Legally Speaking

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The Threat of Long-Arm Jurisdiction to Electronic Commerce

Unfortunately for those whose businesses rely on the Internet, an increasing amount of legal conflict is also arising in reaction to this new business medium. As attorneys and the courts attempt to sort out the Internet's legal status quo, both are considering such pressing substantive issues as electronic contracts, privacy, trademark, copyright, defamation, computer crimes, censorship, and taxation. It is imperative that information system professionals become aware of how evolving Internet law will affect the medium they are charged with administrating. An informed IS community is also much more capable of mounting legal and political challenges to law that might thwart continued development of e-commerce.

One of the critical legal issues seriously threatening the continued growth of the Internet as a commerce medium concerns the exposure of Internet businesses to the long-arm jurisdiction of courts in 50 different states [7]. Under the U.S. legal system, any federal or state court can impose its authority upon parties (either people or corporations) in any other state if it can demonstrate jurisdiction [9, 11]. It is often legally or strategically advantageous to a plaintiff (the person or party that files a lawsuit) to file a legal action in a particular state's court. Sometimes the advantage exists because of differences in a given state's laws that favor the plaintiff, sometimes the advantage accrues because juries in a state are known to favor large awards. Whatever the basis of the advantage, the plaintiff is seeking, literally, to create a home-court advantage.

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The threat of being called into court in any one of 50 different states could be enough to dissuade many businesses from ever operating on the Internet. Differences in liability, criminal law, right to privacy, and so forth all make it very dangerous for a business to be exposed to some states' long-arm jurisdiction. Understanding how long-arm jurisdiction works and carefully designing how a business is presented on the Internet can help businesses avoid unnecessary exposure. Because IS professionals are charged with creating the interface between business and the electronic community, it is particularly important that they understand the issues and can work with the legal team and client to avoid unnecessary exposure.

What Is Long-Arm Jurisdiction?

The Internet knows no boundaries or territory; a business Web site, for example, can be accessed anywhere in the world. In most cases, the site's owner has no awareness by whom the site is used, much less where those users are. Is a company that creates a Web site to advertise in its home state operating in other states where people can view the site? Where does a company like JRTobacco conduct its business—in the home state of its customers (JRTobacco exists there via the Web), in New Jersey where orders are processed, or in North Carolina, where it runs its warehouse and shipping?

In order to bring a defendant into a particular court, the plaintiff must show some connection between the defendant and the plaintiff's chosen jurisdiction. In a traditional example, imagine that a citizen of California enters Arizona and injures an Arizona citizen in a car accident. Where then, could the Arizona plaintiff sue the California defendant? If the plaintiff sued the defendant in Minnesota, that state would have no jurisdiction since the accident had no relationship to Minnesota. However, the defendant could be sued in Arizona since, by driving there, he or she created a connection or relationship with that state. In an Internet example, suppose Fictitious Cycles, based in Ohio, was selling bicycle helmets over the Internet. A man in Mississippi buys a helmet, wrecks his bike, injures his head, and now wants to sue Fictitious Cycles in a Mississippi court. Does the Mississippi court have jurisdiction? Unlike our traditional example, Fictitious Cycles was never physically present in Mississippi; one might even argue that the customer "went" to Ohio to purchase the helmet—or did he?

How Long-Arm Jurisdiction is Determined

The Due Process clause of the U.S. Constitution requires that the legal procedures used in criminal and civil cases be fundamentally fair [10]. This includes how defendants in civil cases are treated in court. Therefore, a state court cannot claim jurisdiction unless it is fair and reasonable to do so.

Assuming a defendant does not simply consent to be tried out of state, the plaintiff must show that the defendant has had a level of "minimum contact" with the plaintiff's chosen state [3, 10]. The defendant must have reasonably anticipated that he or she could have been brought into this particular state, and that bringing the defendant to the state is reasonable. Further, in a business-related case, there must also be a demonstration that the defendant benefited from the privilege of doing business in the state. In our first example, the California defendant, after entering Arizona and injuring a citizen of that state, should have reasonably expected to be sued there. A plaintiff is required (1) to demonstrate that seeking long-arm jurisdiction does not place an undue burden on the defendant; (2) that the court has a substantive interest in adjudicating the dispute; (3) that the forum state's (the state in which civil action is being initiated from) jurisdiction is critical to the plaintiff's interest in effective relief; (4) that bringing the defendent to the forum state supports the efficiency of the interstate judicial system; and (5) that the forum state's jurisdiction may advance the goals of several states shared social policy (see *Burger King vs. Rudzewics*).

