

## You Can Advertise, But Don't Sell That Product: Virtual Jurisdiction in Washington

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Traditional notions of due process and jurisdiction have undergone substantial reassessment with the advancement of telecommunications. In the middle of the past millennium telephone and mail contact with a forum state were often examined to determine whether minimum contacts existed so as to allow the assertion of jurisdiction over the defendant. Now the courts are confronted with worldwide access to web pages, e-mail contracts and other electronic business relationships in deciding whether the assertion of personal jurisdiction satisfies constitutional muster. This article will explore some of these issues and outline the current analysis being given virtual jurisdiction in Washington.

Generally, the plaintiff bears the burden of establishing personal jurisdiction by a preponderance of the evidence. *Hirsch v. Blue Cross, Blue Shield of Kansas*, 800 F.2d 1474, 1477 (9th Cir. 1986). A two-part showing is required: (1) the forum state must have an applicable long-arm statute; and (2) the assertion of jurisdiction must comport with constitutional requirements of due process. *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1286 (9th Cir. 1977).

Due process requires minimum contacts between the defendant and the forum state such that the exercise of personal jurisdiction does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington*, 326 US 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). The nature and quality of contacts necessary to support jurisdiction depends upon the type of jurisdiction asserted.

In order for a court to assert general jurisdiction over a nonresident defendant, the plaintiff must demonstrate that the defendant has “continuous and systematic” contacts with the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415, 80 L.Ed. 2d 404, 104 S.Ct. 1868 (1984). To be subject to specific jurisdiction:

(1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claim must be one that arises out of or relates to the defendant’s forum-related activities [and];

(3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

*Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990).

### **The Internet Age**

In one of the first cases to address personal jurisdiction in the Internet age, the U.S. Sixth Circuit Court of Appeals ruled that a defendant had sufficient contacts with the forum state when he purposefully availed himself of the privilege of doing business in the state by marketing his product through a Internet service provider. *CompuServe, Inc. v. Richard S. Patterson*, 89 F3d 1257; 1996 US App LEXIS 17837 (6th Cir. 1996). The record reflected that the defendant, a resident of Texas, entered into a contract with CompuServe which was headquartered in Ohio. Patterson had never been to Ohio and his company had no offices in the State of Ohio. He claimed that he was not subject to jurisdiction in the State of Ohio and thus was not required to defend against CompuServe’s declaratory judgment suit.

The record also reflected that the defendant had marketed his computer software through CompuServe and when he did so, he agreed to certain terms and conditions that were posted on the CompuServe website that stated that the “service agreement” was entered into in Ohio and the agreement was to be “governed by and construed in accordance with Ohio law.” Patterson never signed any written contract but instead, noted his assent to these terms electronically by clicking on a box entitled “Agree” at the same time he transmitted his software to CompuServe over the Internet.

The court found that while Patterson had minimal contacts with the State of Ohio he had knowingly made an effort to market his product in other states through Ohio-based CompuServe and thus, from the court’s perspective, it was foreseeable for the defendant to anticipate being hailed into the State of Ohio to respond to claims regarding its product. The court’s decision in *CompuServe* is also instructive because it establishes that an electronic

assent to terms and conditions that may be posted on a website is a factor used to determine whether a defendant has voluntarily agreed to jurisdiction within the forum state.

The court's opinion in *CompuServe* is predictive of what courts would look at in future cases in assessing what amount of commerce over the Internet will be sufficient for the assertion of jurisdiction. The District Court had felt that a standard consumer "seated at his computer terminal" might not necessarily expose himself to jurisdiction in every state wherein a website he visits is operated. Thus, not only the amount of commerce but also the type of commerce or contact the defendant has is pertinent to the inquiry.

