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Jurisdiction and the Internet

Steven Betensky

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Jurisdiction and the Internet*

Steven Betensky**

First, I am going to start with a disclaimer, as many web pages on the Internet do. I am supposed to talk about jurisdiction on the Internet. When I agreed to speak, it did not really dawn on me that to deal with this subject as a whole is a little bit troublesome, because personal jurisdiction is a creature of state law.[1] The first place to look is at the long-arm statute of the particular state and the cases interpreting that statute.[2] Internet jurisdiction in that context would take us about five hours. So what I am going to do is blur the differences between states and try to talk about Internet jurisdiction generally. This approach is more suitable to address the underlying theoretical concerns. My disclaimer is, "kids, don't try this at home be-

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** Steven Betensky, Esq. is a partner in White & Case, LLP. He is a graduate of the University of Chicago School of Law and Oberlin College. He specializes in international intellectual property and technology licensing, as well as domestic and international commercial and intellectual property litigation.

1. *See* Schwartz v. Electronic Data Systems, Inc., 913 F.2d 279, 294 n.9 (6th Cir. 1990); Ocee Industries, Inc. v. Coleman, 487 F. Supp. 548, 549 (N.D. Ill. 1980).

2. *See* No Mayo-San Francisco v. Memminger, No. C-98-1392 PJH, 1998 WL 544974, at *2 (N.D. Cal. Aug. 20, 1998).

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cause it probably won't be a very effective way to convince a judge or a Court of Appeals about your case. You should approach it on a case by case basis."

With that disclaimer, I will start with a historical perspective on Internet jurisdiction. Usually, in most areas of law, when someone gives a historical perspective he or she has far more gray hair than I do and has been practicing law for forty years. Luckily, I can say that Internet law really did not exist when I got out of law school and probably did not begin as a form of law until 1994, perhaps 1993.[3] Back in those days, lawyers were discussing theoretical questions, among them, jurisdiction.

The Internet grew at a speed and to a size that no one expected. Equally surprising and remarkable are the number of cases that have ruled on Internet jurisdiction issues. I will discuss a select group of cases regarding this jurisdictional issue. The question that I want to begin with is why there have been such a large number of Internet jurisdiction cases published within a few short years. I think if you go back to the forties and you ask how many cases there were concerning jurisdiction after *International Shoe Co. v. State of Washington,*[4] you would not find nearly as many as you might expect.

I have possible answers for why there is a tremendous wave of Internet jurisdiction cases. It could be a "get on the band wagon" phenomenon. What I mean by that is suddenly people say, "the Internet is out there. This is a really nifty way of getting jurisdiction over someone that I'd otherwise have to go across the country to sue. So I am just going to use this." It is a great little theory. Judges love to write about it.

I think the other explanation is that the Internet has caused a huge amount of harm in a very short amount of time. This really gets back to Professor Bick's comment about digitization.[5] From one perspective, you can say it is really easy for someone without a whole lot of commercial needs and without a

3. *See generally* MTV Network v. Curry, 867 F. Supp. 202 (S.D.N.Y. 1994) (one of the earliest reported Internet cases concerning trademark infringement and trademark dilution caused by use of the domain name "mtv.com").

4. 326 U.S. 310 (1945).

5. *See* Jonathan D. Bick, *Why Should The Internet Be Any Different,* 19 PACE L. REV. 48 (1998).

whole lot of intent, to put something on the Internet which, in theory, can harm a lot of people. The Internet is such a great disseminator of information that the harm is amplified in ways that you could not have in other traditional forms. Again, I think that this is something that goes right to the question of digitization, and whether the Internet is different.[6]

Let me try to illustrate what is at stake here with a hypothetical which is based on a leading Internet jurisdiction case, *Bensusan Restaurant Corp. v. King*.[7] Maybe it should not be a leading case, but we will talk about that as well. First, let us deal with the facts. It happens to be a Second Circuit ruling under the New York long-arm statute.[8] As with many of the Internet jurisdiction cases, this one began with a trademark dispute.[9] In this case, the trademark was the name, "The Blue Note."[10] The trademark is owned by the Bensusan Corporation which is the proprietor of "The Blue Note," a jazz club in New York City, as well as other jazz clubs throughout the world.[11]

Let us jump to 1980 when Mr. King creates "The Blue Note" jazz club in Columbia, Missouri, which is pretty far afield from Manhattan.[12] For the purposes of our discussion, let us assume that the choice of the name was not a coincidence. I think this is a critical point. There is no doubt in my mind, though I have not read the facts presented in this case and I am not sure what the fact finding was, that this was no coincidence. Mr. King intended all along to evoke, at the very least, images of the other Blue Note clubs. There was clearly an attempt to associate his club with the other clubs. Maybe that association was meant to evoke tradition and was not meant as a trademark infringement. But for purposes of the jurisdictional question, we should assume that there was intent to benefit from the good name and the good will of all the other Blue Note clubs.

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6. *See id.*

7. 937 F. Supp. 295 (S.D.N.Y. 1996).

