Personal Jurisdiction II: Transactions, Communications & Domain Names

Tuesday, September 18, 2001

READINGS

Jurisdiction Based on Transactions or Communications

To what extent does the jurisdictional inquiry change when considering not a web site, but rather the existence of online transactions or communications?

Margaret Jane Radin, John Rothchild and Gregory M. Silverman, Internet Commerce: Doing Business in a Networked World (2001) [excerpts from Chapter 16] [pdf, 61 kb]

Jurisdiction Over Domain Names

The rise in disputes over domain names engendered Congressional action, in the form of the Anti-Cybersquatting Consumer Protection Act (ACPA), which we’ll study in detail later in the course. For now, we’ll consider the special jurisdictional provisions of the ACPA:


NOTES & QUESTIONS

1. Geography, again. Revisit the section on geographic location we considered in the last class. Are the same principles and suggestions equally relevant to transactions and communications? Why or why not? Again, are we merely concerned with fairness, or with something else?

2. Communications, Culture and the 'Net. It seems unlikely that many (if any) people understand the scope of Internet-based communications. Should this have a bearing on the scope of jurisdiction? What factors should have a bearing?

3. Domain Names, part I. Why do you think Congress passed the "in rem" provisions of the ACPA? What problems were they seeking to solve? What are the limitations of
bringing an "in rem" action? Is this avenue a useful way of overcoming problems with gaining jurisdiction over an Internet entity, or is it instead limited to specific situations? In this light, note that in Harrods, Ltd. v. Sixty Internet Domain Names, 2000 U.S. Dist. LEXIS 11911 (E.D. Va. Aug. 15, 2000), the court dismissed all causes of action not based on the ACPA (claims based on trademark violations, primarily) and held that 15 U.S.C. § 1125 required the plea of an element of "bad faith" (as defined in that section) to properly invoke the "in rem" jurisdiction provisions.

4. **Domain Names, part 2.** More generally, does it makes sense to view domain names as a form of property, akin to real property? Is it really accurate to say that a domain name "exists" in a specific geographic location? Note that in an era of multiple registration authorities, it should be possible to switch the location of the "in rem" jurisdiction essentially at will. Does this undermine what appears to be the intent of the ACPA?
Chapter Sixteen
Jurisdiction and Related Matters

E. Entering into Commercial Transactions via Online Communications

Under general law, the fact that the defendant has entered into contracts or had other commercial dealings with residents of the forum state may supply the “minimum contacts” necessary for assertion of jurisdiction to comport with the requirements of due process. This rule is the basis for the “jurisdiction exists” category of the taxonomy of websites described in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), discussed above at —: “If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.” The high-water mark for application of the rule came in McGee v. International Life Insurance Co., 355 U.S. 220 (1957), where the Court upheld jurisdiction by a California court over an insurance company defendant with its principal place of business in Texas, on the basis of a single contract of insurance that the company had with a resident of California. The Court found that the contract had the requisite “substantial connection with” California, since “[t]he contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died.” Id. at 223. Commenting on the trend, during the preceding 80 years, “toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents,” the Court observed:

In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id. at 222-23. That was in 1957. During the intervening forty years, the advent of communication via low-cost long-distance telephone service, telex, e-mail, improvements in modes of transportation, and increased nationalization and globalization of commerce have accelerated the trend that the Court noted. Still, the Court continues to reject the view that “an individual’s contract with an out-of-state party alone can automatically establish
sufficient minimum contacts in the other party’s home forum.” Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). It has instead

emphasized the need for a “highly realistic” approach that recognizes that a “contract” is “ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.” * * *  
* It is these factors — prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing — that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Id. at 479.

CompuServe, Inc. v. Patterson
United States Court of Appeals, Sixth Circuit, 1996.
89 F.3d 1257.

Before BROWN, KENNEDY, and WELLFORD, Circuit Judges

BAILEY BROWN, Circuit Judge.

In a case that requires us to consider the scope of the federal courts’ jurisdictional powers in a new context, a computer network giant, CompuServe, appeals the dismissal, for lack of personal jurisdiction, of its complaint in which it sought a declaratory judgment that it had not infringed on the defendants’ common law copyrights or otherwise engaged in unfair competition. The district court held that the electronic links between the defendant Patterson, who is a Texan, and Ohio, where CompuServe is headquartered, were “too tenuous to support the exercise of personal jurisdiction.” The district court also denied CompuServe’s motion for reconsideration. Because we believe that CompuServe made a prima facie showing that the defendant’s contacts with Ohio were sufficient to support the exercise of personal jurisdiction, we REVERSE the district court’s dismissal and REMAND this case for further proceedings consistent with this opinion.

I. BACKGROUND

CompuServe is a computer information service headquartered in Columbus, Ohio. It contracts with individual subscribers, such as the defendant, to provide, inter alia, access to computing and information services via the Internet, and it is the second largest such provider currently operating on the so-called “information super highway.” A CompuServe subscriber may use the service to gain electronic access to more than 1700 information services.

CompuServe also operates as an electronic conduit to provide its subscribers computer software products, which may originate either from CompuServe itself or from other parties. Computer software generated and distributed in this manner is, according to CompuServe, often referred to as “shareware.” Shareware makes money only through the voluntary compliance of an “end user,” that is, another CompuServe subscriber who may or may not pay the creator’s suggested licensing fee if she uses the software beyond a specified trial period. The “end user”
pays that fee directly to CompuServe in Ohio, and CompuServe takes a 15% fee for its trouble before remitting the balance to the shareware’s creator.

Defendant, Richard Patterson, is an attorney and a resident of Houston, Texas who claims never to have visited Ohio. Patterson also does business as FlashPoint Development. He subscribed to CompuServe, and he also placed items of “shareware” on the CompuServe system for others to use and purchase. When he became a shareware “provider,” Patterson entered into a “Shareware Registration Agreement” (“SRA”) with CompuServe. Under the SRA, CompuServe provides its subscribers with access to the software, or shareware, that Patterson creates. The SRA purports to create an independent contractor relationship between Patterson and CompuServe, whereby Patterson may place software of his creation on CompuServe’s system. The SRA does not mention Patterson’s software by name; in fact, it leaves the content and identification of that software to Patterson.

The SRA incorporates by reference two other documents: the CompuServe Service Agreement (“Service Agreement”) and the Rules of Operation, both of which are published on the CompuServe Information Service. Both the SRA and the Service Agreement expressly provide that they are entered into in Ohio, and the Service Agreement further provides that it is to “be governed by and construed in accordance with” Ohio law. These documents appear to be standardized and entirely the product of CompuServe. It bears noting, however, that the SRA asks a new shareware “provider” like Patterson to type “AGREE” at various points in the document, “[i]n recognition of your on line agreement to all the above terms and conditions.” Thus, Patterson’s assent to the SRA was first manifested at his own computer in Texas, then transmitted to the CompuServe computer system in Ohio.

From 1991 through 1994, Patterson electronically transmitted 32 master software files to CompuServe. These files were stored in CompuServe’s system in Ohio, and they were displayed in different services for CompuServe subscribers, who could “download” them into their own computers and, if they chose to do so, pay for them. Patterson also advertised his software on the CompuServe system, and he indicated a price term in at least one of his advertisements. CompuServe asserts that Patterson marketed his software exclusively on its system. Patterson, for his part, stated that he has sold less than $650 worth of his software to only 12 Ohio residents via CompuServe.

