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Application of Personal Jurisdiction Principles to Electronic Commerce: A User's Guide

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APPLICATION OF PERSONAL JURISDICTION PRINCIPLES TO ELECTRONIC COMMERCE: A USER'S GUIDE

Joseph Schmitt and Peter Nikolai[†]

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I. INTRODUCTION

During the past ten years, the Internet has revolutionized the way many American companies and consumers do business.¹ The advent of this new technological device has been termed the "next industrial revolution" by pundits and business analysts alike.² As the Internet has changed the way companies do business in the United States, it has also altered the way parties litigate disputes in the American court system. This change is most evident in the area

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1. Patricia Brown, *Numbers Tell the Internet Story*, at <http://www.tele.com> (Sept. 18, 2000).

2. *Are Internet Incubators a Cheap Way?*, INVESTORS CHRONICLE, July 28, 2000, at 48.

of personal jurisdiction, an area in which United States courts have struggled to apply traditional concepts and principles to disputes arising out of "virtual" transactions.

The greatest advantage of the Internet in the business context, the ability to do business quickly and easily from a great distance with a plethora of customers and vendors,³ also poses substantial difficulties for courts analyzing issues of personal jurisdiction.⁴ Courts now struggle with the question of whether a forum may assert specific jurisdiction over a non-resident defendant solely on the basis of that non-resident defendant's Internet contacts with the forum.⁵ Courts and scholars have offered several answers to this question. Some courts attempt to apply traditional principles of personal jurisdiction,⁶ while others advocate an entirely new set of standards created for electronic commerce.⁷

Part I of this article briefly reviews the development and exploration of modern standards for personal jurisdiction. The courts and legislatures have already revised their analysis of personal jurisdiction in light of substantial social changes, such as the development of nationwide marketing and widespread use of the telephone. The lessons learned from these prior social changes are instructive in evaluating the response to future challenges, such as that posed by electronic commerce and the Internet.

Part II of this article examines judicial responses to the personal jurisdiction challenges created by the Internet. The lower federal and state courts have responded to the impact of technological changes upon issues of personal jurisdiction in several different ways.

Part III of this article analyzes the impact of the new personal jurisdiction standards upon the users of the Internet. Part III also

3. Loh Chyi Jen, *Menagerie of Financial Solutions*, NEW STRAITS TIMES, Oct. 4, 2000, at 38.

4. Michael H. Sorgan & Christopher A. Amanto, *E-Poison: New York's Experience Battling Illegal Pesticide Sales on the Internet*, NAT'L ENVTL. ENFORCEMENT J., Aug. 2000, at 3.

5. *GTE New Media Servs., Inc. v. The Bell S. Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000); *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999); *Mink v. AAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

6. *GTE New Media Servs.*, 199 F.3d at 1350.

7. E.g., David R. Johnson & David Post, *Law and Orders: The Rise of Law in Cyber Space*, 48 STAN. L. REV., 1367, 1370 (1996); Henry H. Perritt, *Jurisdiction in Cyber Space*, 41 VILL. L. REV. 1, 100 (1996).

provides specific suggestions for those doing business over the Internet so as to protect against accidentally creating contacts with a foreign jurisdiction, and offers suggestions for those who wish to protect their right to litigate in their “home” jurisdiction, even against those who reside in other jurisdictions.

II. PERSONAL JURISDICTION ON THE INTERNET

A. *The Supreme Court’s Personal Jurisdiction Jurisprudence*

The United States Supreme Court first articulated the scope of judicial power over a person in *Pennoyer v. Neff*.⁸ The Supreme Court held in *Pennoyer* that the essential requirement for *in personam* jurisdiction was the defendant’s physical presence in the forum state.⁹ As a result, courts within a particular jurisdiction could compel a person domiciled within the borders of that jurisdiction to abide by contracts executed in that state.¹⁰ Likewise, a state through its tribunals could subject property owned by non-residents situated within its borders to the payment on demand by its own citizens against them.¹¹ The Supreme Court, however, did not extend personal jurisdiction beyond defendants physically present or owning property in a particular state.¹² Because lawsuits generally arose out of transactions between people physically present in the same state, and/or states in which both parties owned property, the *Pennoyer* doctrine appropriately balanced the plaintiff’s desire to protect his or her rights with the defendant’s need to avoid litigation in unpredictable locations.