8. *See id.*

9. *See, e.g.*, Cybersell, Inc. v. Cybersell Inc., 130 F.3d 414 (9th Cir. 1997); CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); Zippo Manufacturing Co. v. Zippo Dot Com Inc., 952 F. Supp. 119 (W.D. Pa. 1997); Maritz Inc. v. Cybergold, 947 F. Supp. 1328 (E.D. Miss. 1996).

10. *See Bensusan*, 937 F. Supp. at 297.

11. *See id.*

12. *See* Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2nd Cir. 1997).

The use of "The Blue Note" perhaps was not to confuse people into thinking they were under the same proprietorship. However, certainly there are a lot of other names in the world that you could name your club that would not have caused that type of confusion.

In 1993, some 13 years later, King's use of "The Blue Note" apparently finally reaches Bensusan. Their lawyer sends a cease and desist letter to King saying, "hey, you've got to change the name of your club. You can't use 'The Blue Note.' We have a registration on it."[13] Nothing remarkable happens. I think perhaps the amount of time that it took to have a cease and desist order go out, from 1980 to 1993, says something about the geographical locations and how widely the name was disseminated. But that is all really conjecture.

The next part of our story takes place in 1996, when King begins to set up a web page on a server in Missouri to be downloaded by users of the World Wide Web.[14] This results in the web page being seen in New York.[15] That is really where the problem comes about. Bensusan sues in New York claiming trademark infringement based on the name and the substantially similar look.[16] That is the fact pattern.

Let me go back to my original question and put this in context. Is it the case that the Bensusan Corporation said, "you know, we have really been wanting to sue these guys in Missouri for a long time, but we haven't wanted to go out and get a lawyer in Missouri. So we have been sitting quietly, but now we have got this great thing called the Internet. Isn't it great? They put their web page all over the U.S. and now we can get jurisdiction over them, so we are going to sue." Or is it really a different scenario where Bensusan sits there saying, "you know I can live with them in Missouri. It took me thirteen years to find out about it. I sent them the cease and desist order. I don't know why I did not follow up on that, but now I can't tolerate this anymore. They have gone national. They are risking confusion throughout the United States and the rest of the world."? It did not take very long between April, 1996, when

13. *See id.*
14. *See Bensusan*, 937 F. Supp. at 297.
15. *See id.*
16. *See id.* at 298.

the web page was published and when this case was decided. It was only a matter of months.[17] That kind of immediacy is something that is special about the Internet. These are tough questions to ask. I cannot say what the motivating factor was.

The cases that are decided on Internet jurisdiction are dealing with these two competing ways of looking at the world. The question to ask is perhaps, "what is fair?" At the end of the day, the due process question comes down to fundamental fairness. Would it really be unfair to make the Bensusan Corporation, which is obviously prepared to file a lawsuit in any event, litigate this case in Missouri? It is possible that it would be. The forum selection might have been important. A Missouri court might have said, "you know we really don't find that there is a lot of infringement. We like our local industries. We like these guys in Columbia. We don't want them to change their name. We don't want them to pay penalties." Bensusan may have thought a Missouri court would be prejudiced. Is it prejudicial for King to have to litigate in New York? Again, it is possible that it was prejudicial to him. He did not want to litigate where everybody knew "The Blue Note" and associated it with the jazz club in Greenwich Village, New York. Lawyers are expensive and so on and so forth.

At the end of the day, those are really the underlying policy questions behind all these cases that are often not addressed by the courts. I think that one place that you have to start, when you are looking at Internet jurisdiction cases, is with those underlying facts. We will return to what the court did in *Bensusan* in a few moments.

Now turn to the basics. How are you and the courts going to deal with personal jurisdiction on the Internet? The place to start is with the same general principles that underlie all other personal jurisdiction cases, the United States Constitution. Personal jurisdiction, as I said before, is a creature of state law.[18] Personal jurisdiction over a non-domiciliary must be determined by first looking to the state's long-arm statute, and second, looking to see whether the exercise of jurisdiction based on that long-arm statute comports with the due process require-

17. *See id.* (case decided September 9, 1996).

18. *See* Schwartz v. Electronic Data Systems, Inc., 913 F.2d 279, 294 n.9 (6th Cir. 1990); Ocee Industries, Inc. v. Coleman, 487 F. Supp. 548, 549 (N.D. Ill. 1980).

ments of the U.S. Constitution.[19] Coincidentally, there are a number of states that say long-arm statutes should be interpreted so that they go as far as the Constitution allows.[20] New York is not one of those states.[21] It is an interesting issue to litigate. New York has a more limited view of what will be permitted under its long-arm statute.[22]

There are two types of jurisdiction over a non-domiciliary, general jurisdiction and specific jurisdiction.[23] General jurisdiction is found when the non-domiciliary is present, for all intents and purposes, in the state.[24] Therefore, it is fair to bring any cause of action against him.[25] Usually it is a corporation or perhaps an individual with a lot of land. Under the factors enumerated by the courts in all the non-Internet cases, in other words cases over four years old, courts have found that it really is fair to subject someone to jurisdiction on any cause of action.[26] There have been some Internet cases dealing with general jurisdiction which are fairly well settled.[27]

The more difficult question for us involves specific jurisdiction, where you are basing your jurisdiction on a contact which is also the subject of the cause of action. In *International Shoe*, the Court said that you must have, "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[28] That is still the standard today, although it has been

19. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

20. *See, e.g.,* Gordy v. Daily News, L.P., 95 F.3d 829, 831 (9th Cir. 1996); Resuscitation Technologies, Inc. v. Continental Health Care Corp., No. IP 96-1457-C-M/S, 1997 WL 148567, at *3 (S.D. Ind. March 24, 1997); Uberti v. Leonardo, 892 P.2d 1354, 1358 (Ariz. 1995); Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961); Conn v. ITT Aetna Finance Co., 252 A.2d 184 (R.I. 1969).

