New York's Long-Arm Reach Onto The Web

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The Internet, or Wold Wide Web, has proliferated our society to an extent barely imagined just a few years ago. Major corporations, law firms and even individuals all have their own web site. Indeed, the web is mainstream. The Internet is helping to make the world a much smaller place, as anyone sitting at a computer can be viewing a web site based in any other state, let alone country, for basically the price of a local telephone call.

As with many technological innovations before it, the explosion of the Internet has raised a number of legal questions, one being fundamental for litigation. Put simply, when do New York courts exercise personal jurisdiction over non-domiciliary defendants that own and/or maintain a web site? This article explores that question.

Jurisdiction Over Non-Domiciliary Generally

Pursuant to the CPLR, jurisdiction over a defendant is based on the same principles as at common law. (1) In applying the statute to a non-domiciliary, personal jurisdiction may be exercised over the non-domiciliary if it is present or "doing business", which is such a continuous and systematic course of activity that it can be deemed present in New York. (2) Indeed, a physical presence in New York is not necessary for there to be personal jurisdiction over a foreign corporation under CPLR §301 if that corporation conducts business in New York with "a fair measure of permanence and continuity." (3) New York's long-arm statue [CPLR §302] sets forth three circumstances when jurisdiction may be exercised over a non-domiciliary. (4) The first is when the non-domiciliary transacts any business in New York or contracts anywhere to supply goods and services in New York. (5) The next is when a non-domiciliary "commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act". (6) Lastly, jurisdiction may be exercised over a non-domiciliary that commits a tort (other than defamation of character) outside of New York which causes injury in New York, if the non-domiciliary:

1. conducts business in or derives substantial revenue from New York, or
2. expects or should reasonably expect its tort to have consequences in New York and the non-domiciliary derives substantial revenue from interstate or international business. (7)

Personal Jurisdiction and The Internet

It appears that courts applying New York's jurisdiction statutes have generally held that non-domiciliaries which simply post information on a web site, without more, do not subject themselves to personal jurisdiction in New York. The same is not true of non-domiciliaries which have an interactive web site or have other direct contacts with New York.

"[T]he likelihood that personal jurisdiction can be exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." (8) The spectrum of cases which has emerged regarding a defendant's use of the Internet and jurisdiction over that defendant has, at one end, cases involving a "passive" web site (simply a posting of information) which, without more, will not result in jurisdiction being exercised, and at the other end cases in which the defendant transacts business over its web site and knowingly and repeatedly transmits its information to those in other states, which results in the exercise of jurisdiction. The middle ground are those cases in which the defendant's web site is

interactive, permitting information to be exchanged between the defendant and users in a different state, which may be a basis for jurisdiction depending on both the level and the nature of the exchange. (9)

No Jurisdiction

In Hearst Corp. v. Goldberger, (10) there was no personal jurisdiction over a defendant that maintained a web site which did not offer actual products or services. Mere accessibility to the site by New York residents, without more, was not enough to confer jurisdiction over the defendant. In its analysis, the court analogized the maintenance of a web site to placing an advertisement in a national magazine, which is not enough for jurisdiction. (11) To do otherwise "would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site," which is inconsistent with both case law and public policy. (12) The court also established that a web site which displays marks infringing on a trademark, commits a tort where the web site is created and/or maintained. (13)

The Southern District of New York also refused to exercise jurisdiction over the defendant in Bensusan Restaurant Corp. v. King, (14) where the creator of "The Blue Note" jazz club in New York (and owner of the trademark), commenced a trademark infringement action against the owner and operator of a club in Columbia, Missouri, also called "The Blue Note". The defendant's web site was located on a server in Missouri and contained a "similar" logo to plaintiff's, general information about the club and information on how to order tickets to be picked up at the box office. The site was accessible to all. (15)

In making its determination, the court first applied CPLR §302(a)(2). The existence of the web site, which allowed a user to obtain information about the allegedly infringing product, was "not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York." Moreover, as the defendant did not transmit or send the tickets to the user, there was no proof or even an allegation that the infringing goods were shipped into New York. (16)

