

Cyberspace Has Crossed the Line: The Effects of Conducting Business Online and Its Impact on Personal Jurisdiction and the Need to Qualify to Do Business

By Andrew M. Kulpa

Introduction

The Internet continues to force the business and legal environments to reevaluate their interaction. The Internet has grown from merely presenting simple, static informational pages to what is commonly referred to as Web 2.0, where the Internet is a dynamic environment and the actual platform for development changes and evolves based on user input.¹ Not only do companies continue to emerge as solely online entities, but brick and mortar companies have been forced to have a regular, current and updated web presence with mass appeal and individual customization. Many companies even have Web sites that have their content change to appeal to the end user based on the user's origin, creating user-specific targeted marketing.²

The legislatures have not acted with the same expediency pursued by industry to keep the legal and business environments in sync. Courts are left to reconcile current business activity with case authority and statutory regulations previously developed to handle a different universe of activity. Some primary areas that have lacked specific and consistent regulation as companies perform more and more activity online are the need to qualify to do business in a foreign state and the risk of having personal jurisdiction established in a foreign jurisdiction.

Online Activity and the Need to Qualify to Do Business

One of the seminal issues a business faces as it grows and expands its operations is the question as to whether it is "doing business" in any specific state based on its activities in that foreign state. Every state requires an entity "doing business" within its borders to register in some way shape or form, usually

by filing a few documents, paying a fee and appointing a resident agent and registered office.³ "Doing business" is a term of art that implies a substantial presence in the state, but the specific requirements for and exceptions from the need to register vary from state to state.⁴ Failing to register to do business in a state in which a company is doing business can have a variety of consequences based on the state in question.⁵ Foremost, a company can be shut out of the state's court system, but it can also be subject to a number of monetary penalties to both the company and the principals acting on behalf of the company.⁶

Prior to the proliferation of the Internet and e-commerce, the rules for determining presence in a state and the subsequent need to register to do business were fairly well-developed. Each state enacted a set of rules whether developed internally or through adoption of the Model Business Corporation Act or the Revised Model Business Corporation Act that provided guidance on activities that did or did not constitute doing business.⁷ The rules typically revolved around the physical presence of property or personnel, i.e., items that could be tangibly identified, within a state's borders that lead to the need to register in that state.⁸ However, as more and more business is conducted over the Internet and some businesses have no brick and mortar operation inside a state's borders, but rather do everything online, the rules can no longer be so easily applied.

There is little if any statutory authority or caselaw considering the question as to whether owning or operating a Web site constitutes doing business for the purpose of qualifying to do business. We may, however, look as an analogy to what activities online constitute qualification for personal jurisdiction as a starting point.⁹ This is a slightly

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more developed body of law, and it is equally important for a company to understand what online activity will give rise to personal jurisdiction in a forum state. Personal jurisdiction is important because it gives rise to the ability to be sued in any specific state in which a company has business activity.¹⁰ In a typical analysis for establishing personal jurisdiction, there must be either “substantial, continuous and systematic” presence in the forum state;¹¹ or minimum contacts where the granting of personal jurisdiction does not offend the traditional notions of fair play and substantial justice.¹² This means, in general, that a company must purposefully direct its activities or transactions to residents of a forum state, which give rise to a claim related to the company’s activities in that state and applying personal jurisdiction is fair to the parties.¹³ In terms of online activities, the courts have applied these classic notions of personal jurisdiction and applied them based on a sliding scale test depending on what type of Internet activity is being performed in a state.

The Zippo Sliding Scale Test for Personal Jurisdiction

The most commonly applied test for personal jurisdiction in a forum state being tied to the Internet activity of a company is a sliding scale test established by the Pennsylvania case of *Zippo Mfg Co v Zippo Dot Com, Inc*¹⁴ In this case, Zippo Manufacturing, a manufacturer of popular lighters, sued Zippo Dot Com, a free online news service, based on a number of trademark claims, which ultimately gave rise to the issue of whether personal jurisdiction existed in the state based on the company’s online presence.¹⁵ In making its decision, the court applied a sliding scale test based on three classifications for deciding if certain Internet activity would give rise to a specific forum state having personal jurisdiction over a company.