21. *See* N.Y. C.P.L.R. § 302 (McKinney 1998); Hearst Corp. v. Goldberger, No. 96 CIV 3620, 1997 U.S. Dist. LEXIS 2065, at *28 (S.D.N.Y. Feb. 26, 1997).

22. *See* N.Y. C.P.L.R. § 302 (McKinney 1998).

23. *See* CD Solutions, Inc. v. Tooker, 965 F. Supp. 17, 20 (N.D. Tex 1997).

24. *See generally* Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952).

25. *See id.*

26. *See id.*

27. *See generally* Haelan Products Inc. v. Beso Biological, 43 U.S. P.Q.2d 1672 (E.D. La. 1997).

28. International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945).

commented on to a large extent by subsequent cases.[29] What does it mean though? According to *Hanson v. Denckla*,[30] a defendant can establish those minimum contacts by committing some act by which he "purposefully avails [himself] of the privilege of conducting activities within the forum state," thus invoking the benefits and protections of its laws.[31] Courts in such cases look at whether or not the defendant has done something to thrust himself into the state, seeking the protection of another state's law, so that it would be fair to bring him to court.[32] Those cases are fairly easy to resolve when they deal with business activities. Did you start a company? Did you own land? Here, however, you are looking to another state to protect your interests.

On the Internet, it is a little bit more amorphous. As we will see, the necessary contacts go back to the traditional rules espoused by the Court in *Burger King v. Rudzewicz*.[33] There, the Court held that the contact between the non-domiciliary and the state in which jurisdiction is sought must be of a nature such that the individual non-resident defendant "should reasonably anticipate being haled into court there."[34] Of course reasonableness and what you anticipate largely depends on what courts are going to do. That may be a "which came first the chicken or the egg" problem. But it is certainly a relevant question on the Internet. We are not quite sure what anyone expects because there has not been a lot of time for anyone to figure out what constitutes minimum contacts. Minimum contacts vary with the quality and the nature of the defendant's activities. So again, we have to look at the defendant's actions to figure out whether or not it is fair to maintain jurisdiction over him in that state. This is the constitutional question. What we will find out, as we talk about some of the cases, is

29. *See, e.g.*, Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

30. 357 U.S. 235 (1958).

31. *Id.* at 253 (citing *International Shoe*, 326 U.S. at 319).

32. *See, e.g.*, CompuServe Inc. v. Patterson, No. 95-3452, 1996 U.S. App. LEXIS 17837, at *14 (6th Cir.).

33. 471 U.S. 462 (1985).

34. *Id.* at 474.

that in particular jurisdictions you do not get to that level. The actual state long-arm statute stops you before you get there.

So what does this mean for the Internet and how do these cases pan out? I think with the perspective of many years of Internet cases, we can see that there are three categories emerging for the millennium. This really comes out of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,[35] in which the court suggests a tripartite division.[36] There are Internet cases involving contracts entered into through a web site, others that involve interactive web sites, and those with passive web sites.[37] I will talk about each of these in turn and then talk about some of the cases that rule on these issues.

Beginning with contracts entered into through a website, the first question that pops to mind is, "why would the Internet be any different? Why should it make any difference that I create a contract electronically via e-mail with someone I agree to buy goods or services from in the forum state?" Sending e-mail is, in effect, a writing. Essentially, the courts say that if you are doing business in another state, entering into contracts of significant commercial value in that state, and if it is part of your business, you should at this point reasonably expect to be haled into court in that location.[38] The courts are going to treat e-mail and the Internet just as though you had sent a letter or had written a contract.[39]

Frankly, these standards are not particularly high. For example, an insurance company may be found to do business with a customer when it is sending confirmations and bills. If you compare the non-Internet cases where there are people doing business in the state, it is not a very high standard. So really, these cases are not that troublesome. In *Zippo*, the court said that if the defendant enters into a contract with a member of a foreign jurisdiction that involved the knowing and repeated transmission of computer files over the Internet, jurisdiction is proper.[40] This sheds some light on an issue that was not always

35. 952 F. Supp. 1119 (W.D. Pa. 1997).

36. *See id.* at 1124.

37. *See id.*

38. *See id; see also* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1264-66 (6th Cir. 1996).

39. *See Zippo,* 952 F. Supp. at 1124.

