

TYPES NOT MAPPED YET January 12, 2016 | TTR not mapped yet | Mark Sableman

Will the Zippo sliding scale for Internet jurisdiction slide into oblivion?

Though Internet communications seem to occur in a mystical electronic ether (which we once called cyberspace), authors of Internet messages can be held accountable for them in that very traditional physical place known as a courthouse. *But what courthouse, and where?* That has been a troubling issue ever since the Internet went commercial in the mid-1990s.

In legal terms, where does jurisdiction lie for an Internet dispute?

Many answers have been given over the last 20 years, and some of the weaker, less helpful answers are only slowly being supplanted by more reliable and realistic legal tests. As a recent decision illustrates, particularly in cases of Internet defamation, courts are abandoning some early simplistic precedents.

Particularly in the late 90s, Internet jurisdiction issues seemed to baffle many courts. One of the very first rulings, by a district court in Connecticut, took the bizarre position that anyone who posted an Internet site could be sued anywhere that site reached. Other courts struggled to apply jurisdictional precedents from the physical world into the ethereal new “cyberspace.”

Zippo lights up the jurisdiction question

In that atmosphere, a decision in 1997, with the classic Internet case name of *Zippo Manufacturing Company v. Zippo Dot Com, Incorporated*, seemed to offer some relief. That decision divided Internet activities into three kinds – active, passive, and interactive. An “active” defendant is one who deliberately makes extensive use of the Internet, such as where it enters into contracts with residents of a different jurisdiction, and these contracts call for repeated transmission of computer files over the Internet. In these cases, the defendant was susceptible to jurisdiction in the places it deliberately affected. A passive website, by contrast, was merely informational, and neither solicited nor expected activity in the places it reached; its operators could not be brought into court in those places.

The middle ground, under *Zippo Dot Com*, was the “interactive” website. In these cases, courts were instructed to examine “the level of interactivity and commercial nature of the exchange of information that occurs on the Web site,” to determine just how reasonable and expected it would be for the website creators to be sued in that place.

The *Zippo* test was clear and simple. It divided Internet websites into three categories and allowed the jurisdictional question to be decided based on where a website fell within those categories.

The wonderfully simple *Zippo* legal test, however, ultimately brought to mind an aphorism of H.L. Mencken: “For every complex problem, there is an answer that is clear, simple, and wrong.”

The *Zippo* test worked at the margins, on websites that were demonstratively highly active within a jurisdiction or totally passive and informational with no element of interactivity. But those simple cases were rare, and, at least by the mid-90s, it had become clear how they were to be handled. The *Zippo* test, however, left almost all disputed cases in the murky land of “interactivity,” where courts were given no guidance except to analyze and weigh the levels of interactivity. As a legal test, it was a little like saying, “Look at all the facts and go with your gut.”

Even worse, the *Zippo* test followed a one-size-fits-all approach, for all Internet disputes. But Internet disputes come in many different sizes and shapes. It matters for jurisdictional purposes whether the dispute involves disparagement or breach of contract, privacy or publicity, hacking or misappropriation, copyright infringement or debt collection. The *Zippo* test, however, viewed all those cases equally and instructed courts to look simply at the level of website interactivity.

Does a site 'target' a jurisdiction?

There were better approaches, as many experts and academics pointed out.

Where business disputes are alleged, including disputes arising from e-commerce, traditional tests for commercial contracts often work better than the *Zippo* test. Indeed, the *Zippo* "active" example was derived from a case involving a business arrangement that had more in common with traditional contracts than with Internet activities. Such business arrangements often lead to findings of "general" jurisdiction – jurisdiction for all purposes.

In many cases, particularly involving one-time disputes that give rise to a "specific" jurisdiction (jurisdiction only for that case), it makes better sense to look at whether a website operator specifically targeted a particular person or jurisdiction. Particularly in defamation cases, the targeting test fits well, and is consistent with pre-Internet precedents, like *Calder v. Jones*, in which the Supreme Court allowed suit against a newspaper to be brought in the plaintiff's home state when the newspaper had actively visited that state, conducted research there, and published its report knowing that its effects would be greatest there. In targeting cases, the key focus of the *Zippo* test, the level of "interactivity" of a website, is often irrelevant.

Problems with *Zippo*

Another problem with *Zippo*'s "sliding scale," from active to passive through interactive, is that it may falsely describe the nature of Internet and computer-related communications. The various activities it tries to align on a single continuum are actually quite different. Rather than points along a continuous ski jump, you might better think of active situations as the town's stock exchange, passive situations as the town's billboards, and interactive situations in the middle as boutique shops on Main Street – each of which operates differently and requires its own jurisdictional analysis.

Finally, *Zippo*, written in the early days of the World Wide Web, may have assumed that all key Internet disputes will arise from websites. But our Internet legal concerns have widened considerably since the late 90s, with infringement, hacking, and privacy and statutory violations often arising in ways that often have nothing to do with any website. A hacker, for example, may break into a computer whether it runs a passive, active, or interactive website or none at all.

For these and other reasons, the *Zippo* test has been slowly losing ground. Though it remains an easy refuge for a judge or law clerk looking for a simple rule, its influence is waning.

Scrapping the *Zippo* test

In a recent decision, for example, a federal district court in Arkansas pronounced the *Zippo* test ill-suited for resolving modern Internet jurisdiction issues. The case, *Sioux Transportation v. XPO Logistics*, involved alleged defamation on two online posts following a disputed transaction between the two companies. Following basic and traditional jurisdictional principles, the court found that Sioux's limited acts in Arkansas, XPO's home state, couldn't support jurisdiction there.

XPO then pulled out the *Zippo* precedent, and argued that Sioux's online posts, responding to XPO's posts, counted as deliberate contacts with Arkansas that would support jurisdiction. Rather than defer to *Zippo*, however, the court critically examined *Zippo* and found it inadequate for today's Internet:

- "The internet has undergone tremendous change since *Zippo* was decided in 1997," the court stated. "Cloud computing has eliminated the need for downloading files in many situations, location-based technology has made online interactions that formerly existed only in cyberspace more closely tied to specific geographic locations, and the level of user interaction with websites has exploded with social media. All of this calls into question the modern usefulness of the *Zippo* test's simplistic tri-part framework: The transmission of computer files over the internet is perhaps no longer an accurate measurement of a website's contact to a forum state."

Defamation cases in particular don't fit well with the *Zippo* test, for multiple reasons, the court noted. If *Zippo* is to be applied to defamation cases at all, the court stated that it must be significantly modified to focus on the defamatory content, however it was written and transmitted – not the defendant's website. The better solution, the court concluded, was "to scrap the *Zippo* test" altogether, at least in the context of Internet defamation.

In the last 18 years, *Zippo* has been cited more than 5,000 times. You might call it a highly interactive precedent. But one that may be headed for passivity and retirement.

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