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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

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Personal Jurisdiction and the Internet

As Judge Gerard E. Lynch for the U.S. District Court for the Southern District of New York recently observed, “[t]he question of personal jurisdiction over foreign defendants has become increasingly complex in the Internet age, as the phenomenal reach of Internet communications and Web-based businesses has made traditional notions of ‘presence,’ ‘transacting business,’ or ‘contracting for delivery’ in a forum state difficult to reconcile with a virtual world.”¹

Judges in the Southern District are being asked, with ever greater frequency, to grapple with the extent and quality of Internet activity necessary for the assertion of personal jurisdiction.

This column reports on several recent decisions that serve to add definition to the contours of this developing area of the law.

The Spectrum of Web Sites

In assessing whether Internet-based activity is sufficient to confer jurisdiction, courts have taken the approach described by Southern District Judge Robert W. Sweet in *Citigroup Inc. v. City Holding Co.*,² of evaluating where



along a spectrum of Internet activity a particular defendant’s conduct falls. At one end of the spectrum are “passive” Web sites that merely post information which can be viewed in New York and anywhere else the sites can be accessed, and which standing alone do not confer jurisdiction over a defendant. In the middle of the spectrum are “interactive” Web sites permitting the exchange of information between the defendant and visitors to the site, and at the far end of the spectrum are commercial Web sites over which the defendant is actively conducting business. Depending on the nature and extent of contacts with New York residents, jurisdiction may be asserted based on Internet activities falling into either of the latter categories.

As several courts have stressed, this sliding scale model, while useful as a guide, does not constitute a separate test for analyzing jurisdiction based on Internet activity. Rather, courts continue to apply the traditional statutory

and constitutional jurisdictional analyses, scrutinizing the allegations regarding the nature and quality of the Internet activity at issue, and demanding that all the traditional requisites for personal jurisdiction be met.

Internet and Intellectual Property Claims

Two recent intellectual property cases decided by Judge Lynch illustrate the exacting nature of the jurisdictional analysis involved. Both cases involved extensive Internet activity by commercial enterprises, but the court was able to assert personal jurisdiction only in one, after analyzing how the cases fit within New York’s long-arm jurisdiction statute, CPLR §302.

In the first of those cases, *Savage Universal Corp. v. Grazier Construction, Inc.*,³ the plaintiff, a New York photography supply business, sought to assert trademark infringement claims against an Oregon resident, alleging that through a practice known as “cybersquatting,” the defendant had improperly diverted visitors to the plaintiff’s Web site to competing sites controlled by the defendant. Judge Lynch denied the defendant’s motion to dismiss for lack of personal jurisdiction, finding that his Internet-based activities provided a clear basis for the assertion of jurisdiction under §302(a)(3)(ii). That section provides that a New York court may exercise jurisdiction over a non-domiciliary who commits a tortious act outside the state that

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causes injury within the state, so long as the defendant should reasonably have expected his act to have consequences within the state and derives substantial revenue from interstate or international commerce. Judge Lynch found that the alleged infringing use of plaintiff's trademarks and trade name qualified as tortious acts committed outside of New York, causing injury within the state. He further held that the defendant should have expected his actions to have consequences in New York, observing that "[i]ndeed, the entire purpose of his activity...appears to have been to damage [the plaintiff's] reputation and business."

Often, the biggest hurdle for plaintiffs seeking to assert jurisdiction under §302(a)(3) is the requirement that the "first effects" of the tortious act be felt within the state.⁴ Mere economic consequences felt in New York will not suffice. In *Savage*, the plaintiff was able to satisfy this requirement because the "first effects" of trademark infringement are typically felt where the trademark owner resides and conducts business, and the plaintiff was a New York corporation.

The "first effects" test proved insurmountable for the plaintiff in *Freeplay Music, Inc. v. Cox Radio, Inc.*,⁵ the second Internet jurisdiction case decided by Judge Lynch. In *Freeplay*, the copyright owner of certain musical compositions and recordings sued various radio station owners alleging that they had violated its copyrights by broadcasting some of those works "synchronized" with other recordings without the appropriate licenses. One of the defendants, an out-of-state corporation, operated over 40 radio stations, none of which was located in New York or within broadcast range of New York. Plaintiff sought to defeat that defendant's motion to dismiss for lack of personal jurisdiction by relying on the fact that some of those stations simulcast their broadcasts over Web sites that could be accessed by listeners

in New York.

