

## PERSONAL JURISDICTION AND THE INTERNET: AN INTRODUCTION

By Brian Covotta

Over 35,000,000 consumers and 190,000 businesses presently use the Internet.<sup>1</sup> This concentration of consumers and producers in cyberspace has led to the phenomenal growth of electronic commerce, including electronic data interchange, on-line retailing, and electronic financial services such as home banking, electronic funds transfer, and payment processing.<sup>2</sup> With the growth of electronic commerce also came a rising tide of litigation arising out of these transactions. One of the primary issues in many of these cases is whether the defendant has sufficient minimum contacts with the forum state such that the court can exercise personal jurisdiction over the distant defendant.<sup>3</sup> At the present time, it is difficult for busi-

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1. See Craig W. Harding, Selected Issues in Electronic Commerce: New Technologies and Legal Paradigms, 491 PLI/PAT 7, 9 (1997).

2. See *id.* at 10. In 1996, 220 billion dollars in transactions took place over the Internet. See *id.* at 9. Investment bankers estimate that by the year 2000, over \$500 billion in transactions will occur over the Internet. See *id.* Indeed, the Supreme Court of the United States has observed that “[t]he Web is thus comparable ... to ... a sprawling mall offering goods and services.” *Reno v. American Civil Liberties Union*, \_\_ U.S. \_\_, 117 S. Ct. 2329, 2335 (1997). The nature of the transactions occurring over the Internet continues to evolve. For example, in the past year, at least two Internet-based broker-dealers, IPO.Net and Wit Capital, have experimented with initial public offerings of securities directly to the public from the underwriter. See *Internet IPOs: Hip or Hype?*, AMERICAN BANKER, Nov. 10, 1997, at 40. At the present time, credit cards are used to pay for the vast majority of electronic transactions. See Harding, *supra* note 1, at 20. However, the potential development of electronic cash (e-cash) should reduce the transaction costs for merchants associated with the use of credit cards for purchases under \$10. See *id.* at 20-21. E-cash is the name given to the process through which “[c]urrency is downloaded (or withdrawn) from a user’s bank account and stored on the user’s hard drive as encrypted digital information.... When the user goes to pay for something, the digital currency is sent to the merchant, which passes it on to the bank for validation.” *Id.* at 21. The development of e-cash should further accelerate the rapid growth of electronic commerce.

3. See, e.g., *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997) (finding no personal jurisdiction); *Cybersell, Inc. v. Cybersell, Inc.* 130 F.3d 414 (9th Cir. 1997) (finding no personal jurisdiction); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (asserting personal jurisdiction); *Gary Scott Int’l Inc. v. Baroudi*, No. CIV.A.97-11549-EFH, 1997 WL 710369 (D. Mass. Nov. 13, 1997) (asserting personal jurisdiction); *Telco Communications v. An Apple A Day*, No. 97-542-A, 1997 WL 595086 (E.D. Va. Sept. 24 1997) (asserting personal jurisdiction); *Weber v. Jolly Hotels*, No. 96-2582, 1997 WL 574950 (D.N.J. Sept. 12, 1997) (finding no personal jurisdiction);

nesses conducting commerce over the Internet to assess their risks of exposure to suit in a distant forum.<sup>4</sup> Until personal jurisdiction analysis is consistently applied to contacts arising from transactions over the Internet, the threat of defending suits in any state where the defendant's web site is accessible may serve to slow the rise of electronic commerce.