Patterson’s software product was, apparently, a program designed to help people navigate their way around the larger Internet network. CompuServe began to market a similar product, however, with markings and names that Patterson took to be too similar to his own. Thus, in December of 1993, Patterson notified CompuServe (appropriately via an electronic mail or “E-mail” message) that the terms “WinNAV,” “Windows Navigator,” and “FlashPoint Windows Navigator” were common law trademarks which he and his company owned. Patterson stated that CompuServe’s marketing of its product infringed these trademarks, and otherwise constituted deceptive trade practices. CompuServe changed the name of its program, but Patterson continued to complain. CompuServe asserts that, if Patterson’s allegations of trademark infringement are correct, they threaten CompuServe’s software sales revenue with a loss of approximately $10.8 million.
After Patterson demanded at least $100,000 to settle his potential claims, CompuServe filed this declaratory judgment action in the federal district court for the Southern District of Ohio, relying on the court’s diversity subject matter jurisdiction. CompuServe sought, among other things, a declaration that it had not infringed any common law trademarks of Patterson or FlashPoint Development, and that it was not otherwise guilty of unfair or deceptive trade practices. Patterson responded pro se with a consolidated motion to dismiss on several grounds, including lack of personal jurisdiction. Patterson also submitted a supporting affidavit, in which he denied many jurisdictional facts, including his having ever visited Ohio. CompuServe then filed a memorandum in opposition to Patterson’s consolidated motion, along with several supporting exhibits.

The district court, considering only these pleadings and papers, granted Patterson’s motion to dismiss for lack of personal jurisdiction in a thorough and thoughtful opinion. At various points in its consideration of the case, however, the district court expressly relied on Patterson’s affidavit. Joint Appendix at 97, 98, 99. The court below then denied CompuServe’s motion for a rehearing, which it construed as a motion for reconsideration under Federal Rule of Civil Procedure 59(e). CompuServe timely appealed. Patterson, however, filed no appellate brief, and he did not appear at oral argument.

II. ANALYSIS

A. Standards of Review.

* * *

B. Personal Jurisdiction.

This case presents a novel question of first impression: Did CompuServe make a prima facie showing that Patterson’s contacts with Ohio, which have been almost entirely electronic in nature, are sufficient, under the Due Process Clause, to support the district court’s exercise of personal jurisdiction over him?

The Supreme Court has noted, on more than one occasion, the confluence of the “increasing nationalization of commerce” and “modern transportation and communication,” and the resulting relaxation of the limits that the Due Process Clause imposes on courts’ jurisdiction. E.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293, 100 S.Ct. 559, 565, 62 L.Ed.2d 490 (1980) (quoting McGee v. International Life Ins. Co., 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957)). Simply stated, there is less perceived need today for the federal constitution to protect defendants from “inconvenient litigation,” because all but the most remote forums are easily accessible for the pursuit of both business and litigation. Id. The Court has also, however, reminded us that the due process rights of a defendant should be the courts’ primary concern where personal jurisdiction is at issue. Insurance Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n. 10, 102 S.Ct. 2099, 2104 n. 10, 72 L.Ed.2d 492 (1982).

The Internet represents perhaps the latest and greatest manifestation of these historical, globe-shrinking trends. It enables anyone with the right equipment and knowledge--that is, people like Patterson--to operate an international business cheaply, and from a desktop. That
business operator, however, remains entitled to the protection of the Due Process Clause, which mandates that potential defendants be able “to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit.” World-Wide Volkswagen, 444 U.S. at 297, 100 S.Ct. at 567. Thus, this case presents a situation where we must reconsider the scope of our jurisdictional reach.

To determine whether personal jurisdiction exists over a defendant, federal courts apply the law of the forum state, subject to the limits of the Due Process Clause of the Fourteenth Amendment. Reynolds, 23 F.3d at 1115. “[T]he defendant must be amenable to suit under the forum state’s long- arm statute and the due process requirements of the Constitution must be met.” Id. (citing In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 224 (6th Cir.1972)).

The Ohio long-arm statute allows an Ohio court to exercise personal jurisdiction over nonresidents of Ohio on claims arising from, inter alia, the nonresident’s transacting any business in Ohio. Ohio Rev. Code Ann. § 2307.382(A) (Anderson 1995). It is settled Ohio law, moreover, that the “transacting business” clause of that statute was meant to extend to the federal constitutional limits of due process, and that as a result Ohio personal jurisdiction cases require an examination of those limits. * * *

Further, personal jurisdiction may be either general or specific in nature, depending on the nature of the contacts in a given case. * * * In the instant case, because CompuServe bases its action on Patterson’s act of sending his computer software to Ohio for sale on its service, CompuServe seeks to establish such specific personal jurisdiction over Patterson. Id.

As always in this context, the crucial federal constitutional inquiry is whether, given the facts of the case, the nonresident defendant has sufficient contacts with the forum state that the district court’s exercise of jurisdiction would comport with “traditional notions of fair play and substantial justice.” International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 342-43, 85 L.Ed. 278 (1940)); Reynolds, 23 F.3d at 1116; Theunissen, 935 F.2d at 1459. This court has repeatedly employed three criteria to make this determination:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant’s activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable.

Reynolds, 23 F.3d at 1116 (quoting In-Flight Devices, 466 F.2d at 226); see also Southern Mach. Co. v. Mohasco Indus., 401 F.2d 374, 381 (6th Cir.1968) (adopting the above test for “determining the present outer limits of in personam jurisdiction based on a single act”).

We conclude that Patterson has knowingly made an effort--and, in fact, purposefully contracted--to market a product in other states, with Ohio-based CompuServe operating, in effect, as his distribution center. Thus, it is reasonable to subject Patterson to suit in Ohio, the state which is home to the computer network service he chose to employ.
To support this conclusion, we will address each of the above three criteria seriatim, bearing in mind that (1) CompuServe need only make a prima facie case of personal jurisdiction, and (2) we cannot weigh Patterson’s affidavit in the analysis, given that the district court addressed his motion to dismiss without holding an evidentiary hearing. Theunissen, 935 F.2d at 1459.

1. The “purposeful availment” requirement.

* * *

There is no question that Patterson himself took actions that created a connection with Ohio in the instant case. He subscribed to CompuServe, and then he entered into the Shareware Registration Agreement when he loaded his software onto the CompuServe system for others to use and, perhaps, purchase. Once Patterson had done those two things, he was on notice that he had made contracts, to be governed by Ohio law, with an Ohio-based company. Then, he repeatedly sent his computer software, via electronic links, to the CompuServe system in Ohio, and he advertised that software on the CompuServe system. Moreover, he initiated the events that led to the filing of this suit by making demands of CompuServe via electronic and regular mail messages.

The real question is whether these connections with Ohio are “substantial” enough that Patterson should reasonably have anticipated being haled into an Ohio court. The district court did not think so. It looked to “cases involving interstate business negotiations and relationships” and held that the relationship between CompuServe and Patterson, because it was marked by a “minimal course of dealing,” was insufficient to satisfy the purposeful availment test. Compare Reynolds, 23 F.3d at 1118-21 (holding that the contacts between an England-based association and an Ohio plaintiff in a contract case were “superficial” where, although mail and telephone communications had taken place, the parties had engaged in no prior negotiations and expected no future consequences) and Health Communications, Inc. v. Mariner Corp., 860 F.2d 460, 463-65 (D.C.Cir.1988) (finding no jurisdiction over a nonresident purchaser who had bought services from a corporation in the forum state) with Burger King Corp., 471 U.S. at 479-82, 105 S.Ct. at 2185-87 (finding significant the defendant’s reaching beyond Michigan to negotiate with a Florida corporation for the purchase of a long- term franchise). The district court deemed this case closer to Reynolds and Health Communications than to Burger King Corp., and thus it found no purposeful availment on the part of Patterson.