The court then disagreed with plaintiff's argument that CPLR §302 (a)(3) applied since the defendant could have foreseen that his web site would be viewed in New York, holding that the "mere foreseeability of an in-state consequence and a failure to avert that consequences is not sufficient to establish personal jurisdiction." (17)

The court went on to determine that even if there was jurisdiction under New York's long-arm statute, such jurisdiction would violate the Due Process Clause of the United States Constitution. There was nothing to indicate that the defendant did any business in New York or did anything to encourage New Yorkers to access his site. "Creating a site, like placing a product in the stream of commerce, may be felt nationwide---or even worldwide---but, without more, it is not an act purposefully directed toward the forum state." (18)

In K.C.P.L., Inc. v. Nash, (19) the question of whether long-arm jurisdiction could be exercised over the registrant of a domain name was answered in the negative. Though defendant was the owner of the allegedly trademark infringing domain name, there was neither an operational web site nor any content ever posted at that location. The court held that it did not have personal jurisdiction over the defendant, as he did not transact any business in New York, especially as the web site simply sates that it is under construction. (20)

Recently, jurisdiction over a Washington State Internet service provider was declined, despite the fact that the defendant maintained a web site which allowed a user to purchase services from the site. (21) CPLR §320 (a)(2) was not satisfied as, pursuant to Hearst, supra, the tort occurred in Washington, not New York. (22) Moreover, the evidence did not show that defendant conducted any business in New York or derived any revenue from the state or from interstate commerce, but instead indicated that it was a local Washington business, resulting in CPLR §§302 (a)(3) (i) & (ii) being inapplicable. (23)

Jurisdiction

In American Network, Inc. v. Access America/Connect, (24) the Southern District held it had jurisdiction over a Georgia Internet service provider whose web server was also located in Georgia. Its web site, which contained the allegedly infringing mark, had different pages describing defendant's company and offering services, as well as a service agreement that a subscriber must be entered into to use the services. (25)

Initially, the court determined that plaintiff's claims of harm and threatened harm by its potential customers that are New York computer users have been confused and deceived by the allegedly infringing mark on defendant's site were enough to meet the injury "within the state" requirement of CPLR §302 (a) (3) (ii). (26) The court went on to find that it was reasonably foreseeable that the inclusion of the trademark at issue on the web site would have New York consequences by the two statements on the home page that defendant "could help customers 'across the U.S.'" and that defendant signed up six New York subscribers. (27) Accordingly, there was jurisdiction pursuant to CPLR §302 (a) (3) (ii). Exercising jurisdiction over the defendant would not violate due process as, other than the web site, defendant signed up six subscribers to its service; probably mailed software packages and agreements to those subscribers; was deriving a monthly revenue from those subscribers; was marketing, and sold, its services in New York. That the revenue obtained from New York was not substantial was irrelevant. (28)

In three recent federal cases, the Southern District held that it had jurisdiction over the respective non-domiciliary defendants, each of whom owned web sites and had other contacts with New York.

The Southern District in Citigroup Inc. v. City Holding Co., (29) a trademark infringement action, determined that it had jurisdiction over both of the defendants, West Virginia corporations, one a wholly owned subsidiary of the other. Pursuant to CPLR §302 (a) (1), jurisdiction was conferred over the defendant which maintained two web sites that not only contained information about the defendant's products and services, but allowed customers to apply for loans on-line; to print out applications to send back via fax; to click on a link and "chat" with a representative of the defendant; and e-mail questions to a representative which would be responded to promptly. (30)

Jurisdiction also existed under CPLR §302 (a) (2). Though simply displaying the infringing marks on the web site is not enough for jurisdiction, the interaction between the defendant and New York residents via the web site, e.g., the on-line chats, is the commission of a tort within New York. (31) CPLR §302 (a)(3) was also satisfied as plaintiff's customers were confused and deceived by defendant's web sites; it was reasonably foreseeable that the web sites would have consequences in New York; and the defendant derived substantial revenue form interstate commerce. (32)

