

University of Houston Law Center

Digital Transactions Week #2 **Jurisdiction**

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Internet Jurisdiction In General

- Old Cases Still Apply
 - Due Process under the Fourteenth Amendment
 - *Burger King; International Shoe; Calder v. Jones.*
 - Minimum Contacts
 - “Due process requires only that in order to subject defendant to a judgment in personam, if he be not present in the territory of the forum, he have certain minimum contacts...” *International Shoe.*

Internet Jurisdiction In General

- Old Cases Still Apply
 - Purposeful Availment
 - The “placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state.” *Asahi*.

Types of Jurisdiction

- Personal (in *personam*) Jurisdiction
 - Specific Jurisdiction
 - General Jurisdiction
- In *rem* Jurisdiction
 - Anti-Cybersquatting Protection Act (“ACPA”) for civil cases.
 - Criminal acts (where the harm was caused within the forum state) can give rise to in *rem* jurisdiction.

Asserting Jurisdiction

- Purposeful Availment (*in personam*)
 - Web Pages (in some cases)
 - Electronic Transactions
 - Tortious Conduct
- Presence (*in rem*)
 - Anti-Cybersquatting Protection Act
 - Criminal Acts
- Contractual Forum Selection and Choice of Law

Personal Jurisdiction

- Personal (in *personam*) Jurisdiction
 - General Jurisdiction
 - Available when online defendant engaged in "systematic and continuous" activities in the forum state.
 - Permits jurisdiction when conduct of defendant was not coupled to the corpus of the suit.

Personal Jurisdiction

- Personal (in *personam*) Jurisdiction
 - Specific Jurisdiction
 - an online defendant availed himself of the privileges of doing business in the forum state;
 - the claim arose out of forum-related activities; and
 - the exercise of personal jurisdiction is reasonable.

Purposeful Availment

- Purposeful Availment can be found through:
 - Web pages or the hosting of web pages in forum state
 - Electronic Transactions

Purposeful Availment

- Purposeful Availment can be found through:
 - Tortious Conduct
 - Defamation
 - Copyright Infringement
 - Trademark Infringement
 - Unfair Competition
 - Breach of Contract
 - Misappropriation of Trade Secrets
 - Patent Infringement (potentially)

Purposeful Availment

- Web Pages
 - Cases mixed
 - Two forms of analysis in use by the courts
 - *Zippo* “sliding scale” analysis
 - “Contacts and Connector” analysis
 - Either or both types of analysis may be used by the courts, but look for the Contacts and Connector analysis as the current trend.

Purposeful Availment

- Web Pages
 - Most courts require something more than an Internet “presence.” *See, GTE New Media Services Inc. v. Ameritech Corp.*, 199 F.3d 1343 (DC Cir. 2000) Use of interactive website by DC residents was unilateral acts by residents.

Purposeful Availment

- *Zippo* Sliding Scale Analysis
 - *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).
 - General theory centers around notions of “interactivity.” The more “interactive” a website is with users within the forum state, the easier it is to assert jurisdiction.
 - What the threshold level of interactivity needed to assert jurisdiction varies, depending on the facts of a particular case. “Quality of the activities.”
 - Subjective interpretations of the quality of the activities has led to inconsistent decisions.

Purposeful Availment

- *Zippo* Sliding Scale Analysis (continued)
 - Passive site, no interactivity permitted. Jurisdiction almost never asserted.
 - Semi-active websites, such as those where interactivity is limited to exchanging information (but not goods or services) are in the gray area.
 - Active websites that offer goods and/or services online and allow users to transact business without restriction to location are almost always subject to jurisdiction in other states.

Purposeful Availment

- *Zippo* Sliding Scale Analysis (continued)
 - The key is “implied consent” of the defendant.
 - Courts examine the “qualities of the activity” to determine whether the defendant has impliedly consented to the jurisdiction of the foreign forum.
 - Additional non-Internet commercial contacts with the forum state are very important and may well tip the balance against the defendant.
 - In general, the courts will find implied consent if the exchange is commercial and more than “minimal.”