We disagree. The contract cases upon which the district court relied are both distinguishable in important ways. Patterson, unlike the nonresident defendant in Reynolds, entered into a written contract with CompuServe which provided for the application of Ohio law, and he then purposefully perpetuated the relationship with CompuServe via repeated communications with its system in Ohio. And, unlike the nonresident defendant in Health Communications, Patterson was far more than a purchaser of services; he was a third-party provider of software who used CompuServe, which is located in Columbus, to market his wares in Ohio and elsewhere.
In fact, it is Patterson’s relationship with CompuServe as a software provider and marketer that is crucial to this case. The district court’s analysis misses the mark because it disregards the most salient facts of that relationship: that Patterson chose to transmit his software from Texas to CompuServe’s system in Ohio, that myriad others gained access to Patterson’s software via that system, and that Patterson advertised and sold his product through that system. Though all this happened with a distinct paucity of tangible, physical evidence, there can be no doubt that Patterson purposefully transacted business in Ohio. See Plus System, Inc. v. New England Network, Inc., 804 F.Supp. 111, 118-19 (D.Colo.1992) (finding personal jurisdiction over a nonresident computer network defendant because, inter alia, that defendant benefitted from the intangible computer services provided by the plaintiff’s own computer network system); cf. United States v. Thomas, 74 F.3d 701, 706-07 (6th Cir.1996) (upholding a conviction under federal obscenity laws where the defendants transmitted computer-generated images across state lines, despite the defendants’ argument that the images were intangible), petition for cert. filed, 64 U.S.L.W. 3839 (U.S. June 10, 1996) (No. 95-1992).

Moreover, this was a relationship intended to be ongoing in nature; it was not a “one-shot affair.” Mohasco Indus., 401 F.2d at 385. Patterson sent software to CompuServe repeatedly for some three years, and the record indicates that he intended to continue marketing his software on CompuServe. As this court has often stated,

[B]usiness is transacted in a state when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state; and the defendant has purposefully availed himself of the opportunity of acting there if he should have reasonably foreseen that the transaction would have consequences in that state.

Id. at 382-83 (footnote omitted). Patterson deliberately set in motion an ongoing marketing relationship with CompuServe, and he should have reasonably foreseen that doing so would have consequences in Ohio.

Admittedly, merely entering into a contract with CompuServe would not, without more, establish that Patterson had minimum contacts with Ohio. Burger King Corp., 471 U.S. at 478, 105 S.Ct. at 2185. By the same token, Patterson’s injection of his software product into the stream of commerce, without more, would be at best a dubious ground for jurisdiction. Compare Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987) (O’Connor, J.) (plurality op.) (“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.”) with id. at 117, 107 S.Ct. at 1034-35 (Brennan, J., concurring in part) (rejecting the plurality’s position on the stream of commerce theory). Because Patterson deliberately did both of those things, however, and because of the other factors that we discuss herein, we believe that ample contacts exist to support the assertion of jurisdiction in this case, and certainly an assertion of jurisdiction by the state where the computer network service in question is headquartered.

We find support for our conclusion in the Ohio Supreme Court case of U.S. Sprint Communications Co. Limited Partnership v. Mr. K’s Foods, Inc., 68 Ohio St.3d 181, 624 N.E.2d 1048, 1052-54 (1994). In that case, the court held that a foreign corporation “transacted business” in Ohio, and thus was subject to personal jurisdiction, where it frequently made
long-distance telephone calls to Ohio to sell its products, had distribution facilities in Ohio for its products, and shipped goods to Ohio for ultimate sale. Similarly, Patterson frequently contacted Ohio to sell his computer software over CompuServe’s Ohio-based system. Patterson repeatedly sent his “goods” to CompuServe in Ohio for their ultimate sale. CompuServe, in effect, acted as Patterson’s distributor, albeit electronically and not physically.

Further, we must reject the district court’s reliance on the de minimis amount of software sales which Patterson claims he enjoyed in Ohio. As this court recently stated, “It is the ‘quality’ of [the] contacts,” and not their number or status, that determines whether they amount to purposeful availment. Reynolds, 23 F.3d at 1119 (emphasis added) (quoting LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1301 (6th Cir.1989), cert. denied, 494 U.S. 1056, 110 S.Ct. 1525, 108 L.Ed.2d 764 (1990)). Patterson’s contacts with CompuServe here were deliberate and repeated, even if they yielded little revenue from Ohio itself.

Moreover, we should not focus solely on the sales that Patterson made in Ohio, because that ignores the sales Patterson may have made through CompuServe to others elsewhere. Patterson sought to make those sales from Texas by way of CompuServe’s system in Ohio, and the sales then involved the passage of funds through Ohio to Patterson in Texas. This case is thus analogous to the Mohasco Industries case, 401 F.2d at 383-86, where this court held that jurisdiction was proper where a nonresident defendant both (a) entered a licensing contract for the plaintiff to manufacture and sell equipment in the forum state, and (b) contemplated the ongoing marketing of that equipment in the forum state and elsewhere.

We also find instructive the Supreme Court case of McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), which held that due process did not prohibit California from asserting jurisdiction over a Texas insurance company based upon its issuance of a single insurance contract in California and the receipt of premium payments mailed from California. The McGee Court reasoned that (1) the company had consciously sought the contract with the California insured, and (2) “the suit was based on a contract which had substantial connection with that State.” Id. at 223, 78 S.Ct. at 201.

Similarly, in the instant case, Patterson consciously reached out from Texas to Ohio to subscribe to CompuServe, and to use its service to market his computer software on the Internet. He entered into a contract which expressly stated that it would be governed by and construed in light of Ohio law. Ohio has written and interpreted its long-arm statute, and particularly its “transacting business” subsection, with the intent of reaching as far as the Due Process Clause will allow, and it certainly has an interest “in providing effective means of redress for its residents.” Id. As the Burger King Corp. Court noted, the purposeful direction of one’s activities toward a state has always been significant in personal jurisdiction cases, particularly where individuals purposefully derive benefits from interstate activities. Burger King Corp., 471 U.S. at 472-73, 105 S.Ct. at 2181-83. Moreover, the Court continued, it could be unfair to allow individuals who purposefully engage in interstate activities for profit to escape having to account in other states for the proximate consequences of those activities. Id. (citing Kulko v. Superior Court, 436 U.S. 84, 96, 98 S.Ct. 1690, 1699, 56 L.Ed.2d 132 (1978)).
Finally, we note this court’s own finding of purposeful availment based (in part) on analogous litigation threats in American Greetings Corp. v. Cohn, 839 F.2d 1164, 1170 (6th Cir. 1988). The American Greetings Corp. case involved an Ohio corporation’s suit, in Ohio, against a California shareholder who had threatened to file a lawsuit to invalidate an amendment to the company’s articles of incorporation. Id. at 1165. The district court dismissed the case, without conducting an evidentiary hearing, for lack of personal jurisdiction, finding that the defendant merely owned stock in an Ohio company and expressed strong reservations about a matter of shareholder interest. Id. at 1166. This court reversed, finding purposeful availment because of the defendant’s letters and telephone calls to Ohio, in which he had threatened suit and had sought money to release his claim. Thus, this court stated, the defendant himself had “originated and maintained the required contacts with Ohio.” Id. at 1170.

In the instant case, the record demonstrates that Patterson not only purposefully availed himself of CompuServe’s Ohio-based services to market his software, but that he also “originated and maintained” contacts with Ohio when he believed that CompuServe’s competing product unlawfully infringed on his own software. Patterson repeatedly sent both electronic and regular mail messages to CompuServe about his claim, and he posted a message on one of CompuServe’s electronic forums, which outlined his case against CompuServe for anyone who wished to read it. Moreover, the record shows that Patterson demanded at least $100,000 to settle the matter.

Thus, we believe that the facts which CompuServe has alleged, viewed in the light most favorable to CompuServe, support a finding that Patterson purposefully availed himself of the privilege of doing business in Ohio. He knowingly reached out to CompuServe’s Ohio home, and he benefitted from CompuServe’s handling of his software and the fees that it generated.

[Discussion of “arising from” and “reasonableness” criteria omitted]

Finally, because of the unique nature of this case, we deem it important to note what we do not hold. We need not and do not hold that Patterson would be subject to suit in any state where his software was purchased or used; that is not the case before us. See World-Wide Volkswagen, 444 U.S. at 296, 100 S.Ct. at 566-67 (rejecting the idea that a seller of chattels could “appoint the chattel his agent for service of process”). We also do not have before us an attempt by another party from a third state to sue Patterson in Ohio for, say, a “computer virus” caused by his software, and thus we need not address whether personal jurisdiction could be found on those facts. Finally, we need not and do not hold that CompuServe may, as the district court posited, sue any regular subscriber to its service for nonpayment in Ohio, even if the subscriber is a native Alaskan who has never left home. Each of those cases may well arise someday, but they are not before us now.

