

Confronting Issues of Personal Jurisdiction And Interactive Web Sites in Patent Litigation

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Questions of personal jurisdiction, especially with respect to forum contacts arising out of Internet-related activities, have been litigated now for nearly a decade. During that time, courts have had occasion to analyze and rule upon all sorts of activities through the constitutional lenses of “minimum contacts” and “purposeful availment.” While most circuits appear to have developed relatively robust lines of authority to analyze whether personal jurisdiction exists where the type and nature of the contacts remain grounded in Internet-related activities, the jurisprudence of the Federal Circuit in this area is of relatively recent vintage. At least one district court appears to have concluded that the Federal Circuit’s jurisprudence concerning personal jurisdiction and Web site interactivity remains unsettled. A district court sitting in Indiana noted that, “[t]he Supreme Court and Federal Circuit Court of Appeals have provided very little guidance regarding the concept of personal jurisdiction established through a party’s Internet activities.” *Aero Industries, Inc. v. Demonte Fabricating, Ltd.*, 396 F. Supp. 2d 961, 967 (S.D. Ind. 2005). This article examines recent patent cases by district courts where Internet-related forum contacts appeared to be present or significant to the courts’ rulings on personal jurisdiction grounds.

GENERAL AND SPECIFIC PERSONAL JURISDICTION

Personal jurisdiction may be of two types, specific or general. Under the

“specific” personal jurisdiction concept, a court derives its authority because the plaintiff’s cause of action arises directly from the defendant’s activity purposefully directed toward the forum state. The court does not have jurisdiction to hear other claims against the same defendant that do not arise from the forum-related activity. “General” personal jurisdiction, on the other hand, may be asserted over a defendant in any forum where the defendant’s activities in the forum state have been substantial, continuous, and systematic. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-18 (1984). Where general jurisdiction is found, the court may adjudicate both forum-connected claims as well as claims that have no connection to the forum state.

THE INTERNET AND THE STREAM OF COMMERCE

Some uncertainty remains in analyzing when a business places “a product in the ‘stream of commerce’ such that it ‘purposefully avails’ itself of the benefits and protections of the laws of a given jurisdiction” where the stream is in fact the Internet. Gerard M. Stegmaier, *Offline Contacts Increasingly Analyzed Alongside Online Contacts: While Many Aspects of Online Jurisdiction Appear to Be Near-Settled, The Stream of Commerce Appears Muddy*, Pike and Fischer Internet Law & Regulation (2005) (analyzing personal jurisdiction trends in Internet-related cases and suggesting specialized tests should not displace traditional minimum contacts analysis). The question remains especially relevant in patent litigation because of potential due

process challenges by defendants who contest whether they may be haled into often distant jurisdictions. In such cases, district courts exercising federal question jurisdiction as to subject matter must look not only to the Supreme Court’s precedent, but also to the Federal Circuit’s authority. 28 U.S.C. 1295(a); *Akro Corp. v. Luker*, 45 F.3d 1541, 1543 (Fed. Cir. 1995). Where the underlying subject matter directs district courts to the law of the particular circuit where they sit, these courts often look to the *Zippo* “sliding scale” along with other traditional considerations when determining if a defendant has purposefully availed itself of the forum. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (setting forth “sliding scale” test to evaluate the nature and quality of a defendant’s Internet activity based on its interactivity and commercial nature). For patent cases, the Federal Circuit’s recent *Trintec* case gives district courts some guidance and suggests that courts should indeed take into account traditional jurisprudential considerations when applying the *Zippo* “sliding scale” test to determine if the defendant has purposefully availed itself of the forum. *Trintec Indus., Inc. v. Pedre Promo. Prods., Inc.*, 395 F.3d 1275 (Fed. Cir. 2005). The Federal Circuit declined to adopt any version of *Zippo* when it decided *Trintec*, in part, it seems, because other non-Internet-related forum contacts were alleged such that exclusive analysis of Internet-related activity was unnecessary.

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jurisdiction relating to Internet activities is crystallizing in a uniform manner in patent cases. The cases isolate three issue patterns: 1) must the interactive features of a Web site be used by forum resident to purposefully avail himself or herself of the forum; 2) does the existence of a “request form” make a Web site interactive for the purposes of *Zippo*; and 3) what level of “control” is required to make a Web site interactive if it has a hyperlink to or from a non-party Web page?

