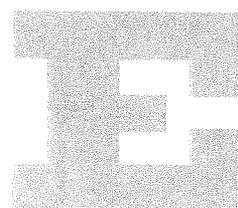


CIVIL LITIGATION

Jurisdiction and the Internet

BY DOUGLAS DEVRIES



Every law student learns that to support personal jurisdiction over an out-of-state defendant in a civil suit, the defendant must have “minimum contacts” with the forum state. (See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).) As venerable as this doctrine may be, it is being tested by the Internet. Now judges must ask: What minimum contacts conducted in cyberspace by an out-of-state resident or a foreign corporation will support personal jurisdiction?

Some courts wrestling with this issue have held that mere ownership and use of a passive website accessible by forum-state residents may suffice. (See, for example, *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996).) However, courts in California and within the Ninth U.S. Circuit Court of Appeals have not hewed to this line of reasoning.

In one of the first Ninth Circuit cases to address this question, the court analyzed whether long-arm jurisdiction was limitless “because cyberspace is without borders and a website that advertises a product or service is necessarily intended for use on a worldwide basis.” (*Cybersell, Inc. v. Cybersell, Inc.*,

130 F3d 414, 415 (9th Cir. 1997).) The court parsed the issue using traditional jurisdictional analysis in a case of first impression involving two corporations competing for the same service mark. Noting the passive nature of the foreign defendant’s website and the absence of additional activity “purposefully directed” at the forum state (Arizona) or any “purposeful availment” of benefits to be derived from contacts within that state, the panel concluded that jurisdiction in Arizona “would not comport with ‘traditional notions of fair play and substantial justice.’” (*Cybersell, Inc.* 130 F3d at 420–421.)

However, as explained below, subsequent courts have on occasion based personal jurisdiction solely on Internet use, unaccompanied by actual physical contact with the forum state.

BURDENS OF PROOF

California’s long-arm jurisdiction statute provides that a court “may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” (See Cal. Code Civ. Proc. §410.10.) Over the years, California jurisdiction has proven to be expansive, its exercise driven by a strong public policy of protecting forum-state citizens so

long as the exercise of judicial authority comports with due process. (See *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 398 (9th Cir. 1981); and *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986).)

Personal jurisdiction may be general or specific. Under *International Shoe*, a finding of “minimum contacts” with the forum state is required to establish either. General jurisdiction may be exercised over a nonresident defendant when the defendant’s activities are substantial or continuous and systematic, even if the asserted cause of action is unrelated to defendant’s activities within the forum. (*Panero v. Centres for Academic Programmes Abroad, LTD.*, 118 Cal. App. 4th 1447, 1455 (2004).)

Specific jurisdiction, on the other hand, results when the defendant’s forum contacts are sufficient to subject the defendant to a suit that is related to, or arises out of, those particular contacts. (*Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th at 476 (1996).) No direct causal link is required between the contacts and a particular plaintiff’s cause of action; it is sufficient that the contacts and the cause of action share a connection to the same general type of activity. Specific jurisdiction arises where a nonresident has “purposely directed” activities at forum residents, “purposely derived benefit” from forum activities, or “purposely availed himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.”

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(*Vons Companies*, 14 Cal. 4th at 446.)

Personal jurisdiction may be appropriate when a corporation “delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.” (*Vons Companies*, 14 Cal. 4th at 447; but see *Dow Chemical ULC v. Superior Court*, 202 Cal. App. 4th 170 (2011), on remand in light of *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011) (foreign manufacturer putting component part into stream of commerce in foreign country aware that final product incorporating it might be sold in California found insufficient to establish minimum contacts absent additional conduct purposefully directed at forum).)

