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Order Code RS21248
June 25, 2002

CRS Report for Congress

E-Commerce and Personal Jurisdiction: Are Participating Businesses Subject to Suit in Foreign Courts?

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Summary

Electronic commerce enables companies to access markets with which they have few physical, legal, or traditional connections. An important question for a company deciding whether to engage in e-commerce is whether establishing an Internet presence will subject it to litigation in foreign jurisdictions. While the Constitution's due process rights protect a company's liberty interests in being subject to suits only in those forums with which it has meaningful "contacts, ties, or relations," it is not clear to what extent electronic connections with a state are sufficient to warrant jurisdiction in a state or federal court. This report reviews due process limitations on assertions of personal jurisdiction by state and federal courts, and examines how lower courts have applied that law to claims involving the Internet. This report will be updated.

I. Introduction

With the proliferation of Internet technologies, a company can forge electronic connections to states with which it has few physical, legal, or traditional ties. As Congress seeks to increase the number of small and medium-sized companies engaged in e-commerce,[1] courts are grappling with whether a company doing business on the Internet is subject to being sued in their jurisdiction. The issues facing Congress and the courts are related, since the risk of defending lawsuits in distant jurisdictions may inhibit small and medium-sized businesses from establishing a presence on the Internet.[2]

To adjudicate a case against a defendant, a federal or state court must have personal jurisdiction over the defendant. Whether a court has jurisdiction is defined by statute, but any such statute must be constitutional. The due process clause of the Fifth and Fourteenth

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[1] See, e.g., the Electronic Commerce Enhancement Act of 2001, H.R. 524 (passed the House and received in the Senate on February 14, 2002).

[2] See Ellen S. Moore, *Cyberjurisdiction*, THE VIRGINIA LAWYER 28 (April 2002).

Amendments prohibits federal and state government from denying a person "life, liberty, or property, without due process of law." This norm protects a company from being sued in a forum with which it has no meaningful "contacts, ties, or relations."[3] It also gives a company with contacts fair warning that its activities in a state may subject it to suit in that state,[4] and thereby allows it "to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State."[5] The extent to which electronic contacts, ties, or relations subject a firm to the personal jurisdiction of state and federal courts is an open question. This report provides a primer on the law of personal jurisdiction, and examines how the lower courts have applied that law to Internet-related cases.

II. Personal Jurisdiction: a Primer

As noted above, whether a court has jurisdiction is defined by statute. State law authorizes the jurisdiction of state courts. While Congress apparently could authorize federal courts to exercise personal jurisdiction over anyone with appropriate contacts with the nation as a whole, under existing law, jurisdiction is proper only over those who could be subjected to jurisdiction in the courts of the state in which the federal court sits.[6] Therefore, a federal or state court may assert jurisdiction over a nonresident defendant, if the laws of the forum state confer jurisdiction and if the Constitution permits the exercise of jurisdiction. A state's long arm statute, the law that defines whether state courts, and, therefore, whether federal courts have jurisdiction over a nonresident defendant, generally confers the maximum amount of jurisdiction allowed under the Constitution.[7] Thus, in most cases, a court will generally have jurisdiction over a nonresident defendant so long as it does not offend the Fifth or Fourteenth Amendments.

Subjecting a defendant to the binding judgments of foreign jurisdictions with which it has few contacts may infringe on these rights. While due process does not require non-resident defendants to have physical ties in the forum state, it does require (1) that defendants have "certain minimum contacts with" the forum state[8], and (2) that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[9] We now discuss these two requirements.

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[3] International Shoe v. Washington, 326 U.S. 310, 319 (1945).

[4] See Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985).

[5] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[6] See Fed. R. Civ. P. 4(k). There are exceptions. For example, the 100-mile bulge rule allows a federal court to authorize jurisdiction if the person is served within 100 miles from the federal courthouse. See Fed. R. Civ. P. 4(k)(1)(B).

[7] See, e.g., Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416 (9th Cir 1997)("Under rule 4.2(a) of the Arizona Rules of Civil Procedure, an Arizona court may exercise personal jurisdiction over parties, whether found within or outside the state, to the maximum extent permitted by the Constitution of the United States.").

[8] Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984)(internal quotation marks omitted).

[9] Id.

(1) *Minimum Contacts.* A court may assert either general or specific jurisdiction over a non-resident defendant. General jurisdiction is established when the defendant's contacts are unrelated to the cause of action, but are "continuous and systematic."[10] The constitutional requirements of specific jurisdiction demand a lower quantum of contacts and are satisfied when the defendant's contacts with the forum state "arise out of," or are "related to," the cause of action.[11] The Supreme Court has explained that the quality and nature of these contacts must have a basis "in some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[12]

Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, it benefits from the laws of the foreign state and, therefore, is subject to the regulation and sanctions of that state for the consequences of those contacts.[13] Thus, personal jurisdiction is proper where a company delivers products to a state with the expectation that they will be purchased and used by residents of that state,[14] or where a company forms interstate contractual relations and creates continuing relationships and obligations in the forum state.[15] Under the "effects" doctrine, personal jurisdiction is also proper where a tort has been committed by a nonresident defendant, and its effects are felt in the forum state.[16]