The *Zippo* sliding scale test has three classifications for Web sites. First, there are passive Web sites or “brochure-ware,” which means simply posting information about the company and its products or services in a static form that appears the same to all visitors.¹⁶ Second, there are active Web sites that allow for the direct interaction between a company and consumers for the repeated sale of products or services via the Web site.¹⁷ Finally, there are interactive Web sites, which provide for a mix of brochure-ware type ad-

vertising and some form of ordering or reservation system.¹⁸

Passive Web Sites

At one end of the sliding scale, there are passive Web sites. Passive Web sites typically post static pages simply announcing that a company exists.¹⁹ It is information only; a simple collection of pages advertising general products or services. In *Zippo*, the court held that a passive Web site alone is not adequate to provide minimum contacts for personal jurisdiction.²⁰ Once a Web site goes from simply posting static pages on the Internet to allowing user to sign up for mailing lists, post their opinions, or conduct monetary transactions, the Web site has the potential to establish personal jurisdiction, and the distinction lies in whether the site is fully active or partially interactive.

Active Web Sites

At the other end of the sliding scale from passive Web sites are active Web sites. Active Web sites are those that are generally financially motivated and include components that engage the user’s input. The courts have applied the active category of Web sites to those companies on the Internet that conduct sales to the forum residents,²¹ conduct business in the forum state through numerous contacts,²² or enter into specific dealings with residents in the forum state.²³ Active Web sites will give rise to personal jurisdiction for a company.²⁴ While it might be easy to identify fully active sites where financial transactions are completed, there are varying degrees that might not give rise to personal jurisdiction, which is where the interactive Web site analysis becomes important.

Interactive Web Sites

In the middle of the sliding scale, there are interactive Web sites. Interactive Web sites are not necessarily subject to personal jurisdiction; it depends on the scope of services occurring on the Web site in question.²⁵ For personal jurisdiction to be established there must be a sufficient level of specifically intended interactivity with residents of the forum state,²⁶ and, if truly interactive, jurisdiction may be proper against a web only business whose only contact with the forum state is the online presence.²⁷ The distinguishing factor for whether a company’s activity on a Web site rises to the level of establishing personal jurisdiction is not whether a user from a certain jurisdiction has the potential

to make a purchase or interact with the company, but rather whether the company specifically targets residents of a foreign state.²⁸ The courts will examine a variety of factors in determining the level of interactivity that exists as well as the commercial nature of the exchange of information occurring on the site.²⁹ This is where the court's specific interpretation of the online activities becomes important. For example, in Minnesota and the District of Columbia, the courts found that the act of allowing users to add their e-mail addresses to a mailing list was enough to establish personal jurisdiction.³⁰ In neither of these two specific cases were there monetary transactions involved, only the exchange of information.³¹ Similarly, courts in Massachusetts and New York have ruled that an arguably passive Web site with some minor active components was adequate to establish personal jurisdiction.³² In Connecticut, a company whose Web site was no more than brochure-ware but also provided a toll-free number was found to have personal jurisdiction in the state because it was perceived to be an active solicitation for business.³³ However, other courts have had contradictory opinions of arguably similar online activity.

The Fifth Circuit Court found there was no personal jurisdiction on a Web site that provided a printable order form, a toll-free number, and an e-mail address for order questions.³⁴ A Texas court found a lack of jurisdiction based on a Web site that both provided information about tour packages and services, as well as a message posting board for users to post their comments and information, a form to request a brochure, and links to the company's e-mail address.³⁵ An Alabama court found that a limited order form that could be completed and submitted online did not provide the necessary minimum contacts for personal jurisdiction.³⁶ All of these interactions do tend to lean more toward an active interface targeted toward residents of the forum state in question, but no personal jurisdiction was found.