In another trademark infringement case, the Southern District exercised jurisdiction over a California owner of a web site which provided information about sporting events but which included advertisements that allowed visitors to link and place sports bets. (33) In National Football League v. Miller, the infringing site's domain name was "nfltodya.com" and contained a hyperlink to the official NFL site. The court found it had jurisdiction under CPLR §302 (a)(3) as the tort was committed outside the state; the link to gambling activity caused damage to the NFL in New York; a site targeting NFL fans would undoubtedly be accessed by New York residents as a result of the two NFL teams in the New York metropolitan area; and the defendant received substantial revenue from interstate commerce. (34)

Jurisdiction was exercised over a Utah corporation pursuant to CPLR §301 in Haddad Bros. Inc. v. Little Things Mean A Lot, Inc. (35) In this patent infringement action, that the defendant maintained a web site with an on-line store offering products to New York customers was one factor in the Court's decision. (36)

New York state courts which have dealt with the issue of Internet jurisdiction have followed the analysis of the federal courts. In People v. Lipsitz, (37) the court agreed that simply maintaining a web site is not enough to confer jurisdiction, but that jurisdiction would be proper where the entity was a subscriber to a local Internet service provider and sold its product through that provider. The defendants in People v. World Interactive Gaming Corp. (38) engaged in an advertising campaign to persuade people to use their web site and gamble, knowing that the advertisements were being seen by New Yorkers and making no attempt to exclude New Yorkers from the advertisements, which was a factor in finding jurisdiction. (39)

Conclusion

Simply having an Internet presence from a web site that posts information, without more, does not subject a defendant to New York jurisdiction. A web site which is interactive, however, having contact with New Yorkers and allowing time to "chat" or to buy, will likely result the exercise of jurisdiction. Jurisdiction will also be exercised if a tort is committed outside of New York and:

1. the defendant does business, engages in persistent conduct or derives substantial revenue in New York, or
2. expects (or should expect) the act to have consequences in New York while deriving substantial revenue from interstate commerce.

Accordingly, any jurisdictional analysis will focus on the interplay between the web site and the residents of New York.

Endnotes

1. CPLR §301, Penny v. United Fruit Co., 869 F. Supp. 122 (E.D.N.Y. 1994).
2. Laufer v. Ostrow, 55 N.Y. 2d 305, 449 N.Y.S.2d 456 (1982); see also, Frummer v. Hilton Hotels International, Inc., 19 N.Y.2d 533, 281 N.Y.S.2d 41 (1967).
3. Landoil Resources Corp. v. Alexander & Alexander Services, 77 N.Y.2d 28, 34, 563 N.Y.S.2d 739, 741 (1990), quoting, Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 267 (1917).
4. Personal jurisdiction may also be exercised over a non-domiciliary who "owns, uses or possesses any real property situated within the state." CPLR §302(a)(4).
5. "[A] court may exercise personal jurisdiction over any non-domiciliary---who in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services in the state." CPLR §302(a)(1).
6. CPLR §302(a)(2).
7. "[A] court may exercise personal jurisdiction over any non-domiciliary---who in person or through an agent: commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

