

## 5. Website Liability

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### Personal Jurisdiction Revised

Joseph Story<sup>1)</sup>, one of the most respected legal scholars and Justices of the United States Supreme Court of the 19th century, summarized the law of personal jurisdiction in very categorical terms as follows:

*"Jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or the thing being within the territory, for, otherwise, there can be no sovereignty exerted ..."*

*No sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions."<sup>2)</sup>*

Legal developments since Story's day completely redefined this simple (but clear) concept of personal jurisdiction. In *International Shoe*<sup>3)</sup> the U.S. Supreme Court ruled that due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident defendant that has certain "minimum contacts" with the forum.

Since *International Shoe*, "minimum contacts" has supplanted strict territoriality. This notwithstanding, some U.S. courts became particularly hostile to claims based solely on website access in the U.S. In *BellSouth*<sup>4)</sup> the court ruled that "access to a website reflects nothing more than a telephone call by a District resident to the defendants' computer servers" which, by itself, is no sufficient basis for personal jurisdiction.

The core question of this paper is the following: "Can personal jurisdiction be exercised by U.S. courts based on a foreign defendant's website activity?"

### Transacting Business

The law of personal jurisdiction over websites and their administrators is still unsettled. In *Zippo*<sup>5)</sup> the court noticed that the Internet makes it possible to conduct business throughout the world entirely from a desktop and that, with this global revolution looming on the horizon, the development of the law concerning the permissible scope of "personal jurisdiction based on Internet use is in its infant stages".

In *Burger King*<sup>6)</sup> the U.S. Supreme Court observed that jurisdiction could not be avoided "merely because the defendant did not physically enter the forum state." The court particularly noticed that transacting business by wire communications is a basis for finding personal jurisdiction over nonresident defendants:

*"It is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted."<sup>7)</sup>*

The most decisive approach U.S. courts have taken on personal jurisdiction based on Internet use is *Zippo*<sup>8)</sup>, a trademark infringement case. Zippo Dot Com ran a news website requiring users to fill out an online application, submit payment information and submit a password. Zippo Manufacturing Co. sued Zippo Dot Com for trademark infringement in Pennsylvania. The court analyzed the contacts of Zippo Dot Com with the forum and held that it was subject to personal jurisdiction in Pennsylvania:

*"Dot Com repeatedly and consciously chose to process Pennsylvania residents' applications and to assign them passwords. Dot Com knew that the result of these contracts ..."<sup>9)</sup>*

*"We conclude that this court may appropriately exercise personal jurisdiction over the Defendant..."<sup>10)</sup>*

Similarly, in *Industrial Quick Search*<sup>11)</sup> the District Court for Southern District of New York, held that Industrial Quick Search, having decided to create an interactive website that enables it to transact business in New York, was subject to personal jurisdiction under CPLR § 302(a)(1) because the cause of action for infringement arose directly out of the use of an allegedly infringing website.

Quite differently, the same court declined to exercise personal jurisdiction over Siemens Austria, a subsidiary of Siemens Germany, in *Ski Train Fire in Kaprun*<sup>12)</sup>. In this case a wrongful death action was brought by relatives of passengers killed on one of Siemens' ski trains in Kaprun, Austria. Siemens Austria maintained a website that allowed customers in New York to place orders for rail vehicles and other products. The court held that there was no showing that the accident in Kaprun had a substantial nexus with Siemens' Austria's transactions over the Internet.

*"There is no contention in this case that the accident in Kaprun, Austria "arises from" or shares a "substantial nexus with" Siemens Austria's ... transactions over the Internet."<sup>13)</sup>*

*"... Siemens Austria's motion to dismiss the case against it for lack of personal jurisdiction must be granted."<sup>14)</sup>*