Zippo and *Trintec*

According to the test laid out in *Zippo*, if a defendant has an interactive Web site that allows residents of the forum to do business with the defendant over the Internet, the court may exercise jurisdiction over the defendant. *Zippo*, 952 F. Supp. at 1124. On the other hand, if the defendant merely has a Web site that is accessible to residents of the forum, but which does not allow any interaction directly from that Web site, then the court does not have jurisdiction based on the Web site. *Id.* Lastly, there is the middle ground, where the defendant has an interactive Web site through which residents of the forum can exchange information with the defendant. *Id.* In those cases, a court must examine the level of interactivity and the commercial nature of the interaction in order to determine if it

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has jurisdiction. *Id.* As generally applied, the *Zippo* test does not supplant traditional jurisprudential analysis of personal jurisdiction issues but rather provides a framework through which courts have analyzed fact patterns specific to Internet-related forum contacts. Thus, “minimum contacts” and “purposeful availment” still remain the touchstones of the due process inquiry.

In *Trintec*, the leading Federal Circuit case analyzing Internet contacts, the court acknowledged that the defendant’s Web site had interactive features that allowed residents of the forum to do business with the defendant, but determined it could not decide the issue of jurisdiction because there was no evidence that indicated how frequently residents of the forum accessed the Web site to use those features or if residents of the forum had ever accessed the Web site to conduct business. 395 F.3d at 1281. The court also acknowledged that the defendant’s products were offered for sale on third-party interactive Web sites that had hyperlinks to the defendant’s Web site, but again, could not decide the issue of jurisdiction because it did not have any evidence that indicated whether the defendant had any control over how its products were advertised on those sites. *Id.* It vacated the district court holding that it had no jurisdiction and remanded for the court to evaluate the evidence on these two issues — even ruling that the district court should allow limited discovery to determine the issue if there was not sufficient evidence in the existing record. *Id.* at 1283.

For patent infringement cases, *Trintec* suggests that it is not enough that a resident of the forum could use an interactive Web site to do business with the defendant; there must also be some evidence that a member of the forum actually did so to establish minimum contacts. *Id.* at 1281. Furthermore, there must be some relationship between a third party that has a Web site with hyperlinks either to or from the defendant’s Web site that indicates the defendant has some control over the business conducted with its products on that Web site. *Id.*

Cases Since *Trintec*

In cases decided since *Trintec*, the courts have addressed three questions dealing with Internet-related forum contacts:

1) Must the interactive features of the defendant’s Web site have to have been used by residents of the forum for the defendant to purposefully avail itself of the forum?

It does appear that residents of the forum must access a defendant’s interactive Web site before a court will necessarily conclude that a defendant has purposefully availed itself of the forum solely on the basis of the site’s interactivity. In *New Generation Devices*, the district court held that the “plaintiff did not demonstrate by a preponderance of the evidence that any New Jersey users have actually accessed the limited mechanisms available on the website ... [T]o subject defendants to personal jurisdiction based on the mere possibility that a New Jersey user could access these website features is inconsistent with the requirements of due process.” *New Generation Devices, Inc. v. Slocum Enterprises, Inc.*, No. Civ.A. 04-2583KSH, 2005 WL 3078181 (D.N.J. Nov. 15, 2005). Likewise, in *Static Control Components*, the court noted that “plaintiff here has not alleged any interaction or exchange between IPW’s website and the forum via the website” when concluding that IPW’s “website does not show an intention by IPW to purposefully avail itself of the privilege of conducting activities within the forum.” *Static Control Components, Inc. v. Lexmark International, Inc.*, No. Civ.A. 04-84-KSF, 2005 WL 2009273 (E.D. Ky. Aug. 19, 2005). In *Xactware*, the court similarly granted the defendant’s motion to dismiss for lack of jurisdiction because the plaintiff could not show that a single resident of Utah had ever accessed and used the Web site’s interactive features. *Xactware, Inc. v. Symbility Solution Inc.*, 402 F.Supp.2d 1359 (D. Utah 2005). The court pointedly stated that “the uncontroverted evidence shows that no individual from Utah ever visited the interactive website prior to the filing of this lawsuit, and only Xactware’s failed

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attempt to register as a resident of Utah has occurred since plaintiff filed its complaint.” *Id.* at 1364.