### Domain Name Cases

Many of the cases in this area have arisen from disputes over the use of domain names. A domain name is essentially a website address that is registered with Network Solutions, Inc. The person registering the domain name may, or may not, have a license or trademark on the name. Thus, numerous disputes have arisen regarding the use of unique names. In *Maritz, Inc. v. Cybergold, Inc.*, 947 F.Supp. 1328; 1996 U.S. Dist. LEXIS 14978 (E.D. Mo. 1996), the plaintiff brought suit against an Internet services provider under the Lanham Act, 15 U.S.C. § 1125(a). The defendant moved to dismiss based on a lack of personal jurisdiction. The record reflected that the defendant maintained an Internet site on the World Wide Web. The server for the website was apparently in Berkeley, California. The suit, however, was filed in Missouri. The court found that the website was accessible to every Internet-connected computer in Missouri and the world. The website had been accessed by people located in Missouri at least 311 times, although 180 of the 311 times were by the plaintiff and its employees. The defendant asserted that other than maintaining the website, it had no other contacts with the State of Missouri. The court did not decide whether the defendant's activities of maintaining an Internet site accessible in Missouri were sufficient to satisfy the "transaction of any business" test under Missouri's long-arm statute because the court concluded that the defendant was amenable to service under the "commission of a tortious act" provision. The court found that the injury from the alleged trademark infringement had occurred in Missouri because the plaintiff was located in Missouri.

The court recognized that the maintenance of a website that was accessible to residents of Missouri presented an issue of first impression to the court regarding the scope of the court's personal jurisdiction. The court recognized a distinction between the use of telephone and mail contact with a forum and simply posting an Internet site. Thus, the court dismissed the defendant's characterization of its activity as maintaining a "passive website." The court found that the defendant's

intent is to reach all internet (sic) users, regardless of geographic location. Defendant's characterization of its activity as passive is not completely accurate. By analogy, if a Missouri resident would mail a letter to Cybergold in California requesting information from Cybergold

regarding its service, Cybergold would have the option as to whether to mail information to the Missouri resident and would have to take some active measures to respond to the mail. With Cybergold's website, Cybergold automatically and indiscriminately responds to each and every Internet user who accesses its website. Through its website, Cybergold has consciously decided to transmit advertising information to all Internet users, knowing that such information will be transmitted globally. Thus, Cybergold's contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal jurisdiction over the defendant.

947 F.Supp. at 1333.

The court's ruling in *Cybergold* boiled down to the proposition that an Internet provider can limit access to its website and its failure to do so may subject itself to jurisdiction in each and every state, particularly if the information posted on the website gives rise to an injury within the forum state. A similar result was reached in *Zippo Manufacturing Company v. Zippo.com, Inc.*, 952 F.Supp. 1119, 1997 U.S. Dist. LEXIS 1701 (W.D. Pa. 1997).

In *Zippo*, the court was presented with a trademark infringement and dilution complaint. The defendant moved to dismiss for lack of personal jurisdiction. The record reflected that Zippo Manufacturing made the well-known Zippo lighter. The basis of the trademark claim was the defendant's use of the word "Zippo" in the domain names it held and in numerous locations on its website. The defendant "dotcom" was a California corporation with its principal place of business in Sunnyvale, California and it operated an Internet website and Internet news service and obtained the exclusive right to use the domain names "Zippo.com," "Zippo.net" and "Zipponeews.com." Zippo Manufacturing had its principal place of business in Pennsylvania, which is where the suit was brought.

The record disclosed that the defendant's contacts with Pennsylvania had occurred almost exclusively over the Internet. The defendant had no employees, offices or agents in Pennsylvania and its Internet servers were located in California. Nonetheless, approximately 3,000 of its Internet webpage subscribers were Pennsylvania residents.

In analyzing the Internet and jurisdiction, the court reviewed extensive case law including the historical underpinnings of jurisdictional analysis. For example, in *Hanson v. Denckla*, the U.S. Supreme Court noted that "as technological progress has increased the flow of commerce between the states, the need for jurisdiction has undergone a similar increase." 357 U.S. 235, 250-51 (1958). Twenty-seven years after *Hanson v. Denckla*, the U.S. Supreme Court observed that jurisdiction could not be avoided "merely because the defendant did not physically enter the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). The court observed that:

It is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. *Id.*

The *Zippo* court went on to describe a sliding-scale approach so that the assertion of personal jurisdiction is “directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” 952 F.Supp. At 1124.