A court cannot assert personal jurisdiction over a defendant unless there is statutory authorization for the exercise of that jurisdiction.<sup>5</sup> In general, a federal district court must comply with the personal jurisdiction statute of the state in which the district court sits.<sup>6</sup> Despite this necessity for statutory authorization, the due process clause of the Fourteenth Amendment<sup>7</sup> constrains a court's ability to assert personal jurisdiction

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American Network, Inc. v. Access America/Connect Atlanta, Inc. 975 F. Supp. 494 (S.D.N.Y. 1997) (asserting personal jurisdiction); Expert Pages v. Buckalew, No. C-97-2109-VRW, 1997 WL 488011 (N.D. Cal. Aug. 6, 1997) (finding no personal jurisdiction); Hobby Lobby Stores, Inc. v. Boto Co., Ltd., 968 F. Supp. 1356 (W.D. Ark. 1997) (finding no personal jurisdiction); Resuscitation Technologies, Inc. v. Continental Health Care Corp., No. IP96-1457-C-M/S, 1997 WL 148567 (S.D. Ind. Mar. 24, 1997) (asserting personal jurisdiction); Digital Equipment Corp. v. AltaVista Technology, Inc., 960 F. Supp. 456 (D. Mass. 1997) (asserting personal jurisdiction); Hearst Corp. v. Goldberger, No. 96 CIV. 3620 (PKL)(AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997) (finding no personal jurisdiction); Cody v. Ward, 954 F. Supp. 43 (D. Conn. 1997) (asserting personal jurisdiction); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) (asserting personal jurisdiction); IDS Life Ins. Co. v. SunAmerica, Inc., 958 F. Supp. 1258 (N.D. Ill. 1997) (finding no personal jurisdiction); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356 (W.D. Ark. 1997) (finding no personal jurisdiction); Heroes, Inc. v. Heroes Found., 958 F. Supp. 1 (D.D.C. 1996) (asserting personal jurisdiction); Edias Software, Int'l, L.L.C. v. Basis Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996) (asserting personal jurisdiction); Panavision Int'l L.P. v. Toeppen, 938 F. Supp. 616 (C.D. Cal. 1996) (asserting personal jurisdiction); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996) (asserting personal jurisdiction); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161 (D. Conn. 1996) (asserting personal jurisdiction); Naxos Resources (USA) Ltd. v. Southam, Inc., No. CV 96-2314 WJR (CMx), 1996 WL 662451 (C.D. Cal. Aug. 16, 1996) (finding no personal jurisdiction); McDonough v. Fallon McElligott, Inc., 40 U.S.P.Q.2d (BNA) 1826 (S.D. Cal. 1996) (finding no personal jurisdiction); State v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. Ct. App. 1997) (asserting personal jurisdiction); Richard Howard, Inc. v. Hogg, No. 12-96-5, 1996 WL 689231 (Ohio Ct. App. Nov. 19, 1996) (finding no personal jurisdiction).

4. See cases and holdings cited *supra* note 3.

5. See GEOFFREY C. HAZARD, JR. ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE: STATE AND FEDERAL 287 (7th ed. 1994).

6. See FED. R. CIV. P. 4(e). There are exceptions to this general rule in which a federal statute grants nationwide personal jurisdiction. See, e.g., 15 U.S.C. § 25 (1994) (antitrust); 15 U.S.C. § 77v(a) (1994) (securities); 28 U.S.C. § 1335 (1994) (interpleader).

7. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law.").

over a defendant.<sup>8</sup> Because states and nations are defined as political and legal entities in terms of their geographical boundaries, presence of the person or thing within the state has always been important to personal jurisdiction analysis.<sup>9</sup> Indeed, in the landmark case of *Pennoyer v. Neff*,<sup>10</sup> the Supreme Court of the United States held that “no State can exercise direct jurisdiction and authority over persons or property without its territory.”<sup>11</sup> However, personal jurisdiction analysis has proven sensitive to technological advancements. Subsequent to the Court’s holding in *Pennoyer*, the increasing use of the train and the inventions of the automobile and the airplane, created more opportunities for potential defendants to have effects in multiple states and reduced the burden upon these defendants to defend the suits.<sup>12</sup>

In response to these new circumstances, the Supreme Court abandoned the rigid formulation of personal jurisdiction espoused in *Pennoyer*. Instead, the Court held that

due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’<sup>13</sup>

These minimum contacts must be evaluated on a case-by-case basis. However, certain principles are clear. In order to comport with “traditional notions of fair play and substantial justice,” the defendant must purposefully avail itself of the privileges of conducting activities within the

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8. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that the due process clause permitted the state of Washington to assert jurisdiction over a Delaware corporation conducting business in Washington); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (holding that the due process clause prohibited the state of Oklahoma from exercising personal jurisdiction over a non-resident automobile retailer and its wholesale distributor); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (explaining that the personal jurisdiction requirement serves to protect the individual liberty interest of the defendant against the burdens of litigating in a distant or inconvenient forum and is not concerned with principles of federalism).

