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7th Circuit refines website jurisdiction analysis

Last month I wrote about the concern that Americans don't know much about history. This month, we shift our focus to geography, since Bulgaria plays a role in an important case from the 7th U.S. Circuit Court of Appeals.

I asked a lot of smart people — lawyers, professors, my children — to name two countries that border Bulgaria. The results were not promising. Answers ranged from Estonia to Albania to “Does Bulgaria still exist?”

Yes, Bulgaria still exists and it provides the background for the case of *Be2 LLC v. Ivanov*. 642, F.3d 555 (7th Cir. 2011). *Be2* is the latest pronouncement by the 7th Circuit on the difficult issue of how the Internet affects personal jurisdiction in intellectual property cases.

The case turns on whether a court can exercise personal jurisdiction over a defendant who resides in a distant venue simply because the defendant's website contains material that infringes the plaintiff's copyright, trademark or domain name.

Courts have grappled with this issue since the early days of the World Wide Web. The problem is that the Internet reaches every corner of the United States. An overly broad application of jurisdiction to website activity would result in defendants being dragged into courts anywhere in the country.

An early case in the Internet age, known as the *Zippo* case, 952 F. Supp. 1119 (W.D. Pa. 1997) devised a three-tier paradigm for assessing Web-based jurisdiction based on a sliding scale of “interactivity.” Under *Zippo*, passive websites, which merely make information available, generally do not permit personal jurisdiction; interactive websites, which allow users to purchase goods or enter contracts through the site, generally permit jurisdiction; and the gray area in between is handled on a case-by-case basis.

Zippo has been an influential case and many courts adopted its approach. But the 7th Circuit never embraced *Zippo* and in recent cases has expressly declined to do so. See, e.g., *Tamburo v. Dworkin*. F.3d 693, 703 n.7 (7th Cir. 2010).

In the past two years, the 7th Circuit



Inside IP Law

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had several infringement cases that provided a platform for it to refine its approach to claims of personal jurisdiction based on Internet presence, including the *Be2 v. Ivanov* case decided earlier this year. *Be2* involves Internet dating services — the modern manifestation of the old practice of matchmaking.

The plaintiff operates “be2.com,” an Internet matchmaking site that has about 26 million members and boasts that “be2 leads you to the love of your life.” The defendant, Nikolay Ivanov, a Bulgarian-American from Mahwah, N.J., started a matchmaking site for other Bulgarian-Americans that used the domain name “be2.net.”

The plaintiff sued for trademark infringement in Illinois, even though Nikolay Ivanov had never set foot here. It asserted jurisdiction on the theory that the trademark/domain name infringement had an effect in Illinois. Ivanov refused to make the trip from Mahwah to Chicago to defend himself and the district court entered a default judgment.

At that point, Ivanov realized he had best not ignore the matter any longer and, acting pro se, appealed the case, arguing that the district court had no personal jurisdiction over him. Ivanov must have ably represented himself because the court of appeals agreed with him that he was not subject to jurisdiction in Illinois and his website was not enough to create personal jurisdiction.

The important feature of this case is

that Ivanov's Bulgarian matchmaking site was completely interactive and, under a strict application of the *Zippo* test, he would have been subject to the court's jurisdiction in Illinois. A Chicago-based Bulgarian-American could easily register and look for love on be2.net.

But that, alone, is not enough in the view of the 7th Circuit. The court made it clear that the key question is not whether a website is interactive, but whether the website “targets” the forum state. “If the defendant merely operates a website, even a ‘highly interactive’ website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution.”

The key, then, to website-based jurisdiction is not merely interactivity — there must also be targeting. The record in this case did not show that Ivanov deliberately targeted or exploited the Illinois market. The only evidence the plaintiff had mustered was a document showing that 20 people who listed Illinois addresses had at some point created free dating profiles on Ivanov's be2.net website. The court held that these attenuated contacts could not give rise to personal jurisdiction without offending traditional notions of fair play and substantial justice.

So, Ivanov is safe for now, thanks to the constitutional principle of due process — unless the plaintiff files suit in New Jersey where Nikolay Ivanov would be fair game.

The case reflects the 7th's Circuit's trend away from relying on interactivity of a website as a sole determinant of personal jurisdiction, looking instead toward the more relevant concept of targeting.

Other cases showing this trend to diminish the effect of mere interactivity as a deciding factor are *Illinois v. Hemi Group, LLC*. 622 F.3d 754 (7th Cir. 2010) and *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston*. 623 F.3d 440 (7th Cir. 2010).

Oh yes, if you are still wondering about the Bulgarian borderlines, the answer is Romania, Serbia, Macedonia, Greece and Turkey.