

**THE SPIDER AND THE FLY:  
The Jurisdictional Trap of the World-Wide Web**  
by  
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Explosive use of the Internet has had significant impact on business around the globe. The Internet has grown from nearly 35 million users in 1996 to an estimated 150 million in 1999. According to some projections, 700 million users could be on-line by 2001.<sup>1</sup> In addition to changing the manner in which companies conduct business, the use of the Internet has also created a new body of jurisdictional case law. Where previously a court could not hale a foreign company into its state, the Internet may now provide the sufficient basis to do so.

Personal jurisdiction is the court's power to bring persons into its adjudicative process. The Due Process Clause of the United States Constitution places limits upon the ability of any court to bring an out-of-state defendant before it. General jurisdiction applies if a defendant's forum activities are so substantial, continuous, and systematic, or extensive and wide ranging that the court deems the exercise of jurisdiction fair and reasonable.<sup>2</sup> The Due Process clause exists, in part, to give a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will render them amenable to suit.<sup>3</sup>

The case law that initially emerged on the subject of Internet use and personal jurisdiction did not give potential defendants any degree of predictability. Nearly simultaneous decisions with seemingly indistinguishable facts rendered opposite results. As Judge Van Graafeiland in *Bensusan Restaurant Corp. v. King* aptly stated, attempting to apply established law to the Internet is somewhat like trying to board a moving bus.<sup>4</sup>

In *Bensusan*, defendant The Blue Note Jazz Club located in Missouri advertised jazz concerts on its web page. The advertisements were viewable anywhere in the United States, including New York, the location of the famous jazz club The Blue Note. New York Blue Note sued Missouri Blue Note for trademark infringement. The New York Court refused to find jurisdiction since the Missouri club owner did nothing to purposely avail himself of the benefits of New York. The Court reasons, creating a site, like placing a product into the stream of commerce, may be felt nationwide -- or even worldwide -- but, without more, is not an

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<sup>1</sup>Rochlin, Richard A. Note: *Cyberspace, International Shoe, and the Changing Context For Personal Jurisdiction*, 32 Conn. L. Rev. 653, 662 (Winter, 2000).

<sup>2</sup>*Helicopteros Nacionales de Columbia, S.A. v. Hall* (1984) 446 U.S. 408, 414-416.

There are two types of personal jurisdiction, general and specific. Specific jurisdiction requires a nexus between the defendant's forum activities and the particular cause of action.

<sup>3</sup>*World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297.

<sup>4</sup>*Bensusan Restaurant Corp. v. King* (2d Cir. 1997) 126 F.3d 25, 27, 937 F.Supp. 295.

act purposefully directed toward the forum state.<sup>5</sup>

*Inset Systems, Inc. v. Instruction Set, Inc.*<sup>6</sup>, with seemingly the same set of facts, reached a different result. *Instruction Set*, a Massachusetts computer company, posted advertisements on the web as did defendant Blue Note. By advertising on the web, *Instruction Set* directed its advertising activities toward not only the state of Connecticut, but to all states.<sup>7</sup> Jurisdiction was appropriate because *Instruction Set* had purposefully availed itself of the privilege of doing business within Connecticut.<sup>8</sup>

After the contradictory opinions of *Bensusan* and *Inset Systems*, came *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*<sup>9</sup> Many courts have embraced the *Zippo* decision as it injects some predictability where little existed before. The *Zippo* court applies a three-category sliding scale based on the level of commercial activity that an entity conducts over the Internet. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a forum jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.<sup>10</sup> At the opposite end are situations where a defendant has simply posted information on an Internet website that is accessible to users in forum jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.<sup>11</sup> The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and the commercial nature of the exchange of information that occurs on the website.<sup>12</sup>

### **Active Websites: Jurisdiction**

The Court placed defendant *Zippo Dot Com*'s conduct at the far end of the sliding scale finding jurisdiction proper based on defendant's sale of passwords to approximately 3,000

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<sup>5</sup>*Id.* at 937 F.Supp. 295, 301 citing *Asahi Metal Indus. Co. v. Superior Court* (1992) 480 U.S. 102, 112.