9. See RESTATEMENT (SECOND) OF JUDGMENTS § 4 cmt. a (1982).

10. 95 U.S. (5 Otto) 714 (1877).

11. *Id.* at 722.

12. See, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957); *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958); *Shaffer v. Heitner*, 433 U.S. 186, 210-03 (1977).

13. *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

forum state.<sup>14</sup> Moreover, the unilateral activity of those who claim some relationship with a defendant<sup>15</sup> and placing products in the stream-of-commerce with knowledge that they will reach the forum state cannot satisfy these minimum contacts.<sup>16</sup>

With the rising globalization of the world economy, courts were granted even more flexibility to address additional factors beyond the defendant's minimum contacts, including the burden on the defendant of defending suit within the forum state, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interest of the interstate judicial system in the efficient resolution of controversies, and the shared interests of the states in furthering fundamental substantive policies.<sup>17</sup> After considering these factors, a court may assert jurisdiction upon a lesser showing of minimum contacts.<sup>18</sup> Conversely, these factors may defeat jurisdiction even if a defendant has established minimum contacts with the forum state.<sup>19</sup>

A major new technological innovation of the 1990s is the Internet.<sup>20</sup> Because the Internet transcends territorial boundaries, courts have been confronted with difficult personal jurisdiction issues and the results have been far from consistent.<sup>21</sup> Two of these cases have been selected for in-depth analysis: *Bensusan Restaurant Corp. v. King*<sup>22</sup> and *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*<sup>23</sup> In *Bensusan*, the Second Circuit held that the New York district court lacked jurisdiction over a Missouri

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14. See, e.g., *Denckla*, 357 U.S. at 253.

15. See, e.g., *id.* (Florida courts did not have personal jurisdiction over a Delaware trustee despite the fact that the settlor of the trust moved to Florida and continued to conduct business with the trustee); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (Oklahoma courts did not have personal jurisdiction over a nonresident automobile retailer and its wholesale distributor when their only connection with Oklahoma was the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma).

16. See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 108-13 (1987) (plurality).

17. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985); *Asahi*, 480 U.S. at 113-16.

18. See *Burger King*, 471 U.S. at 476-78.

19. See *Asahi*, 480 U.S. at 113-16 (holding that California lacked jurisdiction over a Japanese manufacturer even if the manufacturer had established minimum contacts with California because these other factors revealed the unreasonableness of the assertion of jurisdiction).

20. See *Reno v. American Civil Liberties Union*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 2329, 2334 (1997) (chronicling the exponential growth of the Internet).

21. See cases cited *supra* note 3.

22. 126 F.3d 25 (2d Cir. 1997).

23. 952 F. Supp. 1119 (W.D. Pa. 1997).

resident whose only contact with New York was the placing of a web site on the Internet.<sup>24</sup> In contrast, in *Zippo Manufacturing*, the district court in Pennsylvania held that it could constitutionally assert jurisdiction over a California resident whose contacts with Pennsylvania occurred almost exclusively over the Internet.<sup>25</sup> Specifically, three thousand Pennsylvania residents subscribed to the defendant's Internet news service and the defendant contracted with seven Pennsylvania Internet access providers to permit these subscribers to access the news service.<sup>26</sup> The case comments explore how personal jurisdiction analysis should be tailored to accommodate this new technology.

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24. See *Bensusan*, 126 F.3d at 27.

25. See *Zippo Manufacturing*, 952 F. Supp. at 1127.

26. See *id.* at 1121.