### Passive Websites

Other courts found that the maintenance of a website does not subject foreign corporations to personal jurisdiction. In *Cybersell*<sup>15)</sup> the Ninth Circuit, relying on *Zippo*, held 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. The court found that it had no personal jurisdiction over Cybersell that had conducted no commercial activity over the Internet in Arizona. All that it did was post an essentially "passive home page" on the web. The court added that Cybersell did nothing to encourage people in Arizona to access its site, it entered into no contracts in Arizona, made no sales in Arizona, received no telephone calls from Arizona, earned no income from Arizona, sent no messages over the Internet to Arizona, and that no money changed hands on the Internet from or through Arizona.<sup>16)</sup>

Employing a similar analysis, the Fifth Circuit in *AAAA*<sup>17)</sup> held that defendant AAAA maintained a website that was found "passive", as it did not allow consumers to order or purchase products, and that it had no personal jurisdiction over defendant for this reason:

*"Essentially, AAAA maintains a website that posts information about its products and services. While the website provides users with a printable mail-in order form, AAAA's toll-free telephone number, a mailing address and an electronic mail ("e-mail") address, orders are not taken through AAAA's website. This does not classify the website as anything more than passive advertisement which is not grounds for the exercise of personal jurisdiction."<sup>18)</sup>*

"AAA's website does not allow consumers to order or purchase products and services on-line."<sup>19)</sup>

"In this case, the presence of an electronic mail access, a printable order form, and a toll-free phone number on a website, without more, is insufficient to establish personal jurisdiction."<sup>20)</sup>

In another case, *Sage Group*<sup>21)</sup>, the Fifth Circuit found that advertisements placed in publications which circulate in the U.S. were generally insufficient to establish personal jurisdiction and that Sage Group's operation of a website containing company and product information and links to its U.S. subsidiaries also did not provide sufficient grounds for the exercise of personal jurisdiction. Likewise, the Fourth Circuit in *Motivation*<sup>22)</sup> held that the fact that Motivation operated a website did not prove purposeful availment of the forum and there was also no evidence in the record that any North Carolina entity purchased products from the website or purchased products because of the website. The website of Motivation was found purely passive and personal jurisdiction over Motivation was denied.<sup>23)</sup>

Similarly, the Tenth Circuit in *SCB*<sup>24)</sup> declined to exercise jurisdiction over Standard Chartered Bank (SCB), an English Bank. Plaintiff Soma Medical International that held an account with SCB brought action against the bank for fraudulent transfer of funds. The court rejected to grant personal jurisdiction over SCB holding that plaintiff had failed to carry its relatively light burden of making *prima facie* showing that SCB's website was anything more than a passive website.<sup>25)</sup>

*"Finally, we cannot conclude that SCB's maintenance of a passive website, merely providing information to interested viewers, constitutes the kind of purposeful availment of the benefits of doing business in Utah, such that SCB could expect to be hauled into court in that state. We therefore affirm the district court's dismissal of all claims against SCB for lack of personal jurisdiction."<sup>26)</sup>*

### Something more

The Ninth Circuit in *Rio*<sup>27)</sup> made a distinction pursuant to which even passive websites in conjunction with "something more" may subject foreign defendant's to personal jurisdiction. In that case, a Costa Rican corporation maintained Internet gambling websites and had also run advertisements for its gambling website in Las Vegas. The court held that Rio's actions in Nevada, including its radio and print advertisements, demonstrated an insistent marketing campaign directed toward Nevada and that the purposeful availment requirement for the exercise of personal jurisdiction was satisfied.<sup>28)</sup> The "something more" test reads as follows:

*"... operating even a passive website in conjunction with "something more" – conduct directly targeting the forum – is sufficient to confer personal jurisdiction."<sup>29)</sup>*

In this context another decision, *Sinatra*<sup>30)</sup>, is of interest even though not involving a website. In this case, the court exercised personal jurisdiction over a Swiss Clinic that misappropriated Frank Sinatra's name through a series of advertisements aimed at California residents and thereby caused injury in California. The Ninth Circuit confirmed that the Clinic had directed its activities at California by using Sinatra's name in an effort to promote its business. The relevant activities included (1) the misappropriation of the value of Sinatra's name through interviews conducted in Switzerland between Clinic employees and media reporters; (2) the Clinic's California advertising efforts to attract patients; and (3) the Clinic's knowledge of Sinatra's residence in California.