Judge Lynch found that the simple transmission of infringing recordings over a Web site accessible in New York did not amount to an injury in New York. He noted that for commercial torts, the place of injury is generally where the critical events giving rise to the dispute occurred. He found that here, the critical events were the alleged unlicensed use of the recordings and compositions, which plaintiff did not allege had taken place in New York. He specifically rejected plaintiff's argument that its economic loss, suffered in New York, constituted the situs of the injury

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of the alleged copyright infringement, holding that such economic loss was only a consequence of the injurious use of the copyrights, not an injury in and of itself.

Significantly, the plaintiff never alleged that any New York resident ever actually accessed the defendant's Web casts or listened to any of the infringing recordings in New York, a failure noted not only in Judge Lynch's analysis of the location of the injury from the infringement, but also in his denial of plaintiff's efforts to predicate jurisdiction on §302(a)(1)—the section of the long-arm statute permitting the assertion of jurisdiction over a defendant who transacts business within the state. Judge Lynch observed that "[i]t stretches the meaning of 'transacting business' too far to subject defendants to personal jurisdiction in any state merely for operating a

Web site, however commercial in nature, that is capable of reaching customers in that state, without some evidence or allegation that commercial activity in that state actually occurred or was actively sought."⁶

Judge Lynch also rejected the plaintiff's argument that jurisdiction could be predicated on CPLR §302(a)(2), which permits jurisdiction over a foreign defendant who commits a tortious act "within" the state. Quoting from *Citigroup*, he noted that simply because allegedly infringing material can be viewed anywhere "does not mean that the infringement occurred everywhere ...[and that] in the case of Web sites displaying infringing [material] the tort is deemed to be committed where the Web site is created and/or maintained." Because in this case plaintiff did not contend that the Web sites were either created or maintained in New York, Judge Lynch held that jurisdiction could not be asserted over the defendant under §302(a)(2).

General Jurisdiction

Most cases considering whether Internet-based activities support jurisdiction in New York do so in connection with §302, which confers specific jurisdiction only, requiring a nexus between the cause of action and New York. In rare instances, a defendant's Internet activities in New York are so extensive that they may permit the exercise of general jurisdiction, making a defendant amenable to suit on causes of action wholly unrelated to its New York activities. CPLR §301 confers general jurisdiction over a defendant who engages in a continuous and systematic course of doing business such that the defendant is "present" in New York.

In *Schottenstein v. Schottenstein*,⁷ Southern District Judge Shira A. Scheindlin found that the plaintiff had adequately alleged general jurisdiction against one of the defendants, an Ohio

company that built homes in a number of states other than New York, operated an interactive Web site, and derived substantial revenue from New York customers. The Web site not only advertised the company's products, but permitted viewers to exchange information with the company, view sample homes in specific neighborhoods, and use an interactive calculator to determine how much they could spend. The site also enabled users to contact a customer service representative. Based on this level of Internet activity, and the plaintiff's allegation that 20 percent of the defendant's revenues came from New York residents, Judge Scheindlin found a sufficient basis to exercise general jurisdiction under §301.⁸

More recently, Judge Scheindlin again considered the question of Internet-based general jurisdiction in *Allojet PLC v. Vantgag Assoc.*,⁹ a suit brought by a European distributor of aviation plastics against an Oklahoma manufacturer and seller of replacement parts for airplane interiors. The plaintiff alleged that the defendant had breached a distribution agreement with the plaintiff by engaging in various practices designed to induce the plaintiff's European customers to bypass the plaintiff and purchase directly from it.

