
Out-Of-State Website Operator May *Not* Be Sued in State Where Harm Occurred Unless It Expressly Targeted That State

2003-01-23

Reversing an appellate court decision, the Supreme Court of California recently concluded that an out-of-state website operator's knowledge that its conduct may have an impact on individuals or entities in California is insufficient on its own to subject him to personal jurisdiction in California. Personal jurisdiction is a necessary prerequisite for an out-of-state defendant to be sued in a particular state. In [Pavlovich v. Superior Court of Santa Clara County](#), an appellate court had held that the out-of-state defendant, an operator of an Indiana-based website that contained a posting for a software program which enabled users to decrypt and copy DVDs, could be forced to defend a lawsuit in California because he knew or should have known that his conduct might have a substantial adverse effect on industries centered in California, including the motion picture industry, the consumer electronics industry, and the computer industry. This decision was discussed in our [December 18, 2001 Internet Alert](#). The California Supreme Court determined that this decision violated the federal and state constitutions.

The defendant in [Pavlovich](#) had no physical presence in California. He had never lived, worked, had a telephone listing or bank account, or owned property in California. In addition, he had not solicited business in California or maintained any business contacts there. Moreover, according to the California Supreme Court, the defendant's website was purely passive. It consisted of a single page with text and links to other sites, some of which were posted by individuals or entities other than the defendant, including most notably the software at issue in the suit. The website did not solicit or transact business or permit any interactive exchange between its operators and visitors.

In reaching its determination that the defendant could not be sued in California, the California Supreme Court explained that, for jurisdiction to exist, a defendant must have established certain "minimum contacts" with the state. A defendant that "purposefully availed" himself or herself of the benefits of the state by conducting business there, for example, might be subject to jurisdiction. The California court held that acting in a way that one knows or should know will cause injury to individuals or entities in another state, while potentially relevant to a finding of jurisdiction in combination with other circumstances, is insufficient, on its own, to satisfy this requirement. Instead, according to the California court, the defendant must have taken some action "*expressly aimed at or targeting*" the state in question. Because the court concluded there was no evidence

that the defendant's website had expressly targeted California or that any California resident had ever downloaded the program at issue or even visited the site, the court concluded that this requirement was not met.

The California Supreme Court's decision highlights the fact that, although there has been an effort to develop new guidelines and tests for determining jurisdiction in Internet-related cases, such as the "sliding scale" analysis first described in *Zippo Manufacturing Company v. Zippo Dot Com, Inc.* (W.D. Pa. 1997), the ultimate inquiry, as in all cases, is whether the exercise of jurisdiction would offend "traditional notions of fair play and substantial justice" that are the foundation of conventional jurisdictional analysis. The *Zippo* court's "sliding scale" suggests that websites fall along a spectrum: at one end are purely passive, information-only websites, while at the other are websites through which a party is doing business and knowingly entering into contracts with residents of the foreign state. Although the California Supreme Court appeared to conclude that the website in *Pavlovich* fell at the passive end of the spectrum, the fact that one could download data from the site suggests that the distinction made in *Zippo* is not so clear.

Ultimately, the California Supreme Court's decision appears driven by the concern that applying the "effects test" adopted by the appellate court potentially could subject defendants in Internet-related cases to jurisdiction in every state in the country, a result that the California court concluded to be inconsistent with the fundamental principles of personal jurisdiction.

There are signs that the United States Supreme Court may be considering taking up the issue of personal jurisdiction in an appropriate Internet-related dispute. Approximately one month after the issuance of the California Supreme Court's decision, United States Supreme Court Justice Sandra Day O'Connor granted a stay of the California Supreme Court's judgment, based on an application asserting that the parties that brought this suit would be irreparably harmed by the publication of the decryption program during the pendency of their anticipated appeal. Subsequently, the website operator filed a response contending that the program was widely available from other sources, such that the claim of harm was implausible, and Justice O'Connor vacated the stay. Further developments therefore seem likely.

Mark Matuschak
mark.matuschak@haledorr.com

Vinita Ferrera
vinita.ferrera@haledorr.com

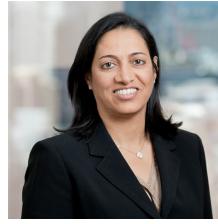
Authors



**Mark G.
Matuschak**
PARTNER

✉ mark.matuschak@wilmerhale.com

☎ +1 617 526 6559



Vinita Ferrera
PARTNER

✉ vinita.ferrera@wilmerhale.com

☎ +1 617 526 6208