1. *Development Of The “Minimum Contacts” Analysis*

The Supreme Court soon recognized the need to update the personal jurisdiction framework set forth in *Pennoyer* to adapt to societal change. As American society became more complex, businesses routinely sold products in states far from their headquarters and places of production. Companies were able to transact business throughout the United States without owning property or being physically present in many of those states. In short, the societal

8. 95 U.S. 714 (1877).

9. *Id.* at 714.

10. *Id.* at 723.

11. *Id.* at 724-25.

12. *Id.* at 723.

facts upon which the Supreme Court's view of personal jurisdiction in *Pennoyer* was based had radically changed.

The Supreme Court adapted its view of personal jurisdiction to reflect these societal changes in *International Shoe Co. v. Washington* and its progeny. The Supreme Court recognized in *International Shoe* that rapid changes in communications technology allowed persons to do business with one another without being physically present within the forum state.¹³ To accommodate these new ways of conducting business, the Supreme Court articulated a two pronged analysis to determine whether the forum state could exercise jurisdiction over a foreign defendant.

Initially, the Supreme Court examined the forum state's long arm statute to decide whether that statute permitted the defendant to be haled into the courts of the forum state.¹⁴ If the long arm statute was not sufficiently broad as to encompass the defendant's actions, the analysis was over, and the courts in the forum state did not have personal jurisdiction over the defendant.

If the forum state's long arm statute was sufficiently broad so as to encompass the defendant's actions, the Supreme Court held that a second inquiry was necessary, to determine whether the defendant possessed sufficient "minimum contacts" with the forum state to allow the courts of the forum state to assert personal jurisdiction without offending Constitutional notions of due process. The Supreme Court held that Constitutional due process only required a defendant maintain minimum contacts with the forum state such that the suit did not offend "traditional notions of fair play and substantial justice."¹⁵

The Supreme Court specifically distinguished between the type of contacts with a forum state necessary to assert personal jurisdiction over a defendant for different purposes. Initially, the forum state may assert "general jurisdiction" over the defendant if the defendant had "continuous and systematic" contacts with the forum state.¹⁶ If the defendant had such continuous and systematic contacts with the forum state, the courts of the forum state could assert personal jurisdiction over the defendant, even for suits that arose out of events unrelated to the contacts in question.¹⁷

13. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

14. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 313-314 (1945).

15. *Id.* at 316.

16. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-46 (1952).

17. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414

Alternately, the Supreme Court held that the forum state may assert “specific jurisdiction” over the defendant for a particular suit if the contacts in question were specifically related to the transaction or dispute giving rise to the lawsuit. To assert specific jurisdiction, however, the controversy must arise “out of or [be] related to the defendant’s contacts with the forum.”

Regardless of whether the jurisdiction is specific or general, the Supreme Court has held that personal jurisdiction is appropriate only when “the defendant’s conduct and connection with the forum state [are] such that he [or she] should reasonably anticipate being called into court there.” The defendant must therefore “purposefully avail” itself of the “privilege of conducting activities within the forum state” to justify exercise of personal jurisdiction within that state.¹⁸ In other words, the contacts connecting the defendant to the forum state must be the foreseeable consequences of the defendant’s actions, and not merely actions of the plaintiff or some third party.¹⁹

The Supreme Court later clarified the minimum contacts test in *World-Wide Volkswagen Corp. v. Woodson*,²⁰ holding that a defendant’s placement of an item into the “stream of commerce” was insufficient to support a claim of specific or general jurisdiction.²¹ The plaintiff in *World-Wide Volkswagen* purchased an automobile in New York and was involved in an accident in Oklahoma while in route to Arizona.²² The Supreme Court reasoned that the company’s ability to foresee that the product had entered “the stream of commerce” was by itself an insufficient benchmark for personal jurisdiction because the defendant could not have reasonably anticipated being haled into court in that forum state.²³

The Supreme Court noted in *World-wide Volkswagen* that the minimum contacts analysis served two functions. First, the minimum contacts analysis protected the defendant from the burden of litigating in an inconvenient forum. Minimum contacts with the forum state are necessary to ensure that the defendant receives due

(1984).

18. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

19. *Id.*

20. 444 U.S. 286 (1980).

21. *Id.*; see also *Asahi Metal Indus. v. Super. Ct.*, 480 U.S. 102, 112 (1987) (finding that placement of a product into the stream of commerce alone is not sufficient to establish that the defendant purposefully targeted the forum state).

22. *World-Wide Volkswagen*, 444 U.S. at 287.

23. *Id.* at 297.

process of law as required by the United States Constitution. Second, the Supreme Court held that the minimum contacts analysis ensured that state courts and legislatures do not overstep the bounds imposed by a federal system.²⁴ In doing so, the Supreme Court reaffirmed the importance of interstate boundaries and their importance in interstate federalism.²⁵ The Court held that the forum state's assertion of personal jurisdiction over the resident of a second state must comport with Constitutional requirements of federalism.²⁶

The Supreme Court later added a new level of analysis to the personal jurisdiction issue in *Burger King Corp. v. Rudzewicz*.²⁷ The Supreme Court held in *Burger King* that mere application of talismanic jurisdictional formulas is inappropriate in the personal jurisdiction context because such formulas fail to weigh the facts of the case.²⁸ Instead, the Court held that once minimum contacts have been established within the forum, those contacts must be weighed against other factors to determine whether the assertion of jurisdiction comports with traditional notions of fair play and substantial justice.²⁹ The Court observed that the Due Process Clause of the United States Constitution provides flexibility so that a defendant cannot unfairly shield itself from judgments, but a plaintiff cannot unfairly obtain a default judgment against unwitting defendants.³⁰

The history of the Supreme Court's personal jurisdiction jurisprudence reflects a respect for technological advances in transportation and communication and the impact of those changes upon society and the American legal system. However, the courts are

24. *Id.* at 292.

25. *Id.* at 293.

26. *Id.* at 293-94. The Court stated:

Hence, even while abandoning the shibboleth that '[the] authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established,' we emphasized that the reasonableness of asserting jurisdiction over the defendant must be assessed 'in the context of our federal system of government,' and stressed that the Due Process Clause ensures not only fairness, but also the 'orderly administration of the laws.'

Id. (citations omitted).

27. 471 U.S. 462 (1985).

28. *Id.* at 486.

29. *Id.* at 476.

30. *Id.* at 473-74, 486 (finding that where individuals derive benefit from interstate activities it would be unfair to allow them to use that interstate activity as a shield to having to account for the consequences of their actions).

now experiencing a great deal of difficulty in adapting these standards to the new situation of personal jurisdiction in the age of electronic commerce the Internet.

B. Recent Decisions Regarding Personal Jurisdiction On the Internet

1. Differing Views Of The Internet

Any analysis of personal jurisdiction and the Internet must start by conceptualizing the nature of the Internet itself. Courts and commentators view the use of the Internet through three basic paradigms.³¹ The first of these paradigms is the “virtual presence” framework, under which every user of the Internet is simultaneously physically connected with every other user of the Internet.³² Under this view, it is the person posting the information who travels, instantly, to the home location of all users of the Internet. Of course, even under the virtual presence framework, a web page or Internet communication is not necessarily enough to establish the minimum contacts for personal jurisdiction; but, depending upon the nature and quality of those contacts, the virtual presence paradigm may allow exercise of personal jurisdiction based solely upon a web page.³³

