

Introduction to Cyberlaw

Handout 1 - Internet Jurisdiction

Dow Jones & Company Inc v Gutnick **[2002] HCA 56 10 December 2002 M3/2002**

The appellant contends that the Internet is not "pushed" into any particular jurisdiction. The contention ignores the commercial and social realities that greater publication produces both greater profit and broader persuasion. Indeed, the appellant's arguments would suggest that all of its objectives were exclusively high minded. Revenues from increased advertising and circulation, and the word "profit" never passed the appellant's advocate's lips. It may well be that "firewalls" to deny access to the unintended or non-subscribing reader are at present perhaps imperfect. So be it. Publishers are not obliged to publish on the Internet. If the potential reach is uncontrollable then the greater the need to exercise care in publication.

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The notion that those who publish defamatory material on the Internet are answerable before the courts of any nation where the damage to reputation has occurred, such as in the jurisdiction where the complaining party resides, presents difficulties: technological, legal and practical. It is true that the law of Australia provides protections against some of those difficulties which, in appropriate cases, will obviate or diminish the inconvenience of distant liability. Moreover, the spectre of "global" liability should not be exaggerated. Apart from anything else, the costs and practicalities of bringing proceedings against a foreign publisher will usually be a sufficient impediment to discourage even the most intrepid of litigants. Further, in many cases of this kind, where the publisher is said to have no presence or assets in the jurisdiction, it may choose simply to ignore the proceedings. It may save its contest to the courts of its own jurisdiction until an attempt is later made to enforce there the judgment obtained in the foreign trial. It may do this especially if that judgment was secured by the application of laws, the enforcement of which would be regarded as unconstitutional or otherwise offensive to a different legal culture.

However, such results are still less than wholly satisfactory. They appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself. In default of local legislation and international agreement, there are limits on the extent to which national courts can provide radical solutions that would oblige a major overhaul of longstanding legal doctrine in the field of defamation law. Where large changes to settled law are involved, in an area as sensitive as the law of defamation, it should cause no surprise when the courts decline the invitation to solve problems that others, in a much better position to devise solutions, have neglected to repair.

Zippo Manufacturing Co. v. Zippo Dot Com, Inc. **952 F.Supp. 1119 (E.D. Penn., Jan. 16, 1997)**

This is an Internet domain name dispute. At this stage of the controversy, we must [*1121] decide the Constitutionally permissible reach of Pennsylvania's Long Arm Statute, 42 Pa.C.S.A. § 5322, through cyberspace. Plaintiff Zippo Manufacturing Corporation ("Manufacturing") has filed a five count complaint against Zippo Dot Com, Inc. ("Dot Com") alleging trademark dilution, infringement, and false designation under the Federal Trademark Act, 15 U.S.C. § § 1051-1127. In addition, the Complaint alleges causes of action based on state law trademark dilution [**2] under 54 Pa.C.S.A. § 1124, and seeks equitable accounting and imposition of a constructive trust. Dot Com has moved to dismiss for lack of personal jurisdiction and improper venue pursuant to Fed.R.Civ.P 12(b)(2) and (3) or, in the alternative, to transfer the case pursuant to 28 U.S.C. § 1406(a). For the reasons set forth below, Defendant's motion is denied.

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Enter the Internet, a global "'super-network' of over 15,000 computer networks used by over 30 million individuals, corporations, organizations, and educational institutions worldwide." Panavision Intern., L.P. v. Toepfen, 938 F. Supp. 616 (S.D.Cal. 1996) (citing [**12] American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830-48 (E.D.Pa. 1996). "In recent years, businesses have begun to use the Internet to provide information and products to consumers and other businesses." Id. The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The [*1124] cases are scant. Nevertheless, our review of the available cases and materials n5 reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. 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 foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g. Compuserve, [**13] Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996). At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. E.g. Bensusan Restaurant Corp., v. King, 937 F. Supp. 295

(S.D.N.Y. 1996). The middle ground is occupied by interactive Web sites 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 commercial nature of the exchange of information that occurs on the Web site. E.g. *Maritz, Inc. v. Cybergold, Inc.*, 940 F. Supp. 96, 1996 U.S. Dist. LEXIS 14976 (E.D.Mo. 1996).

**Case C- 170/12,
REQUEST for a preliminary ruling under Article 267 TFEU, from the Cour de cassation (France),
made by judgment of 5 April 2012, received at the Court on 11 April 2012, in the proceedings
Peter Pinckney v KDG Mediatech AG,**

9 Mr Pinckney, who lives in Toulouse (France), claims to be the author, composer and performer of 12 songs recorded by the group Aubrey Small on a vinyl record.

10 When he discovered that those songs had been reproduced without his authority on a compact disc (CD) pressed in Austria by Mediatech, then marketed by United Kingdom companies Crusoe or Elegy through various internet sites accessible from his residence in Toulouse, Mr Pinckney brought an action, on 12 October 2006, against Mediatech before the Tribunal de grande instance de Toulouse (Regional Court, Toulouse) seeking compensation for damage sustained on account of the infringement of his copyrights.

11 Mediatech challenged the jurisdiction of the French courts. By order of 14 February 2008, the judge preparing the case for trial at the Tribunal de grande instance de Toulouse dismissed that plea of lack of jurisdiction on the ground that the very fact that Mr Pinckney had been able to purchase the records concerned at his residence in France from an internet site accessible to the French public was sufficient to establish a substantial connection between the facts and the alleged damage, justifying the jurisdiction of the court seised.

12 Mediatech appealed against that judgment, arguing that the CDs had been pressed in Austria, where its headquarters is situated, at the request of a United Kingdom company which marketed them through an internet site. Thus, it claimed, the only courts having jurisdiction are the courts of the place of the defendant's domicile, which is in Austria, or the courts of the place where the damage was caused, that is the place where the alleged infringement was committed, in the United Kingdom.

13 By a judgment of 21 January 2009, the Cour d'appel de Toulouse (Court of Appeal, Toulouse) held that the Tribunal de grande instance de Toulouse lacked jurisdiction on the ground that the defendant is domiciled in Austria and the place where the damage occurred cannot be situated in France, and that there was no need to examine the liability of Mediatech and Crusoe or Elegy in the absence of any allegation of collusion between them and Mediatech.

14 Mr Pinckney brought an appeal in cassation against that judgment, relying on Article 5(3) of the Regulation. He argued that the French courts have jurisdiction and that his action was wrongly rejected.

15 In those circumstances the Court of cassation decided to stay its proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 5(3) of ... [the Regulation] to be interpreted as meaning that, in the event of an alleged infringement of copyright committed by means of content placed online on a website,

– the person who considers that his rights have been infringed has the option of bringing an action to establish liability before the courts of each Member State in the territory of which content placed online is or has been accessible, in order to obtain compensation solely in respect of the damage suffered on the territory of the Member State of the court before which the action is brought,

or

– does that content also have to be, or to have been, directed at the public located in the territory of that Member State, or must some other clear connecting factor be present?

2. Is the answer to Question 1 the same if the alleged infringement of copyright results, not from the placing of dematerialised content online, but, as in the present case, from the online sale of a material carrier medium which reproduces that content?'

(...)

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in the event of alleged infringement of copyrights protected by the Member State of the court seised, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seised. That court has jurisdiction only to determine the damage caused in the Member State within which it is situated.