

Internet Website Sales and Proper Use of the *Zippo* Sliding Scale for Personal Jurisdiction

BY GARY BEAVER

With the rise of electronic commerce, some practitioners and judges have struggled with applying the “old law” of personal jurisdiction to the “new ways” of doing business. More than nine years ago, a federal district judge made such an application in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*¹ In *Zippo*, Judge McLaughlin of the Western District of Pennsylvania, after noting that there were few decisions providing guidance, created a sliding scale of personal jurisdiction over a defendant based upon the interactivity of that defendant’s website. At one end, the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, and personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet website that is accessible to users in foreign jurisdictions; here, personal jurisdiction is not proper. The middle ground is occupied by interactive websites where a user can exchange information with the host computer; here, jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.²

Many courts have applauded and applied Judge McLaughlin’s *Zippo* website interactivity sliding scale. Unfortunately, a few have given that scale almost a talismanic effect rather than performing the heavy lifting of applying due process principles to the facts of the particular case before them. The courts that try to use the *Zippo* sliding scale as a bright-line test are in error, as nothing in the Supreme Court’s due process decisions would lead one to conclude that the interactivity of a website alone should decide the issue of personal jurisdiction. Indeed, the *Zippo* court did not use its sliding scale as a bright-line test: Its decision rests more upon the facts that the defendant had contracted with about 3,000 forum residents, and seven forum Internet service providers, than upon the existence of an interactive website. Personal jurisdiction does not “turn on ‘mechanical’ tests,”³ and the law governing due process does not change simply because a website is involved in the case.⁴ “It is the conduct of the defendants, rather than the medium utilized by them, to which the parameters of specific jurisdiction apply.”⁵

Courts cannot use the three *Zippo* categories as bright-line tests—the line is blurred between the second and third categories, and the categories do not fully

account for all of the required due process requirements. A rigid application of the *Zippo* sliding scale gives short shrift to the “continuous and systematic” requirement for general jurisdiction and, as to specific jurisdiction, to whether the defendant *deliberately* engaged in *significant* activities within the forum state (i.e., what is the level of actual interactivity and was it *purposefully directed* by the defendant into the forum state) or has created continuing obligations and relationships with forum residents to such an extent as to create a substantial connection between itself and the forum state.

The following general principles have emerged after *Zippo*:

Website Content. You must examine the website’s “level of interactivity and commercial nature of the exchange of information that occurs,” whether or not the forum state has adopted the *Zippo* sliding scale. The *Zippo* scale helps in evaluating whether a website’s interactivity tends to create a substantial connection to the forum state. If a website is passive, it does little to show such a connection unless it contains advertising directly targeting the forum state’s residents. If interactive or semi-interactive, then many other due process factors must be considered.

Advertisements. Website advertising typically can be accessed on the Internet by anyone anywhere and rarely shows a particular link to or targeting of the forum state or its residents, and thus is not “purposefully directed” to the forum state.⁶ Specific jurisdiction will not lie for advertising and soliciting unless it is focused on and targeted to forum residents.⁷

That the plaintiff suffers its harm in the forum state is not enough to convert broad-based advertising into activities focused on forum residents.⁸ Something more is required, such as actual sales to forum residents through forum-state distributors or high amounts of website sales to forum residents.

Federal courts usually do not find personal jurisdiction on the basis of nationally available advertisements.⁹ Placing advertisements on one’s website selling products is akin to publishing an ad in a national magazine even though the website advertisement is more passive, because an Internet user must initiate the contact with the website through an Internet search or by typing in the website address.¹⁰

Sales. Actual sales made to forum residents through the website (other than sales initiated by the

plaintiff or its counsel)—not the potential for sales—count in whether a “substantial connection” to the forum state exists.¹¹ If a website allows forum buyers to purchase, then it creates connections with the forum state when that state’s residents actually purchase through the website. Such sales do not automatically result in personal jurisdiction over the Internet seller, however, because the sales may be too insignificant to justify having the Internet seller defend in that state, or can be seen as not purposefully directed at the forum state.¹²

A website sale involves a moderate degree of interactivity as it allows the buyer to place an order through the website but does not necessarily include the extensive contract negotiation, ongoing contractual duties, and maintenance of the product sold that might be characterized as creating a “substantial connection” to

the forum state. An Internet sale does not necessarily reflect action directed at or into the forum state.¹³

Even if the basis for the lawsuit is infringement of intellectual property rights through website advertising and sales, the plaintiff still must show sufficient contacts between the defendant and the forum state.¹⁴

