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Courts wrestle with defining boundaries of the Cyberworld

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By Sandra Matthews
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Where is a Web site located? Courts around the world have been grappling with this very issue of jurisdiction in a cyberworld that seems to have no boundaries.

In the United States, at least, an answer is emerging.

"Jurisdiction is one of the essential issues in Internet cases," said Ian Ballon, partner of Los Angeles' Manatt, Phelps, & Phillips and author of the legal treatise, "E-Commerce and Internet Law."

"The standard that the U.S. Supreme Court applies is clear. The standard focuses on contact with the defendant, [contact] with the forum state and the cause of action," he said.

The fact that a company maintains a Web site that is accessible in a particular state should not be enough to establish personal jurisdiction in that state, Ballon said. The cause of action must be considered to determine whether there is enough "minimum contact" with the forum state to determine the jurisdiction.

Of course, it is up to the judges to decide on a case-by-case basis how much contact a defendant has had in a given state.

Recently, a federal judge in Washington state threw out a case Internet powerhouse Amazon.com had filed against a Los Angeles business, Amazontan.com. The latter hawks tanning oils but uses its Web site only as advertising. No online credit-card sales are made.

The court granted Amazontan's motion to dismiss the case Feb. 26 based on lack of jurisdiction. The case since has been refiled in Los Angeles.

Defense counsel Michael Diliberto, partner with Kleinberg & Lerner in Los Angeles, said there were insufficient grounds to hear the case in Washington, home base for Amazon.com.

"Simply having a Web site is not enough. You have to look at what is the [company's] activity," Diliberto said, noting that there was no

"systematic and continuous activity" by Amazontan.com in the state of Washington. Business owner Von Eric Lerner Kalaydjian never traveled to Washington, did not own property there and did not pay taxes there, Diliberto said.

The court ruled that it was unclear whether any of Amazontan's orders originated from Washington-based visits to its Internet site, although Judge Barbara Jacobs Rothstein noted that the tanning products company did send a sample of its oil to a Washington resident by request.

David Zapolsky, associate general counsel for Amazon.com, believes his client properly filed the case of trademark infringement against Amazontan.com in the state of Washington.

"It's hard to understand how someone who intends to harm us wouldn't be subject to personal jurisdiction where we [Amazon.com] are," Zapolsky said.

Considering that Web sites may be accessed worldwide, Zapolsky said, "It's hard to think that they wouldn't be subject to personal jurisdiction in most places."

In the case of Amazontan.com, the fact that the Web site can be accessed by Washington residents was not considered to be "substantial or continuous" enough to constitute general jurisdiction.

The issue of personal jurisdiction has been addressed in other cases involving Internet companies. In the cases of *Panavision Int'l L.P. v. Toepfen*, 141 F.3d 1316, the 9th Circuit noted that "simply registering someone else's trademark as a domain name and posting a Web site on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction in another."

Rather, there must be "something more" to demonstrate that the defendant directed his activity toward the forum state.

In another case, *Cybersell Inc. v. Cybersell Inc.*, 130 F.3d 414, the 9th Circuit noted a distinction between "passive" and "active" sites.

According to the court, an active site may constitute purposeful availment but a passive site

would not, since merely creating a site without subsequent activity is not an act directed toward the forum state.

In the recent case, Rothstein ruled that because the defendant's personal contacts appear to be primarily concentrated in California, Amazontan.com was determined to be a "passive site."

Aggressive to protect its trademarks, Amazon.com was more successful in keeping its home state as jurisdiction in another case in November.

In *Amazon.com Inc. v. Webovation Inc.*, the defendant moved to have the case brought to Minnesota where Webovation, a Web site design and Internet marketing company, is based.

The court denied the motion on the grounds that Webovation "intentionally" registered the Amazongifts.com domain name and the Amazon gifts Web site with the "knowledge" of Amazon.com's site in Washington and that this constituted "express aiming" of its conduct at Amazon.com in Washington state.

But it's not always that cut and dry, Diliberto said.

"Some cases had companies with sales and even presentations in the state, and the court still found no jurisdiction. It really is fact specific," he said.

Diliberto added that courts are "sensitive" to the economic hardship that defendants may suffer, having to bring witnesses to the forum state and incurring other litigation expenses.

Despite the Amazontan loss, Zapolsky is optimistic about the future of personal jurisdiction as it relates to Internet cases.

It should be resolved within the next couple of years," he said. "This area of law is getting more interesting, especially internationally." All attorneys interviewed agree that the law related to personal jurisdiction is more consistent in the United States than abroad.

"I don't see a uniform process there at this time," Diliberto stated.

Ballon explained that there is no internationally held uniform law governing personal jurisdiction.

"Unlike the U.S. due-process standard, internationally there is no single treaty to govern when jurisdiction is proper, so there are inconsistent rulings. Internationally, there is no pressure to get Internet conformity [of personal jurisdiction]," he said.