### Effects Test

The Ninth Circuit that has endorsed the Zippo approach also employs an "effects test" for tort actions against foreign website operators. In *Healthgrades.com*<sup>31)</sup>, defendant operated a website that rated home health care providers. Northwest Health Care Alliance was unhappy with its negative rating on Healthgrades.com's website and brought action against Healthgrades.com. The court held that Healthgrades.com had purposefully interjected itself into the Washington state home health care market through its intentional act of offering ratings of Washington medical service providers. The court particularly noted that:

*"... the brunt of the harm allegedly suffered by plaintiff occurred in Washington – where plaintiff is incorporated ...*

*The effects, therefore, of defendant's out-of-state conduct were felt in Washington."<sup>32)</sup>*

A similar effects test was recently applied by the Fifth Circuit in *Fielding Borer*<sup>33)</sup>, a case that is of interest even though it does not involve a website. Here Thomas Borer, a former Swiss ambassador to Germany and Shawne Fielding, his wife, brought a suit for libel and other charges against Hubert Burda Media, Bertelsmann and Gruner & Jahr in Texas. The court found that Fielding and Borer had shown neither significant circulation nor certain harm in the forum state and added:

*"The brunt of the harm of alleged libel was not suffered in Texas and the Publishers did not meaningfully direct their activities toward Texas. The district court correctly concluded that it lacked specific jurisdiction."<sup>34)</sup>*

### Electronic Brochure

Passive websites that serve as an "electronic brochure", creating visibility of a foreign company's brand, may subject the company to personal jurisdiction in the U.S. In particular, accomplishments and developments posted on a foreign company's website can be used against it when assessing personal jurisdiction over it. In *Dassault Aviation*<sup>35)</sup> a flight attendant, Ms Anderson, brought a product liability claim against Dassault Aviation, a French corporation. The Eighth Circuit considered the fact that Dassault Aviation and its U.S. subsidiary in Little Rock, Arkansas, shared a website indicating their pride in the Arkansas facility and its importance to their success by noting on their website that the Little Rock completion center was one of the best-equipped and most efficient facilities anywhere. The court further noted that the website that was operated and administered jointly by Dassault Aviation and its subsidiary Dassault Falcon Jet ([www.dassaultfalcon.com](http://www.dassaultfalcon.com)) included a "time line" that represented the following:

*"Major expansion brings Dassault Falcon Jet Little Rock to almost half a million square feet – and boosts the center's production capacity to over 60 new aircraft completions per year. Little Rock is now the main completion center for all Falcon jets worldwide."<sup>36)</sup>*

The court further held that the time line also reported that the Little Rock facility employed more workers than any single Dassault Aviation plant in France. It concluded that:

*"This is not a situation in which Dassault Aviation simply placed the jet at issue "into the stream of commerce" which fortuitously swept it into Arkansas."<sup>37)</sup>*

*"We conclude that Dassault Aviation has sufficient contacts with Arkansas to support an Arkansas court's assertion of personal jurisdiction over it."<sup>38)</sup>*

Unfortunately for foreign defendants, efforts to market to the American consumer over the Internet may open them up to liability should a claim be filed in the U.S.

## Summary

Courts addressing the issue of whether personal jurisdiction can be constitutionally exercised over a defendant look to the "nature and quality of commercial activity that an entity conducts over the Internet."<sup>39)</sup> The Zippo decision categorized Internet use into a spectrum of three areas:

At the one end of the spectrum, there are situations where a defendant clearly does business over the Internet by entering into contracts with residents of other states which "involve the knowing and repeated transmission of computer files over the Internet...."<sup>40)</sup> In this situation, personal jurisdiction is proper.<sup>41)</sup>

At the other end of the spectrum, there are situations where a defendant merely establishes a passive website that does nothing more than advertise on the Internet. With passive websites, personal jurisdiction is not appropriate.<sup>42)</sup>

In the middle of the spectrum, there are situations where a defendant has a website that allows a user to exchange information with a host computer. In this middle ground, "the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Website."<sup>43)</sup>

Courts found that the reasoning of Zippo is persuasive and adopted it in other Circuits.