The second paradigm, known as the “single presence” framework, conceptualizes the Internet as a series of pathways that a user can employ to obtain information.³⁴ Information is therefore stored (posted) in a single location, and users then travel to that location to access the information.³⁵ Under this paradigm, it is the person who accesses the information who establishes the contacts with a foreign jurisdiction, and not the person who posts the information, unless the person posting the information undertakes other efforts to establish contacts with the foreign jurisdiction.³⁶

The third paradigm is known as the “cyberspace” framework.³⁷ The term “cyberspace” was first coined by cyberpunk author William Gibson in his novel *Neuromancer* to refer to the non-existent

31. Lief Swedlow, *Three Paradigms of Presence: A Solution for Personal Jurisdiction on the Internet*, 22 OKLA. CITY U. L. REV. 337 (1997).

32. *Id.* at 340.

33. *E.g.*, *Maritz, Inc. v. The Cyber Bold, Inc.*, 947 F. Supp. 1328, 1332 (E.D. Mo. 1996).

34. Swedlow, *supra* note 31, at 340.

35. *Id.*

36. *GTE New Media Servs.*, 199 F.3d at 1348.

37. Swedlow, *supra* note 31, at 340.

space where computer communication takes place.³⁸ The cyberspace paradigm conceptualizes the Internet as such a non-existent space, unconnected to the physical world.³⁹ Actions within cyberspace therefore do not occur in any physical forum, and are not a “contact” with any forum for purposes of personal jurisdiction analysis.

2. *Legal Analysis Of Internet Contacts*

Courts analyzing an electronic commerce issue in a personal jurisdiction context have employed several different models.⁴⁰ Each of these models is based (implicitly or explicitly) upon the court’s view of how the Internet is structured.

a. *Web Site Interactivity/Zippo Model*

The most popular framework for analyzing personal jurisdiction based upon electronic contacts is a sliding-scale analysis of web site interactivity. The website interactivity framework was first articulated in 1997 by the United States District Court for the Eastern District of Pennsylvania in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,⁴¹ and has been frequently cited by various other courts since that time.⁴²

The *Zippo* case arose when Zippo Manufacturing Company, a Pennsylvania corporation making the well-known “Zippo” tobacco lighters, commenced a lawsuit against a California corporation who operated a website and Internet news service. Zippo Manufacturing sued Zippo Dot Com alleging trademark dilution, infringement, and false designation under the Federal Trademark Act,⁴³ as a result of Zippo Dot Com’s use of the domain names “Zippo.com,” “Zippo.net,” and “ZippoNews.com.”⁴⁴ Zippo Dot Com moved to

38. WILLIAM GIBSON, *NEUROMANCER* 51 (Ace Books 1984).

39. Swedlow, *supra* note 31, at 340.

40. As of yet no court has found general jurisdiction based on Internet contacts with the forum state.

41. 952 F. Supp. 1119 (W.D. Pa 1997).

42. *E.g.*, *Soma Med. Int’l v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999); *Mink v. AAAA Dev. LLC*, 190 F. 3d 333, 336 (5th Cir. 1999); *Cyber Sell, Inc. v. Cyber Sell, Inc.* 130 F. 3d 1414, 1419 (9th Cir. 1997); *Roche v. The Worldwide Media, Inc.*, No.Civ.A. 99-1534-A, 2000 WL 340098, at *3 (E.D. Va. March 27, 2000).

43. 15 U.S.C. §§ 1051-1127 (2000).

44. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1121 (W.D. Pa 1997).

dismiss for lack of personal jurisdiction and improper venue pursuant to Rule 12(b)(2) and Rule 12(b)(3).

The Court noted that Zippo Dot Com's websites contained three levels of membership to receive information, advertisements, and Internet news services—public/free, "Original" and "Super."⁴⁵ A customer who subscribed to either the "Original" or "Super" level of service filled out an online application that included the customer's name and address.⁴⁶ Customers then made payments to Zippo Dot Com by credit card, either over the Internet or by telephone.⁴⁷ Customers received passwords from Zippo Dot Com that permitted the customer to view Internet newsgroups messages stored in Zippo Dot Com's California server.⁴⁸ Customers were also allowed to download those messages to their own computers.

