

Pittsburgh Claims Association

April 2, 2001

“Legal Issues for Internet Usage and E-Business”

The dramatic increase in Internet usage and e-business is creating legal issues that were never before contemplated by the courts or legislature. One of these issues is the creation of jurisdiction over a defendant by virtue of its conducting e-business or Internet advertising in a particular jurisdiction or forum. The courts are beginning to apply the traditional standards to the new technology, creating guidelines and precedent for a determination of who can be sued where, with implications for adjusters, agents and investigators.

Presented by: **Dale K. Forsythe**
Wayman, Irvin & McAuley, LLC
1624 Frick Building
Pittsburgh, PA 15219

Phone: (412) 566-2970

Fax: (412) 391-1464

E-mail: www.waymanlaw.com

For any additional inquiries on this or any other area, please feel free to contact me at dforsythe@waymanlaw.com

This material is prepared for information/educational purposes only. It is not intended as legal advice, nor should it be construed as or relied upon as legal advice. You should consult with counsel before embarking on any course of conduct or refraining from any activity that may entail legal consequences. Although the above was prepared on the basis of the state of the law of Pennsylvania as of the date of preparation, the law is subject to interpretation and may change in the future. Therefore, absolutely no representations are made relative to any specific legal situation or the application of law to any specific facts. NO EXPRESS OR IMPLIED WARRANTIES ARE INTENDED OR MADE.

Introduction

Federal Rule of Civil Procedure 4(e)

Federal Courts are authorized to exercise personal jurisdiction over a nonresident to the extent permitted by law of the state where the action is brought.

Analysis done by federal courts is to determine whether the Pennsylvania Long Arm Statute, 42 Pa.C.S.A. Section 5322 confers jurisdiction and whether the same comports with due process under the U.S. Constitution.

Two Types of Personal Jurisdiction

A. General Jurisdiction

This permits a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when the defendant has engaged in 'systematic and continuous' activities in the forum state.

Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414-16, 104 S.Ct. 1868, 1872-73, 80 L.Ed.2d 404 (1984).

B. Specific Jurisdiction

This permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the "relationship between the defendant and the forum falls within the 'minimum contacts' framework."

International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)

Three Prong Test for Specific Personal Jurisdiction

1) must have sufficient minimum contacts

Did the defendant purposefully establish contacts within the forum state?

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183-84, 85 L.Ed. 2d 528 (1985)

Did defendant reach out beyond one state and create continuing relationships and obligations with the citizens of another state, so as to be subject to that state's regulations and sanctions for the consequences?

Travelers Health Assn. v. Virginia, 339 U.S. 643, 647, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950).

Are defendant's conduct and connection with forum state such that he should reasonably expect to be haled into court there?

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

Did defendant purposefully avail itself of the privilege of conducting activities within the forum?

Hanson V. Dankly, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed. 2d 1283 (1958).

2) the claim must arise out of those contacts

3) exercise of jurisdiction must be reasonable

Cannot offend "traditional notions of fair play and substantial justice."

International Shoe, 326 U.S. at 316, 66 S.Ct. at 158.

Factors to consider: 1) forum state's interest in adjudicating the dispute

2) plaintiff's convenience, when choice of forum insufficient

3) interstate judicial system's interest in efficient resolution

4) shared states' interest in furthering fundamental substantive social policies

World-Wide Volkswagen, 444 U.S. at 292, 100 S.Ct. at 564.

Zippo Manufacturing Company v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D. Pa., 1997)

Plaintiff was Pennsylvania manufacturer of, among other things, Zippo lighters. Defendant was a California corporation who operated an Internet web site and Internet news service. Trademark dilution suit was brought in Western District of Pennsylvania, which jurisdiction would follow Pennsylvania's long arm statute.

Sliding Scale Test

"likelihood that personal jurisdiction can be constitutionally exercised is directly proportional to the nature and quality of commercial activity that an entity conducts over the Internet"

Defendant clearly does business over Internet	----->----->	Interactivity and commercial nature Of info exchange	----->----->	Passive posting of info re: defendant
---	--------------	--	--------------	---

Clearly Does Business

If the defendant clearly enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmissions of computer files over the Internet, personal jurisdiction is proper.

Varying Interactivity

Jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Passive Posting

If the defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions, where information is made available to those who are interested in it, there would not be grounds for personal jurisdiction.

Zippo Manufacturing, Continued

Specifics of case -

1. Dot Com's contacts with Pennsylvania have occurred almost exclusively over the Internet.

2. Advertising consists of posting information on Web page, which is accessible to Pennsylvania residents over the Internet.