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Because a Web site puts a business everywhere, it can potentially expose that business to the long-arm jurisdiction of virtually any state in which users have access to it. To better understand how the problem of long-arm jurisdiction is particularly problematic for Internet-active firms, consider the difference between two catalog operations, one paper-based, the other Web-based. The paper-based catalog firm would certainly expect to be under the jurisdiction of the states in which it has ongoing mail-order customers. However, the paper catalog company has the right not to send catalogs to states whose jurisdictions it wishes to avoid. The Web-based catalog company is seen in all 50 states, regardless of the company's home state. As such, an Internet business presence might expose an organization to legal actions in other states simply by being online. Additionally, since many of the informational transactions that take place at a Web site are automatic, information exchanges between the Web site owner and a user are difficult to control. Limiting the distribution of, for instance, promotional software, requires very specific programming and relies on honest information from the requesting user. A paper-based catalog company could simply refuse to ship to certain zip codes and completely avoid any exchange of transactions with an unattractive state.

Internet Cases in Point

As noted earlier, a growing number of Internet business cases have already been brought into the courts using long-arm jurisdiction. Although no Internet cases have reached the Supreme Court, enough cases have been decided that we can offer a reasonable description as to what creates exposure to long-arm jurisdiction in Internet commerce.

In the 1997 case of *Zippo Manufacturing Co. vs. Zippo Dot Com*, the federal court for the Western District of Pennsylvania created a "sliding scale" test for determining long-arm jurisdiction in cases involving the Internet. Although the Zippo Test received little notice at the time of its decision, it has been adopted by a growing number of courts [2, 6].

Zippo Test: Scenario 1. Essentially, the Zippo Test divides Internet cases into three categories or scenarios. In scenario one, the defendant actively does business in the state seeking jurisdiction. Since the defendant is not actually present in the state, the courts look for "business activities" involving the intentional and repeated exchange of information through the Internet (or any other means). This continuing information exchange might involve discussion of contract terms, making offers and counteroffers, and the execution of contracts that take place in the state seeking jurisdiction over the defendant (for instance, goods will be delivered there, information services supplied there, and so on). In this scenario, the defendant's continuing business activities in the state are enough to establish long-arm jurisdiction.

This first scenario is reflected in *CompuServe, Inc. vs. Patterson*. Besides being an excellent example of a Zippo Scenario 1 case, *Compuserve* is also an influential case because it sets standards for the 6th Federal Circuit (Michigan, Ohio, Kentucky, and Tennessee) and has been cited approvingly by a number of other courts. This means that it will likely influence many future judicial decisions.

In *CompuServe*, Patterson (a resident of Texas) subscribed to CompuServe's computer information network service, located in Columbus, Ohio. Patterson subsequently advertised his software service over the Internet, and entered into a separate agreement with Compuserve to distribute his software as shareware. Patterson's Web site was seen in Ohio, and Patterson sold a number of copies of his software to purchasers in Ohio. Also, when Patterson signed up for the shareware distribution service, he also entered into a series of electronic contractual exchanges that "placed" him in Ohio.

This case arose when CompuServe allegedly began to sell its own software with names and markings very similar to Patterson's software. Patterson demanded (by email) that CompuServe pay him a minimum of $100,000 for trademark infringement. In anticipation of a lawsuit, CompuServe asked an Ohio court to immediately resolve the trademark and unfair trade practice allegations made by Patterson. Patterson then objected to the Ohio jurisdiction, arguing that he did not have minimum contacts with Ohio.

The court concluded that Ohio courts had jurisdiction over Patterson because Patterson had sufficient contact with Ohio to make its assertion of jurisdiction reasonable. As described in the *Zippo* ruling, Patterson established this contact through his intentional and repeated business activities "in" the state (for example, the contract activity, the transfer of software to the CompuServe mainframe in Ohio, and shareware sales that went through CompuServe in Ohio).

The *CompuServe* decision clearly demonstrates that when a business such as Patterson's enters into an agreement to use a service provider in another state, it opens the door to being taken to court in that state. Had Patterson chosen a service provider in his home state of Texas, many of the activities that landed in Ohio's jurisdiction such as the contract activity and sending software to Ohio would not have happened. This issue of the location of the service provider is an additional

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key to the determination of jurisdiction.

