site owner follow the same analysis as the purely domestic cases. The first case to discuss the issue of specific jurisdiction in an international context was *Minnesota v. Granite Gate Resorts, Inc.*[26] Granite Gate Resorts, Inc., a Nevada Corporation, advertised on the Internet a Web site known as WagerNet. WagerNet was maintained on a web server located in Belize by a Belize registered corporation. The Minnesota Attorney General took the position that his state can exercise personal jurisdiction over any party which uses the Internet to conduct any activity illegal in Minnesota. He filed a complaint against Granite Gate Resorts, Inc. alleging deceptive trade practices, false advertising and consumer fraud for advertising in Minnesota. The Minnesota Court of Appeals held that because the Web site was accessible by Minnesota residents, and because the defendant had directed its advertisements at customers in the United States, including residents of Minnesota, it could exercise personal jurisdiction over the defendant.

In *Weber v. Jolly Hotels*,[27] the United States District Court for the District of New Jersey addressed whether a United States court could exercise general personal jurisdiction over a foreign defendant based solely on maintenance of a passive Web site. The defendant was a hotel, located in Italy, which maintained a Web site as an advertisement. The plaintiff, a New Jersey resident, sustained injuries while visiting the hotel in Italy. On returning to the United States, the plaintiff sued the defendant in New Jersey state court,[28] and claimed the New Jersey court could assert personal jurisdiction over the defendant based on its Web site. The Court determined that maintaining a Web site as an advertisement is comparable to advertising in a national magazine and is insufficient to allow the forum court to establish personal jurisdiction over the defendant. Because the defendant's sole contact with New Jersey was its Web site, and because the injury was not related to the Web site, the court declined to exercise jurisdiction over the Italian defendant.

Owners of Web sites maintained in the United States should address whether operating the Web site will subject them to the jurisdiction of courts in other countries. Foreign courts will determine whether they can exercise jurisdiction over a defendant resident in the United States based upon the foreign country's own rules, which may differ from those used by United States courts. Further, because widespread use of the Internet is occurring later in many foreign countries than in the United States, little or no guidance may be available to predict how a particular country's courts might address the issue.

Nevertheless, the risk of being sued overseas does exist. For example, in the [LG Berlin\[29\]](#) case, a German court found it could exercise jurisdiction over a defendant based in Kansas City based on the fact that the Web site operated at the defendant's domain name was accessible at the plaintiff's location in Germany. In another case, [Action Asia Publishing, Ltd. v. Jake Taylor and Best Internet Communications, \[30\]](#) the Supreme Court of Hong Kong attempted to exercise jurisdiction over a California Internet service provider by issuing a Writ of Summons against the defendant. That case settled before the issue of jurisdiction was determined.

Conclusion

A company putting a Web site on the Internet should remain aware that its Web site may expand the geographic scope of its business. Depending on the nature of the business and the Web site content, the company might now be directing its activities toward customers in other states and countries. This makes it subject to foreign laws and regulations governing business activities and possibly subject to jurisdiction in foreign courts. Thinking in advance about the nature of its business and the content of its Web site will help the company assess the risk of its being hailed into a foreign court, even if definitive answers are not available.

Some protective measures may be available. The company might use click-through agreements or disclaimers to clarify a geographic focus. Trademark searches will help assess the risk of a trademark infringement suit resulting from use of the Web site and help pinpoint the location of potential plaintiffs. Where a trademark infringement suit is anticipated, a preemptive lawsuit can be filed in the company's home state or where the domain name registrar is located. A company can perform a global review of the laws governing its industry to identify particular jurisdictions where it might become subject to suit. Once it identifies specific problem states or countries, it can obtain an opinion regarding that jurisdiction's laws and case law regarding Web site based jurisdiction. Where a potential problem exists, the company can bring its business methods into compliance with the problem jurisdiction's laws. No company will be able to completely predict or prevent being sued in foreign courts. However, being aware of the problem is the first step in minimizing the risk it creates.

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[2] For a more comprehensive review of the case decisions see Michael J. Dunne and Anna L. Musacchio, *Jurisdiction Over the Internet*, The Business Lawyer, Vol. 54, No. 1, Pg. 385 (ABA Section of Business Law, November 1998). Another resource is the decision in *Millennium Enterprises, Inc. v. Millenium Music, LP*, Civ. No. 98-1058-AA (D.C. Ore. 1999), which discusses and analyzes numerous cases on the subject.

[3] *Burnham v. Superior Court*, 495 U.S. 604, 619, 110 S. Ct. 2105, 2115 (1990).

[4] Uniform Interstate and International Procedure Act, 13 U.L.A. 355 (1986) (adopted by Arkansas, District of Columbia, Massachusetts, Michigan, Pennsylvania and Virgin Islands).

[5] Under the 5th Amendment, ratified in 1791, which states "No person shall be deprived of life, liberty, or property, without due process of law" and under section 1 of the 14th Amendment, ratified in 1868, which states "Nor shall any

State deprive any person of life, liberty, or property, without due process of law."Ö

[6] *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), *International Shoe Co. v. Washington, Office of Unemployment Compensation & Placement*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

[7] *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

[8] *Burger King v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

[9] *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240 (1958), citing, *International Shoe Co. v. Washington, Office of Unemployment Compensation & Placement*, 326 U.S. 310, 319 (1945).