III. CONCLUSION

Because we believe that Patterson had sufficient contacts with Ohio to support the exercise of personal jurisdiction over him, we REVERSE the district court’s dismissal and REMAND this case for further proceedings consistent with this opinion.
Notes

1. **Multiple factors.** The court did not base its decision on the existence of a contract alone, since “merely entering into a contract with CompuServe would not, without more, establish that Patterson had minimum contacts with Ohio.” It found that jurisdiction was justified based on a combination of factors: Patterson (1) subscribed to CompuServe, (2) entered into the Shareware Registration Agreement, which stated that disputes would be governed by Ohio law, (3) repeatedly sent his software to CompuServe via online means, (4) advertised and made his software available for download on CompuServe’s system, (5) received revenues from sales of the software from CompuServe, less a 15% fee, (6) threatened to sue CompuServe for trademark infringement and demanded $100,000 to settle his claims, and (7) made actual sales of his software through this arrangement, to people living in Ohio and elsewhere. Which, if any, of these factors was essential to the court’s decision? How much guidance does the decision offer in resolving future cases?

2. **Glosses on CompuServe.** Courts have cited *CompuServe* for a variety of interesting propositions. E.g.,
   - “If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.” Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).
   - “[C]ourts generally have exercised jurisdiction * * * where the defendant ‘conducted business’ over the Internet by engaging in repeated or ongoing business transactions with forum residents or by entering into a contract with the plaintiff through the Internet.” Millennium Enterprises, Inc. v. Millennium Music, LP, 33 F. Supp.2d 907, 916 (D. Ore. 1999).
   - “Personal jurisdiction can be exercised over a defendant which maintains an Internet site where customers can transact business.” Decker v. Circus Circus Hotel, 49 F.Supp.2d 743, 747-48 (D.N.J. 1999).
   - “If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files, such system is interactive and personal jurisdiction is proper.” American Homecare Federation, Inc. v. Paragon Scientific Corp., 27 F. Supp.2d 109, 113 (D. Conn. 1998).
• “[In] cases in which individuals enter into contracts with defendants by way of the Internet and download, transmit, or exchange files[,] the exercise of personal jurisdiction will almost always be proper.” Mieczkowski v. Masco Corp., 997 F. Supp. 782, 786 (E.D. Tex. 1998).

Is any of these characterizations of CompuServe correct?

3. Location of CompuServe’s servers. Several of the factors that the court relied upon involve Patterson’s use of CompuServe’s proprietary online system, including the storage of his software on CompuServe’s computers so that it could be downloaded by subscribers. Would it make any difference if CompuServe’s computers were located not in Ohio, but in Indiana? In Tadjikistan? Some courts have found the location of computer servers that enable online communications relevant to the jurisdictional analysis. See below at —.

Note: Cases involving entering into contracts as grounds for jurisdiction

In most cases where the defendant entered into contracts with residents of the forum state, the court has held the due process requisites for personal jurisdiction to be satisfied. Usually the court relies on the existence of a contract together with other online contacts that would not alone support jurisdiction. See Alitalia-Linee Aeree Italiane S.p.A. v. Casinoalitalia.com, 128 F. Supp.2d 340 (E.D. Va. 2001) (five residents of forum state gambled via defendant’s online casino, wagering a total of $264.80 in one year); Superguide Corp. v. Kegan, 987 F. Supp. 481 (W.D.N.C. 1997) (jurisdiction based on assumed facts that forum residents have visited defendant’s website and purchased products through it); Gary Scott Int’l, Inc. v. Baroudi, 981 F. Supp. 714 (D. Mass. 1997) (defendant advertised products on his website and sold twelve cigar humidors to forum residents); Hall v. LaRonde, 56 Cal. App.4th 1342 (Ct. of Appeal, 2d Dist. 1997) (defendant made royalty payments to plaintiff on a continuing basis, pursuant to a contract).

One recurrent issue, which the courts rarely address, is whether defendant’s entering into a contract with plaintiff can support jurisdiction in the plaintiff’s home forum even if the defendant is unaware of the plaintiff’s location. If the contract involves purchase of a digital good or service that may be delivered electronically via the network, and may be paid for either by credit card or using digital cash, the seller need never learn the location of the buyer. Such digital items include subscriptions to e-zines, databases that are accessed online, provision of Internet access, online gambling, software that is downloaded, music in MP3 format, and digitized photographs. In such circumstances, can a seller be found to have purposely directed her conduct at the state where the buyer is located? Does a party enter into a contract with an unlocated party at peril of being subjected to jurisdiction wherever that party happens to reside?

For example, in Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738 (W.D. Tex. 1998), defendant operated on online casino. Plaintiff entered into a contract with defendant that
allowed him to play games on the site. When plaintiff attempted to redeem the 19,372,849 “Funbucks” that he won for $193,728.40 in cash, defendant balked. Plaintiff brought an action for breach of contract in Texas, where he lived. Defendant, a California corporation with principal place of business in California, resisted the jurisdiction of the Texas court. The court held that it had jurisdiction over defendant, based on the existence of the contract, the defendant’s continuous interaction with players like plaintiff, and the defendant’s advertisement of its services via its website. The court’s opinion does not indicate whether the defendant was aware of the plaintiff’s location.

One court held that defendant’s sales to residents of the forum state were insufficient to support jurisdiction, where defendant offered the items via an online auction. In Winfield Collection, Ltd. v. McCauley, 105 F. Supp.2d 746 (E.D. Mich. 2000), plaintiff alleged that defendant infringed his copyrights on home-craft patterns by selling crafts she made using the patterns via eBay. Defendant made two sales to forum residents. The court reasoned that “the function of an auction is to permit the highest bidder to purchase the property offered for sale, and the choice of that highest bidder is therefore beyond the control of the seller.” Since defendant did not choose to sell to forum residents — they instead chose to buy from her — the sales did not demonstrate purposeful availment of the forum state. How does offering goods for sale to the highest bidder via an auction site differ, in terms of purposeful targeting of the purchasers, from offering goods for sale at a fixed price via a website?

The fact that a seller is offering a digital good or service does not necessarily mean that the seller does not know the location of its customers. In American Network, Inc. v. Access America/Connect Atlanta, Inc., 975 F. Supp. 494 (S.D.N.Y. 1997), the defendant was an Internet service provider, and jurisdiction was based on the fact that it had six subscribers in the forum state. Similarly, in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997), jurisdiction was based on the fact that defendant, which offered an Internet newsgroup service, had 3,000 subscribers in the forum state (as well as contracts with seven ISP’s in the forum state).

The existence of contracts with forum state residents is such a strong ground for jurisdiction that plaintiffs will go out of their way to manufacture a contract if none exists. In Millennium Enterprises, Inc. v. Millennium Music, LP, 33 F. Supp.2d 907 (D. Ore. 1999), the defendant was a South Carolina corporation that sold music CD’s at retail stores in its home state and via its website. The plaintiff was an Oregon seller of music CD’s, and brought suit in its home state. Jurisdiction in Oregon was premised on defendant’s sale of a lone CD to an Oregon resident. The court’s opinion relates that the purchase was made by an employee of an acquaintance of plaintiff’s counsel, and therefore was presumably instigated by plaintiff’s counsel. The court expressed dismay at plaintiff’s counsel’s “lack of candor,” and disregarded the sale as a basis for jurisdiction. A similar attempt to manufacture jurisdiction by orchestrating a sale into the forum state is described in Edberg v. Neogen Corp., 17 F. Supp.2d 104 (D. Conn. 1998).