Non-Zippo Tests for Personal Jurisdiction

Not all courts have adopted the *Zippo* sliding scale test. Some courts have specifically rejected the *Zippo* holding that Internet activity alone is insufficient to create personal jurisdiction.³⁷ A North Carolina court applied a fairness test in finding that jurisdiction was established for a company's Web site provid-

ing an advertisement of products to forum state residents, and the court's assumption that the residents had actually utilized the company's services.³⁸ Others, such as the Ninth Circuit Court, have applied what is commonly referred to as the "effects doctrine,"³⁹ under which personal jurisdiction may be found where the online conduct of a company was aimed at or has an effect in the forum state.⁴⁰ The effects doctrine is fairly similar to the *Zippo* test in applying a classic personal jurisdictional analysis to the online activity of a company and potentially establishing personal jurisdiction in a forum state if there is something more than a company merely placing a Web site in the stream of commerce. These tests still focus on a company's minimum contacts within a state and overall fairness in permitting personal jurisdiction in a forum state, but acting under a different methodology than the *Zippo* test.

Regardless of how a court looks at personal jurisdiction based on Internet activity, there is still a question of translating that into the need to qualify to do business.

Application of the Personal Jurisdiction Tests for the Qualification to Do Business

There are various issues with applying the outcome from a test for personal jurisdiction to the need for a company to qualify to do business in a foreign jurisdiction. Generally, it is easier to meet the qualification for personal jurisdiction than the tests for what constitutes doing business.⁴¹ Also, a somewhat greater quantum of business activity is required to compel a corporation to need to qualify to do business within a foreign state than that which subjects it to service of process.⁴² However, it seems clear based on the lower standard for personal jurisdiction that if a company does not even meet the qualification for personal jurisdiction, such as for a passive Web site, it should most likely not be concerned with the need to qualify to do business. Therefore, the issue becomes the divergence between what gives rise to personal jurisdiction, but not the qualification to do business.

There is no bright line rule in regard to how courts are handling a company's Internet presence to establish personal jurisdiction let alone the need to qualify to do business. As was previously discussed, even the prevailing *Zippo* test is ambiguous in the interactive Web site category, and, arguably,

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various jurisdictions declining the *Zippo* test have established equally ambiguous tests.⁴³ However, this ambiguity may provide room for legislatures to identify the heightened standard necessary for the qualification to do business. Much of the analysis under both the tests for personal jurisdiction as well as the need to qualify to do business are based on the traditional view of purposeful availment,⁴⁴ or that a company is purposely engaged in intrastate business in the forum state in question.⁴⁵ The crux of both issues from an online presence may turn on a Web site operator purposely targeting marketing and sales to residents of a forum state.⁴⁶ Therefore the legislature could consider doing away with the interactive Web site classification and just leave the higher standard of an “active Web site” for the need to qualify to do business in a forum state. Further, there is also some consensus among the courts that active Web sites are targeting forum state residents from a financial transaction prospective. With that in mind, it must be considered that more and more companies, no matter what size, are using “active Web sites” based on their marketing and business approach and as a result of the continued decrease in the cost and availability of technology.⁴⁷

The dynamic nature of Web 2.0 encourages user interface and interaction to hold the attention of users and provide them with a full web experience tailored to their specific needs.⁴⁸ Linking the qualification to do business to active Web sites could become particularly onerous to businesses of any size, let alone start ups and small businesses that typically rely on the Internet to give them the ability to create a perception of equality with larger competitors.⁴⁹ However, there needs to be a more careful balance between business activity, Internet expansion, and state registration requirements. Not all interactive components on a Web site should necessitate the need to register to do business, but rather those components that clearly define a Web site as an active Web site and not simply a passive or interactive Web site. If a company wants to provide a dynamic web presence it must be advised that it is subjecting itself to the laws of the states in which it is tailoring that experience. If a company does not desire to be subject to a certain state’s laws, registrations, and courts, it may use the same technology that makes the web experience dynamic to exempt itself. For example, if a user were identified by the company as being

in the state in which it does not wish to operate, the program that would otherwise create a dynamic user experience could simply load a static brochure-ware view of the site. The current problem is driven by ambiguity, not cost. If a company understands its respective burden of expansion into foreign jurisdictions whether electronically or physically, it can plan and budget for these as costs of doing business, regardless of enterprise size.