This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involved the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.

. . . At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction . . . The middle ground is occupied by interactive Web sites where a user can exchange information with a host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. *Id.*

In reaching its decision that the assertion of jurisdiction over Zippo.com would be proper because it was “doing business over the Internet,” the court distinguished another trademark infringement case that had reached a contrary result. *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295 (S.D. N.Y. 1996)

In *Bensusan*, the court recognized that the “mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York.” The court found that the fact that the defendant operated a nightclub and website under the name “The Blue Note” in Missouri and made tickets to its nightclub available for reservation on its website was insufficient to subject it to personal jurisdiction in New York in a suit brought by the owner of the Blue Note trademark.

The *Zippo* court’s sliding-scale analysis has been cited with great frequency. In its view, the court felt that because the defendant Zippo.com had entered into contracts with residents of the forum state, it was not a mere informational website but the defendant had instead, purposely availed itself of the benefits and detriments of doing business in the forum state thereby subjecting itself to personal jurisdiction therein.

The extraterritorial reach of personal jurisdiction and the Internet goes beyond the boundaries of the United States. For example, in *Euromarket Designs, Inc. v. Crate & Barrel Limited*, 96 F. Supp.2d 824; 2000 U.S. Dist. LEXIS 6746 (N.D. Ill. 2000), the court denied a motion to dismiss for lack of personal jurisdiction that had been filed by a corporation organized under the law of Ireland. The suit was brought by the corporate entity that did business as stores commonly known as Crate & Barrel. The defendant apparently decided that Crate & Barrel had a good store concept and opened retail stores in Ireland under the same name. Even though the plaintiff had registered the website “www.crate&barrel.com,” the defendant decided to register the domain name “www.crate&barrel-ie.com.” Thus the plaintiff brought suit asserting the defendant’s infringement of its trademark and violations of the Lanham Act.

The defendant’s contacts with the forum state of Illinois were quite limited. Thus, general jurisdiction did not exist and accordingly, the court went on to examine whether it had specific jurisdiction over the defendant. Specific jurisdiction allows a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities in cases where the defendant has minimum contacts within the framework of *International Shoe Company v. Washington*, 326 U.S. 310 (1945) and its progeny. Since Illinois’ long-arm statute allowed the assertion of jurisdiction to the outer limits of due process requirements, the court’s analysis focused on those elements. The court described the three-part test that focuses on whether the defendant has sufficient minimum contacts with the forum state, the claim arises out of or results from the defendant’s forum-related activities and the exercise of jurisdiction is reasonable.

In order to be subject to jurisdiction, a defendant must have minimum contacts and have purposely availed themselves of the burdens and benefits of doing business in the forum state. One of the tests used to determine whether a defendant has minimum contacts is the “effects doctrine.” This doctrine allows the assertion of personal jurisdiction when the defendant’s intentional tortious actions are expressly aimed at the forum state and cause a harm to the plaintiff in the forum state of the type that the defendant knows is likely to be suffered. *Calder v. Jones*, 465 U.S. 773 (1984). Applying the doctrine to the facts that were before it, the Illinois District Court found that the trademark had been infringed in Illinois and thus the injury would be felt mainly in Illinois, the defendant intentionally and purposefully directed its actions toward Illinois and Crate & Barrel and the defendant knew that harm would likely be suffered in Illinois. Uniquely, the court did not cite to any affidavit to support its findings, but did find that by intentionally designing its website to be interactive, the defendant induced Illinois and United States residents to order goods over the Internet with an order format specifically designed for United States “ship to” and “bill to” addresses, and providing for credit card usage for ease of billing.

The Euromarket court also examined the sliding-scale test adopted in *Zippo*. In doing so, the court acknowledged that personal jurisdiction analysis in the Internet age is in a state of development.