F. Jurisdiction based on sending e-mail messages, or posting messages to a BBS, listserv, chat room, or newsgroup
Should the dissemination of a statement via e-mail, an electronic bulletin board system, Internet mailing list, chat room, or newsgroup carry the same weight, for purposes of evaluating jurisdictional contacts, as placing the same statement on a website? Consider the variations among these modes of online communication according to the following criteria:

— **Persistence:** A website persists for as long as the site owner chooses (unless it is shut down by the access provider for violation of the terms of service or some other reason). A message posted on a newsgroup or BBS persists as long as the manager of the forum chooses, which may be anywhere from several hours to several years. Newsgroup postings may be archived by third-party systems indefinitely. An e-mail message persists for as long as the recipient chooses. Chat sessions are normally ephemeral, though in some cases they may be persistent (as, for example, chats via a proprietary system such as ICQ, which are archived on the users’ computers until they choose to delete them).

— **Mediation:** Websites, e-mail, newsgroups, and chat sessions are unmediated. BBS’s and mailing lists may or may not be mediated.

— **Accessibility:** Websites and newsgroups are accessible by anyone with Internet access. E-mail is normally available only to the intended recipient. Chat sessions may be limited to the interlocutors one selects, or may be open to the public. BBS’s are normally proprietary, with membership criteria determined by the board’s manager. Mailing lists may be either open or closed.

— **Geographic determinacy:** One who communicates via a website, newsgroup, BBS, or (usually) a mailing list or chat session normally does not know the geographic location of those who receive the communication, and has no way of limiting access to the communication based on the location of the visitor. One may direct an e-mail to a person known to reside in a particular place, but one cannot know where the recipient will be located at the time she reads the message.

To what extent should these criteria be relevant to the jurisdictional inquiry?

1. **Due process analysis**

When jurisdiction is premised on the effects test, the mode by which the statement was communicated online — whether it is transmitted via website, newsgroup, BBS, chat session, mailing list, or e-mail — should not be relevant to the analysis. In Bochan v. La Fontaine, 68 F. Supp.2d 692 (E.D. Va. 1999), the court had no difficulty concluding that an allegedly defamatory newsgroup posting could meet the due process requirement for jurisdiction, based on the known effects of the posting on the plaintiff located in the forum state.

When the effects test is inapplicable, should a posting in a newsgroup or on an Internet mailing list be analyzed through application of the *Zippo* three-category approach? In Barrett v. Catacombs Press, 44 F. Supp.2d 717 (E.D. Pa. 1999), the plaintiff brought an action for defamation, based on statements that the defendant posted in newsgroups and on Internet mailing lists (as well as on her websites). The court held that the postings did not support jurisdiction in the courts where plaintiff resided. It did so by analogizing the postings to statements on a “passive” website. The court explained:

We agree with the Plaintiff that posting of messages to listserves and USENET discussion groups technically differs from the maintenance of a “passive” Web page.
because messages are actively disseminated to those who participate in such groups. * * *
However, for jurisdictional purposes, we find that these contacts are akin to a “passive”
Web site and insufficient to trigger this court’s jurisdiction. * * * Not unlike the
maintenance of a “passive” Web site, anyone who is interested could become a member
of such listserves or USENET groups, and we cannot see how from that fact alone, it can
be inferred that the Defendant directed its efforts towards Pennsylvania residents.

Id. at 728.

Following the Zippo analysis, the court found that “[t]he non-commercial nature of
Defendant’s postings” was a factor weighing against jurisdiction. Where the claim is based on
defamation, should it matter for purposes of jurisdiction whether the defendant’s motivation was
commercial, political, vindictive, or otherwise?

In one sense, an online bulletin board is highly interactive: each posting invites
responses, and the result is often very much like a conversation among a number of participants.
Why does the court consider a BBS “akin to a ‘passive’ Web site” for purposes of jurisdictional
treated a BBS maintained on a website as “passive” for purposes of the Zippo test. The court
explained: “Although this may seem interactive in that information can be sent to the website, it
is not truly interactive in that the site does not send anything back * * *.” Is this logic
convincing? Consider the following criticism of the interactivity criterion:

[T]he distinction drawn by the Zippo court between actively managed, telephone-like use
of the Internet and less active but “interactive” web sites is not entirely clear to this court.
Further, the proper means to measure the site’s “level of interactivity” as a guide to
personal jurisdiction remains unexplained. Finally, this court observes that the need for a
special Internet-focused test for “minimum contacts” has yet to be established.


Is the Zippo analysis applicable when jurisdiction is based on contacts through e-mail
148567 (S.D. Ind. Mar. 24, 1997), the plaintiff backed out of a proposed deal under which
defendants would fund his startup company, and then sued for declaratory and injunctive relief,
arguing that there was no contractual relationship between the parties and that defendants had
breached confidentiality agreements. The deal had been developed during the course of several
months through correspondence via e-mail, telephone, postal mail, and fax. About eighty e-mail
messages were exchanged. Plaintiff premised jurisdiction on these contacts. The court read
Zippo broadly as establishing that the “notion of transacting business over the Internet involves
examining the level of interactivity, and the commercial nature of the exchange of information
that occurs.” It found that the parties had “communicate[d] extensively through electronic mail,”
and that “the commercial nature of the Internet activity between the parties was focused on” the
forum state.

Are Zippo’s “level of interactivity “ and “commercial nature” factors a useful gauge of
contacts with the forum state when applied to e-mail? Can e-mail be anything but interactive? Is
there any reason not to approach e-mail contacts through the same analysis that applies to contacts by postal mail?

Suppose that defendant and plaintiff exchange e-mail messages, that defendant knows plaintiff to be a resident of State A, and that, unbeknownst to defendant, plaintiff downloaded and read the e-mail while located temporarily in State B. Should the e-mail correspondence be a basis for finding that defendant had the required contacts with State B? Does the *Zippo* analysis provide any answer to this question? Would knowledge of the residence or location of the recipient be a more appropriate criterion for assessing jurisdiction based on e-mail than the *Zippo* criteria?

Can sending unsolicited commercial e-mail to residents of the forum state satisfy the “purposeful availment” criterion? In *Internet Doorway, Inc. v. Parks*, 138 F.Supp.2d 773 (S.D. Miss. 2001), the defendant “sent an unsolicited e-mail to persons all over the world, including Mississippi residents, advertising a pornographic web-site,” and forging plaintiff’s name as the sender of the e-mails. The court held that sending the e-mails subjected defendant to the jurisdiction of Mississippi courts: “By sending an e-mail solicitation to the far reaches of the earth for pecuniary gain, one does so at her own peril, and cannot then claim that it is not reasonably foreseeable that she will be haled into court in a distant jurisdiction to answer for the ramifications of that solicitation.” On the court’s rationale, does indiscriminate sending of bulk commercial e-mail subject the sender to jurisdiction in all states where it was received? Is this analytically different from allowing jurisdiction based on maintenance of a website in all states where the site was accessed? If the sender knows of the location of the recipient of unwanted e-mail, this issue drops out. *See Intercen, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244 (10th Cir. 2000) (jurisdiction based on defendant’s intentional misrouting of its customers’ email through plaintiff’s e-mail server located in the forum state).

2. **Analysis based on state long-arm statutes**

As discussed above, at —, state long-arm statutes typically extend jurisdiction to persons outside the state who (1) transact business in the state, (2) cause tortious injury within the state by some act or omission either within or outside the state, or (3) solicit business within the state.

Some courts have found that the location of the computer servers that are used in posting a message on a BBS is determinative in applying such long-arm provisions. In *Krantz v. Air Line Pilots Assn., Int’l*, 245 Va. 202, 427 S.E.2d 326 (1993), the defendant posted, on a proprietary BBS operated by a labor union (which was itself a defendant), a statement that allegedly tortiously interfered with plaintiff’s employment. The BBS was operated by the union “from its offices in Herndon, Virginia.” Other union members accessed the BBS and read the message, resulting in harm to plaintiff. The court found that, by virtue of the fact that the BBS was “a Virginia facility,” defendant’s posting of the message amounted to an “act * * * in this Commonwealth” that supported jurisdiction under the state’s long-arm provision. Other courts have followed *Krantz* in giving great weight to the location of the computers hosting a BBS or newsgroup. *See Telco Communications v. An Apple a Day*, 977 F. Supp. 404 (E.D. Va. 1997) (jurisdiction in Virginia based on electronic distribution of press releases through various outlets, including America Online, which is headquartered in Virginia); *Mitchell v. McGowan*, 1998

Should the location of the computer servers that are used in transmitting or storing newsgroup or BBS messages be determinative in the jurisdictional inquiry? Should this even be a relevant factor? If the location of such computer equipment is deemed relevant, shouldn’t the same be true for the location of the ISP through which a user obtains access to the Internet? The location of the server on which a website is hosted? The location of a proxy server that caches frequently accessed data? How about the location of the name servers that are queried each time a user accesses a website? Is it coherent to speak of the “location” of a newsgroup?