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

[11] See, *Burger King v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

[12] *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S. Ct. 1473 (1984).

[13] *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482 (1984).

[14] *IDS Life Insurance Company v. SunAmerica, Inc.*, 958 F. Supp. 1258 (N.D. Ill. 1997).

[15] The court stated, in reaching its decision, that "It cannot plausibly be argued that any defendant who advertises nationally could expect to be haled into court in any state, for a cause of action that does not relate to the advertisements." Id. See, e.g. *Gehling v. St. George's School of Medicine, Ltd.*, 773 F.2d. 539, 542 (3rd Cir. 1985).

[16] *Gaingolo v. Walt Disney World Co.*, 753 F. Supp. 148 (D.N.J. 1990).

[17] See, *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

[18] *Panavision International, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996), *affirmed*, No. 97-55467 (9th Cir.

1998) (Illinois resident can be sued in California because it tried to sell the "Panavision" domain name to a California corporation.), *Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc.*, No. 97-3259 (C.D. Ill. 1998) (Illinois could exercise jurisdiction over New York corporation that infringed trademark rights of Illinois plaintiff through a national advertising campaign and passive Web site.), *Playboy Enterprises, Inc. v. AsiaFocus, Inc.*, CA No. 97-734-A (E.D. Va. 1998) (Hong Kong based parties subject to suit in Virginia when metatags in Web site violate Virginia corporation's trademark rights.), *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F.Supp. 494 (S.D.N.Y. 1997) (Georgia firm subject to suit in New York for Web site based trademark infringement where it targeted customers in New York State), *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa 1997) (California company can be sued in Pennsylvania for trademark infringement when it maintained an Internet based news service with 3,000 subscribers in Pennsylvania.), *Telco Communications v. An Apple a Day*, 977 F. Supp. 404 (E.D. Va. 1997) (Missouri company can be sued in Virginia for posting two defamatory messages on the Internet.), *Minnesota v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. Ct. App. 1997) (Nevada company advertising illegal gambling activities over the Internet is subject to personal jurisdiction in Minnesota.), *Maritz v. CyberGold, Inc.*, 947 F.Supp. 1328 (E.D. Mo. 1996) (California company can be sued for trademark infringement in Missouri based on Internet advertisements.), *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (Massachusetts corporation can be sued in Connecticut for trademark infringement based on Internet advertisements.)

[19] *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) (Florida web site advertiser not subject to suit in Arizona for trademark infringement related to use of domain name when no other contacts exist.), *Bensusian Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997) (Missouri jazz club can not be sued for trademark infringement in New York even though it advertised on the Internet.), *Advanced Software, Inc. v. Datapharm, Inc.*, No. CV 98-5943 (C.D. Cal. 1998) (Maintaining Web site accessible in California not sufficient to allow California to exercise jurisdiction when no evidence presented that any California resident actually accessed the Web site.), *Blackburn v. Walker Oriental Rug Galleries, Inc.*, No. 97-CV-5704 (E.D. Pa. 1998) (Jurisdiction in Pennsylvania can not be based on accessibility of passive Web site even when the Web site infringes copyrights held by Pennsylvania resident.), *Hearst*

Corp. v. Goldberger, 1997 WL 97097 (S.D.N.Y. 1997) (Philadelphia resident can not be sued in New York for trademark infringement by his domain name.), *McDonough v. Fallon McElligott, Inc.*, 40 U.S.P.Q. 1826 (S.D. Cal. 1996) (Minnesota company can not be sued in California for copyright infringement.)

[20] *CD Solutions, Inc. v. Tooker*, No. 3:97-CV-0479-D (N.D. Tex. 1997) (Texas could not exercise general jurisdiction over defendant based solely on maintenance of Web site.), *SF Hotel Company, L.P. v. Energy Investments, Inc.*, 985 F.Supp. 1032 (D. Kansas 1997) (Maintenance of "passive" Web site did not create sufficient contacts to all Kansas court to exercise general jurisdiction over Florida resident.), *IDS Life Insurance Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258 (N.D. Ill. 1997) (California company can not be sued in Indiana in tort solely because it advertised nationally in newspapers, on television, and using an Internet Web site.), *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997) (Italian company can not be sued in New Jersey by a New Jersey resident injured in its hotel in Italy even though it advertised on a Web site.)

[21] *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).

[22] C.G.S. § 33-411(c)(2)

[23] *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Missouri 1996).

[24] *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997).

[25] 735 ILCS 5/2-209(a).

[26] *Minnesota v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. Ct. App. 1997).

[27] *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997).

[28] The case was removed to Federal court on diversity grounds.

[29] *LG Berlin*, 97O193/96 (Nov. 20, 1996), *aff'd*, KG, 5U659/97 (March 25, 1997).

[30] *Action Asia Publishing, Ltd. v. Jake Taylor and Best Internet Communications*, High Court No. A4249 (Supreme Court of Hong Kong, April 30, 1996).