

New York Law Journal

TUESDAY, NOVEMBER 28, 2006

LITIGATION REVIEW



Weaving Jurisdiction From the Web

BY KEVIN SCHLOSSER

“As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase.” Little did he know how prophetic his words in *Hanson v. Denckla*, 357 U.S. 235, 250-51, would be when Chief Justice Earl Warren observed in 1958 that the parameters of personal jurisdiction must adapt and evolve with technological advances.

While Justice Warren was commenting on the advances of communication and transportation in 1950s America, courts continue to grapple with jurisdictional issues relating to the "technological progress" of the e-age in the 21st century.

An instructive body of federal case law has already developed concerning the circumstances under which personal jurisdiction may be derived from an out-of-state defendant's maintenance and operation of a Web site. As shown by the recent decision of Eastern District Judge Arthur D. Spatt in *ISI Brands, Inc. v. KCC International, Inc.*, 2006 WL 2989032 (Oct. 19, 2006), courts are now resolving with relative comfort and ease the thorny issues of personal jurisdiction arising from and in connection with interstate commerce through the Internet.

In *ISI*, Judge Spatt was asked to determine whether the Eastern District of New York was empowered to exercise jurisdiction over a company located in Tampa, Fla., with no offices, telephones or sales personnel in New York but which allegedly sold products across the country through its Web site.

In federal diversity cases and in federal question cases where the applicable federal statute does not specifically provide for national service of process, the federal court must apply the forum state's procedural rules to determine whether there is personal jurisdiction over an out-of-state defendant. See *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997) (diversity); *PDK Labs v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997) (federal question). Thus, federal courts in this state look to New York's long-arm statute under CPLR 302, authorizing personal jurisdiction through acts of non-domicilliarities.

Of course, even if jurisdiction is permitted under CPLR 302, the court must also determine whether the exercise of that jurisdiction over an out-of-state defendant satisfies federal constitutional due process requirements (*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 [1985]), but, as a practical matter, once a court finds jurisdiction exists under CPLR 302, it is virtually unheard of for the court to rule that the exercise of such jurisdiction violates due process.

Internet Activity

A leading decision analyzing the reach of long-arm jurisdiction arising from Internet activity is *Citigroup, Inc. v. City Holding Co.*, 97 F.Supp.2d 549 (S.D.N.Y. 2000). Acknowledging that "[w]ith the advent of the internet, the courts have been confronted with a new set of challenges," the *Citigroup* court observed that the "guiding principle which has emerged from the case law is that whether the exercise of personal jurisdiction is permissible is "directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet."" (Quoting *K.C.P.L., Inc. v. Nash*, 1998 WL 823657, at *5 (S.D.N.Y. 1998), which cited *Zippo Mfg. Co. v. Zippo DOT Com*, 952 F.Supp. 1119, 1124-25 (W.D.Pa. 1997).

Surveying the applicable cases, the *Citigroup* court continued that on one end of the spectrum "are cases where the defendant makes information available on what is essentially a 'passive' web site" - similar to advertising in a national magazine or newspaper - that does not justify jurisdiction. On the other end of the spectrum, are "cases in which the defendant clearly does business over the internet, such as where it knowingly and repeatedly transmits computer files to customers in other states" - which would plainly confer jurisdiction.

The *Citigroup* court then characterized cases in the "middle ground" - where the defendant maintained an interactive Web site permitting the exchange of information between users in another state and the defendant, which depended on "the level and nature of the exchange," in order to justify jurisdiction.

Kevin Schlosser is a partner and chair of the Litigation Department at Meyer, Suozzi, English & Klein, P.C., Counselors at Law, Garden City, New York (516) 741-6565 • kschlosser@msek.com

Against this backdrop, Judge Spatt declined to exercise jurisdiction in *ISI* over the out-of-state Web site seller. In *ISI*, the plaintiff was "an intellectual property holding company" that acquired the trademark "FUEL" in connection with vitamins, minerals, dietary and nutritional supplements, food bars and drinks, such as "DIET FUEL," "RIPPED FUEL" and "JOINT FUEL." Plaintiff alleged claims of trademark infringement, violations of the Lanham Act and various statutory and common law claims under New York law against defendant for using the marks "LIVING FUEL" and "LIVING FUEL RX" in connection with the sale of meal replacements and dietary supplements.