In Krantz, would the result have been different if the union had outsourced the operation of its BBS, so that the computer equipment on which it was hosted was located outside Virginia? What is the most sensible result, given the purposes of the long-arm provision?

When a newsgroup or BBS posting does not make use of computer servers located in the forum state, there is little to distinguish such a posting from a statement on a website. In Mallinckrodt Medical, Inc. v. Sonus Pharmaceuticals, Inc., 989 F. Supp. 265 (D.D.C. 1998), the court found it did not have jurisdiction based on an allegedly defamatory statement that defendants posted on an America Online bulletin board, and that was accessible by some 200,000 District of Columbia residents. Relying on cases analyzing passive websites, the court found that the posting did not amount to “transacting business” in the District of Columbia. It also found that the posting did not cause “tortious injury” in the District, since nothing about the circumstances distinguished the District from any other place in the country where the posting could be accessed.

Does sending an e-mail message to a resident of the forum state
If defendant located outside the forum state commits a tort by sending an e-mail message to a forum resident, is the tort committed in the state for purposes of a long-arm grant of jurisdiction? Compare Internet Doorway, Inc. v. Parks, 138 F. Supp. 2d 773 (S.D. Miss. 2001) (sending unsolicited commercial e-mail to forum resident was a tort committed “in whole or in part in this state,” since the tort was not complete upon sending but only upon being opened by the recipient) with Northwest Airlines, Inc. v. Friday, 617 N.W. 2d 590 (Minn. Ct. of Apps. 2000) (sending defamatory e-mail to forum resident is not an “act in” the state, since the operative act is the sending, which by analogy to postal mail occurred outside the state).

G. Jurisdiction Based on Distribution of Publications Online

Under general law, distribution of publications in the forum state can support an assertion of jurisdiction. In Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), the Court held that defendant’s sale of 10,000 to 15,000 copies of its magazine in the forum state each month “is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine.” Id. at 773-74. The Court explained: “Such regular monthly sales of thousands of
magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous.” *Id.* at 774.

What are the applicable criteria when the basis for jurisdiction is the defendant’s distribution of electronic publications in the forum state? Consider the following two contrasting approaches.

1. In *Scherr v. Abrahams*, 1998 WL 299678 (N.D. Ill. May 29, 1998), the plaintiff brought an action alleging various business interference torts, based on defendant’s distribution of a humor and satire publication called the Annals of Improbable Research. The hard-copy version of the publication had fewer than 60 subscribers in the forum state, as well as a smaller number of newsstand sales. The court quoted *Keeton* for the proposition that jurisdiction is proper “‘whenever a substantial number of copies are regularly sold and distributed’” in the forum state. Comparing the 60 to 120 (hard) copies that defendant circulated in the forum state with the 10,000 to 15,000 circulated in *Keeton* (and the 600,000 circulated in *Calder v. Jones*, 465 U.S. 783 (1984)), the court concluded that defendant’s circulation was “insubstantial” and therefore did not support jurisdiction. The court then went on to consider the online circulation of the magazine as an independent basis for jurisdiction. According to the court, the defendant stated that the online version of the magazine was sent, free of charge, to about 20,000 people who had placed their e-mail addresses on a mailing list, and the mailing list was accessed via the defendant’s website. Perceiving the involvement of a website, the court shifted from the *Keeton* criterion of “substantiality” of the circulation in the forum state to the *Zippo* criterion of the “level of interactivity and commercial nature of the exchange of information that occurs on the Web site.” It rejected defendant’s characterization of the site as “passive,” since the fact that visitors to the site were able to subscribe to the mailing list meant that the site was “one in which the user can exchange information with the host computer.” But it found that the level of interactivity presented by the website was “rather low: the only exchange is the listing of a person’s e-mail address for an electronic copy of the” magazine; and it found that the commercial nature of the exchange of information was low, since “[n]o money is exchanged,” and the only commercial content of the magazine was advertisements for the hard-copy version of the magazine and other products that defendant offered for sale. The court therefore concluded that the online circulation of the magazine did not support jurisdiction.

Is the *Zippo* analysis appropriate on these facts? Was jurisdiction premised on the circulation of the magazine, or on defendant’s use of its website as a means of obtaining subscribers to the magazine? Typically, one subscribes to an Internet mailing list by sending an e-mail request to the server that hosts the list. In the case of an open list, the request is processed automatically by the list-management software, with no human intervention. If defendant had advertised the availability of the online magazine through a medium other than its website, would the court have still applied the *Zippo* interactivity criterion?

If the website had offered additional opportunities for users to “exchange information with the host computer,” so that the level of interactivity was rather high, should the jurisdictional analysis have come out differently?
*Zippo* calls for consideration of the “commercial nature of the exchange of information that occurs on the website.” Did the court deviate from the *Zippo* analysis by considering the commercial content of the publication? Do you agree with the court that the publication was not commercial in nature?

2. In *Naxos Resources (U.S.A.) Ltd. v. Southam Inc.*, 1996 WL 662451 (C.D. Cal. Aug. 16, 1996), plaintiff claimed that it was defamed in an article that defendants published, and premised jurisdiction on the fact that the article was made available via an online information provider. The court found that the “article was disseminated on LEXIS, which is available in California [the forum state] ***. Thus, defendants did knowingly disseminate the allegedly tortious material in California, and thus ‘purposefully availed’ themselves of the privileges of conducting activities there.” The court concluded, however, that it did not have jurisdiction over the defendants, since plaintiff’s claim did not “arise from” the forum-related activities.

The court seems to hold that one who provides written material to an online information provider has thereby met the “purposeful availment” element of the due process jurisdictional test. Is this consistent with the nearly uniform view that a “passive” website does not alone constitute “purposeful availment” of every jurisdiction in which it may be accessed?

How would the *Keeton* analysis apply in this situation? Is it sufficient that the defendant knows that by virtue of its availability on LEXIS the article *may* have a substantial circulation in California? Would the plaintiff be required to introduce evidence as to how many California residents actually accessed the publication via LEXIS? Does it make a difference that the article is made available in the forum state not directly by the defendant, but by a third-party distributor? Is providing a publication to an online service like LEXIS comparable to injecting a manufactured item into the stream of commerce? Consider the applicability of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980) (“The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”). Consider also the contending opinions in *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 112 (1987) (“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.”) (opinion of O’Connor, J.); *id.* at 117 (agreeing with the view of “most courts and commentators” that “jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause [without any need for] a showing of additional conduct”) (opinion of Brennan, J.).

**H. Jurisdiction Based on Defendant’s Use of Computer Equipment Located in the Forum State**

Communication via computer networks almost inevitably involves the accessing of computer equipment that is located at some distance from the person initiating the communication. This may come about in several ways: (1) When you access a website, you cause the computer hosting the website to transmit packets of information to your own computer. (2) Information that is transmitted via the network, whether consisting of the contents of a Web page, an e-mail message, or any other data, generally is relayed through one or more
intermediary computers on its way from sender to recipient. (3) Accessing information located in a remote database causes activity by the computer on which the database is stored. (4) Accessing the Internet via a dial-up connection results in activity by the service provider’s computers. (5) Posting a message to, or receiving a message from, a computer bulletin board system causes activity on the part of the computer on which the BBS is hosted. (6) Communication via a proprietary online service may result in activity by the service’s remotely located computers.