40. *See id.* at 1126.

clear: when would there be jurisdiction? Since the contract was created in cyberspace and cyberspace has not yet achieved statehood, we do not know where cyberspace is and where jurisdiction should be. The answer to this dilemma is that it is like any other piece of communication, and jurisdiction would be proper based on the contracts entered into by the parties.

One of the first cases dealing with this issue was *CompuServe, Inc. v. Patterson.*[41] In this case, Patterson, a Texas resident, entered into what was called a share-ware registration grant (SRA) with CompuServe, an Ohio based corporation.[42] CompuServe stored and distributed Patterson's software in exchange for 15% of Patterson's sales.[43] Thus, there was a commercial relationship going on between the two parties.[44] The twist was that this SRA agreement was entered into electronically.[45] Patterson learned that CompuServe was marketing products similar to his own. He started complaining about trademark infringement and deceptive trade practices.[46] CompuServe filed for a declaratory judgment claiming it had not infringed on any common law trademarks or engaged in any deceptive trade practices.[47] Ultimately, the Sixth Circuit held that Patterson "purposefully availed himself of the privilege of doing business in Ohio" by entering into the SRA with CompuServe.[48] I do not think there is a whole lot of dispute over that result. CompuServe entered into contracts. Patterson entered into contracts with an Ohio company to sell his software and was getting money from CompuServe.[49] I do not think that is a particularly contentious result.

In *Zippo,* the court also found that the defendant's contacts with Pennsylvania were sufficient to allow jurisdiction.[50] The defendant contracted with approximately three thousand individuals and seven Internet access providers in Pennsylvania to

41. 89 F.3d 1257 (6th Cir. 1996).
42. *See id.* at 1260.
43. *See id.*
44. *See id.* at 1264.
45. *See id.* at 1261.
46. *See CompuServe,* 89 F.3d at 1261.
47. *See id.*
48. *Id.* at 1266.
49. *See id.* at 1257.
50. *See* Zippo Manufacturing v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1128 (W.D. Pa. 1997).

allow them to download certain messages.[51] This was the basis of the suit. So again, this is another case where you have contractual activity between the residents of the state where jurisdiction is being sought, and the individual that is being sued. The court finds that it is fully fair and appropriate for the individual to be sued where all of those contracts were entered into, even if they may have been entered into in other states as well.[52]

Another similar case is *Digital Equipment Corporation v. Alta Vista Technology, Inc.*[53] This case comes out of a trademark arrangement between Digital and Alta Vista.[54] Digital took the trademark of Alta Vista and used it for its Internet search engine.[55] The agreement provided that Alta Vista Technology Corp. Inc. could only use the Alta Vista portion of its name as part of its company name.[56] Alta Vista, however, proceeded to create a web page that really made it look as though it was responsible for the Alta Vista search engine.[57] Digital did not appreciate that and sued Alta Vista.[58] Clearly, there was a contract between Digital based in Massachusetts, and the defendant, Alta Vista. There was no reason to think that it should be treated any differently than if the contracts had all been done in writing. The court held that business was transacted in Massachusetts, and that the web site caused tortious injury in Massachusetts.[59] Therefore, there should be jurisdiction in Massachusetts.[60] These cases, I think, are pretty well settled, and that is a good thing, because I think everyone practicing in this area of the law had hoped that at least these cases, which were not that tough, would be resolved in a rational way.

The next category of cases involves interactive web sites. The first question to ask is, "what is an interactive web site?" I think the *Zippo* court defines an interactive web site as a web

51. *See id.* at 1128.
52. *See id.* at 1121.
53. 960 F. Supp. 456 (D. Mass. 1997).
54. *See id.* at 459.
55. *See id.*
56. *See id.*
57. *See id.* at 460.
58. *See Digital,* 960 F. Supp. at 461.
59. *See id.* at 456.
60. *See id.*

site where you exchange information.[61] Perhaps a search engine would be an interactive web site. The user does not enter into a contract with a search engine, but the user asks it to search for a firm on the Internet. Does the user have a relationship with that web site? The user knows that there is some service being provided. This might be an interactive web site.

What about e-mail? Some courts that have found that a web site that allows you to send e-mail to it or the organization is an interactive web site.[62] For me, that means that every web site is interactive, because sending e-mail to a web site is not particularly out of the ordinary. That is part of being on the Internet.

Talking about interactive web sites becomes problematic because it is not clear where one begins and the other ends. In any event, you can define the cases. Maybe it helps, on a theoretical basis, to define interactive web sites as web sites where there is some interplay between the user, wherever that user may be located, and the operator of the web site.

In *Zippo*, the court found that the likelihood that jurisdiction can be constitutionally exercised is directly proportional to the nature and quality of the commercial activity that an entity conducts over the Internet.[63] I think that this is undoubtedly true. It is kind of like saying, "there is a spectrum between having business contacts over the Internet, and doing absolutely nothing but having a web site. Whether or not jurisdiction is proper is going to fall somewhere in between." Is that helpful? I am not sure.