3. Approximately 2% of subscribers to defendant's news service are Pennsylvania residents.

4. Subscribers visited Web site and filled out application thereon.

5. Defendant processed approximately 3000 of these applications.

6. Defendant has entered into contracts with seven Internet access providers in Pennsylvania to permit their subscribers to access defendant's news service, two of which are in Western District.

Court concludes this falls in the "clearly does business" end of the continuum, and cited to three prong test:

Minimum contacts - Defendant has sold passwords to approximately 3,000 subscribers and entered into seven contracts with Internet access providers to furnish its services to its Pennsylvania customers.

- Contacts were not simply fortuitous, per **World-Wide Volkswagen**. Defendant repeatedly and consciously chose to process applications and assign passwords, knowing the result would be the transmission of electronic messages into forum.

- Defendant freely chose to sell its service to residents, presumably in order to profit.

- Even one contact can be sufficient, depending upon nature and quality.

Claim arises out of contacts - Objects of contracts was the transmission of information which plaintiff claims dilutes its trademark, and this would clearly be done in Pennsylvania.

Reasonableness - Pennsylvania has strong interest in adjudicating disputes regarding resident corporations, and due regard must be given to plaintiff's choice. These factors outweigh burden to the defendant, especially since defendant chose to conduct the business.

Cases cited by **Zippo Manufacturing**

Jurisdiction proper

CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (Plaintiff sought declaratory judgment in Ohio federal court against Texas defendant).

- entered into contract to distribute shareware through its Internet server (CompuServe) in Ohio
- electronically uploaded thirty two master software files to CompuServe's server in Ohio via the Internet
- one software product was designed to help people navigate the Internet

Maritz, Inc. v. Cybergold, Inc. 947 F.Supp. 1328 (E.D.Mo 1996). (Missouri plaintiff sued California defendant for trademark infringement, in district court in Missouri.)

- defendant had put up a Web site as a promotion for upcoming Internet service
- the service consisted of assigning users an e-mailbox and then forwarding advertisements for products and services that matched users' interests to those mailboxes
- plan was to charge the advertisers and provide users with incentives to view ads
- users encouraged to add address to mailing list to receive updates about service

Inset Systems, Inc. v. Instruction Set, 937 F. Supp. 161 (D.Conn. 1996) (Plaintiff filed trademark infringement claim in Connecticut federal court against Massachusetts defendant, based on use of Internet domain name).

- defendant posted Web site accessible to 10,000 residents and maintaining a toll free number
- (Zippo court noted this was "outer limits" of exercise of personal jurisdiction. Court noted that "unlike television and radio... the advertisement is available continuously to any Internet user").

Jurisdiction not proper

Bensusan Restaurant Corp. v. King, 937 F.Supp. 295 (S.D.N.Y. 1996). (Missouri defendant sued for trademark infringement claim in New York federal court).

- Internet site had general information about defendant's club, a calendar of events and ticket information

- site was not interactive

- if someone wanted to attend, would have to call or visit a ticket outlet and pick up tickets at the club on the night of the show

- This was not purposeful availment of jurisdiction's laws. Distinguished from CompuServe, where user had "reached out" from Texas to Ohio and "originated and maintained" contacts with Ohio.

Pres-Kap, Inc. v. System One, Direct Access, Inc., 636 So.2d 1351 (Fla.App. 1994), review denied, 645 So.2d 455 (Fla.1994). (Delaware corporation sued its New York customer in Florida court)

- defendant had leased computer equipment which it used to access and airline ticketing computer in Florida

- contract solicited, negotiated, executed and serviced in New York

- only contact with Florida was logging onto the computer there and mailing payments for the leased equipment there

- Consumer logging on to server in foreign jurisdiction is engaging in fundamentally different type of contact than an entity that is using the Internet to sell or market products or services to residents of foreign jurisdictions.

Other Pennsylvania cases

Blackburn v. Walker Oriental Rug Galleries, Inc., 999 F.Supp. 636 (E.D.Pa., 1998).

(Lancaster County plaintiff sued Allegheny County defendant in Lancaster Co, in copyright infringement action. Issue of venue decided on basis of where defendant “may be found,” which would include where personal jurisdiction would lie)

- Web site of defendant showed pictures of oriental rugs available for sale
- site provided detailed description of rugs
- site provided information on maintenance and care of oriental rugs
- site had e-mail link where customer could send message
- site had other advertisement for the company
- no option to purchase was available

Court held that venue (personal jurisdiction) **would not be appropriate** in Lancaster County, although court referenced lack of “continuous and substantial contacts” which would involve general, not specific, personal jurisdiction.