May a person’s use of a computer network which results in activity on the part of a remote piece of computer equipment constitute contacts with the state in which that equipment is located, sufficient to satisfy the due process requirements for assertion of personal jurisdiction?

Several courts have relied on defendant’s accessing of a server computer located in the forum state as a justification for the forum’s assertion of jurisdiction.

a. Location of newsgroup or BBS server. In Bochan v. La Fontaine, 68 F. Supp.2d 692 (E.D. Va. 1999), the plaintiff brought an action for defamation, based on messages that defendants posted on an Internet newsgroup. The court found that defendants’ use of their America Online account to post message to the newsgroup met the long-arm statute’s provision for jurisdiction based on “tortious injury by an act or omission in this Commonwealth.” The court explained: “[B]ecause the postings were accomplished through defendant’s AOL account, they were transmitted first to AOL’s USENET server hardware, located in * * * Virginia. There, the message was apparently both stored temporarily and transmitted to other USENET servers around the world.” The court found that this approach would not justify jurisdiction over another defendant, who “did not use an AOL account after accessing the Internet, or use any Virginia-based service, but instead used only the Internet service providers Earthlink, located in California, or High Fiber, located in New Mexico.”

Notes

1. Relocation of servers. Should the geographic location of America Online’s USENET server be determinative of the jurisdictional analysis? What if AOL happened to locate its USENET server outside Virginia? What if it had several servers, some in Virginia and some elsewhere, and USENET postings were routed randomly to one server or the other? What if the postings in question were to an AOL bulletin board rather than to USENET, and the BBS server was located outside Virginia? Should it matter whether defendants had knowledge of the location of the server?

2. Remote USENET servers. The court notes that after being stored on AOL’s USENET server, the allegedly defamatory messages were “transmitted to other USENET servers around

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1 The court went on to inquire whether defendants’ contacts with the forum state satisfied the due process requirement. As the court explained: “Although Virginia’s long-arm statute extends personal jurisdiction ‘to the outmost [sic] perimeters of due process,’ it nonetheless appears that it is possible ‘for the contacts of a non-resident defendant to satisfy due process but not meet the specific grasp of a Virginia long-arm statute provision.’” Is this statement logically coherent?
the world.” Is there a rationale for holding that the involvement of AOL’s server justifies jurisdiction in Virginia, without concluding that the involvement of other USENET servers that propagated the message likewise justify jurisdiction wherever they may be located? In another context, a court rejected a plaintiff’s argument that an Internet service provider that operates a USENET server is directly liable for copyright infringement based on material that a subscriber posts to a newsgroup. It explained: “Plaintiff’s theory would create many separate acts of infringement and, carried to its natural extreme, would lead to unreasonable liability ***. Plaintiff’s theory further implicates a Usenet server that carries *** messages to other servers regardless of whether that server acts without any human intervention beyond the initial setting up of the system. It would also result in liability for every single Usenet server in the worldwide link of computers transmitting [messages] to every other computer. *** There is no need to construe the [Copyright] Act to make all of these parties infringers.” Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361, 1369-70 (N.D. Cal. 1995). Is similar reasoning applicable in the context of personal jurisdiction?

3. E-mail servers. Assume that any time an AOL user sends e-mail, it is routed through the company’s main servers in Virginia. By the court’s logic, would the long-arm provision be satisfied each time an AOL user located in, say, Tennessee sent an e-mail to another user located in California?

4. Location of access provider. What if the second defendant, who resided in New Mexico, had accessed the Internet and posted allegedly defamatory USENET messages via an access provider located in Virginia? Would the court have found the long-arm provision satisfied? How would the court determine where an access provider, which may have customers and local access numbers located throughout the country, is “located” for purposes of the jurisdictional analysis? In Mitchell v. McGowan, 1998 U.S. Dist. LEXIS 18587 (E.D. Va. Sept. 18, 1998), the court concluded that it lacked jurisdiction over defendant based on his posting of an allegedly defamatory message “to the Internet” (apparently to a USENET newsgroup), since “the computer bulletin board he accessed is based in Texas.” What might have led the court to conclude that a particular newsgroup is “based” in a particular state?

5. Location of business vs. location of computer equipment. In CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1264 (6th Cir 1996), discussed above at —, the court relied in part on the fact that CompuServe was located in the forum state. The court refers, in a single paragraph, to both the location of the company (referring to CompuServe as “an Ohio-based company”) and the location of the equipment that constitutes its online system (software was sent “to the CompuServe system in Ohio”). What if the company were headquartered in one state and its computer equipment located in another? In Krantz v. Air Line Pilots Assn., Int’l, 245 Va. 202, 204, 427 S.E.2d 326, 327 (1993), discussed above at —, the court noted that the bulletin board system was “operated by ALPA from its offices in *** Virginia.” Was the court assuming that the computer equipment in question was likewise located in Virginia, or was the relevant factor the location of the owner of the equipment?

b. Location of a Web server, or location of server’s owner. Several courts have considered whether a court may assert jurisdiction based on the defendant’s use of a service provider located in the forum state to host its website. As with newsgroup servers, the cases do
not always clearly distinguish between the location of the computer equipment on which the files
constituting a website are stored, and the location of the company (state of incorporation?
principal place of business?) that owns the equipment.

In Jewish Defense Organization, Inc. v. Superior Court, 85 Cal. Rptr.2d 611 (Cal. App.
2d Dist. 1999), plaintiff brought an action for defamation in a California court. Defendants’ only
relevant contacts with California consisted of contracting with Internet service providers,
“located in California,” to host a website which they maintained from their residence in New
York. The court concluded “that defendants’ conduct of contracting, via computer, with Internet
service providers, which may be California corporations or which may maintain offices or
databases in California, is insufficient to constitute ‘purposeful availment.’” But in 3DO Co. v.
Poptop Software Inc., 49 U.S.P.Q.2d 1469, 1472 (N.D. Cal. 1998), the court found it relevant
that “Defendants use a San Francisco-based company as a server to operate a website that
distributes allegedly infringing copies of [software].”

jurisdiction over defendants was based on the fact that they had electronically distributed an
allegedly defamatory press release through several outlets, “including America Online, which is
headquartered in this District.” The court also relied on distribution of the press release to
recipients located in Virginia.

c. **Location of computer holding a database.** In Pres-Kap, Inc. v. System One, Direct
corporation for breach of contract. Under the contract in question, plaintiff provided defendant
with computer terminals and access to a computer database that was held on a computer located
in Florida. Defendant’s only connections with Florida were that it made rental payments under
the contract to plaintiff’s Florida billing office, and it accessed data from plaintiff’s computer
located in Florida. The court held that these contacts do not amount to sufficient contacts with
Florida to support jurisdiction. It explained:

Indeed, a contrary decision would, we think, have far-reaching implications for
business and professional people who use “on-line” computer services for which
payments are made to out-of-state companies where the database is located. Across the
nation, in every state, customers of “on-line” computer information networks have
contractual arrangements with out-of-state supplier companies, putting such customers in
a situation similar, if not identical, to the defendant in the instant case. Lawyers,
journalists, teachers, physicians, courts, universities, and business people throughout the
country daily conduct various types of computer-assisted research over telephone lines
linked to supplier databases located in other states. Based on the trial court’s decision
below, users of such “on-line” services could be haled into court in the state in which
supplier’s billing office and database happen to be located, even if such users, as here, are
solicited, engaged, and serviced entirely instate by the supplier’s local representatives.
Such a result, in our view, is wildly beyond the reasonable expectations of such
computer-information users, and, accordingly, the result offends traditional notions of
fair play and substantial justice.
For example, Westlaw is based in St. Paul, Minnesota, and all bills are generated and paid in St. Paul. ** Lexis is based in Dayton, Ohio, and all bills for use of the Lexis System are generated in and paid in Dayton. **

Is the court’s reasoning equally applicable to online contacts other than accessing remote databases? In EnvisioNet Computer Services v. Microportal.com, Inc., 2001 WL 179882 (D. Me. 2001), the court based jurisdiction on the fact that defendant had placed its proprietary customer information on a computer system located in the forum state, for plaintiff to use in providing support services to defendant’s customers. What explains the difference between these two results?

d. **Location of mail server that defendant tortiously accesses.** Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244 (10th Cir. 2000), is a rather unusual case. Both plaintiff and defendant offered Internet access services, including e-mail routing. Due to confusion between plaintiff’s domain name, “icon.net,” and the name of a provider that defendant used in routing e-mail, “iconnet.net,” defendant mistakenly routed its customers’ e-mail messages via plaintiff’s servers, greatly burdening plaintiff’s system. Once informed of its error, defendant continued misrouting the e-mail for four more months. The court held that “defendant purposely availed itself of [plaintiff’s] Oklahoma server,” meeting the due process requirements for jurisdiction. In this case, both plaintiff and its mail servers were located in the forum state. What if plaintiff were instead a Texas corporation, with its principal place of business in Texas: would jurisdiction by the Oklahoma court based on access of defendant’s mail server in Oklahoma still be supportable?