The following factors, that I have pulled out of cases, may be helpful in determining whether an interactive web site should be the basis for jurisdiction.[64] First, is the user asked to sign in or register on the web site?[65] If so, that is a factor that indicates that they may be more amenable to jurisdiction elsewhere.[66]

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61. *See* Zippo Manufacturing v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

62. *See* Hasbro, Inc. v. Clue Computing, 994 F. Supp. 34 (D. Mass. 1997); Conseco, Inc., v. Hickerson, 698 N.E.2d 816, 820 n.6 (Ind. Ct. App. 1998).

63. *See Zippo,* 952 F. Supp. at 1124.

64. *See infra* notes 65-73.

65. *See Zippo*, 952 F. Supp. at 1121.

66. *See id.* at 1125.

Second, does the defendant enter into agreements through the web site?[67] If so, then you would probably have jurisdiction over the contracts.[68]

Third, can the user e-mail the web site?[69]

Fourth, has the defendant's site been accessed by users located in the forum state?[70] This factor seems relevant in theory. If absolutely no one from the forum state has accessed the particular web site, it would be more difficult to claim that there is jurisdiction.

Fifth, is the site commercial in nature?[71] Frankly, I think that is a huge factor in all of these cases. I think that there is a real bias against invoking jurisdiction against non-commercial entities or semi-commercial entities. Certainly, if it is a non-commercial site, the court is going to have to look hard at it.

Sixth, does the defendant actively solicit sales through the site?[72] Is that a contract? Or is that an offer for solicitation? If you are looking for sales, or in some cases donations on your web site, and you put an 800 number on it, chances are a court may look at that and say you are trying to do business, even though no one may have given you a donation.

Finally, is the web site primarily local or does it serve a national market, as in the *Bensusan* case?[73] As we know, in a typical scenario the World Wide Web is global in fact, and not local. I do not believe that there are very many entities that restrict their web site access only to a local audience. You could have it so it would probably make it an interactive web site per se if you required someone to log on and declare that they are a

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67. *See* Resuscitation Technologies, Inc. v. Continental Health Care Corp., No. IP 96-1457-C-M/S, 1997 WL 14567, at *3 (S.D. Ind. 1997); *Zippo,* 952 F. Supp. at 1125; Hall v. LaRonde, 66 Cal. Rptr. 2d 399 (Cal. Ct. App. 1997).

68. *See Resuscitation Technologies,* 1997 WL 148567, at *6; *Zippo,* 952 F. Supp. at 1124; *Hall*, 66 Cal. Rptr. 2d at 401, 402.

69. *See* Hasbro, Inc. v. Clue Computing, 994 F. Supp. 34, 37 (D. Mass. 1997).

70. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1338, 1341 (E.D. Mo. 1996); Humphrey v. Granite Gate Resorts, Inc., 568 N.W.2d 715, 716 (Minn. Ct. App. 1997).

71. *See generally* CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996).

72. *See* Cody v. Ward, 954 F. Supp. 43 (D. Conn. 1997); Gary Scott Ralph Int'l, Inc. v. Baroudi, 981 F. Supp. 714 (D. Mass. 1997).

73. *See generally* Bensusan Restaurant Corporation v. King, 937 F. Supp. 295 (S.D. N.Y. 1996), *aff'd*, 126 F.3d 25 (2nd Cir. 1997).

resident of the State of Missouri. Practically the only web sites that do that are ones that are trying to prevent minors from accessing adult-oriented material. These web sites require the user to log in with an assigned subscription. You could do all of that, and of course in the *Bensusan* case, using that as our hypothetical fact pattern, King could have said, "well I am really only trying to get these people at the University of Missouri, so I am going to put a subscription page on my site. If you are not from the University of Missouri you can't get on my page." I don't know what that case would have turned up, if it actually made its way to court, but in any event that is certainly something that courts are going to look at.

Whether the web site is local or national, the existence of an 800 number has been found, when displayed on the advertisement or on the web site, to make it an "interactive site."[74] This is because you can just pick up the phone and, if it is an 800 number, presumably call toll-free anywhere in the United States. That means you are trying to actively solicit business in those states. Those are just some of the factors that the courts look at.

Briefly, let me hit on some of the key cases and what the specific courts have done. One of the leading cases, in what I would call the interactive category, is *Maritz, Inc. v. Cybergold, Inc.*[75] In that case, the defendant used its web site to promote its upcoming Internet service.[76] The court found that jurisdiction was proper because the web site was accessible to an estimated 12,000 Missouri-based Internet users.[77] In fact, it was accessed by Missouri Internet users all 311 times.[78] Apparently, about half of those were by the plaintiff.[79] In any event, we probably should not count those, but there was activity. The site advertised the services of the defendant.[80] The web site, in

74. *See, e.g.*, Heroes, Inc. v. Heroes Foundation, 958 F.Supp. 1 (D. D.C. 1996) (rejecting defendant's characterization of web site as "passive" where the home page contains a 1-800 number to solicit contributions in the fight against cystic fibrosis).

75. 947 F. Supp. 1328 (E.D. Mo. 1996).

76. *See id.* at 1330.