In determining whether the court had jurisdiction over the nondomiciliary defendant, Judge Scheindlin focused on its Web site, which permitted potential customers to review product catalogues, place orders, and "chat" online with, or e-mail questions to, the defendant's employees. On its Web site, the defendant also explained that it had relationships with a number of "accredited" installers in New York. Judge Scheindlin found that this Web site was sufficiently interactive that it could support the exercise of general jurisdiction, depending on the degree of business solicited from New York customers and the amount of revenue derived from New York sales. She held, however, that the plaintiff had not provided sufficient evidence on either

question. Judge Scheindlin concluded that despite the plaintiff's failure to make a prima facie showing of jurisdiction, it had "made a sufficient start" toward that showing, and had demonstrated a "reasonable basis" for the court to assume jurisdiction such that jurisdictional discovery was warranted.

Securities Litigation

Although not the only factor, a foreign corporation's Web site, containing English translations of its regulatory filings and board reports, figured prominently in Southern District Judge Lewis A. Kaplan's recent decision in *In re Parmalat Securities Lit.*,¹⁰ upholding the assertion of jurisdiction over an Italian citizen who served on the corporation's Board of Statutory Auditors. Jurisdiction in that securities fraud action was governed by §27 of the Securities Exchange Act of 1934, which permits the exercise of jurisdiction to the limits of the Due Process Clause of the Fifth Amendment, requiring only a showing that the defendant has minimum contacts with the United States and that the exercise of jurisdiction is reasonable.

In determining whether the defendant had minimum contacts with the United States, Judge Kaplan relied on the test articulated by Judge Henry Friendly in *Leasco Data Processing Equipment Corp. v. Maxwell*.¹¹ Under that test, to assert jurisdiction over a foreign defendant for conduct outside the country, "[t]he person sought to be charged must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him." Judge Kaplan concluded that the allegations in the complaint satisfied this test.

Specifically, he found that the complaint sufficiently alleged that as a member of the Statutory Board, the defendant knew that the company's shares were traded actively in the United States and that the company made note offerings in this country. He also relied on allegations that board reports and

other corporate materials were posted, in English, on company Web sites, thus suggesting that she knew that U.S. investors would rely on those documents. He further reasoned that the likelihood that U.S. investors would be injured by the issuance of false and misleading reports "must have been palpable." He concluded that if, as alleged, the defendant knowingly participated in the issuance of false financials and reports, she should have known that her actions would have effects here.¹²

Conclusion

As these decisions demonstrate, Internet-based activity can subject a defendant to personal jurisdiction in a remote forum. But, in order to rely on Internet activities to support jurisdiction, a plaintiff should be prepared to make detailed, highly specific allegations about the nature and extent of those activities and the degree to which those activities were aimed at, and had consequences in, the forum in which jurisdiction is sought.



1. *Savage Universal Corp. v. Grazier Construction, Inc.*, 2004 WL 1824102, at *7 (S.D.N.Y. Aug. 13, 2004).

2. 97 F. Supp. 2d 549 (S.D.N.Y. 2000).

3. 2004 WL 1824102.

4. *DiStefano v. Carozzi North America, Inc.*, 286 F.3d 81, 84-85 (2d Cir. 2001).

5. 2005 WL 1500896 (S.D.N.Y. June 23, 2005).

6. *Id.* at *6, citing *Citigroup*, 97 F. Supp. 2d at 566. Judge Lynch also relied on similar logic in rejecting the *Savage* plaintiff's argument that jurisdiction in that case was proper under §302(a)(1) where the complaint contained no allegation that any New York customer ever saw one of the offending Web sites, notwithstanding the fact that those sites were highly interactive and patently commercial.

7. 2004 WL 2534155 (S.D.N.Y. Nov. 8, 2004), motion for reconsideration denied, 2004 WL 2711086 (S.D.N.Y. Nov. 22, 2004).

8. Judge Scheindlin went on, however, to grant this defendant's motion to dismiss for failure to state a claim.

9. 2005 WL 612848 (S.D.N.Y. March 15, 2005).

10. 2005 WL 1630893 (S.D.N.Y. July 12, 2005).

11. 468 F.2d 1326 (2d Cir. 1972).

12. Judge Kaplan's holding that the allegations were sufficient to establish minimum contacts was limited to claims brought by plaintiffs who had purchased their shares in the United States. He reasoned that the claims of those who purchased elsewhere did not arise from effects in the United States attributable to the defendant's actions.