A plurality opinion of the Supreme Court controls cases where a defendant has placed a product in the stream of commerce, which, through unpredictable currents or eddies, eventually sweeps the product into a state in which the defendant has no other contacts.[17] The split is over the proper measure for determining whether a company has "purposefully availed" itself of a forum.[18] One approach understands due process to allow an exercise of personal jurisdiction to be based on the naked act of placing a product in the stream of commerce.[19] This point of view was articulated by Justice Brennan, who argued that once goods are placed in the stream of commerce the defendant "benefits economically from the retail sale of the product" as it moves from state to state, and thereby "indirectly benefits from the State's laws that regulate and facilitate commercial activity."[20] The other approach requires that the defendant's action be *purposefully directed at* the forum state.[21] This point of view was articulated by Justice O'Connor, who argued that a "defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert

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[10] See id. at 416.

[11] See id. at 414 n. 8.

[12] *Burger King*, 471 U.S. at 475 (emphasis added).

[13] Id.

[14] See *World-Wide Volkswagen*, 444 U.S. at 297-298.

[15] See Travelers Health Assn. v. Virginia, 339 U.S. 643, 647 (1950)(the contract cannot alone automatically establish sufficient minimum contacts).

[16] See Calder v. Jones, 465 U.S. 783 (1984).

[17] See Asahi Metal Indus. Co., Ltd. v. Superior Court, 480 U.S. 102 (1987).

[18] See id.

[19] See id. at 117 (Brennan, J. concurring)(writing for four Justices).

[20] Id.

[21] See id. at 112 (plurality opinion of O'Connor, J.)(writing for four Justices).

the mere act of placing the product in the stream into an act purposefully directed toward the forum State."[22]

(2) *Fair Play and Substantial Justice.* Even apart from the question of whether a defendant has sufficient minimum contacts, jurisdiction against a non-resident defendant must comport with traditional notions of fair play and substantial justice.[23] This is a case-by-case determination and will depend upon an evaluation of several factors, including the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief.[24]

III. Personal Jurisdiction and Electronic Commerce

In cases where a court's jurisdiction depends upon a defendant's Internet presence, the outcome has depended primarily on whether a defendant has sufficient minimum contacts with the forum state, while the forum state's long arm statute and the Constitution's requirement of fair play and substantial justice have played only minor roles.[25] Regarding "minimum contact" issues, some courts adopt an approach resembling Justice Brennan's loose purposeful availment standard to measure minimum contacts, while others courts adopt an approach resembling O'Connor's strict purposeful availment standard. The approach of the majority of courts, however, falls in between these approaches, measuring minimum contacts on a sliding scale on which the exercise of jurisdiction is "directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet."[26] We will now discuss the Brennan, the sliding scale, and the O'Connor approaches.

Justice Brennan's Approach. In a case involving an Internet domain name dispute, a federal district court in Connecticut determined that a defendant's Web site established minimum contacts with Connecticut to warrant personal jurisdiction.[27] The plaintiff, owner of the federal trademark "INSET," objected to the defendant's use of "inset.com" as its Internet domain address. The defendant was a Massachusetts corporation that provided computer technology and support to thousands of organizations throughout the world. It did not have any employees or offices in Connecticut, nor did it conduct business there on a regular basis. Its only contact with Connecticut was its Web site, which was relatively passive, merely containing information about the company and its toll-free number. The court held that, by maintaining the site, the defendant had purposefully availed itself of the privilege of doing business in Connecticut, since its advertisements, solicitations, and

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[22] Id.

[23] See *International Shoe*, 326 U.S. at 319.

[24] See id.

[25] See, e.g., Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 300 (S.D.N.Y. 1996) (declining to exercise jurisdiction under New York's long arm statute).

[26] Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). While some cases apply the "effects doctrine" to Internet-related cases, those cases will not be discussed here due to their relative infrequency. See, e.g., note 17 and accompanying text. See Panavision International v. Dennis Toeppen, 141 F.3d 1316, 1324 (9th Cir 1998) (finding jurisdiction under the effects doctrine).

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

company information were continuously available to Internet users in Connecticut. Few cases apply this interpretation of due process.[28]

The Sliding Scale Approach. In cases involving electronic contacts, ties, or relations with a forum state, the majority of courts measure a company's minimum contacts by using a sliding scale on which the exercise of jurisdiction is "directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet."[29] If a company's "presence" is established by a passive Web site that merely provides information accessible to users in the forum state, personal jurisdiction is not likely to be established.[30] On the other hand, jurisdiction is established when a company is "clearly doing business" over the Internet by entering into contracts with residents of the forum state and by repeatedly transmitting computer files to that forum.[31] These are not absolute categories, however. A vast grey area lies in between these extremes, where a court must scrutinize the "level of interactivity and commercial nature" of a Web site in order to determine whether jurisdiction is warranted.[32] At least three states have adopted or cited with approval this approach,[33] as have many federal courts, including the Fifth, Sixth, Ninth and Tenth Circuit Courts of Appeals.[34] We now discuss passive and interactive sites, as well as sites where a company is "clearly doing business."