Zippo Test: Scenario 2. The second scenario, really a middle ground, covers those cases in which a plaintiff's primary contact with a defendant is through the defendant's Web site. In this scenario, the site must be interactive in nature (questionnaires or information exchanges, to name two examples), there must be a certain quantity of interaction, and the interaction may be examined to see if it is of a commercial nature. In other words, the courts examine the "level of interactivity and commercial nature of the exchange of information" (see the *Zippo* case) on the Web site before it can be determined whether the defendant can be reached through long-arm jurisdiction. In this gray area of the law, cases are highly fact-specific and subject to judicial interpretation [2, 4].

In *Maritz vs. Cybergold, Inc.*, Maritz, the Missouri-based plaintiff, operated a Web site using the service mark "Gold Mail" (in essence, Maritz operated a Web site known as "Gold Mail"). Gold Mail offered email advertising, including free email addresses, to users who filled out demographic surveys and advertising questionnaires. Soon thereafter, Cybergold (both the company and Web site name) started to offer the same services. This precipitated Maritz' suit for trademark infringement and unfair competition.

Although Cybergold was based in a computer in Berkeley, Calif., its Web site was accessible by people in Missouri (and everywhere else in the world as well). The court ruled that Cybergold should have anticipated being under the jurisdiction of the Missouri court, since it knew its Web site was accessible to Missouri users and since it had availed itself of the privilege of doing business in Missouri. The court further found that Cybergold's advertising was an active solicitation to (among others) Missouri users, which was buttressed by the fact that 131 Missouri users had accessed the Cybergold site.

It should be reemphasized that cases falling into Scenario 2, are fact-specific, and therefore possibly subject to a great deal of interpretation and variations among the courts [4]. At least one commentator, for example, has called the *Maritz* decision, "alarming" presumably for its breadth, arguing that it "strayed" from the Due Process analysis developed in the *CompuServe* case [8]. As one can see from reading *Maritz*, the amount of business activity leading to long-arm jurisdiction is far less obvious in Scenario 2 cases than in Scenario 1 cases. In *Maritz*, the key to establishing long-arm jurisdiction was a combination of Cybergold's availability to Missourians coupled with the fact that Cybergold had service transactions with Missourians.

Zippo Test: Scenario 3. This covers those cases in which a defendant's Web site is truly passive in that it simply posts information. At this end of the continuum, long-arm jurisdiction is very difficult to assert.

In the case of *Bensusan Restaurant Corp. vs. King,* a Missouri citizen who maintained a passive Web site (which of course could be accessed worldwide) was sued in a New York court for trademark infringement by the owner of a club in New York. The defendant challenged the plaintiff's choice of New York as the forum, arguing he had no minimum contacts with that state.

Bensusan (the defendant) owned a small club in Columbia, Missouri called the "Blue Note." His Web site was meant to promote his club, but contained a logo substantially similar to the plaintiff's who also owned the more famous "Blue Note" club as well as its federally registered mark: "The Blue Note."

Bensusan's contacts with New York were tenuous. For example, if a New Yorker accessed the Missouri Web site, and then wanted to see a show there, he or she would have to telephone the box office in Missouri (via regular long distance) and reserve tickets. Then he or she would have to drop by the club to pick up the tickets since the defendant does not mail them out. Unlike defendant Cybergold in *Maritz*, Bensusan had not sought to provide services through his site, nor had he created any mechanism for user transactions. Accordingly, the court ruled that while King (of the New York "Blue Note") could sue Bensusan for trade mark infringement in Missouri, he had no basis of action in a New York court [2].

Despite the ruling in *Bensusan*, courts continue to scrutinize passive business Web sites. In *Inset Systems, Inc. vs. Instruction Set, Inc.*, a case with many facts quite similar to Bensusan, a Connecticut court asserted long-arm jurisdiction over a Massachusetts defendant, who maintained a passive Web site. The court exerted its jurisdiction primarily because of one small difference with *Bensusan*; in *Inset*, the defendant listed a toll-free phone number. The presence of the toll-free number, combined with the fact that Connecticut is so close to Massachusetts, led the court to assert that its jurisdiction was reasonable and not unnecessarily burdensome on the Massachusetts defendant [4, 6].