Purposeful Availment

- Example *Zippo* cases
 - *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997). Arizona plaintiff sued the Florida defendant for trademark infringement for offering web page construction services over the Internet. The plaintiff alleged that personal jurisdiction should lie because the defendant's web page was viewable on a worldwide basis. The Ninth Circuit concluded that the defendant's website was “essentially passive” and that the Florida defendant had conducted no business in Arizona.

Purposeful Availment

- Example *Zippo* cases
 - *Mink v. AAAA Devel. LLC*, 1909 F.3d 333 (5th Cir. 1999).
Printable mail-in form, a toll-free call-in number and a posted email address were not enough to impose specific jurisdiction in Texas over a Vermont website operator.

Purposeful Availment

- Contacts and Connector Analysis
 - Developed after criticism of post-*Zippo* decisions that required subjective evaluation.
 - This form of analysis is rooted in the “effects” test from *Calder v. Jones*, 465 US 783 (1984).
 - More often applied in cases involving defamation and intentional torts (such as trademark infringement).
 - Gets around the *Zippo* problem that one side of the “interaction” is typically a robot.

Purposeful Availment

- Web Pages – Cases Against Finding Jurisdiction
 - *Med-Tec Iowa, Inc. v. Computerized Imaging Reference Systems, Inc.*, 223 F. Supp. 1034 (SD Iowa, 2002). Website that contained information about products, but did not permit online placement of orders or other "exchange" of information" lacks sufficient contacts with Iowa to warrant federal court's exercise of jurisdiction in patent infringement case.

Purposeful Availment

- Web Pages – Cases Against Finding Jurisdiction
 - *Snyder v. Dolphin Encounters Ltd.*, (E.D. Pa, 2002). Tour operator's interactive web site did not target forum (even though customers could order souvenirs or book reservations), thus didn't support general jurisdiction.
 - *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir., 1997).

Purposeful Availment

- Web Pages – Cases Finding Jurisdiction
 - *MGM Studios v. Grokster, Ltd.*, 243 F. Supp. 2d 1073 (DC CCalif., 2003). Distribution of software via a web home page allows finding of jurisdiction in California.
 - *Mariz v. CyberGold*, 947 F.Supp. 1328 (E.D. Mo., 1996). Interactive website containing domain name that allegedly infringed plaintiff's trademark was sufficient for finding of jurisdiction.

Purposeful Availment

- Electronic Transactions
 - *CompuServe, Inc. v. Paterson*, 89 F.3d 1257 (6th Cir. 1996).
CompuServe DJ'ed a Houston attorney that alleged trademark infringement. The Sixth Circuit concluded that when a defendant subscribed to CompuServe, loaded his software onto its system for others to use, and advertised his software on the system, the defendant had taken direct actions to create a connection with the forum state.

Purposeful Availment

- Electronic Transactions
 - *Origins Natural Resources, Inc. v. Kotler*, 133 F. Supp. 2d 1232 (D.N.M. 2001). “Merely advertising from another forum [via the Internet] into New Mexico has not been considered constitutionally sufficient.”

Purposeful Availment

- Tortious Conduct
 - Defamation
 - Copyright Infringement
 - Trademark Infringement
 - False Advertising
 - Unfair Competition
 - Breach of Contract
 - Misappropriation of Trade Secrets
 - (potentially) Patent Infringement

Purposeful Availment

- Tortious Conduct – Defamation
 - *Bochan v. La Fontaine*, 68 F.Supp. 2d 692 (E.D. Va. 1999)
Libelous postings made to newsgroup hosted in Virginia sufficient for personal jurisdiction in that state.
 - *Oasis Corp. v. Judd*, 132 F.Supp. 2d 612 (S.D. Ohio 2001)
Ohio district court finds no personal jurisdiction in “gripesite” because alleged wrongs are only on non-commercial website and defendants have no inherent connection to Ohio.

Purposeful Availment

- Tortious Conduct – Defamation
 - *Dow Jones & Co. v. Gutnick*, Austl., 2002 H.C.A. 56 (2002).
Australian high court asserts jurisdiction over U.S. based web publisher, rejects single publication rule for Internet defamation.

