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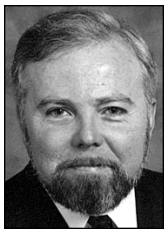
# Courts edge closer to guidelines on Web suit venues

BY HENRY DINGER

The home court advantage. Teams battle for it. Athletes feed off it. Sports fans debate its significance.

Home court advantage matters in litigation, too. Plaintiffs and defendants both prefer to litigate in their home courts. It is less expensive and imposes additional costs on one's adversary.



Henry Dinger

Moreover, while justice is supposed to be impartial, litigants fear that local judges and local juries will often favor local parties.

That is why litigants argue so strenuously over jurisdiction when they face litigation in another state.

Plaintiffs cannot proceed in their home state where defendants have so few contacts that forcing them to surrender their own home court is unfair. Courts ask whether the dispute arises out of those contacts and whether defendants have purposefully availed themselves of the legal benefits of the plaintiff's state. These are vague standards that have not been applied in an entirely consistent fashion.

Courts have had a particularly difficult time applying these standards when the dispute arises out of a defendant's online activities. Publishing a Web site establishes a potential contact with every state in the country and every country on earth.

If such a contact were a sufficient basis for jurisdiction, the tiniest, most localized operation would be subject to that jurisdiction everywhere in the world just because it had a Web site.

Courts have not taken that road but have looked to the kind of Web site involved. Publishing a passive site — one that makes fixed content available for viewing — is generally not enough. Operating an e-commerce site generally is sufficient to establish jurisdiction at least where the dispute arises out of such commercial activity. If a site falls somewhere in between, well then, it depends.

The California Supreme Court recently decided an important jurisdiction case arising out of online activity. The defendant, named Pavlovich, ran a site while he was at Purdue University in Indiana. It was a passive Web site that published the source code for DeCSS, a program written by a Norwegian teenager to decrypt movies released on DVD.

Courts have found DeCSS to violate the Digital Millennium Copyright Act.

The owner of the DVD encryption program that DeCSS decrypted sued Pavlovich in California, its home court, alleging complicity in the divulgence of the owner's trade secrets. Pavlovich challenged jurisdiction, claiming (accurately) that he had no physical contacts with California and that the site was passive.

But the plaintiff insisted (also accurately) that Pavlovich knew that DeCSS was a program used to enable copying of films on DVD and that much of the film industry was concentrated in California. Therefore, Pavlovich must have known that the impact of his site would be felt particularly in California and that made it legitimate for California courts to exercise jurisdiction over Pavlovich.

A 1984 Supreme Court case appeared to give some force to this argument. In that case, actress Shirley Jones sued the editor of the *National Enquirer* and the author of a libelous article that appeared in that paper.

The Supreme Court unanimously agreed that Jones could maintain her defamation suit against these individuals in California. They knew that Jones was a California resident and that the principal effect of the libel would be felt in California by Jones and her husband.

Substitute the film industry for Jones and trade secret theft for libel and the case of Pavlovich seemed on point.

A 4-3 majority of the court disagreed. Knowledge that a passive site will harm someone in a state is not enough to expose the publisher to jurisdiction in that state. Some additional contacts are required.

The three dissenters were not persuaded and found the Jones case controlling. The dissent observed that their rule did not expose a passive site publisher to suit everywhere; just where the Web site did the principal harm.

Small site operators may breathe a little easier, but the case was close and is not binding outside California.

I have reservations about a contrary rule that would allow industries to force all litigation concerning the rights of the industry to take place where the industry has the most economic influence. From the standpoint of reducing home court advantages, the decision has some appeal.

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