A website on the Internet is accessible to the world over. Simply registering a domain name for a website is not sufficient to create jurisdiction without “something else” . . . Thus, “something else” must be required for a court to exercise jurisdiction over a defendant for Internet based activities . . . This “something else” is precisely what the courts have been grappling with. Thus, the analysis must begin with what else is needed, that is, what level of interaction with an Internet website is required to rise to the level of “minimum contacts” such that a defendant maintaining that website has purposefully availed itself of the laws of the forum state, making specific personal jurisdiction over it appropriate.

96 F.Supp at 837.

The *Euromarket* court then went on to assess the *Zippo* factors which have been grouped into three separate categories: conducting business over the Internet, interactive website and passive website. In the first category, the court considered the *CompuServe v. Patterson* case to be illustrative. The second category is best described by the *Zippo* case. The *Bensusan* matter best describes the third category. After analyzing each of those decisions, the *Euromarket* court decided that the defendant’s website clearly fell into the first category of interactive websites that allow a defendant to “do business” and “enter into contracts with residents of the foreign jurisdiction over the Internet.” Among the factors it found to support its decision was the fact that the site actively solicited all users, including residents of Illinois, to purchase goods. The defendant claimed, however, that it was not conducting commerce in Illinois because it only shipped products to the Republic of Ireland. The court dismissed that argument finding that while the defendant may ship only to Ireland, it sent bills to Illinois, collected revenues from Illinois and recorded sales on goods ordered from Illinois. In addition, and probably of most significance was the fact that the damages were sustained in the State of Illinois by a corporation domiciled in Illinois.

### Washington Cases

Surprisingly, for a state known for its high tech economy with the likes of Microsoft and others, relatively few cases have discussed virtual reality jurisdiction in Washington. One of the first cases to discuss Internet jurisdiction did so by footnote. *Precision Laboratory Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 981 P.2d 454 (1999). This case was a traditional jurisdictional case; however, the court did foreshadow the course it would take in a case involving jurisdiction and the Internet.

Precision Laboratory Plastics, Inc. (Precision) was a Georgia manufacturer who contracted with Micro Test, Inc. (Micro Test), a Washington manufacturer, to purchase vials for its business. Micro Test created a special mold for vials. Precision refused to pay on the contract claiming the vials leaked. Precision sued in Georgia and Micro Test counterclaimed. Micro Test sued Precision in Washington for breach of contract for Precision’s failure to pay. Micro Test moved to dismiss for a lack of personal jurisdiction under Wash. Rev. Code § 4.28.185, Washington’s

statute governing “acts submitting person to jurisdiction of courts.” The trial court granted the motion and Precision sought review.

In Washington, specific personal jurisdiction over out-of-state defendants is measured by RCW 4.28.185, which reads in pertinent part: (1) any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts: (a) the transaction of any business within this state ... three factors must coalesce to satisfy RCW 4.28.185: (1) the nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation. These are known as the *Tyee factors*, citing *Tyee Constr. Co. v. Dulien Steel Products, Inc.*, 62 Wash.2d 106, 115-16, 381 P.2d 245 (1963).

On appeal, the trial court was reversed and held that Washington courts had personal jurisdiction over Micro Test because the parties’ business relationship established minimum contacts in that Micro Test initiated contact, an ongoing business relationship ensued, continued sales and obligations resulted, and the suit was instituted in Washington to recover amounts owed a Washington corporation stemming from an ongoing business relationship with an out-of-state corporation.

In discussing the third *Tyee factor*, fair play and substantial justice, the court assessed the nature, quality, and extent of Micro Test’s activity in Washington, the convenience of the parties, the benefits and protections of Washington law, and the basic equities of the situation. The court found that Micro Test’s activities in Washington consisted of negotiating a long term business relationship with Precision Labs, convincing Precision Labs to build a special mold and custom manufacture a different size vial, and purchasing these and other vials from Precision Labs.

