

IS YOUR WEBSITE EXPOSING YOU TO RISK?

By Jayme P. Moore

Can you be sued in every state in which your website can be viewed? Unfortunately, the answer is not a clear-cut "No." In fact, a recent case in California against L.L. Bean, the Northeastern clothing retailer, highlights that some courts are moving toward answering this important jurisdictional issue in a way that should frighten every company with a website.

In *Gator.Com Corp. v. L.L. Bean, Inc.*, a California court of appeals applied a "sliding scale"/ "interactive-passive" test when analyzing the jurisdiction issue. Although the decision was reheard by the full court and very recently dismissed as moot after the parties settled out of court, the court's analysis still provides a glimpse of a potential resolution to the Internet jurisdiction question.

Remember Burger King

Here is a quick and simple summary of personal jurisdiction. A court must have personal jurisdiction over a defendant to hear a case against it. For a court to have personal jurisdiction, the defendant must have minimum contacts with the jurisdiction and the suit must not violate traditional notions of fair play and substantial justice.

There are two types of personal jurisdiction: general and specific. General jurisdiction requires substantial or continuous and systematic contacts with the forum state. Specific jurisdiction requires the case to arise from the contacts with the state. Usually, a business must have some sort of physical presence in the state before a state will assert personal jurisdiction. However, the economic realities of the internet are blurring the ideas of physical presence and causing courts to think creatively to protect their citizens.

Gator.com Corp. v. L.L. Bean, Inc.

Gator.com ("Gator"), a Delaware corporation that develops and distributes software to consumers, sued L.L. Bean, a clothing company based in Maine. Gator users were offered pop-up coupons for Eddie Bauer, L.L. Bean's competitor, when the users visited L.L. Bean's website. L.L. Bean's counsel mailed Gator a cease-and-desist letter requesting that Gator stop the pop-up windows.

Gator's principle place of business was in California while L.L. Bean maintained corporate offices, distribution facilities, and manufacturing facilities in Maine. L.L. Bean stores were located in Maine, Delaware, New Hampshire, Oregon, and Virginia. L.L. Bean did not have an agent for service of process in California nor was L.L. Bean required to pay taxes in California. However, L.L. Bean mailed catalogs and packages to California residents, targeted California residents for direct email solicitation, and maintained on-line accounts for California consumers. Based on this evidence, the trial court granted L.L. Bean's motion to dismiss, holding that L.L. Bean's contacts with California were not substantial or continuous and systematic. Gator appealed the decision to the California Court of Appeals. The court of appeals found that L.L. Bean's mail-order and internet-based commerce in California were enough to support general personal jurisdiction.



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Sliding Scale Test and Interactive-Passive Distinction

The California Court of Appeals also applied the sliding scale test to determine the validity of personal jurisdiction. The sliding scale test requires that a party clearly conduct business over the internet and that the internet business's contacts with the state are substantial or continuous and systematic. The court explained that the test does not require an actual presence in the state. However, the commercial activity must be substantial enough to approximate physical presence. Moreover, the Court explained that businesses like L.L. Bean that "structure their activities to take full advantage of the opportunities that virtual commerce offers can reasonably anticipate that these same activities will potentially subject them to suit in the locales they have targeted." The website contacts with California consumers, thus, were enough to bring a Maine corporation properly before a California state court.

Other courts analyze internet jurisdiction issues by determining if the website is highly interactive, passive or middle ground. A highly interactive website is one that allows the consumer to interact with the company through the ability to purchase products or enter into contracts. In most cases, a court can exercise personal jurisdiction over companies with highly interactive websites. A passive website is one that simply makes information available without providing any additional interaction. A foreign court will most likely not have personal jurisdiction over cases based on a passive website. Finally, the middle ground website provides for an exchange of information between users but is not as interactive as the first category. For this type of website, jurisdiction depends on the level and nature of the exchange. Courts determine personal jurisdiction on a case by case basis by analyzing the website to determine the level of contact the website has with the state.

Final Thoughts

The fact that the California Court of Appeals vacated the L.L. Bean decision to be reheard by the full court instead of a three-judge panel demonstrates the complexity and importance of internet jurisdictional issues. California and other states have used different variations of the interactive-passive test to determine jurisdiction over companies without a physical presence in the state. Unfortunately, with the dismissal of L.L. Bean, the law remains unclear.



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