Grutkowski v. Steamboat Lake Guides & Outfitters, 1998 WL 962042 (E.D.Pa, 1998). (Pennsylvania estate sued Colorado entity in federal court in Pennsylvania, on wrongful death claim).

- site contains information and photographs describing tours and services it offers
- site contains map of its location
- site contains screen allowing reader to send e-mail
- site does not allow purchases or reservation of tours online
- site does not allow transaction of business online
- site directs readers to call for information, reservations and directions
- information on defendant available at booking agent site, which provides printable \$5.00 discount coupon for defendant, and Information Request Form allowing reader to e-mail information and comments directly to defendant

Court held **no general personal jurisdiction** (the parties conceded no specific general jurisdiction existed). Site, even with booking agent site, was passive advertisement.

Desktop Technologies, Inc. v. Colorworks Reproduction & Design, Inc., 1999 WL 98572 (E.D. Pa., 1999)

(Pennsylvania plaintiff sued Canadian defendant in Pennsylvania federal court, in trademark infringement case).

- Web site contains information and advertisements about the company
- site had information regarding employment opportunities at the company
- site had order form and instructions for entering orders
 - cannot be completed online
 - must print up copy of fax order form, complete it and fax to company
- site allows reader to send a message via e-mail
- site allows reader to exchange files via Internet Site Transfer Protocol
- site indicates that it does not conduct sales, accept orders or receive payments online
- site indicates that transfer of file does not constitute placing an order

Court held **no general personal jurisdiction** and **no specific personal jurisdiction**, as site was tantamount to passive Web site, since level of interactivity was minimal.

Barrett, M.D. v Catacombs Press, 44 F.Supp. 2d 717 (E.D.Pa., 1999). (Pennsylvania plaintiff sues Oregon defendant in Pennsylvania federal court, for defamation over web site).

- defendant had defamatory comments regarding plaintiff on her Web sites
- defendant posted messages on various national listserves or news discussion groups with links back to her Web sites
- messages reached hundreds, if not thousands of Pennsylvanians

Court held **no jurisdiction**. Though not simply a passive Web site, the contacts were accessible around the world and did not target Pennsylvania residents. The messages were on national issues, and anyone could become a member of the listserves. No information was accepted online from forum residents, and listings were non-commercial. Comments were also on plaintiff as national and international figure, not as Pennsylvania resident.

Hurley v. Cancun Play Oasis International Hotels, 1999 WL 718556 (E.D. Pa., 1999). (Pennsylvania plaintiff sues Georgia corporation in Pennsylvania federal court, on personal injury claim.)

- web site accepts and confirms reservations for various hotels
- site publicizes a 1-800 number for voice reservations
- site provides e-mail address to contact the company

Court held **no general personal jurisdiction**. Though site has interactive quality that goes beyond passive advertisement, lack of any business contacts with Pennsylvania or any focus of efforts of site on Pennsylvania as opposed to any other state prevents showing of continuous, systematic and substantial business contacts needed.

Molnlycke Health Care AB v. Dumex Medical Surgical Products LTD., 64 F.Supp. 2d 448 (E.D.Pa., 1999). (Pennsylvania subsidiary of Swedish corporation sued a Canadian company for patent infringement, in Pennsylvania federal court. Plaintiff relies on claim of *general* personal jurisdiction, requiring “continuous and systematic” contacts.)

- defendant maintains two Web sites, one of which permits users to place name on mailing list to receive product information
- sites advertises defendant’s products and that products are for sale on site
- products can be ordered directly on the site, by placing same in “shopping cart”, completing on-line order form and supplying credit card number

Court held **no jurisdiction**. This would not establish general jurisdiction, particularly without evidence that Pennsylvania is essential part of defendant’s business.

S. Morantz, Inc. v. Hang & Shine Ultrasonics, Inc. 79 F.Supp. 2d 537 (E.D.Pa., 1999). (New York company sued in federal court in Pennsylvania).

- site of defendant had a few minimally interactive features
- lease application that could be printed out
- a form for ordering a \$10 video
- an additional information form
- an e-mail link

Court held **no jurisdiction**, particularly with very few sales resulting from site presence.

Dale K. Forsythe
Wayman, Irvin & McAuley, LLC
1624 Frick Building
Pittsburgh, PA 15219

Phone: (412) 566-2970

Fax: (412) 391-1464

e-mail: dforsythe@waymanlaw.com