The court continued its analysis and noted that “[l]ong distance negotiation of a contract should not defeat jurisdiction in this electronic era where myriad contracts are consummated daily by telecommunication.” In dictum, the court states the following by footnote:

"Although business is transacted using modern devices, as was done here, established notions of due process and fair play, as expressed by Constitutional due process requirements, work well to determine whether an individual has established minimum contacts with a state sufficient for the state to exercise jurisdiction. Even in today’s business environment, where



companies can negotiate contracts and conduct business from the office desktop, established standards for determining personal jurisdiction can and do accommodate “new” personal jurisdiction questions. In analyzing personal jurisdiction over the Internet, courts look to whether the web site was passive or active, and to what extent the parties purposefully conducted business in any given jurisdiction. Eric H. Findlay, *Litigation on the Net: Personal Jurisdiction in Cyberspace*, 62 Tex.B.J. 334 (1999). A federal district court noted that a passive web site, one that merely makes information available, does not support jurisdiction; but when web sites invite an exchange of information, courts can examine “the level of interactivity and commercial nature of the exchange of information that occurs on the web site.” *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (WD Pa. 1997). In that case, the district court looked to the extent and nature of the cyber contacts and found jurisdiction proper using the established analytical frame work; minimum contacts, cause of action arising from the transaction, and traditional notions of fair play and substantial justice. *Zippo*, 952 F.Supp. At 1124. Likewise, in *CompuServe, Inc. v. Patterson*, the Sixth Circuit used traditional jurisdiction analysis where the transaction in question occurred wholly over the Internet and was “almost entirely electronic in nature.” *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262-68 (6th Cir. 1996

In this case, each party remained in its respective home state and negotiated the contract via telephone and facsimile machines, as opposed to the Internet. However, the court’s dictum foreshadows that Washington courts would likely apply the passive/active analysis if the appropriate case were presented.

Judge Rothstein decided the first significant virtual reality jurisdiction case in Washington in 2001. *Amazon.com, Inc. v. Kalaydjian*, 2001 U.S. Dist. LEXIS 4924, 58 U.S.P.Q.2D (BNA) 1247. The plaintiff, a Delaware corporation whose principle place of business was in Seattle, Washington, is a large on-line retail store that sells a wide variety of products including suntan lotions and cosmetics. Amazon.com uses the name and mark of AMAZON.COM and various logos incorporating that mark to identify its goods and services. Amazon.com registered these trade and service marks with the United States Patent and Trademark Office. Amazon.com also registered the Internet domain name “amazon.com” with Network Solutions, Inc. (“NSI”).

Defendant Von Eric Lerner Kalaydjian was a sole proprietor making and selling sun tanning products under than name Amazon Cosmetics and Tan Products (“Amazon Tan”). Amazon Tan is located in Los Angeles, California, where Kalaydjian resides. Kalaydjian used the following three marks in association with his tanning oil products: (1) AMAZONTAN.COM, Reg. No. 106216, a trademark for identification of skin tanning preparations; (2) AMAZON, Reg. No. 53218, a service mark used for “company advertising and producing sun skin tanning preparations;” and (3) AMAZON, Reg. No. 053218, a service mark used for “producing sun tanning preparations.” Kalaydjian registered these three marks in the state of California in April 2000. Before registering these marks, he registered the Internet domain name “amazontan.com” with NSI and created an Internet site to advertise his suntan oils. Visitors to the

AmazonTan.com site could obtain information about Kalaydjian's products, although they could not exchange information with Kalaydjian or place orders through the web site.

At the time of trial, Kalaydjian had sold approximately one hundred bottles of tanning oil. Of these sold, Kalaydjian sold roughly ninety-eight bottles at a flea market in Pasadena, California, one bottle to a customer in Arizona, and one bottle to a customer in Canada. The record was unclear whether any of these orders originated from the AmazonTan.com Internet site. With respect to Washington, Kalaydjian never sold his products to Washington residents; however, he mailed a free sample of his tanning oil to a Washington resident after the resident contacted him requesting to purchase a bottle.