Purposeful Availment

- Tortious Conduct – Copyright Infringement
 - *MGM Studios v. Grokster, Ltd.* (DC CCalif, 1/9/2003). Defendant (a foreign corporation) was found to have purposefully availed itself of privilege of doing business in California by distributing software via the Internet that facilitated infringement of plaintiff's copyrights. The court noted that approximately two million of the software downloaders were California residents, and that the distribution of the software, although free, was essentially a commercial act that (through advertising) generated income for the defendant.

Purposeful Availment

- Tortious Conduct – Trademark Infringement
 - *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.* (4th Cir. No. 02-1137, July 2, 2003). Plaintiff gave defendant notice of plaintiff's federal trademark registration and common law rights in the mark “CAREFIRST.” Maryland plaintiff sued Illinois defendant in Maryland for trademark infringement and dilution. The district court dismissal for lack of personal jurisdiction over defendant was affirmed by the Fourth Circuit. Court noted that only connection to forum was website on the Internet and Maryland web host provider – both insufficient to establish jurisdiction. Merely placing information on the Internet is not sufficient absent “manifest intent” of targeting forum state.

Purposeful Availment

- Tortious Conduct – False Advertisement
 - *Minnesota v. Granite Gate Resorts*, 568 N.W.2d 715 (Ct. App., Minn., 1997). Nevada provider of Internet gambling service was subject to personal jurisdiction in Minnesota in an action for false advertising and consumer fraud. Court found that defendant “availed itself of the privilege of conducting activities within every state from which [the Internet] information may be accessed” and that allowed the Minnesota long-arm statute to apply. The court based its decision on the number of "hits" that the website received, the number of different locations within the forum states that accessed the website, and the fact that the website's mailing list included residents of the forum state.

Purposeful Availment

- Tortious Conduct – Trade Secret Misappropriation
 - *DVD Copy Control Association v. Pavlovich* (29 Cal. 4th 262 2002). California courts could not exercise personal jurisdiction over a Texas resident for alleged trade secrets misappropriation where the only contact with the state was the maintenance of a website over the Internet. Justice Brown, writing for the 4-3 majority found that mere allegations that the defendant “should have known” that his conduct “may” cause harm, standing alone, were not enough for a court in California to exercise personal jurisdiction over an out-of-state resident.

Purposeful Availment

- Tortious Conduct – Unfair Competition
 - *Graphic Controls Corp. v. Utah Medical Products, Inc.*, 149 F.3d 1382 (Fed. Cir. 1998). Utah Medical sent letters to hospitals in New York alleging Graphic Controls infringed a patent. Graphic Controls DJ'ed for unfair competition and invalidity/non-infringement in New York. Defendant's toll-free number and website were not enough to establish jurisdiction. The letters sent by Utah Medical were of “insufficient quality and degree to be considered the 'transaction of business' under New York law.”

Purposeful Availment

- Tortious Conduct – Breach of Contract
 - *Pres-Kap, Inc. v. System One*, 636 So.2d 1351 (Fla. App. 1994). Florida lacked personal jurisdiction over nonresident defendant corporation. New York travel agency used Florida plaintiff's online airline reservation system. Plaintiff had a New York office, solicited defendant in New York, negotiated the contract in New York, and delivered the equipment in New York. Only Florida contact was use of the airline reservation database. The court said that sending payments to Florida, and use of the database located in Florida “cannot convert this obviously New York-based transaction into a Florida transaction so that the defendant could reasonably expect to be sued in Florida in the event the transaction soured.”

Purposeful Availment

- Tortious Conduct – Patent Infringement
 - *Interactive Gift Express Inc. v. CompuServe Inc.*, 47 U.S.P.Q.2d 1797 (S.D.N.Y. 1998). Plaintiff claimed that CompuServe was a contributory and inducing infringer by distributing software over the Internet.
 - *E-Data Corp. v. Micropatent Corp.*, 989 F.Supp. 173 (D.Conn. 1997). Plaintiff claimed that defendant infringed by offering photographic images to customers via the Internet. The court held that the defendant's website alone was insufficient for jurisdiction.
 - *Agar Corp. v. MultiFluid Inc.*, 45 U.S.P.Q.2d 1444 (S.D. Tex. 1997). Norwegian defendant not subject to jurisdiction in Texas based on its marketing of infringing technology via the Internet. Passive website not directed to Texas.