Sales Evidence. While a single contract can be a sufficient

basis for the exercise of personal jurisdiction if it creates a substantial connection with the forum state, if the plaintiff can prove only that the defendant made a few sales through its website to plaintiff or plaintiff’s counsel, then the substantial connection required by due process is lacking—in part because the plaintiff cannot manufacture jurisdiction through its own unilateral acts. Courts regularly refuse to find personal jurisdiction where the plaintiff or its counsel try to manufacture it, and courts can condemn that type of gamesmanship.¹⁵

The sales shown must be made prior to the filing of the lawsuit.¹⁶ The plaintiff may be entitled to some jurisdictional discovery¹⁷ regarding defendant’s Internet sales but not where the plaintiff offers only speculation or conclusory assertions about the defendant’s conduct in the forum state.¹⁸

General Jurisdiction. The *Zippo* scale is not well suited to the general jurisdiction analysis.¹⁹ Regardless

of the nature of the website as interactive or passive, the court must still analyze whether the defendant directed activity in a substantial way into the forum state such that it is “continuous and systematic.”²⁰ If the Internet seller’s sales in the forum state are insignificant, then they will be deemed insufficient to allow the exercise of general personal jurisdiction.²¹ The percentage of the seller’s sales in the forum state is not determinative because the seller may be making a huge volume of sales, such as Microsoft does. The focus is on whether the defendant’s contacts are substantial for the forum, not for the defendant.²² ■

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1. 952 F. Supp. 1119 (W.D. Pa.1997).

2. *Id.* at 1124.

3. *Burger King v. Rudzewicz*, 471 U.S. 462, 478 (1983).

4. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 711 (4th Cir. 2002) (stating that “technology cannot eviscerate the constitutional limits on a state’s power to exercise jurisdiction over a defendant”).

5. *Millenium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 921 (D. Or. 1999) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

6. *See, e.g., CEM Corp. v. Personal Chemistry AB*, 192 F. Supp. 2d 438, 441 (W.D.N.C. 2002); *Millenium*, 33 F. Supp. 2d at 922.

7. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997); *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1199–2000 (4th Cir.1993) and cases cited therein.

8. *ESAB*, 126 F.3d at 626.

9. *See, e.g., id.* at 623–24; *Nichols*, 991 F.2d at 1199–1200.

10. *See, e.g., Am. Wholesalers Underwriting, Ltd. v. Am. Wholesale Ins. Group*, 312 F. Supp. 2d 247, 255 (D. Conn. 2004); *Estate of Bank v. Swiss Valley Farms, Inc.*, 286 F. Supp. 2d 514, 518 (D. Md. 2003) (interactive website that offers the possibility of transacting is only “advertising and solicitation” if actual sales are not made); *Millenium*, 33 F. Supp. 2d at 922 (“Publishing a Web site requires no ‘deliberate’ action within the forum state[;] the user must take affirmative action to access either a passive or interactive Web Site.”).

11. *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997) (website allowed sales to forum residents but no sales made; no personal jurisdiction); *Shamsuddin v. Vitamin Research Prods.*, 346 F. Supp. 2d 804, 813–17 (D. Md. 2004) (interactive website and two sales of allegedly infringing product to forum residents; no purposeful availment); *Reynolds & Reynold Holdings, Inc. v. Data Supplies, Inc.*, 301 F. Supp. 2d 545, 553 (E.D. Va. 2004); *Robbins v. Yutopian Enters., Inc.*, 202 F. Supp. 2d 426, 428–29 (D. Md. 2002) (no allegations or proof of actual transactions with forum resident; no specific jurisdiction); *Dagesse v. Plant Hotel N.V.*, 113 F. Supp. 2d 211, 222 (D.N.H. 2000); *ESAB*, 34 F. Supp. 2d at 332–33 (single sale of 10 allegedly infringing items to forum business coupled with maintaining website allowing ordering products; no specific jurisdiction).

Courts regularly refuse to find personal jurisdiction where the plaintiff or its counsel try to manufacture it.

12. Hockerson-Halberstadt, Inc. v. Proper USA, Inc., 62 Fed. Appx. 322 (Fed. Cir. 2003); Lindgren v. GDT, LLC, 312 F. Supp. 2d 1125, 1131 ((S.D. Iowa 2004); McGill Tech. Ltd. v. Gourmet Techs., Inc., 300 F. Supp. 2d 501, 508 (E.D. Mich. 2003) (interactive website allowing sales and single \$4,000 sale in forum state amounting to less than 0.25 percent of annual sales; no personal jurisdiction).