The United States District Court for the Eastern District of Pennsylvania found that Zippo Dot Com had sufficient contacts with Pennsylvania to allow the suit to proceed. The Court concluded that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity conducted over the Internet.⁴⁹ The court explained the sliding-scale website interactivity test as follows:

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. 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 of personal jurisdiction. 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 the information

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 1124.

that occurs on the web site.⁵⁰

The sliding-scale website interactivity test therefore divides cases into three groups. The first category of websites are active websites at which the defendant conducts business with clients: "If a 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."⁵¹ The second category of websites are passive websites that merely post information.⁵² Finally, the third group of web sites lie between these two extremes, and are web sites in which users "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 website."⁵³

The *Zippo* test is based upon the virtual presence view of the Internet, and seeks to balance a defendant's desire for certainty and predictability with society's need to prevent the Internet from becoming a shield to personal jurisdiction.⁵⁴ Since the United States District Court first articulated this test in 1997, a number of courts in other jurisdictions have adopted the sliding-scale interactivity test to resolve personal jurisdiction questions arising out of electronic commerce and the Internet.⁵⁵

b. The Purposeful Availment Test

The District of Columbia Circuit Court of Appeals has rejected the sliding-scale interactivity test in favor of a purposeful availment test. In *GTE New Media Services, Inc. v. Bell South Corp.*, the District of Columbia Court of Appeals held that contacts over the Internet should be governed by traditional notions of personal jurisdiction analysis.⁵⁶ *GTE New Media Services* arose out of a dispute between GTE and the so-called "Baby Bells" over the Internet yellow pages market. GTE claimed that Bell South and the other Bells had conspired to form agreements with providers of search engines to mo-

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 1125.

55. *E.g.* *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999); *Mink v. AAAA Dev. LLC*, 190 F. 3d 333, 336 (5th Cir. 1999); *Cyber Sell, Inc. v. Cyber Sell, Inc.*, 130 F.3d 1414, 1419 (9th Cir. 1997).

56. 199 F.3d 1343, 1350 (D.C. Cir. 2000).

nopolize the Internet yellow pages market.⁵⁷ GTE filed suit in the District of Columbia, and several defendants moved to dismiss the complaint for lack of personal jurisdiction.⁵⁸

The United States District Court for the District of Columbia initially denied the Motion to Dismiss, analyzing the defendants' conduct under the sliding scale interactivity test and concluding that the Defendants' web site was sufficiently interactive so as to justify personal jurisdiction in the District of Columbia.⁵⁹ The district court then certified the jurisdictional question to the District of Columbia Circuit Court of Appeals for an interlocutory appeal.

The District of Columbia Circuit Court of Appeals reversed the district court's decision and remanded the case to the district court for jurisdictional discovery.⁶⁰ The court of appeals held that access to a website is analogous to a telephone call by a resident of the district to the defendants' computer.⁶¹ The court of appeals (implicitly) followed the "single presence" framework of personal jurisdiction, concluding that a defendants' computer was located in their jurisdiction, and their electronic commerce did not move outside of that jurisdiction. The court of appeals held this framework would provide better notice to defendants and allow more predictable outcomes than the sliding scale interactivity test.⁶²

The United States District Court for the Southern District of New York followed similar reasoning in focusing upon traditional jurisdictional notions of purposeful availment in *Bensusan Restaurant Corp. v. King*.⁶³ *Bensusan* arose out of a dispute between two music clubs, one of which was located in New York, and one of which was located in Missouri, over the ownership of the name "The Blue Note." The Missouri club advertised its concert dates on the Internet and offered a phone number where tickets could be ordered for the advertised club dates. The United States District Court for the Southern District Court of New York held that the mere presence of a website on the Internet was insufficient to satisfy due process.⁶⁴ The court cited *Asahi Metal Industry Co* and

57. *GTE New Media Servs., Inc. v. Bell S. Corp.*, 21 F. Supp. 2d 27, 32 (D. C. 1998).