77. *See id.*

78. *See id.*

79. *See id.*

80. *See Maritz*, 947 F. Supp. at 1330.

that instance, really promoted the ability of the web site provider's business to work anywhere in the world. Thus, the court held that they provide computer technology to thousands of people around the world.[81] This is a commercial enterprise that is looking for national and international business. Many courts have held that simply putting a web page on the Internet does not confer jurisdiction because it is passive.[82] Why an 800 number or e-mail should make any difference is something that may be debated.

In another case, *Heroes, Inc. v. Heroes Foundation*,[83] the court again found that the defendant had purposefully availed itself of the privilege of conducting activities in the District of Columbia by soliciting donations on its web site and in the local newspaper.[84] It may well be that the newspaper was the dispositive factor, not the web site. The fact that they put ads in *The Washington Post* in order to get donations gave the appearance that the defendant was purposefully availing itself of the jurisdiction in order to get business donations.[85]

A more recent case is *Hasbro, Inc. v. Clue Computing, Inc.*[86] This is another domain name case, where Clue Computing, a computer consultant firm based in Colorado, had acquired the domain name clue.com.[87] Hasbro decided it liked that domain name and wanted to use it. Hasbro probably wanted use it to sell its Clue board game or to have a web site based on the Clue game.[88] There was no evidence, according to the court, to indicate that this is a "cyber-squatter" case.[89] A cyber-squatter case is where someone comes in and takes the Clue name merely to deny it to Hasbro and extort funds.[90] What the court found was

81. *See id.* at 1333.

82. *See* Bensusan Restaurant Corporation v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2nd Cir. 1997).

83. 958 F. Supp. 1 (D. D.C. 1996).

84. *See id.* at 5.

85. *See id.* at 3.

86. 994 F. Supp. 34 (D. Mass. 1997).

87. *See id.* at 38.

88. *See id.*

89. *See id.* at 37.

90. Cyber-squatters are "individuals [that] attempt to profit from the Internet by reserving and later reselling or licensing domain names back to the companies that spent millions of dollars developing the goodwill of the trademark." In-

that Clue Computing was a world-wide entity.[91] In fact, Clue says that they will go anywhere to help their customers.[92] The court held them to their word and said, "if you're going to go anywhere to help your customers, you can go anywhere to litigate as well."[93] The court concluded that the exercise of jurisdiction was proper.[94] If you look at the case, it looks as though it was decided on the fact that the user could send e-mail to the proprietor of the web site. I personally think that is not a fantastic criteria. I think that the court was probably equally persuaded by some factors it did not articulate.

The next case, *Panavision v. Toeppen*,[95] is also a cybersquatter case. It is an interesting one because the court in California found the alleged facts were that someone obtained the panavision.com domain name and then tried to get Panavision to pay for it.[96] Panavision alleged that the defendant was not legitimately using the domain name panavision.com.[97] Rather, the defendant obtained the name solely to sell the domain name to Panavision.[98] The court found that the defendant's actions were anything but "random, fortuitous or attenuated."[99] The court also found that this "cyber-squatter" had directed its activities to Panavision.[100] The directed activity targeted a California entity and caused harmful effects in California. Thus, this activity subjected the defendant to the jurisdiction of the California court.[101]

The court assumes for purposes of jurisdiction that a plaintiff's allegations are true.[102] The court must look at the specific facts in a complaint.[103] In *Bensusan,* the court had to discern

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termatic, Inc. v. Toeppen, No. 96 Civ. 1982, 1996 WL 716892, at *6 (N.D. Ill. Nov. 26, 1996).

91. *See Hasbro,* 994 F. Supp. at 38.

92. *See id.*

93. *See id.* at 44.

94. *See id.* at 46.

95. 938 F. Supp. 616 (C.D. Cal. 1996).

96. *See id.* at 616.

97. *See id.* at 619.

98. *See id.*

99. *Id.* at 622 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).

100. *See Panavision,* 938 F. Supp. at 622.

101. *See id.*

102. *See id.* at 621.

103. *See id.* at 620.

whether King's "The Blue Note" web page was "random, fortuitous or attenuated" or whether that web page targeted New York and other "The Blue Note" club locations.[104]

The last category is the passive web site. The dividing line between a passive and an interactive web site is not clear. Some courts have found that e-mail contact with the web site proprietor distinguishes an active web site from a passive one.[105] Other courts have held that web sites with the same e-mail contacts are passive sites.[106] It seems that the courts in these cases are looking to the slippery slope. They are concerned about creating law that will make an individual subject to jurisdiction anywhere in the United States, or the world, by the mere creation of a web site.

Hearst v. Goldberger,[107] is one of a host of cases on this issue. The *Hearst* court states that finding jurisdiction based on an Internet web site would mean there would be nationwide, world-wide, personal jurisdiction over anyone and everyone who establishes an Internet web site.[108] The court further states that such nationwide jurisdiction is inconsistent with traditional personal jurisdiction case law and unacceptable to the courts as a matter of policy.[109] The *Hearst* court expressed a valid concern about the potentially unlimited jurisdiction based on an Internet web site.[110] The court did state that if an individual or entity is harming people, however, that individual should be subject to the jurisdiction of the court where the harm took place.[111]

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104. Bensusan Restaurant Corporation v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2nd Cir. 1997).