Reducing Legal Risk

The possibility of exposure to litigation in a variety of unattractive venues is a problem that every business must face. However, with the enormous popularity of Internet business activity, the special risks of operating in this medium need to be well understood and considered carefully by those planning a business Web site [1, 5]. Although it is impossible to avoid all risk of long-arm exposure, there are some practical considerations that may help an organization plan its Internet presence:

- Limit the amount of interaction. As the *Bensusan* case points out, the inability of New Yorkers to have tickets sent to them from the defendant in Missouri greatly aided the defendant's case. Having no form of interaction with users shows that the organization operating the Web site is not "purposely availing" itself of the benefits of doing business in the users' state (unless, of course, a user is in the business's home state). Offering such things as sign-on for services, posting messages and ordering products through the Web site or by a toll-free number, may increase exposure to long-arm jurisdiction. Thus, if the purpose of developing a Web site is simply to inform potential customers about products, services, and suppliers, make sure all such information is part of the Web site and requires no interaction with a user other than allowing them to log on [2].
- Choose an ISP carefully. As the facts in *Compuserve* make clear, an organization that subscribes to an out-of-state ISP almost certainly exposes itself to that state's jurisdiction. While there may be sound business reasons to go with a particular ISP, part of the determination in the choice of an ISP should be a consideration as to how it can expose the organization to unfavorable jurisdictions.
- Limit access to certain locales. Since doing business in a state creates risk of being sued there, a Web site operator might wish to prevent access from certain places. Users might be required to give their state or zip code in order to gain access, with some states or zip codes precluded from entering. Asserting that the site is directed toward certain users in certain places may also help; conversely, explicitly stating that the site is not intended for users in a certain state may also prevent that state's jurisdiction (for example, this Web site not intended for viewing by those in _____). One of the important details in the *Bensusan* case was that the Web site stated it was intended to provide information only for those in the Columbia, Missouri area.
- Choice of forum and law clauses. Currently, much business conducted between differ-

ent states and nations routinely includes agreement to "choice of forum" or "choice of law clauses." A choice of forum clause specifies beforehand what state or country would be the forum for a lawsuit, should one arise. Generally these clauses are enforceable if reasonable.

A choice of law clause provides which state or nation's law would be applied to a lawsuit. Generally it is the law of the state or country chosen as the forum. This clause further serves to reaffirm a party's tie to a particular state. Choice of law clauses are generally enforceable too unless there is no reasonable basis for its application, or if the choice of law violates public policy. Thus, if an Oregon-based business operates a Web site, and most of its customers from the U.S. selected Oregon as the forum and Oregon law as the choice of law, both would be reasonable. It could not, however, select Argentina as its forum (no connection, too burdensome) and the law of Iraq as its choice of law (no reasonable basis and connection, likely public policy conflicts).

Although no set of guidelines can completely eliminate the risk of exposure to long-arm jurisdiction, these should provide some direction to organizations currently operating or considering Web operations. Understanding the risks and how some of them can be avoided will allow information system professionals to help their clientele minimize unnecessary exposure to jurisdiction in an unfavorable court. Finally, any time information system professionals find themselves working on projects with legal ramifications, they should consult with a knowledgeable attorney to avoid any potential problem with the law. C

References

1. Bourque, R.A. and Konrad, K.L. Avoiding remote jurisdiction based on Internet Web site. *New York Law Rev.* Dec. 10, 1996.
2. Chamberlain, C.W. Recent case holds: E-Mail is minimum contact. *National Law J. 20* (Oct. 20, 1997), p. C8.
3. Flower, S.M. When does Internet activity establish the minimum contact necessary to confer personal jurisdiction? *Miss. Law Rev. 62* (1997), 845–868.
4. Kidd, D.L. Casting the net: Another confusing analysis of personal jurisdiction and Internet contacts in Telco Communications v. An Apple a Day. *U. Richmond Law Rev. 32*, (1998), 505–543.
5. Leibowitz, W.R. In personam via Web site? *National Law J. 20* (Oct. 20, 1997), A6.
6. Meyer, C.W. *World-wide web advertising: Personal jurisdiction around the whole wide world. Washington and Lee Law Rev. 54* (1997), 1269–1336.
7. Sheehan, K.C. Predicting the Future: Personal jurisdiction for the twenty-first century. *U. Cincinnati Law Rev. 66* (1998), 385–440.
8. Stott, D.L. Personal jurisdiction in cyberspace: The constitutional boundary of minimum contacts limited to a web site. *John Marshall J. Comput. Info. Law 15*, 4 (1997), 819–854.
9. Stravitz, H.B. Personal jurisdiction in cyberspace: Something more is required on the electronic stream of commerce. *S. Carolina Law Rev. 49*, (1998), 925–941
10. Zembeck, R.S. Jurisdiction and the Internet: Fundamental fairness in the networked world of cyberspace. *Albany Law J. Sci and Tech. 6*, (1996), 339–380.

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