I. Jurisdiction Based on a Combination of Factors, Including Online Contacts

A number of cases have held that the due process standard may be satisfied by a combination of online activities and other contacts with the forum state. In some of these cases, the court suggests that it would not have been able to assert jurisdiction but for the defendant’s online activities. For example, in CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1265 (6th Cir. 1996), discussed above at —, the court noted that neither Patterson’s contract with CompuServe, nor his placing software into the stream of commerce by making it available online, would by itself have been sufficient to support jurisdiction, but the two actions in combination (together with other contacts) satisfied the due process requirement. In Vitullo v. Velocity Powerboats, Inc., 1998 WL 246152 (N.D. Ill. Apr. 27, 1998), the court apparently concluded that defendant’s website, which solicited attendance at a boat show in the forum state, supplied the “additional conduct” required under Justice O’Connor’s articulation of the stream-of-commerce basis for jurisdiction in Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102 (1987). In Telephone Audio Productions, Inc. v. Smith, 1998 WL 159932 (N.D. Tex. Mar. 26, 1998), the court held that “the website combined with Defendants [sic] other contacts with Texas satisfy [sic] the jurisdictional prerequisite,” but “[d]id not determine if maintenance of the website alone is sufficient.” In Rubbercraft Corp. v. Rubbercraft, Inc., 1997 WL 835442 (C.D. Cal. 1997), the court found it had jurisdiction based on the facts that defendant advertised in a nationally circulated publication, maintained a toll-free telephone number, operated a website, and made sales into the forum state. It explained that “[a]lthough each of these factors may not alone create purposeful availment, in combination” they did.
J. General Jurisdiction

May operation of a website constitute sufficient contacts with a state to support general jurisdiction? As discussed above, see —, a defendant’s contacts with a state will support general jurisdiction over his activities — that is, jurisdiction over any claims brought against the defendant, regardless of whether they arise from the forum contacts — if they are “continuous and systematic.” This criterion presents a much higher hurdle than that which the plaintiff must clear to establish specific jurisdiction.

No court has held that a website alone may give rise to general jurisdiction, but at least one court has ruled that in circumstances where other types of forum contacts are inadequate, the presence of a website may supply the additional contacts needed to support a finding that the court has general jurisdiction over the defendant. In Haelan Products Inc. v. Beso Biological, 43 U.S.P.Q.2d 1672 (E.D. La. 1997), the defendant’s contacts with the forum state consisted of placing advertisements in nationally circulated trade magazines, maintaining a toll-free telephone number, and operating a website. The court held: “Although [defendant’s] advertisements in trade magazines alone would not be sufficient to establish minimum contacts, * * * [and] although [defendant’s] Internet site would be insufficient, * * * [the] Internet site and toll-free number, in addition to advertisements in four national trade publications, constitute a ‘purposeful availment’ of” the forum state, supporting general jurisdiction.

In Mieczkowski v. Masco Corp., 997 F. Supp. 782 (E.D. Tex. 1998), the defendant furniture seller’s contacts with the forum state included selling $5.7 million of products to forum residents over a six-year period, sending direct mailings to forum residents twice a year, purchasing .2% of its furniture from a company located in the forum state, and maintaining a website. The court analyzed the significance of the website through application of the Zippo three-category approach: it classified the site as an interactive one, and looked to the Zippo factors of the “level of interactivity and commercial nature of the exchange of information.” The court added: “It should be noted that the majority of courts that have addressed this issue have done so in the context of specific jurisdiction analysis. However, the Court sees no reason why the analysis should not be applied equally to cases involving a general jurisdiction analysis.” Id. at 786 n.3. The court held that it “need not decide today whether standing alone the Web site maintained by the defendant is sufficient to satisfy a finding of general jurisdiction [, nor] must it look only to the traditional business contacts that the defendant has with * * * Texas. Rather, it is the combination of the two that leads the Court to the conclusion that the defendant maintains substantial, continuous and systematic contacts with Texas sufficient to subject it to personal jurisdiction.” Id. at 788.

Notes

1. Zippo applied to general jurisdiction analysis. Do you agree with the court that the Zippo analysis is the appropriate tool for ascertaining whether a website supports general jurisdiction? What is the logic behind using the same criterion, namely that proposed in Zippo, both to determine whether a website meets the requirements for specific jurisdiction and to determine whether it meets the more stringent requirements for general jurisdiction? In the absence of the other forum contacts, under what circumstances would the “interactivity” analysis
lead to a conclusion that the website contacts were sufficiently “continuous and systematic” to support general jurisdiction? The court in Mink v. AAAA Development LLC, 190 F.3d 333 (5th Cir. 1999), likewise applied the Zippo analysis to evaluate whether a website supported general jurisdiction, without even noting that the analysis was designed for determining whether the standards for specific jurisdiction were met.

2. **Substantiality of website contacts.** Given the non-online contacts that the defendant had with the forum state, does the website amount to a substantial additional contact?

§ 1125. False designations of origin, false descriptions, and dilution forbidden

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

[...]

(d) Cyberpiracy prevention

(1)(A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person

(i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and

(ii) registers, traffics in, or uses a domain name that--

(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

(III) is a trademark, word, or name protected by reason of section 706 of Title 18 or section 220506 of Title 36.
(2)(A) The owner of a mark may file an in rem civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located if

(i) the domain name violates any right of the owner of a mark registered in the Patent and Trademark Office, or protected under subsection (a) or (c); and

(ii) the court finds that the owner--

(I) is not able to obtain in personam jurisdiction over a person who would have been a defendant in a civil action under paragraph (1); or

(II) through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) by--

(aa) sending a notice of the alleged violation and intent to proceed under this paragraph to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar; and

(bb) publishing notice of the action as the court may direct promptly after filing the action.

(B) The actions under subparagraph (A)(ii) shall constitute service of process.

(C) In an in rem action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which

(i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or

(ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.

(D)(i) The remedies in an in rem action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark. Upon receipt of written notification of a filed, stamped copy of a complaint filed by the owner of a mark in a United States district court under this paragraph, the domain name registrar, domain name registry, or other domain name authority shall

(I) expeditiously deposit with the court documents sufficient to establish the court’s control and authority regarding the disposition of the registration and use of the domain name to the court; and

(II) not transfer, suspend, or otherwise modify the domain name during the pendency of the action, except upon order of the court.

(ii) The domain name registrar or registry or other domain name
authority shall not be liable for injunctive or monetary relief under this paragraph except in the case of bad faith or reckless disregard, which includes a willful failure to comply with any such court order.

(3) The civil action established under paragraph (1) and the in rem action established under paragraph (2), and any remedy available under either such action, shall be in addition to any other civil action or remedy otherwise applicable.

(4) The in rem jurisdiction established under paragraph (2) shall be in addition to any other jurisdiction that otherwise exists, whether in rem or in personam.