In November 1999, Kalaydjian sent Amazon.com a cease-and-desist letter asserting that Amazon.com's sale of suntan lotions and cosmetics infringed his rights in the AMAZON and AMAZONTAN.COM marks. Amazon.com responded to the letter, and a series of communications between the parties ensued. These communications included various emails, phone calls, and letters from Kalaydjian to Amazon.com in which Kalaydjian maintained that he was the lawful owner of the trademarks and domain name at issue. Amazon.com sent a cease-and-desist letter to Kalaydjian, alleging trademark infringement and dilution. Amazon.com eventually filed suit in the Western District of Washington, alleging infringement and dilution of trademarks. Kalaydjian moved to dismiss for lack of personal jurisdiction.

General jurisdiction was lacking because Kalaydjian and his business resided exclusively in California. Kalaydjian's only presence in Washington was limited to the existence of his Internet site, which could be accessed by Washington residents, his act of shipping one free sample of his tanning oil into Washington, and his communications with Amazon.com regarding the domain name and trademark dispute. The court held that these activities were too limited in breadth and frequency to be deemed "substantial or continuous and systematic" to find general jurisdiction.

In assessing whether the court had specific jurisdiction over Kalaydjian, the court looked to *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998) for guidance. In *Panavision*, the Ninth Circuit determined that purposeful availment existed under the effects doctrine. The defendant in *Panavision*, Toeppen, deliberately registered over one hundred domain names, including "panavision.com," intending to sell them. When plaintiff Panavision learned that its trademark was being used as a domain name for what appeared to be a purposeless Internet site, it notified Toeppen of the alleged trademark infringement. Toeppen responded by offering to sell the domain name to Panavision for \$13,000. After Panavision ignored his demands, Toeppen created a second site using another one of Panavision's trademarks. The *Panavision* court concluded that Toeppen's acts were tortious in nature because he registered the domain names for the purpose of extorting money from Panavision. Applying the effects test, the court determined that the purposeful availment requirement was satisfied.

## You Can Advertise, But Don't Sell That Product: Virtual Jurisdiction in Washington

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In *Panavision*, the Ninth Circuit explicitly noted that the application of the effects doctrine was not appropriate in all cases and under the effects test, “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.” The court said that there must be “something more to demonstrate that the defendant directed his activity toward the forum state.”

Amazon.com argued that it alleged “something more” because Kalaydjian registered a domain name and operated an Internet site incorporating the “amazon” element of Amazon.com’s trademark with knowledge that Amazon.com owned and used the mark and with knowledge that Amazon.com’s headquarters were located in Washington. The court flatly rejected this argument and distinguished the facts from *Panavision* where the court focused on Toeppen’s acts of extortion, as opposed to his knowledge of the plaintiff’s use of the trademark.

Amazon.com also relied on the Ninth Circuit’s recent decision in *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082 (9th Cir. 2000) which was a non-dilution and non-infringement case. In that case, Bancroft & Masters filed a declaratory judgment action against Augusta, seeking a judgment declaring non-dilution and non-infringement for its use of the Internet domain name “masters.com” Augusta moved to dismiss for lack of personal jurisdiction and the district court for the Northern District of California granted its motion. On appeal, the Ninth Circuit reversed, holding that Augusta’s act of writing a letter to NSI regarding use of the “masters.com” domain name was “express aiming and therefore, constituted purposeful availment under the effects test.” The court held that because, under the NSI procedure, Bancroft & Masters was forced to either “bring suit or lose control of its website,” Augusta’s actions were analogous to the defendant’s conduct in *Panavision* and the “tort” in *Bancroft & Masters* was essentially an attempt at conversion.

The court distinguished Kalaydjian’s conduct because it did not rise to the level of “something more” like extortion or conversion than merely “registering someone else’s trademark as a domain name and posting a web site on the Internet.” Thus, the court held that Kalaydjian’s knowledge of Amazon.com’s use of the AMAZON mark and Amazon.com’s location was not enough to establish purposeful availment under the effects doctrine.