- 1) Joseph Story (1779-1845); Professor at Harvard Law School (1829-45), Associate Justice of the U.S. Supreme Court (1811-1845), author of twelve volumes of Commentaries codifying United States law. Joseph Story presided over the famous *Amistad* case, the "genesis of justice", in 1841. He is considered today "the foremost of American legal writers".
- 2) Joseph Story, Commentaries on the Conflict of Laws 539 (Arno Press Inc. 1972) (1834); Personal Jurisdiction Over Foreign Defendants in the United States and England, in: John Fellas, Transatlantic Commercial Litigation and Arbitration, Oceana Publications, Inc., Dobbs Ferry, New York, 2004, at. 79
- 3) *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)
- 4) *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349-50 (D.C. Cir. 2000)
- 5) *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1123 (W.D. Pa. 1997)
- 6) *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174 (1985)
- 7) *d.* at 2184
- 8) *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997)
- 9) *Id.* at 1126
- 10) *Id.* at 1128
- 11) *Thomas Publishing v. Industrial Quick Search, Inc.*, 237 F.Supp.2d 489, 492 (S.D.N.Y. 2002)
- 12) *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 F.Supp. 2d 403 (S.D.N.Y. 2002)
- 13) Plaintiffs argued that Siemens Austria had various contacts with the U.S., *inter alia*, based on English training that Siemens Austria provided for its employees. In this respect, the court used very clear words:

"Plaintiffs' attempt to make a prima facie showing of general jurisdiction by New York courts based on English language courses for its employees, one United States patent, and a smattering of contacts in Massachusetts and Puerto Rico – verges on the frivolous." *Id.* at 408.

- 13) *Id.* at 408
- 14) *Id.* at 413
- 15) *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417-20 (9th Cir. 1997)
- 16) *Id.* at 419
- 17) *Mink v. AAAA Dev. LLC*, 190 F.3d 333 (5th Cir. 1999)
- 18) *Id.* at 336-337
- 19) *Id.* at 337
- 20) *Id.*
- 21) *Quick Techs., Inc. v. Sage Group PLC*, 313 F.3d 338, 345 (5th Cir. 2002)
- 22) *Yates v. Motivation Indus. Equip. Ltd.*, 38 Fed. Appx. 174, 178-79 (4th Cir. 2002)
- 23) *Id.* at 180
- 24) *Soma Medical International v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir. 1999)
- 25) *Id.* at 1297
- 26) *Id.* at 1299
- 27) *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007 (9th Cir. 2002)
- 28) *Id.* at 1020-21
- 29) *Id.* at 1020
- 30) *Sinatra v. National Enquirer, Inc. and Clinique La Prairie S.A.*, 854 F.2d 1191, 1195 (9th Cir. 1988)
- 31) *N.W. Healthcare Alliance Inc. v. Healthgrades.com, Inc.*, 50 Fed. Appx. 339 (9th Cir. 2002)
- 32) *Id.* at 341
- 33) Shawne Fielding, Thomas Borer v. Hubert Burda Media Inc., et al. (5th Cir. 2005) <http://www.ca5.uscourts.gov/opinions/pub/04/04-10297-CV0.wpd.pdf>
- 34) *Id.* at 12
- 35) *Anderson v. Dassault Aviation*, 361 F.3d 449 (8th Cir. 2004), cert. denied, 2004 U.S. LEXIS 7903
- 36) *Id.* at 453
- 37) *Id.* at 454
- 38) *Id.* at 453
- 39) *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997)
- 40) *Id.*
- 41) *Id.*, citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996)
- 42) *See Id.*, citing *Bensusan Restaurant Corp., v. King*, 937 F.Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997)
- 43) *Id.*, citing *Maritz, Inc. v. Cybergold, Inc.*, 947 F.Supp. 1328 (E.D.Mo. 1996)



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