Alternatively, at least one court has suggested that a defendant may have purposefully availed itself of benefits and privileges of the forum by simply maintaining an interactive Web site. In a footnote, however, that court questioned the deficiency of the record as to whether any Indiana resident had ever actually interacted with the defendant through the site. Nonetheless, the court concluded that purposeful availment had occurred in large measure as a result of two sales of the allegedly infringing product into the jurisdiction and the offering of warranty coverage in connection with those sales. *Aero Indus.*, 396 F. Supp. 2d at 969. Together these cases suggest that courts will often find that they do not have jurisdiction where the sole allegation to support personal jurisdiction is the existence of an interactive Web site, but there is no parallel allegation that forum residents used the site or that the defendant acted on their attempts. The *Aero* court did not, however, cite *Trintec*, which was decided earlier in 2005. *Aero* seems to represent a good example of how courts facing these questions will seldom confront allegations of Internet-only contacts with the forum. Faced with a multiplicity of potential contacts, traditional factors will likely predominate, including whether and how the product entered the stream of commerce.

2) Does the existence of a “request form” make a Web site interactive for the purposes of *Zippo*?

In the two published opinions since *Trintec* where courts have considered whether a Web site is interactive because it had a request form that a user could download and fill out, the courts came to opposite opinions about whether the Web sites were interactive for the purposes of the *Zippo* sliding scale. In *Aero Industries*, a user could submit a request for a quote by transmitting his or her name, company name, address, phone number, number of items needed, and

other product specifications with a form from the defendant’s Web site, but the Web site had no other interactive features. *Id.* at 969. The court found that “[t]his type of interactivity is entirely commercial in nature” and that “Quick Draw has purposefully directed the commercial activities on its website at residents outside its home state, including those in Indiana.” *Id.* at 968.

Similarly, in *Static Control Components*, users could access the defendant’s Web site and download a form and request information from the defendant, but the Web site did not have other interactive features. *Static Control Components*, 2005 WL 2009273. However, despite their very similar facts, the court in *Static* reached the opposite conclusion of the court in *Aero*. It concluded that, “[a]lthough IPW’s website might be considered somewhat interactive, it appears that it is not interactive to a degree that reveals it specifically intended interaction with residents of Kentucky,” and “IPW’s website does not show an intention by IPW to purposefully avail itself of the privilege of conducting activities within Kentucky.” *Id.* at *4. The court did note that “in theory, IPW could choose not to interact with customers based on their location once they receive a request,” suggesting that if an automatic reply issued from the Web site in response to the request in every forum, the court might have found that the Web site was interactive to a degree high enough that the defendant would avail himself of the forum. *Id.*

3) Do hyperlinks on or to third-party interactive Web sites establish purposeful availment?

The CAFC guidance in *Trintec* suggests that defendant must have some responsibility or control for the third party’s advertising of its products on the third-party Web site in order to establish that it purposefully availed itself of the forum. 395 F.3d at 1281. In *Trintec*, the defendant did not have links to third-party Web sites that sold the accused product, but third-party Web sites did have hyperlinks to the defendant’s Web site. *Id.* In *Telemac Corp.*, the defendant’s Web site directed customers to third-party distributors’ interactive Web

sites where customers could purchase the defendant’s telephone products on-line. *Telemac Corp. v. Phonetec LP.*, No. C 04-1486 CW, 2005 WL 701605 (N.D. Cal. Mar. 25, 2005). The defendant would subsequently ship the phone to the customer. *Id.* at *1. Although the court did not solely decide that the defendant purposefully availed itself of the forum strictly based on the hyperlink from its Web site to a distributor’s Web site, it did say that “while the Phonetec Defendants themselves do not have an interactive website, their website does direct customers to a distributor’s website, which the Phonetec Defendants know makes their products readily available to California customers.” *Id.* at *4. Customers of the forum accessed the hyperlink to the distributor’s Web site, purchased phones from that Web site, and the defendant actually shipped phones to the customers. *Id.* at *1. The court found these factors indicated that the defendant purposefully availed itself of the forum even though its Web site was not interactive. *Id.* at *4.

CONCLUSION

Web site interactivity continues to be an issue in determining whether exercise of personal jurisdiction comports with due process where a defendant’s purported contacts are Internet related. These questions will often need to be decided amidst other more traditional issues such as the nature and scope of the allegedly infringing products’ offer for sale and the particular channels involved. *Trintec* and recent cases suggest that the Federal Circuit’s analysis of the Internet-related aspects of these issues is falling in line with its sister circuits, but continued evolution of e-commerce may continue to make predicting outcomes where forum contacts are of a mixed nature no less difficult.