13. See Lindgren, 312 F. Supp. 2d at 1131.

14. See Cybersell, 130 F.3d at 419 (alleged trademark infringement on website; no personal jurisdiction); Graduate Mgmt. Admission Council v. Raju, 241 F. Supp. 2d 589, 596 (E.D. Va. 2003) (alleged trademark and copyright infringements on website not purposefully directed at forum merely because accessible there).

15. See, e.g., Carefirst of Maryland v. Carefirst Pregnancy Ctrs. Inc., 334 F.3d 390, 401 (4th Cir. 2003) (single donation initiated by plaintiff's counsel); Shamsuddin, 346 F. Supp. 2d at 813 and 816-17 (two sales made in forum (one through website) to acquaintances of plaintiff); CEM Corp., 192 F. Supp. 2d at 441; Millennium, 33 F. Supp. 2d at 911 (plaintiff's counsel chastised for lack of candor in asserting Oregon Internet sales caused plaintiff harm and ascertainable loss where only Oregon resident to purchase had been instructed to do so by acquaintance of plaintiff's counsel).

16. Lindgren, 312 F. Supp. 2d at 1131.

17. Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 513 (D.C. Cir. 2002).

18. See Carefirst, 334 F.3d at 402-03; Reynolds, 301 F. Supp. 2d at 554-55; Swiss Valley Farms, 286 F. Supp. 2d at 520-21.

19. See Lakin v. Prudential Secs., Inc., 348 F.3d 704, 710-12 (8th Cir. 2003).

20. See, e.g., Gator.com v. L.L. Bean, Inc., 341 F.3d 1072, 1080 (9th Cir. 2003) (millions of dollars in sales were "substantial" and "continuous and systematic"); Bird v. Parsons, 289 F.3d 865, 874 (6th Cir. 2002) (website allowed plaintiff to do business with forum residents but residents initiated direct contact; no general jurisdiction); Hy Cite Corp. v. BadBusinessBureau.com, LLC, 297 F. Supp. 2d 1154, 1161 (W.D. Wis. 2004) (website advertising did not target forum residents; "potential contacts" did not support general jurisdiction).

21. See, e.g., Coremetrics, Inc. v. AtomicPark.com, LLC, 370 F. Supp. 2d 1013, 1021-23 (N.D. Cal. 2005) (found general jurisdiction in "close call" where Wisconsin company sold over \$3 million of product in California via Internet "virtual store" in 10 months, sales were 14.71 percent of total company sales, and no other state had half as many sales); Robbins v. Utopian Enters., Inc., 202 F. Supp. 2d at 430 (website sold products and 46 transactions with forum residents in 10.5 months; no general jurisdiction).

22. Lakin, 348 F.3d at 708-09 & n.7.



For the Young Lawyer: A Primer on Discovering the Anonymous Corporate Cybersmearer

BY EFFIE D. SILVA

The anonymous disclosure of information about a company that is false, defamatory, or otherwise potentially actionable is known as a "cybersmear." Those who engage in such acts, or "cybersmearers," abound on Internet-based stock message boards, financial chat sites, and investors' blogs—and corporate clients are vulnerable to them. With the click of a key, a competitor, creditor, or disgruntled employee can spread defamatory statements or disseminate proprietary information.

A target of such cybersmearing may sue and seek to subpoena identifying information from the Internet service provider involved.¹ But subpoenaing identifying information from providers raises First Amendment concerns. This article describes the four most often cited cases addressing this issue: *Columbia Insurance Co. v. Seescandy.com*,² *In re Subpoena Duces Tecum to America Online, Inc.*,³ *Doe v. TheMart.com Inc.*,⁴ and *Dendrite International, Inc. v. Doe*.⁵

Columbia Insurance Co. v. Seescandy.com

A company filed a trademark infringement suit in federal court when its trademark was registered as the domain name "seescandy.com" and sought identifying

information from a provider. Cognizant of the potential for discovery as a form of harassment or intimidation, the Northern District of California required the plaintiff to: (1) identify the cybersmearer with "sufficient specificity" to permit the court to determine that the defendant was a person or entity amenable to suit, (2) describe previous steps taken to locate that person, (3) establish to the court's satisfaction that the complaint could withstand a motion to dismiss, and (4) file a discovery request with the court along with a "statement of the reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might be served[.]" The court ruled in favor of the plaintiff, compelling disclosure, noting that consumers were confused by the seescandy.com website.⁶

In re Subpoena Duces Tecum to America Online, Inc.

A year after the *Seescandy* decision, America Online, Inc. filed a motion to quash a subpoena seeking disclosure of information that would identify certain of its subscribers. Again the issue was analyzed under a First Amendment rubric, with an inquiry similar to that in the