105. *See* Conseco, Inc. v. Hickerson, 698 N.E.2d 816, 820 n.6 (Ind. Ct. App. 1998) (concluding that the ability to send and receive e-mail from a web site makes that site "interactive").

106. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997) (stating that even though the defendant Cyersell's web site could receive the browser's name and address via e-mail, Cybersell's home page is essentially passive).

107. No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

108. *See id.* at *1.

109. *See id.*

110. *See id.* at *16.

111. *See id.* at *24.

Another policy point is made in one of the first Internet cases, *Cybersell, Inc. v. Cybersell, Inc.*[112] An Arizona corporation uses the mark "Cybersell" in connection with imminent web advisors.[113] A Florida corporation uses the mark "Cyber-Sell Inc." for a business consulting service on its web page.[114] The Florida web page says, "Welcome to CyberSell!"[115] The Arizona plaintiff filed a trademark infringement suit.[116] The court found that the essentially passive nature of the defendant's activity in hosting a home page did not qualify as purposeful activity invoking the benefits and protections of Arizona laws.[117] The Ninth Circuit affirmed the District Court's dismissal for lack of personal jurisdiction.[118] This was a "passive case" and the court should not be able to exercise jurisdiction.

It is relevant that the site received no "hits" from Arizona residents, other than the plaintiff.[119] Other relevant factors for the court to consider are whether there is evidence that any Arizona residents signed up for the defendant's services, or whether there are any contacts with Arizona residents.[120] In this case, there was no 1-800 number.[121] There were no sales and no income.[122] It appears that the court will determine that the web site is passive if it displays none of the factors the court uses to determine whether the web site is interactive.

Bensusan Restaurant Corporation v. King[123] is an interesting hypothetical and one close to home. On appeal the court ignores, and rightfully so, the District Court's finding under the Due Process Clause.[124] The Second Circuit found that the New York long-arm statute did not reach the defendant because the

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112. 130 F.3d 414 (9th Cir. 1997).
113. *See id.* at 415.
114. *Id.*
115. *Id.*
116. *See id.* at 416.
117. *See Cybersell,* 130 F.3d at 420.
118. *See id.* at 419.
119. *See id.*
120. *See id.*
121. *See id.*
122. *See Cybersell,* 130 F.3d at 419.
123. 937 F. Supp. 295 (S.D.N.Y. 1996).
124. *See* Bensusan Restaurant Corporation v. King, 126 F.3d 25 (2nd Cir. 1997).

defendant was not physically present in New York.[125] Therefore, he did not commit a tort in New York.[126]

The court looked at other factors, but it is relevant that in *Bensusan*, the Court of Appeals essentially said that the New York long-arm statute would not be invoked if an individual in New Jersey lobbed a shell into New York and caused a tort.[127] That action would not make the New Jersey individual subject to jurisdiction in New York. If *Bensusan* is the standard, the court is not going to find jurisdiction. Take your lawsuit elsewhere. It is a very restrictive reading of a long-arm statute. The *Bensusan* court did not discuss all the details that we have talked about today. It has been cited by a number of other cases, perhaps sadly, for the proposition that passive web sites should not make one amenable to jurisdiction.[128] Whether that is really true for those cases that are citing it is another matter.

I will move quickly onto *Hearst Corp. v. Goldberger*.[129] The defendant in this case established a web site under esqwire.com, offering computer services and legal information to attorneys.[130] *Esquire Magazine*, owned by Hearst, brought a lawsuit claiming trademark infringement.[131] The court found that esqwire.com was a passive web site, most analogous to a national magazine, not targeted to residents of New York or any particular state and therefore, jurisdiction was not proper.[132]

I think it is clear that the passive cases are the most troubling. The court is forced to choose between finding jurisdiction when the proprietor of a web site is in a foreign state and has merely put up a web site and all other cases where there may be substantial harm in a foreign state created by that presence. I am not so sure that putting information on the Internet is so passive to begin with. You are certainly disseminating informa-

125. *See id.* at 29.

126. *See id.*

127. *See id.* at 27.

128. *See* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 417-18 (9th Cir. 1997); Hearst v. Goldberger, No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997); Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 119, 125 (W.D. Pa. 1997).

129. *See Hearst,* 1997 WL 97097.

130. *See id.*

131. *See id.* at *5.

132. *See id.* at *27.

tion. You are disseminating it on a global basis. This is not a passive act in all cases.

The next question is what is different about the Internet? The best analogy we have for a passive Internet case is if someone distributed a national journal at every airport in the country. Perhaps a better example is one where the person puts huge stacks of free journals in the airport in Washington, D.C. People take the journals to every other airport. They put their own piles down. Everyone has the journal and before you know it, the whole country has the journal. The defendant says, "well I just put them in one little airport." The difference, of course, is that it would really be hard to disseminate any sort of journal across the entire United States without putting a lot of money into it. Distributors are paid. It is a business to get magazines out and when you look, as the courts do, at the newspaper cases, you lose the commercial element.