In tort cases, an “effects test” may support personal jurisdiction if the defendant’s conduct is aimed at or has an effect in the forum state. (*Panavision Int’l, L.P. v. Toepfen*, 141 F.3d 1316, 1321 (9th Cir. 1998); *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995); and *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482 (1984); but see *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir. 1993).) In a related vein, the “representative services doctrine” supports exercise of personal jurisdiction when a subsidiary performs a function that assists a parent company’s business. (*Panero*, 118 Cal. App. 4th at 1456.)

Once the plaintiff demonstrates facts showing minimum contacts, the burden shifts to the defendant to establish that the exercise of jurisdiction would be unreasonable—that is, that jurisdiction does not comport with fair play and substantial justice. When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction “will justify even the serious burdens” placed on the defendant. (*Vons Companies*, 14 Cal. 4th at 476–477.)

When no applicable federal jurisdictional statute is involved, federal courts apply the law of the state in which the district court sits. (Fed. R. Civ. P. 4(k)(1)(A); and *Panavision Int’l*, 141 F.3d

at 1320.) The Ninth Circuit applies a three-part test when evaluating whether the exercise of personal jurisdiction is warranted: The defendant must have purposefully availed itself of the privilege of conducting business in the state; the claim must arise out of forum-related activities; and the exercise of jurisdiction must be reasonable. (*Roth v. Garcia Marquez*, 942 F.2d 617, 620–621 (9th Cir. 1991).)

In assessing “reasonableness,” courts consider seven factors: the extent of the defendant’s purposeful interjection; the burden on defendant to defend in the forum; the extent of conflict with the sovereignty of the defendant’s state; the forum state’s interest in adjudicating the dispute; the most efficient judicial resolution of the controversy; the importance of the forum to the plaintiff’s interest in convenient and effective relief; and the existence of an alternative forum. (*Burger King v. Rudzewicz*, 471 U.S. 462, 476–477; and *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (*en banc*).)

INTERNET ACTIVITY

In California, the analysis of Internet-related personal jurisdiction has changed substantially since a court ruled 39 years ago that transactions conducted by telephone and mail without physical contact with California did not trigger long-arm jurisdiction. (*Interdyne Co. v. SYS Computer Corp.*, 31 Cal. App. 3d 508 (1973).) By 1997, the use of electronic mail unaccompanied by physical presence in the state was deemed sufficient to establish minimum contacts. (*Hall v. LaRonde*, 56 Cal. App. 4th 1342, 1345–1347 (1997).) Ever since, traditional “minimum contacts” analysis has been applied to Internet-based activity on a case-by-case basis, and not always consistently.

In one instance, the court confronted cyberspace activities and application of the Federal Trademark Dilution Act. The defendant, an Illinois resident, was alleged to be “a ‘cyber pirate’ who steals

valuable trademarks and establishes domain names on the Internet using these trademarks to sell domain names to the rightful trademark owners” in order to obtain money from a California company. (*Panavision Int’l*, 141 F.3d at 1318). The court concluded that all requirements for specific personal jurisdiction were satisfied, and although some of the *Burger King* factors weighed in favor of the defendant, he failed to demonstrate that the exercise of personal jurisdiction was unreasonable. (*Panavision Int’l*, 141 F.3d at 1324.)

However, in another case, a California corporation alleged that a Washington company had violated its trademark by sending promotional materials to California and maintaining an Internet website and email address. The court found these activities collectively insufficient to justify exercise of personal jurisdiction absent “something more” directed at the forum state. (*CFOs 2 GO, Inc. v. CFOs 2 GO, Inc.*, 1998 WL 320821 (N.D. Cal. 1998).)

That same year, a different Washington corporation with a location in California sued an Ohio corporation for trademark infringement. The plaintiff sought to distinguish the *Cybersell* decision as involving a “passive” website, arguing that the current defendant maintained an “interactive” website containing interactive hyperlinks and a toll-free phone number accessible from California. The court ruled that “interactive potential” is irrelevant unless a forum state resident actually used the site’s interactive features. (*Advanced Software, Inc. v. Datapharm, Inc.*, 1998 WL 35151366 (C.D. Cal. 1998).) Likewise, website advertising alone, without targeting California residents or actual interactive website use, is insufficient to establish jurisdiction. (*Shisler v. Sanfer Sports Car, Inc.*, 146 Cal. App. 4th 1254, 1261 (2006).)

