Web Site Story 5 - The Emerging Limits To Out-of-State Jurisdiction Over Web Sites

by David Rabinowitz

A dramatic change in Internet law was announced by the Ninth Circuit in December. The Court ruled, for the first time, that no state could exercise jurisdiction over a passive out-of-state Web site as a matter of constitutional law.

A previous ruling of the Second Circuit had established that New York State's long-arm statute did not extend to passive Web sites, but it did not reach the issue of whether such jurisdiction could be exercised constitutionally. Although many district court decisions have applied long-arm jurisdiction to out-of-state Web sites–some more passive than others–they have left unresolved the basic question of the constitutionality of long-arm jurisdiction over passive Web sites. The Ninth Circuit's December ruling is the first federal appellate decision to answer that question.

For the first two years of rulings on jurisdiction over Web sites, it appeared that all Web sites might be treated uniformly, and that the universal accessibility of Web sites would lead to universal jurisdiction. The nature of the Internet, however, is now coming into focus for non-techies (including judges). As the Internet becomes more familiar, its comparability to "800" numbers and other forms of cross-jurisdictional communication is becoming apparent. The Internet's mystique is diminishing, and traditional jurisdictional rules are becoming easier to apply.

In *Cybersell, Inc. v. Cybersell, Inc.,* one corporation sought to stop another corporation of the same name from using that name in a Web site. Plaintiff was an Arizona corporation, defendant a Florida corporation. Plaintiff sued in Arizona. The only basis offered for Arizona jurisdiction was the use of plaintiff's claimed trademark in defendant's Web site.

Arizona has a jurisdictional statute that, in terms, extends the state's jurisdiction "to the maximum extent allowed by the federal constitution." The Ninth Circuit therefore applied the traditional test for personal jurisdiction under the Constitution, which requires an "act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state.[1] The Ninth Circuit adds to this formulation the requirements that the case arise out of or result from the in-forum activity and that the exercise of jurisdiction be "reasonable"[2]. (The former limitation is in accord with all Web site jurisdiction cases, which have stated that Web sites do not expose the hosts to jurisdiction on claims unrelated to Web site activities.)

The Ninth Circuit held that defendant's posting an "essentially passive home page on the Web" did not expose it to out-of-state jurisdiction. While there can and will be further development of what "essentially passive" means, this case, if followed, at least makes it possible for a Web site to escape foreign judicial jurisdiction.

If there are lessons to be learned from *Cybersell* about how to build a jurisdiction-proof Web site they are not entirely clear. The Ninth Circuit did cite enough facts that might be peculiar to the Web site before it to give subsequent courts room to distinguish *Cybersell* But it also used language broad enough to serve as a basis for presumptive jurisdictional immunity for many Web sites. The Court only created one bright line rule: Just having a Web site is not enough to create foreign jurisdiction.

Looking at the broad language in the opinion that Web sites will be able to use, the Ninth Circuit said that:

> No court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiffs home state. . . . Rather, in each [case sustaining jurisdiction], there has been 'something more' to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state.

Contrasted with this language, however, is the fact that the Ninth Circuit did not expressly reject any of the multitude of prior cases finding out-of-state jurisdiction over Web sites. While it did not distinguish each of them individually, it suggested, via the "something more" language quoted above, that each was factually distinguishable. This is a difficult position to defend, however, when the facts in *Cybersell* are compared with the facts in the cases mentioned.

The Court correctly stated that the 1996 District of Connecticut case, *Inset Systems, Inc. v. Instruction Set, Inc.*, was plaintiff's strongest precedent. The only fact in Inset different from *Cybersell* was that the Inset Web site gave out an "800" telephone number, instead of the local area code number, as in *Cybersell*. This distinction is thin, since "800" numbers without Web sites do not create out-of-state jurisdiction. In addition, there were jurisdiction-favorable facts present in *Cybersell* that were not present in *Inset*. The *Cybersell* Web site, for example, was interactive with visitors in (1) providing a hypertext link to enable visitors to "introduce" themselves to the defendant, and (2) inviting visitors to e-mail defendant to find out about defendant's services. However incongruous on these facts, the Ninth Circuit's failure to expressly reject *Inset* leaves open the argument that any Web site that provides an "800" number crosses the jurisdictional line.

While no clear practical guidelines are available from *Cybersell*, it does discredit the position that all Web sites may constitutionally be subjected to out-of-state jurisdiction. Judicial line drawing will have to await further cases.

This article is reprinted with permission from the April 1998 edition of *Corporate Counsel Magazine*. © 1998 NLP IP Company www.lawnewsnetwork.com

Footnotes

1. Quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958).

2. Citing Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995)

MOSES & SINGER LLP

Disclaimer

Viewing this document or contacting Moses & Singer LLP does not create an attorney-client relationship.

This document is intended as a general comment on certain developments in the law. It does not contain a complete legal analysis or constitute an opinion of Moses & Singer LLP or any member of the firm on the legal issues herein described. This document contains information that may be modified or rendered incorrect by future legislative or judicial developments. It is recommended that readers not rely on this general guide in structuring or analyzing individual transactions or matters but that professional advice be sought in connection with any such transaction or matter.

Attorney Advertising

It is possible that under the laws, rules or regulations of certain jurisdictions, this may be construed as an advertisement or solicitation.

Copyright © 2010 Moses & Singer LLP
All Rights Reserved