The state legislatures need to consult and coordinate with business enterprises to ensure that as the web evolves, so do the laws dictating how business interacts with the legal environment. As more and varied opinions and interpretations of classic legal doctrine are applied in various jurisdictions to a company’s online presence, the burden on companies to operate continues to grow as well. However, without an understanding of what the expectations and demands are on a business, it not only suppresses their desire to expand commercial enterprises, but it also stifles advancement, two issues the states cannot afford to encourage at any time.

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NOTES

1. Tim O’Reilly, *What Is Web 2.0*, O’Reilly Media, available at <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html> (Sept. 30, 2005).
2. William Minnis, et al., *Dynamic Reconfiguration of Web Pages Based on User behavioral Portrait*, U.S. Patent App. No. 20080201242 (applied Aug. 21, 2008).
3. *A Legal Guide to Acquisitions and Doing Business in the United States* 81 (Cornell University ILR School 2007).
4. *Id.*
5. *Consequences of Doing Business in Other States Without Qualifying*, Weiss & Associates, available at http://www.weissandassoc.com/article_consequences.html (2006).
6. *Id.*
7. *What Constitutes Doing Business* 33 (CT Corp. 2003).
8. *Id.*
9. Benjamin Spencer, *Jurisdiction and the Internet*, 2006 U. Ill. L. Rev. 71, 76-86 (2006).
10. *Milliken v Meyer*, 311 US 457 (1940).
11. *International Shoe Co v Washington*, 326 US 210, 316 (1945).
12. *Id.*
13. *Core-Vent v Nobel Indus AB*, 11 F3d 1482, 1485 (9th Cir 1993).
14. *Zippo Mfg Co v Zippo Dot Com, Inc*, 952 F Supp 1119, 1124 (WD Pa 1997); *Auburn Mfg v Steiner Indus*, 493 F Supp 2d 123 (D Me 2007).
15. *Id.*
16. *Nutrition Physiology Corp v Enviros, Ltd.*, 87 F Supp 2d 648 (ND Tex 2000); *Havey v Stahler*, 616

SE2d 642 (NC App 2005); *Cybersell, Inc. v Cybersell, Inc.*, 130 F3d 414, 420 (9th Cir 1997); *Bensusan Rest Corp v King*, 937 F Supp 295 (SDNY 1996). This argument is not based on directed tortious activity under which a state may exercise their long-arm statutes.

17. *Zippo Mfg Co*, 952 F Supp at 1124.

18. *The 50-State Qualification Handbook* 41 (Corp Service Co 2008).

19. *Zippo Mfg Co*, 952 F Supp at 1124.

20. *Id.*

21. *CompuServe, Inc v Patterson*, 89 F3d 1257 (6th Cir 1996), which asserted personal jurisdiction based on the defendant selling software over the Internet to twelve people in the forum state.

22. *Baritz, Inc v CyberGold, Inc*, 947 F Supp 1328 (ED Mo 1996), which asserted personal jurisdiction on grounds the Web site operator placed Internet users on a mailing list and indiscriminately responding to all users.

23. *Zippo Mfg Co*, 952 F Supp at 1119 (WD Pa 1997), which asserted personal jurisdiction where the Web site operator charged a fee to the forum state's residents to enter its Web site.

24. *Id.*; *Compuserve, Inc*, 89 F3d at 1257.

25. *Snowney v Harrah's Entm't*, 35 Cal 4th 1054 (2005); *Shamsuddin v Vitamin Research Prods*, 346 F Supp 2d 804 (D Mass 2004); *Zippo Mfg Co*, 952 F Supp at 1124.

26. *Neogen Corp v Neo Gen Screening, Inc*, 282 F3d 883, 890 (6th Cir 2002), citing *Zippo Mfg Co*, 952 F Supp at 1124.