Where the application of the effects test is not appropriate, the court examines the facts and determines if “the defendant has taken deliberate action within the forum state, or...created continuing obligations to forum residents.” *Cybersell*, 130 F.3d at 417 (quoting *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995)). Amazon.com contended that Kalaydjian’s actions, including his operation of the AmazonTan.com site and his shipment of one bottle of tanning product into Washington, constituted deliberate transaction of business in Washington sufficient to establish purposeful availment.

Relying on the passive/interactive Internet site distinction alluded to in *Precision Laboratory Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 981 P.2d 454 (1999) and articulated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (WD Pa. 1997), the court held that Kalaydjian's Internet site was not sufficiently interactive to support a finding of purposeful availment. The site did not allow users to purchase products via the Internet and did not facilitate interactive transactions. It merely provided information about Amazon Tan products and specified how customers may purchase products through the mail. The court described Kalaydjian's site as "a textbook example" of a passive site because it does little more than make information available to those who are interested in it.

Kalaydjian did not use his site to establish distribution networks designed to bring products into Washington. Instead the record showed that his business was primarily generated by his personal contacts, and those contacts were primarily local to California.

The court also stated that the fact that Kalaydjian shipped a single bottle of tanning lotion as a free sample to a Washington state resident at that resident's request did not establish purposeful availment. The isolated act was insufficient to establish the type of purposeful availment activity necessary for personal jurisdiction in Washington.

Because Kalaydjian's acts did not constitute purposeful availment, the court granted his motion to dismiss for lack of personal jurisdiction.

As predicted, the dictum in *Precision Laboratory Plastics, Inc. v. Micro Test, Inc.* became the holding in *Amazon.com, Inc. v. Kalaydjian*. Although it appears a foreign business can safely advertise in Washington via the Internet albeit with a passive web site as in *Amazon.com*, the outcome could change dramatically once the company actually sells product into the state or creates on going relations, as in *Precision*. This presents a curious business model as foreign companies can advertise in Washington via a passive Internet site without subjecting themselves to jurisdiction; however, should probably not sell their product in state to avoid the jurisdiction of the Washington courts. Companies are generally not in the business of promoting, but not selling their product. But such appears to be the trade-off to avoid the jurisdiction of Washington courts.

### **Anti-Cybersquatting Consumer Protection Act**

In response to concerns about prolific litigation over domain name usage, the U.S. Congress recently passed the Anti-Cybersquatting Consumer Protection Act (the "ACPA"), 15 USC § 1125 (d)(2). The Act has its own unique jurisdictional requirements. For example, a plaintiff can proceed *in rem* if the plaintiff is able to show the "absence" of personal jurisdiction. Essentially, the Act allows a plaintiff to challenge the registration of a domain name by either suing the registrant of the domain name if they can obtain personal jurisdiction over them, or file an *in rem* proceeding if the plaintiff is unable to obtain personal jurisdiction over the current owner

of the domain name or through due diligence has been unable to find a person who could be a defendant.

The Act places the plaintiff in an awkward position. Usually, at an in personam proceeding, a plaintiff must prove personal jurisdiction by a preponderance of the evidence. *Mylan Laboratories, Inc. v. Akzo, N.V.*, 2 F3d 56, 60 (4th Cir. 1993). Thus, the court usually construes all relevant allegations in the light most favorable to the plaintiff and draw inferences in favor of jurisdiction. However, under Section 1125(d)(2), a plaintiff must “disprove” the presence of personal jurisdiction in order to proceed *in rem*. Thus, the plaintiff is in a difficult position of having to prove a negative. In a decision of first impression, in *Heathmount A.E. Corp. v. Technodome.Com*, 200 U.S. Dist. LEXIS 10991 (E.D.Va. 2000), the court decided that the proper burden of proof is to require the plaintiff to prove that he has exercised due diligence in trying to establish personal jurisdiction. If personal jurisdiction is lacking, the court allows the plaintiff to proceed *in rem*. Thereafter, if the plaintiff satisfies other elements of the statute, the court is empowered to order the domain name to be deposited in the registry of the court for further disposition.