Purposeful Availment

- In general...
 - courts will focus on the effects and local impact that a website has on a particular jurisdiction.
- ... which means that...
 - When an online activity has a significant impact within a locality, courts will assert jurisdiction.
- Note
 - A showing of “minimum contacts” is not generally a problem. Courts tend to subsume the minimum contacts requirement within the purposeful availment test.

Purposeful Availment

- Tips
 - Where the web page is located/hosted is generally (but not always) irrelevant.
 - Focus on the effects within the forum.
 - Try not to rely on Internet-related elements for implied consent, judges are more comfortable with cases having traditional fact patterns.

Presence – In *rem* Jurisdiction

- Anti-Cybersqatter Protection Act
- Criminal Acts

Presence – ACPA

- In *rem* jurisdiction is expressly allowed under the Anti-Cybersquatting Protection Act ("ACPA") .
 - 15 U.S.C. § 1125(d) protects against bad faith intent to profit from registration of domain name.
 - Act does not require plaintiff to show that the offending domain name is being used in commerce or that the use causes confusion among customers.
 - Act requires the plaintiff to show that the allegedly infringing domain name was registered with the bad faith intent to profit from the plaintiff's trademark.

Presence – ACPA

- Procedure under 15 U.S.C. § 1125(d)(2)(A)
 - The plaintiff must follow the prescribed procedures for filing an in rem action, namely:
 - Plaintiff must file an (*in personam*) action against a company or person;
 - Plaintiff must have attempted personal jurisdiction or have served by publication if personal service is impractical; *and*
 - Obtain court permission to file in *rem* action (and must prove that offending domain name violates trademark rights prior to filing an in *rem* action).
 - Can bring action district of domain name registrar.

Presence – ACPA

- Early district courts decisions narrowly interpreted 15 USC § 1125(d)(2).
- Fourth Circuit has interpreted § 1125(d)(2) more broadly.

Presence – ACPA

- Precedent

- *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214 (4th Cir. 2002).

- Presence of the domain name registrar within the judicial district where the case is brought is, in itself, sufficient “minimum contact” to satisfy Constitutional due process concerns.
 - No other personal contact between the domain name registrant and the forum district is necessary.
 - In *rem* provisions have broadest possible reach, and enable a trademark owner to obtain jurisdiction for “any right” of a trademark owner that is violated by the domain registrant.

Presence – Criminal Acts

- Criminal Acts

- *United States v. Thomas*, 74 F.3d701 (6th Cir. 1996). Adult bulletin board operators charged with allowing obscene material to be transmitted over the Internet. Defendants were extradited to Tennessee and charged under 18 U.S.C. § 1465. Court found that binary signals to were sufficient to invoke statue even if the pictures were unviewable during transmission.

Presence – Criminal Acts

- Criminal Acts

- *United States v. Kammersel*, 196 F.3d 1137 (10th Cir. 1999).
Defendant sent a bogus bomb threat to his girlfriend via AOL instant messenger so that she would get off work early. The signal went from Utah to AOL's server in Virginia back to Utah, thus invoking the interstate communication needed for jurisdiction under 18 U.S.C. § 875(c).

Contractual Forum Selection

- *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) Forum selection clause upheld because there was no evidence that clause was designed to discourage pursuit of claims.
- *Caspi v. The Microsoft Network, L.L.C.*, 323 N.J. Super. 118 (App. Div. 1999) Forum selection clause in an online subscriber agreement to MSN service deemed enforceable, even though the clause had no bold or uppercase font.
- *Groff v. AOL*, 1998 WL 307001 (R.I. Super. Ct. 1998) Forum selection clause unreasonable. Dismissed for improper venue.
- Beware of shrinkwrap/clickwrap/browsewrap issues.
- Uniform Computer Information Transactions Act (UCITA).

Domain Name Disputes

- What are domain names?
- The root
- ICANN
 - Uniform Domain Name Dispute Resolution Policy
 - Domain confusingly similar to rightful trademark
 - Defendant has no right in domain name
 - Defendant registered and is using in bad faith
 - Federal TM Registration

Internet Jurisdiction

The End