<sup>6</sup>*Inset Systems, Inc. v. Instruction Set, Inc.* (D. Conn. 1996) 937 F.Supp. 161, 165.

<sup>7</sup>*Id.* at 165.

<sup>8</sup>*Id.*

<sup>9</sup>*Zippo Mfg. Co. v. Zippo Dot Com Inc.* (W.D. Pa. 1997) 952 F.Supp. 1119.

<sup>10</sup>*Id.* at 1124.

<sup>11</sup>*Id.* at 1124.

<sup>12</sup>*Id.* at 1124.

subscribers in the forum state and its seven contracts with Internet access providers furnishing services to customers in the forum state. 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 would be the transmission of electronic messages into Pennsylvania. The transmission of these files was entirely within its control.<sup>13</sup> (See also *Standard Knitting, Ltd. v. Outside Design, Inc.* where the Court characterized defendant's website activities, namely the marketing and sale of tundra pants, sufficient grounds upon which to base jurisdiction.<sup>14</sup>)

### **Passive Websites: No Jurisdiction**

Falling within the passive category is *Lofton v. Turbine Design, Inc.*,<sup>15</sup> in which defendant, a Florida corporation, in the business of design and development of engine applications for aircraft, was sued in Mississippi. The defendant maintained a website, but the Court categorized defendant's website activity as passive. The website does not contain a price list for services, contracts for engagement of services, or order forms. It is not suited for shopping or ordering on line. It does not even offer the opportunity to receive a quote as to costs of potential services via the site, it merely offers pictures and information regarding the defendant's business and information for accessing the defendant's.<sup>16</sup> (See also *Westcode, Inc. v. RBE Electronics, Inc.* -- Defendant's website was little more than a promotional or informational resource. No purchases may be executed on line; rather, they must be accomplished through traditional means.)<sup>17</sup>

### **The Middle Ground: Jurisdiction? Maybe**

Jurisdictional determinations where defendant maintains an active website (as in *Zippo* above) or where defendant maintains a passive website -- those merely that post information, are somewhat easy to predict. Murkier is the middle ground. The following recent cases illustrate how the courts view Internet activities that fall in the middle of the *Zippo* continuum.

In *Ty, Inc. v. Clarke*,<sup>18</sup> plaintiff argued for jurisdiction over Clarke (a British company) in Illinois based on Clarke's website activities. Ty alleged that Clarke had solicited orders for Beanie Baby toy products and represented that United States currency was acceptable for

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<sup>13</sup>*Id.* at 1126.

<sup>14</sup>*Standard Knitting, Ltd. v. Outside Design, Inc.* (E.D. Pa. 2000) 2000 WL 804434.

<sup>15</sup>*Lofton v. Turbine Design Inc.* (D.C. Miss. 2000) 100 F.Supp.2d 404.

<sup>16</sup>*Id.* at 410.

<sup>17</sup>*Westcode, Inc. v. RBE Electronics, Inc.* (E.D. Pa. 2000) 2000 WL 124566, at \*6.

<sup>18</sup>*Ty, Inc. v. Clarke* (N.D. Ill. 2000) 2000 WL 51816.

payment. On the website, Clarke provided a price list of all Beanie Baby models and an icon to allow consumers to click on and send e-mail messages to obtain product information. The Court determined that the case fell in the middle ground of the Zippo sliding scale. The defendants did not run a completely passive website, for it was possible for consumers to e-mail questions about products and to receive information about placing orders. However, at the same time, defendants did not do business over their website, for they did not take orders nor enter into contracts. In fact, defendants make it extremely clear that they did not conduct on-line transactions. Instead, they have consumers print out an order form, and either fax, telephone, or send their orders through traditional mail to the defendants' offices in Great Britain.<sup>19</sup> Accordingly, the Court found that personal jurisdiction was not appropriate.