8. Zippo Mfg. Co. v. Zippo Dot Com. Inc., 952 F. Supp. 1119, 1124 (W.D.Pa. 1997).
9. See, e.g., Citigroup Inc. v. City Holding Co., 97 F. Supp.2d 549, 565 (S.D.N.Y. 2000); Zippo Mfg. Co. v. Zippo Dot Com. Inc., 952 F. Supp. 1119, 1124 (W.D.Pa. 1997).
10. No. 96 Civ. 3620, 1997 WL 97097 (S.D.N.Y. 1997).
11. See, Davidson Extrusions, Inc. v. Touche Toss & Co., 131 A.D.2d 421, 516 N.Y.S.2d 230 (2d Dept. 1987). In Connecticut, however, the exact opposite conclusion was reached in Inset Systems, Inc. v. Instruction Set, Inc., 937 F.Supp. 161 (D. Conn. 1996). The defendant, a Massachusetts corporation which had no office or employees in Connecticut and which did not regularly conduct business in Connecticut, did have a web site which was used to advertise its goods and services. Determining that each computer with internet access was an "access site" to the advertisement, and that unlike print advertisements, a web-site "can be accessed again and again by many more potential consumers", the court held that since "advertising via the Internet is solicitation of a repetitive nature to satisfy" Connecticut's long-arm statute, it had personal jurisdiction over the defendant. The court even went a step further, holding that the very nature of a web site both its content and its availability to computer users in every state, is proof that the defendant "purposefully availed the privilege of doing business in Connecticut" Id. at 165.
12. Hearst, 1997 WL 97097 at *2.
13. Id. at *10.
14. Bensusan Restaurant Corp. v. King. 937 F. Supp. 295 (S.D.N.Y. 1996), aff'd, 126 F. 3d 25 (2d Cir. 1997).
15. 937 F. Supp. At 297.
16. Id. at 299.
17. Id. at 300.
18. Id. at 300. In Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996), however, a California web site owner was held to have violated Missouri's long-arm statute by committing a tortious act simply by being available to Missouri web users. The Maritz court further found that the Due Process Clause was not violated as a result of defendant (i) intending to reach all internet users, regardless of their geographic location; (ii) purposefully availing itself of activities in Missouri by having 131 hits on its site from Missouri; and (iii) allegedly infringing on plaintiff's trademark which causes injury in Missouri.
19. No. 98 Civ. 3773, 1998 WL 823657 (S.D.N.Y. 1998).
20. Id. at *4. The court also did not find that defendant's alleged activities of attempting to have plaintiff buy his rights to the domain name were enough to confer jurisdiction over him pursuant to New York's long-arm statute. Id. at **6-8.
21. Telebyte, Inc. v. Kendaco, Inc. NYLG, Aug. 9, 2000, p. 32 col. 5 (E.D.N.Y. 2000).
22. Id. at p. 32 Col. 5 - p. 33 col. 1.
23. Id. at p. 33 col. 2.
24. 975 F. Supp. 494 (S.D.N.Y. 1997).
25. Id. at 495-96.
26. Id. at 497.
27. Id. at 498.
28. Id. at 498-500.
29. 97 F. supp.2d 549 (S.D.N.Y. 2000).

30. Id. at 565-66.
31. Id. at 566-67.
32. Id. at 567-69. The Court went on to decline to determine whether there would be jurisdiction over the defendants based on their internet activities pursuant to CPLR §301, but would be "hesitant" to make such a finding. Id. at 569-71.
33. National Football League v. Miller, No. 99 Civ. 11846, 2000 WL 335566 (S.D.N.Y. 2000).
34. Id. at *2. Due process was also satisfied as defendant profits from the very activity which causes the damage to the NFL in New York. Id.
35. No. 00 Civ. 00578, 2000 WL 1099866 (S.D.N.Y. 2000).
36. Defendant had a corporate showroom in New York from which it was actively soliciting business from and selling to customers; sent catalogues and order forms to New York customers; sold merchandise to retailers located in New York; and derived substantial revenue from New York. Id.
37. 174 Misc. 2d 571, 663 N.Y.S. 2d 468 (Sup. Ct. N.Y. Co. 1997).
38. 1999 WL 591995 (Sup. Ct. N.Y. Co. 1999).
39. In both Lipsitz and World Interactive Gaming, the defendants were based in New York and performing other acts in New York. As a result, their respective web presence was not the determining factor in finding jurisdiction. See also, Cybertech Comm. Corp. v. Quad International Inc., 262 A.D.2d 44, 691 N.Y.S. 2d 460 (1st Dept. 1999)(jurisdiction under CPLR §302(a)(1) established where defendant's New York contact included sales into New York through its web site).