58. *Id.*

59. *Id.*

60. *GTE New Media Servs.*, 199 F.3d at 1346.

61. *Id.* at 1349-50.

62. *Id.* at 1350.

63. 937 F. Supp. 293 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2nd Cir. 1997).

64. *Id.* at 301.

analogized that a website, like placing a product into the stream of commerce, is not an act purposefully directed to the forum state.⁶⁵ The court found that the purpose and intended audience of the website in *Bensusan* was directed almost exclusively at residents of Missouri and concluded that access to the website alone was insufficient to support the claim that the defendant's acts were purposefully directed toward the forum state.⁶⁶

Courts have also analyzed cases under a "purposeful availment" framework when the parties are contractually bound to one another based upon their Internet contacts. In *CompuServe International v. S. Patterson*,⁶⁷ the Sixth Circuit Court of Appeals found that a Texas resident had purposefully availed himself of the privilege of acting in Ohio when he purposefully contracted with the Ohio-based CompuServe.⁶⁸ CompuServe had sued Patterson to receive a declaratory judgment that it had not infringed on Patterson's common-law trademarks or engaged in unfair practices. Patterson had placed software he had designed as "shareware" on the CompuServe system for others to use and purchase.⁶⁹ In doing so, he entered into a "Shareware Registration Agreement" with CompuServe, which provided for application of Ohio law.⁷⁰ Additionally, he had made repeated communications with CompuServe's system in Ohio.⁷¹ The Sixth Circuit Court of Appeals focused upon the fact that "Patterson chose to transmit his software from Texas to CompuServe's system in Ohio, that a myriad of others gained access to Patterson's software via that system, and that Patterson advertised and sold his product through that system"⁷² in finding personal jurisdiction. The court of appeals held that the minimum contacts requirement was satisfied because CompuServe acted as Patterson's distributor.⁷³

III. IMPLICATIONS FOR INTERNET USERS

The experimentation that has been undertaken by courts and state legislatures in the area of personal jurisdiction to respond to

65. *Id.*

66. *Id.*

67. 89 F.3d 1257 (6th Cir. 1996).

68. *Id.* at 1264.

69. *Id.* at 1260.

70. *Id.* at 1264.

71. *Id.*

72. *Id.*

73. *Id.* at 1265.

challenges posed by the Internet may be a textbook example of federalist experimentation in action, but also poses challenges for businesses operating on the Internet. Given the current state of the law, businesses may face conflicting standards for personal jurisdiction in different states and circuits. Adapting to these different standards on a case by case basis may be difficult, if not impossible.

However, businesses may take several steps to adapt to these new rules regarding personal jurisdiction in electronic commerce. These steps break into several groups. First, businesses doing business through websites should take steps to limit the jurisdictions within which they may be sued. In order to address the question of personal jurisdiction over the Internet, various courts have identified a number of precautions that may reduce or eliminate the “minimum contacts” necessary to establish personal jurisdiction in a foreign state. Second, on the other side of the equation, a plaintiff doing business over the Internet who wants to establish local jurisdiction over its customers or vendors, may take a number of steps to protect its ability to sue those customers and vendors in the plaintiff’s “home” forum.

A. *Avoiding Unintended Personal Jurisdiction*

Companies doing business over the Internet should consider taking several possible precautions to reduce the likelihood of establishing the minimum necessary contacts with a foreign state. Some of these precautions may be too burdensome, and businesses may choose not to take others due to compelling commercial interests. However, businesses should make a conscious decision regarding each of the following prophylactic measures:

First, businesses maintaining a web page should reduce or eliminate the use of auto responders on that web page.⁷⁴ Because an auto responder automatically sends information to anyone requesting it through the web page, a business employing such devices may inadvertently find that it has systematically communicated with residents of a foreign state, and therefore established the necessary contacts with that state so as to establish personal jurisdiction.⁷⁵

74. Kevin R. Lyn, *Personal Jurisdiction and the Internet: Is a Home Page Enough to Satisfy Minimum Contacts?*, 22 CAMPBELL L. REV. 341, 363 (2000).