In *American Eyewear, Inc. v. Peeper's Sunglasses and Accessories, Inc.*<sup>20</sup> another middle-of-the-Zippo-scale case, the Court found that defendant had sufficient jurisdictional contacts with Texas through its website. Users of the Peepers.Com website interact with the site and Peepers' employees by using the Internet to submit product order forms that contain credit card and shipping information. Customers can receive personalized service directly from the website by using the site's e-mail option to transmit questions or requests to Peepers' customer service department. Peeper ships directly to Texas residents products ordered over the Internet. Peeper even provides customers with user names and passwords to process future orders more conveniently.<sup>21</sup>

In *Tech Heads, Inc. v. Desktop Service Center, Inc.*,<sup>22</sup> Tech Heads attempted to assert jurisdiction over Desktop, a job recruiter, in Oregon. Although there was no evidence of a contract between any Oregon resident and Desktop, or any files or information of any kind transmitted by Desktop to Oregon, the Court categorized Desktop's website activity as certainly interactive. Instead of only providing information to those who choose to visit it, Desktop's website encourages interactivity by users exchanging information with Desktop through the website, getting help with technical projects and questions, searching a database of resumes, or posting a resume. The Court noted that other decisions have taken a broad view and based personal jurisdiction solely on an interactive website without requiring actual contact with forum residents.<sup>23</sup> *Millennium*,<sup>24</sup> however, determined that this middle zone of the sliding scale needed further refinement to include the fundamental requirement of personal jurisdiction:

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<sup>19</sup>*Id.* at \*4.

<sup>20</sup>*American Eyewear Inc. v. Peeper's Sunglasses and Accessories* (N.D. Texas) 2000 WL 637085.

<sup>21</sup>*Id.* at \*4.

<sup>22</sup>*Tech Heads, Inc. v. Desk Top Service Center, Inc.* (D. Or. 2000) 2000 WL 1016730.

<sup>23</sup>*Id.* at \*7.

<sup>24</sup>*Millennium Enter., Inc. v. Millennium Music, LP* (D. Or. 1999) 33 F.Supp.2d 907.

deliberate action within the forum state in the form of transactions with the residents of the forum or conduct purposefully directed at residents of the forum state.<sup>25</sup> The *Tech Heads* Court distinguished the *Millennium* case, however, by stating that *Tech Heads* had presented evidence of a highly interactive website and one actual transaction involving an Oregon resident. The Court states: Though the actual number of transactions with Oregon is the smallest number possible, the critical inquiry in determining whether there was a purposeful availment of the forum state is the quality, not merely the quantity, of the contact.<sup>26</sup>

*Tech Heads* defines the outer limit of the middle ground cases under which a court is willing to find jurisdiction. The Court even admits that its exercise of personal jurisdiction in this case does not strictly comply with the traditional notions of jurisdiction.<sup>27</sup> However, traditional notions of jurisdiction must remain flexible in the context of the constantly changing society where technological innovations have transformed the interactions that serve as the basis for personal jurisdiction.<sup>28</sup>

The *Tech Heads* Court provides excellent advice for those conducting any kind of business over the Internet: Lest personal jurisdiction in cases such as this be mistaken for overreaching, those conducting business over the Internet can protect themselves with 1) a disclaimer that they will not sell products or provide services outside a certain geographic area; and 2) an interactive agreement that includes a choice of venue clause to which a consumer or client must agree before purchasing any products or receiving any services. In utilizing such methods, a business may be able to limit the jurisdiction in which it could be subject to suit.<sup>29</sup> However, even with above disclaimers, a business that takes advantage and reaps the benefits of engaging in unlimited commerce over the Internet, runs the risk of being haled into a distant court.

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<sup>25</sup>*Supra, Tech Heads, Inc.* at \*8.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.* at \*10.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*