In traditional cases, *Hertz System, Inc. v. Hervis Corporation*[133] and *Gordy v. Daily News*,[134] courts have tried to determine whether exercising jurisdiction is appropriate. There, the courts held that putting an ad in a national journal does not subject someone to jurisdiction for trademark infringement.[135] I am not sure whether you can really compare them because they are quite different animals.

On the Internet, you are able to disseminate information throughout the entire globe. In fact, from one web site you do not need to spend a million dollars to distribute. You do not need to hire shippers, and you do not need any sort of commercial business to get the information out. So, in the passive cases, frequently there will be someone using the Internet for a non-commercial use, but nonetheless creating a lot of harm. That is a tough case. Even though the defendant passively put something on the web for the world to see, a court in a foreign jurisdiction can ask, "why should the plaintiff have to travel to the defendant's state when he is being harmed in his own state?" I think that this is something we will see more of in the future. There is no question that there is a lot of disagreement

133. 549 F. Supp. 796 (S.D.N.Y. 1982).

134. 95 F.3d 829 (9th Cir. 1996).

135. *See Hertz*, 549 F. Supp. at 797.

among the courts as to how the passive cases should come out. I am sure there is disagreement among the attorneys as well.

The next area where there are only a few cases and where I think that there are future issues, is international jurisdiction. I think this area will present the biggest problem. There have been several cases that have addressed whether a web site from an international defendant makes that defendant amenable to general jurisdiction anywhere in the United States.[136]

In *Weber v. Jolly Hotels*[137] the court found that creating a web site did not create jurisdiction over an international defendant.[138] In *Weber*, an Italian hotel put up a web site.[139] The plaintiff slipped and fell in the hotel in Italy and then sued in his home state.[140] This scenario creates a fairly classic jurisdiction question. Is it fair to drag that Italian hotel to the United States merely because they have a passive web site advertising the hotel where the slip occurred? I think that if the court came out the other way, it would open a whole host of problems.

Taking the scenario one step further, instead of the slip and fall case, consider what some call a "data haven" in the Caribbean. There are no intellectual property protections there. A person merely makes a facsimile of *Playboy* and creates their own version of playboy.com. The person puts the web site on a server and makes advertising revenue from it. Would a court find that there is jurisdiction in any state? I think the court would go after them and find personal jurisdiction because there would be such harm, and the web site is so targeted to all states. Maybe the answer is in the Federal Rules of Civil Procedure, particularly Rule 42.[141] Rule 42 looks at instances where there is no jurisdiction in any particular state and finds nationwide jurisdiction for federal causes of action.[142] There are no cases on this issue which are helpful.

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136. *See, e.g.*, Agar Corp. v. Multi-Fluid, Inc. 45 U.S.P.Q.2d 1444 (S.D. Tex. June 25, 1997).

137. 977 F. Supp. 327 (D. N.J. 1997).

138. *See id.* at 334.

139. *See id.* at 329.

140. *See id.*

141. *See* FED. R. CIV. P. 42.

142. *See id.*

Aerogroup International, Inc. v. Marlboro Footworks, Ltd.[143] deals with a trademark infringement question. I think the case was in New York and Massachusetts. That court found that there was no jurisdiction over a Canadian defendant.[144] The court held that it was not fair for them to have to litigate in the United States.[145] It would offend traditional notions of fair play and substantial justice.[146] Maybe that is not the right case, but I think that there will be cases where foreign entities are brought into the United States and where jurisdiction will be found, certainly in the gambling cases.

There have been a bunch of arrests and other lawsuits against proprietors of gambling cites.[147] I have no doubt that the individual states and the federal government are going to seek to regulate information entering the United States over the Internet wherever they can. It is going to start to push the boundaries of personal jurisdiction. But, that is the way it goes. The one query, of course, is do we want it the other way? There are many other countries where I frankly do not want to get off the plane and be arrested for what I put on my web site because it happens to offend that particular country's morality or idea of what is theologically proper. I do not think we would like that result so I think we really must think through what the right answers are going to be.

In closing, I will leave with one final question. Are we really asking the right question today? I have been talking today about where the courts should find Internet jurisdiction and whether or not the Internet is something different. Maybe we are going to have to take a long-term perspective on this question. Has the Internet changed the landscape of the legal environment in our world so much that the traditional cases, which are cited in all of these Internet cases, are really a little less relevant than before. It is not simply that air travel is available, but I know, certainly in my practice, I do an incredible amount of work from what you could call a virtual office. It is

143. 955 F. Supp. 220, 231-32 (S.D.N.Y. 1997).

144. *See id.* at 231.

145. *See id.*

146. *See id.*

147. *See generally* Humphrey v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn. Ct. App. 1997); Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738 (W.D. Tex. 1998).

certainly less difficult for someone to litigate in Missouri now than it was forty years ago. I think as time goes on we have to ask whether the policy basis upon which these older Supreme Court cases were based really needs to be challenged. Whether it is an Internet jurisdiction case or some other case, the hardship of traveling to another jurisdiction is really becoming a lot less significant. Again, this is not an Internet and the law question. It is a question of law generally, and how the Internet impacts our world.