75. *Id.*

Second, to the extent that the business uses auto responders, the business should modify those auto responders so as to explicitly state that the company does not do business in specific states.⁷⁶ Of course, the first step in the process is to consciously decide whether the business wishes to risk being sued in particular states. Once the company has identified states that it wishes to avoid (if any), it should identify those states in its auto responder and note that it does not do business in those states.

Third, the business should note that it does not do business with those states on its web page. The company should be certain that this message is prominently featured, so any users of the web page have actual notice of the states within which the company does not operate or do business.

Fourth, the business should carefully review any messages from vendors or customers received through the web site. Businesses should monitor the physical location of their customers and vendors, including the physical location of customers and vendors contacting the business over the Internet or through a web page. Businesses should analyze whether they wish to expose themselves to suits in particular jurisdictions before doing business with customers or vendors in those jurisdictions. Many businesses already have such safeguards in place for mail or telephone transactions, but few have followed the same precautions in the sphere of electronic commerce. Given the current state of Internet personal jurisdiction law, businesses should apply those safeguards to electronic transactions as well as mail and telephone transactions.

Finally, in addition to these precautions, businesses should carefully watch their non-electronic contacts with entities from foreign jurisdictions. Most cases involving personal jurisdiction and the Internet turn upon whether the defendant had contacts with the plaintiff's forum outside of "cyberspace."⁷⁷ Even businesses that take all of the precautions identified above will be subject to personal jurisdiction in foreign states if they establish contacts with those states through correspondence, telephone calls and physical trips.⁷⁸

76. *Id.*

77. *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998); *Blumenthal v. Drudge*, 992 F. Supp. 44, 55 (D. D.C. 1998).

78. *Blumenthal*, 992 F. Supp. at 48.

B. *Protecting The Right To Sue In Your "Home" State*

Of course, the precautions listed above are only half of the story. The battle for personal jurisdiction may be fought in both directions. Individuals or corporations doing business over the Internet should also consider taking several steps to protect their ability to sue their customers or their vendors in their "home" state. These possible steps include the following:

First, these individuals and businesses should identify their physical location in any messages sent out, whether by auto responder or through conventional messages, to vendors and customers. In this manner, the individuals and businesses can build an argument that any individuals receiving such messages knew that they were dealing with a resident of the home state of the individual or business. Courts are far more likely to find that a defendant has established sufficient minimum contacts with a state if the defendant knew it was interacting with a resident of that state.⁷⁹

Second, and similarly, the individual and business should identify their physical location on their website. Because many Internet disputes, including trademark and copyright disputes, revolve around material taken from websites, including the physical location on the website should allow the architect of that site to argue that any individuals who took information from the web page knew that they were harming a resident of the architect's home state.

Third, because many electronic disputes arise between Internet companies and the company providing their on line service, Internet companies may wish to take specific precautions to ensure that such disputes are venued in their local courts. Such precautions can include negotiating a venue clause in the service contract and ensuring that physical meetings and other contacts occur in the company's home state.⁸⁰ Some companies have even switched to local on line service providers to better control their litigation prospects.

IV. CONCLUSION

Concepts of personal jurisdiction will undoubtedly continue to evolve and change in the foreseeable future as courts and legislatures come to grips with the impact of electronic commerce and

79. *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1266-67 (6th Cir. 1996).

80. *Lyn*, *supra* note 74, at 363.

the Internet. The beginnings of this evolution is already apparent in the sliding scale web site interactivity test and other efforts to address personal jurisdiction based upon contacts made over the Internet. Although these issues will present challenges to businesses and individuals using the Internet and electronic commerce, there are a number of precautions that will protect such users' ability to chose the forum within which they wish to litigate their dispute.