27. *CompuServe v Patterson*, 89 F3d 1257 (6th Cir 1996).

28. *Just Entm't, Inc v (888) Justice, Inc*, No 06-5023-CV-S-JCE, 2007 US Dist LEXIS 9040 (WD Mo 2007); *Slocum Enter, Inc v New Generation Devices*, No CV-04-201-HU, 2004 US Dist LEXIS 17044 (D Or 2004); *Millennium Entertainers, Inc v Millennium Music, LP*, 33 F Supp 2d 907 (D Or 1999).

29. Christopher Wolf, *Standards for Internet Jurisdiction*, Proskauer Rose (1999).

30. *Blumenthal v Drudge*, 992 F Supp 44 (DDC 1998); *Maritz, Inc v Cybergold, Inc*, 947 F Supp 1328 (ED Mo 1996); *Minnesota v. Granite Gate Resorts, Inc*, 568 NW2d 715 (Ct App MN 1997).

31. *Id.*

32. *Hasbro v. Clue Computing, Inc*, 994 F Supp 34 (D Mass 1997), *Digital Equip Corp v AltaVista Tech, Inc*, 960 F Supp 456 (D Mass Mar 12, 1997), *American Network, Inc v Access America/Connect Atlanta, Inc*, 975 F Supp 494 (SDNY Aug 14, 1997).

33. *Inset Sys, Inc v Instructions Set, Inc*, 937 F Supp 161 (D Conn 1996).

34. *Mink v AAAA Dev*, 190 F3d 333 (5th Cir 1999).

35. *Amazon Tours, Inc v Wet-A-Line Tours, LLC*, No 3-01-CV-1422-R, 2002 US Dist LEXIS 1649 (ND Tex 2002).

36. *Butler v Beer Across America*, 83 F Supp. 2d 1261 (ND Ala 2000).

37. *Howard v Mo Bone and Joint Center, Inc*, 373 Ill App.3d 738 (2007); *Auburn Mfg v Steiner Indus*, 2007 US Dist LEXIS 47163 (2007).

38. *Superguide Corp v Kegan*, No 4:97cv181-C, 1997 US Dist LEXIS 19317 (1997).

39. *Panavision Int'l LP v Toeppen*, 141 F3d 1316 (9th Cir 1998).

40. *Id.* at 1321.

41. See, *supra* note 18 at 36.

42. *Horton v Richards*, 594 P2d 891, 893 (Utah 1979).

43. See generally, Section 3 of this paper.

44. *Burger King Corp v Rudzewicz*, 471 US 462, 475-476 (1985); *Asahi Metal Indus Co, Ltd v Superior Court of California*, 480 US 102 (1987).

45. Anthony Mancuso, *Qualifying to Do Business Outside Your State*, Nolo, available at <http://www.nolo.com/article.cfm/objectId/494E7E2F-336B-44E6-A16DF8A798E1E67A/catID/BAAE1B67-F54A-41B4-91943A51F56C3F79/111/182/245/ART/> (2008).

46. Jamie Spataro, *Personal Jurisdiction Over The Internet*, 2 PGH. J. Tech. L. & Pol'y 3 (Fall 2002).

47. Geoffrey A. Moore, *The Internet as a Small-Business Edge*, Business Week Online, available at <http://www.businessweek.com/smallbiz/0006/ma000619.htm> (2000).

48. O'Reilly, *supra*, note 1.

49. Moore, *supra*, note 47.



Andrew M. Kulpa is an associate based in Butzel Long's Detroit office. His practice concentrates on corporate and limited liability company organization and operation, corporate transactions, and finance law. He is actively involved with negotiating and drafting transactions for closely held and public companies dealing with start ups, general contract issues, joint ventures, and mergers and acquisitions. He is also director of Global Vision, Inc., a non-profit corporation focused on developing computerized global forecasting models to assist in organization planning by improving the grounds on which such forecasting is made.