Plaintiff alleged that defendant was subject to jurisdiction in New York solely because it engaged in activity over the Internet and through its Web site - even though defendant had no physical presence in New York.

Relying upon the above case law, including *Citigroup*, Judge Spatt noted that Web sites that are not commercial in nature and do not permit the purchase of products online are insufficient to confer personal jurisdiction, while commercial Web sites that do permit consumers to place orders and communicate e-mail questions can confer personal jurisdiction pursuant to New York's long-arm statute.

However, in surveying the Internet-based jurisdictional decisions, Judge Spatt found that in the commercial Web site cases the courts relied upon activity beyond the mere Web site to exercise personal jurisdiction over the defendant. For example, he noted that in *Citigroup*, the court determined the defendant's activities were not limited solely to the Internet but that defendant also directly solicited New York clients through the mail and hired New York companies to record mortgages. In other similar cases, Judge Spatt found that defendants had affiliates residing in New York, representatives who appeared in trade shows in New York, sold several products to New York residents or had other significant contacts with and in New York, thereby justifying personal jurisdiction.

Judge Spatt continued that the plaintiff in *ISI* only alleged that the defendant sold products nationally through its interactive site, but had not alleged that defendant had any specific connections to New York or purposely solicited New York customers in particular. Significantly, Judge Spatt rejected the plaintiff's attempt to show that defendant sold products for delivery into New York by virtue of orders placed by individuals affiliated with plaintiff or its counsel after the action was instituted.

He rejected these contrived purchases for several reasons, including that (i) only prelitigation contacts could be relied upon to confer jurisdiction, (ii) placing orders for purposes of "manufacturing" a contact with the forum state were not sufficient and (iii) the sales procured by the plaintiff's representatives did not have a direct relationship to the claims for trademark infringement and unfair competition because the purchasers were not "confused" by the alleged infringement, a necessary element of the claims.

Judge Spatt chose to rely upon the decision in *Mattel, Inc. v. Anderson*, 2005 WL 1690528 (S.D.N.Y.), where the court found that plaintiff's investigator's purchase of a product on defendant's Web site for delivery in New York was insufficient to justify personal jurisdiction, instead of *Mattel, Inc. v. Adventure Apparel*, 2001 WL 286728 (S.D.N.Y.), where the court came to a directly opposite result on identical facts.

Jurisdictional Discovery

Interestingly, Judge Spatt did not grant the plaintiff's request to conduct discovery on the jurisdictional issue, as the court had "considerable procedural leeway" to do. See *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). It is hard to argue with Judge Spatt's ultimate decision to decline jurisdiction in New York given the fact that plaintiff itself asserted that it "conducts no sales in New York, owns no property in New York, maintains no New York telephone or directory listing, and does not advertise or engage in other promotional activities in New

York." (Plaintiff's memorandum of law in opposition to defendant's motion, p. 11.) (Plaintiff was defending against a different prong of defendant's motion seeking to dismiss based upon plaintiff's failure to obtain a license to do business in New York under BCL Section 1312.) In fact, plaintiff admitted that its "only 'presence' in New York is the fact that its general counsel is located in the Southern District of New York."

Given the fact that neither party, therefore, had virtually any contact with New York, not to mention the Eastern District, one can readily understand Judge Spatt's reluctance to exercise "considerable procedural leeway" to allow discovery on the jurisdictional issue. Nevertheless, in cases where a plaintiff indeed is located solely in or otherwise has substantial connections with New York, it would appear to be fair to plaintiff to allow it to establish that defendant had in fact sold products in New York or had other contacts in the state - through expedited, carefully directed discovery seeking such information.

Counsel in such cases would be wise to articulate precisely what discovery would be needed and persuasively urge the court to grant such discovery before resolving the jurisdictional motion.

As noted above, although one court has approved of relying upon sales generated by plaintiff itself for purposes of proving the sale of goods into New York, counsel are on notice that such "manufactured" contacts are not likely to be sufficient to confer personal jurisdiction over an out-of-state defendant.

Kevin Schlosser is a partner and chair of the litigation department at Meyer, Suozzi, English & Klein in Garden City.