Then there is *Bancroft & Masters, Inc. v. Augusta National Inc.* (223 F.3d 1082 (9th Cir. 2000)), in which a California corporation sued Georgia’s Augusta National Golf Club. The plaintiff owned

a commercial domain name (masters.com), while Augusta National owned a golf-related domain name (masters.org). The plaintiff filed a “defensive” declaratory trademark action in California. The court found Augusta National’s contacts with California insufficient to establish general jurisdiction, even though the club had licensing agreements with two television networks that broadcast its golf tournament into California and multiple vendors merchandised and shipped its trademarked products into the state.

However, the court did find specific jurisdiction based on the fact that the club had sent a cease-and-desist letter to Network Solutions, Inc., a domain name repository located in Virginia. The registry had adopted procedures that effectively required Bancroft & Masters to either shut down its website or file a declaratory relief action in defense of its right to continued use. (*Bancroft & Masters* 223 F.3d at 1987.) Thus, sometimes the consequences of a foreign party’s Internet-related acts occurring out-of-state can constitute activity that is “purposeful availment,” aimed at the forum state, intended to affect a forum state citizen, and having an effect in the forum state.

WEBSITES

An out-of-state company’s use of an interactive website that enables users to exchange information with a host computer may establish minimum contacts. (*Snowey v. Harrah’s Entm’t, Inc.*, 35 Cal. 4th 1054, 1063 (2005), cert. denied, 546 U.S. 1015.) However, additional facts present in the *Snowey* case—a toll-free reservations number for the Nevada hotel complex, a significant percentage of forum-state patrons, and extensive California advertising—also demonstrated that Harrah’s purposely availed itself of the benefits of doing business in the forum state, and exercise of specific jurisdiction was therefore deemed to be fair.

Use of an intermediary website accessible by California residents to provide links to other sites has been deemed

“commercial facilitation” of the business of the linked entities. In *Schultz v. Neovi Data Corp.*, this subjected the site owner to California jurisdiction (152 Cal. App. 4th 86, 94–97 (2007)).

In finding that a foreign company violated California’s unfair business practice statutes, the same court observed that an entity might avoid California jurisdiction by making its website inaccessible to California residents or by posting notice at the point-of-sale that it may not be

“Minimum contacts” analysis has been applied to Internet-based activity on a case-by-case basis, and not always consistently.

used by or relied upon by California residents. (*Brown v. Puritec*, 153 Cal. App. 4th 1524, 1531–1534 (2007).)

The Ninth Circuit, applying California law, became the first federal appellate court to address whether personal jurisdiction in a forum state could be established when an out-of-state resident makes use of an intermediary website accessible by forum-state citizens, such as an Internet auction site. The court held that the one-time sale of a car by interactive auction on eBay did not constitute sufficient minimum contact to support the exercise of California jurisdiction. (*Boschetto v. Hansing*, 539 F.3d 1011 (9th Cir. 2008).)

A declaratory action decided that same year involved the “takedown” provisions of the Digital Millennium Copyright Act. The district court plaintiff alleged that the defendant—in its attempt to have the plaintiff’s YouTube video postings removed from the Internet—had knowingly misrepresented to the file-sharing website that the video postings infringed the defendant’s copyrights and sent a “takedown notice” to YouTube in California. Reviewing the *Burger King* factors, the court concluded that California jurisdiction would be unreasonable because, although the notice was served on a California entity, the plaintiff was a permanent resident of Pennsylvania and

the defendants were located in England. (*Doe v. Geller*, 533 F.Supp.2d 996, 1005-6 (N.D. Cal. 2008).)