Passive Sites. Passive Web sites are accessible over the Internet, but do not allow interaction between the host of the Web site and a visitor to the site. Passive Web sites do not conduct business, offer goods for sale, or enable a person visiting the Web site to order merchandise, services, or files. Instead, they merely provide information to a person visiting the site. A number of courts have found jurisdiction lacking in cases where a defendant's contacts with the forum state was established solely through these sites.[35] For instance, in *Mink v. AAAA Development LLC*, the Fifth Circuit found that a Vermont defendant did not

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[28] See, e.g., Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1333 (E.D. Mo. 1996) (finding jurisdiction where the defendant "consciously decided to transmit advertising information to all internet users, knowing that such information [would] be transmitted globally").

[29] *Zippo*, 952 F. Supp. at 1124.

[30] See id.

[31] See id.

[32] See id.

[33] See, e.g., Efford v. Jockey Club 796 A.2d 370 (Pa Super. Ct. 2002), Gessmann v. Stephens, 51 S.W.3d 329 (Tex. App. 2001), and Nam Tai Electronics v. Titzer, 93 Cal. App. 4th 1301 (2001).

[34] See, e.g., Mink v. AAAA Dev. LLC, 190 F.3d 333, 336 (5th Cir. 1999); Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883 (6th Cir 2002); *Cybersell*, 130 F.3d at 419; and Soma Med. Intl v. Standard Chartered Bank, 196 F.3d 1292, 1296 (10th Cir. 1999).

[35] See, e.g., *Cybersell*, 130 F.3d at 415 (no jurisdiction over a Florida defendant, which allegedly infringed an Arizona company's trademark); SF Hotel Co. v. Energy Investments, 985 F. Supp. 1032 (D. Kan. 1997)(no jurisdiction over a Florida defendant whose Web site only provided information about its hotel with no provision for direct communication between the defendant and the Internet user); Weber v. Jolly Hotels, 977 F. Supp. 327, 333 (D. N.J. 1997)(no jurisdiction over a defendant where general information was placed on defendant's Web site as an advertisement and "not as a means of conducting business"); and Smith v. Hobby Lobby Stores, 968 F. Supp. 1356 (W.D. Ark. 1997)(no jurisdiction over a Hong Kong defendant whose Internet advertisements were not directed at the forum state).

establish minimum contacts with Texas by advertising, posting printable order forms, and posting its telephone number and e-mail address on its Web site.[36]

Interactive Sites. Interactive Web sites enable a user to exchange information with the defendant's computer and may or may not support the exercise of jurisdiction. Whether they do will depend on the level of interactivity and the nature of the information. Jurisdiction was found not proper in a case that involved a Web site that provided company information, allowed customers to enter personal contact information, and provided for the submission of resumes by potential employees.[37] In that case, the court held that the level of interactivity did not serve to confer jurisdiction since there was no evidence that the company specifically targeted potential customers in the forum or that any resident of the forum contacted the company through its Web site.[38] However, jurisdiction was appropriate in a case involving a Web site that provided company information, and allowed users to apply for loans, print out applications, send e-mail, and "chat" online with employees.[39]

"Clearly Doing Business." In cases where courts have found personal jurisdiction in cases involving Internet-related disputes, the defendants at issue were clearly doing business over the Internet; and, therefore, clearly invoked the benefits and protections of its laws the forum state. For instance, the Sixth Circuit upheld a finding of personal jurisdiction over a nonresident defendant who entered into a written contract to access the forum state market, transmitted 32 software files to servers located in the forum state, and received money from residents of the forum state.[40]

Justice O'Connor's Approach. In a case where a defendant was not clearly doing business over the Internet, but was operating an interactive Web site, the U.S. Court of Appeals for the District of Columbia apparently applied O'Connor's "purposeful availment" standard, and rejected "interactivity" as an appropriate measure for measuring minium contacts.[41] According to the court, *interactivity* does not allow a Web site operator to reasonably anticipate where it will be subject to suit, since "interactivity" merely describes the nature of a Web site, not the nature of the operator's connection with a particular forum.[42] Therefore, the test fails to place Web site operators on fair notice of where they will be subject to suit – the primary goal of due process. Instead, the D.C. Circuit only exercises personal jurisdiction over defendants that engage in activity *specifically targeted* at its forum; however it did not elaborate on this standard.[43] Other cases have applied a similarly strict due process standard.[44]

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[36] 190 F.3d 333, 336-337 (5th Cir. 1999).

[37] American Information Corp. v. American Infometrics, 139 F. Supp. 2d 696 (D. Md. 2001).

[38] See id. at 700.

[39] Citigroup v. City Holding, 97 F. Supp. 2d 549 (S.D.N.Y. 2000).

[40] See CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996), cited by *Zippo,* 952 F. Supp. at 1124.

[41] GTE New Media Services, Inc. v. Bell South, 199 F.3d 1343 (D.C. 2000).

[42] See id. at 1345.

[43] See id. at 1348.

[44] See *Weber*, 977 F. Supp. at 334 (no jurisdiction over an Italian business for merely advertising on the Internet).