A recent Ninth Circuit opinion illustrates the reluctance of courts to accept jurisdiction based solely on the existence of an interactive website, as well as their corollary preference for traditional personal jurisdictional analysis. Mavrix, a Florida-based celebrity photo agency with a physical presence in California, copyrighted and sold photos to media

outlets. Brand, an Ohio-based celebrity gossip website, had various contractual ties with California entities but no physical presence in the state. Mavrix sued Brand in California alleging misappropriation of Mavrix-copyrighted photos for publication on Brand’s website. The court, applying California law, found that Brand’s interactive commercial website, readily accessible by California citizens, did not of itself confer general jurisdiction; however, specific jurisdiction was found by applying the traditional three-part test; the activity was found to be purposefully directed at the forum, purposefully availing of the forum’s benefits, and therefore subject to a reasonable exercise of jurisdiction in the interests of fair play and justice. The mere posting of photos to a website was not determinative, but rather the fact that they were posted on a website that was “aimed at a California audience”; the court found this constituted activity intended to exploit the California market for financial gain. (*Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1227-9, 1332 (9th Cir. 2011).)

As with many legal doctrines, when it comes to the Internet and jurisdiction, context matters. ☐

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Jurisdiction and the Internet

SELF-ASSESSMENT TEST OCTOBER 2012

1. To meet the traditional constitutional requirement for personal jurisdiction, the defendant must have some "minimum contacts" with the forum state.

True False
2. California bases jurisdiction on a public policy of protecting forum-state citizens, so long as the exercise of judicial authority comports with due process.

True False
3. It is the defendant's primary burden to establish that the exercise of jurisdiction would be unreasonable.

True False
4. General jurisdiction may be exercised when a defendant's activities in a forum are substantial or continuous and systematic.

True False
5. Specific jurisdiction can arise when a nonresident has purposely directed activities at forum residents, derived benefit from forum activities, or taken advantage of conducting activities in the forum state.

True False
6. When a corporation offers its products with the expectation that they will be purchased by consumers in the forum state, jurisdiction will generally be exercised.

True False
7. In tort cases, an effects test may support personal jurisdiction if the defendant's conduct is aimed at or has an effect in the forum state.

True False
8. Even when no applicable federal jurisdictional statute is involved, federal courts apply federal jurisdictional law, not the law of the state in which the district court sits.

True False
9. Prior to the advent of email, transactions by telephone and mail without physical contact in California did not trigger long-arm jurisdiction.

True False
10. A lack of physical presence in the state prevents a finding of minimum contacts to support jurisdiction.

True False
11. California courts apply traditional jurisdiction analysis to Internet-based activity on a case-by-case basis.

True False
12. Sending promotional materials to California while maintaining an Internet website and email address constitutes sufficient minimum contacts to justify personal jurisdiction.

True False
13. A company's use of an interactive website through which users can exchange information with a host computer may be sufficient to establish minimum contacts.

True False
14. To establish personal jurisdiction, it need not be shown that someone in the forum state actually used a website's "interactive potential."

True False
15. Courts sometimes distinguish between doing business with California and doing business in California, and only the latter is sufficient to support jurisdiction.

True False
16. Use of a website accessible by California residents to provide links to other sites may subject the site owner to California jurisdiction.

True False
17. An entity may not avoid California jurisdiction by making its interactive website inaccessible to California residents or by posting notice at the point-of-sale that it may not be used by Californians.

True False
18. An out-of-state resident's use of an intermediary website accessible by forum-state citizens for a one-time sale has been deemed insufficient to support California jurisdiction.

True False
19. In one case, a plaintiff claiming to be adversely affected by Internet-related activity failed to establish jurisdiction because he was not a permanent resident of the forum.

True False
20. A website's content does not necessarily determine jurisdiction, even if it's accessible from California, unless it was aimed at a California audience and intended to exploit the state market for financial gain.

True False

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