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Cover Page Footnote

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FORUM NON CONVENIENS

*Stephen H. Weiner**

INTRODUCTION

Expanding use of the Internet will not require changes in existing standards for jurisdiction and *forum non conveniens*, at least for conduct within the United States. Cases concerning contacts with U.S. forums by traditional means of communication, such as telephones or the mails, are applicable to new electronic forms of communication. These include sending messages by electronic mail, posting messages on electronic bulletin boards or newsgroups, participating in "chat rooms" or forums, or maintaining World-Wide Web pages. Any hardship to individuals from Internet-related litigation or criminal prosecutions should be minimized through application of the doctrine of *forum non conveniens*. This section of the Report will explore how the doctrine of *forum non conveniens* will apply to the information superhighway in both the civil and criminal context.

I. CIVIL CASES

For a court to maintain jurisdiction over a party, the requirements of due process must be met. A determination of whether due process has been satisfied depends on the "traditional notions of fair play and substantial justice"[933] and on the jurisdictional statutes and case law of the state forum.[934] Thus, any determination of whether jurisdiction exists in a case involving use of the Internet must begin with these principles. Because the circumstances presented in existing precedents interpreting these principles closely resemble the "new" world of the Internet, these precedents and principles are likely to be invoked in disputes concerning transactions concluded over the Internet.

Thus, in *Parke-Bernet Galleries, Inc. v. Franklyn*,[935] the New York State Court of Appeals considered whether there was jurisdiction over an out-of-state participant by telephone in a New York auction. Defendant, a California resident, sent a letter to New York stating that

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933. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citation omitted).

934. For example, in a diversity case, federal courts look to the forum state's jurisdictional statutes to determine whether there is in personam jurisdiction over a nonresident defendant. If the statute permits the exercise of jurisdiction, then the court must determine "whether exercise of jurisdiction comports with due process." Savin v. Ranier, 898 F.2d 304, 306 (2d Cir. 1990) (citing Arrowsmith v. United Press Int'l, 320 F.2d 219, 223 (2d Cir. 1963) (en banc)).

935. 256 N.E.2d 506 (N.Y. 1970).

he wished to bid for a painting and telephoned the plaintiff gallery requesting that "telephonic communication be established" between himself and the gallery during the bidding.[936] On the evening of the auction, an open telephone microphone was set up between the defendant in California and an employee of the gallery. The employee informed the defendant of the bids that were being made, took bids from the defendant, and relayed them to the auctioneer.[937] The defendant purchased two paintings. After he failed to pay for them, plaintiff commenced an action in New York. The Court of Appeals held that New York had jurisdiction over the defendant pursuant to New York's long-arm statute[938] because defendant had transacted business in New York.[939] The court explained:

> [I]t is highly significant that, on his own initiative, the defendant, in a very real sense, projected himself into the auction room in order to compete with the other prospective purchasers who were there. This activity far exceeded the simple placing of an order by telephone. . . . [Defendant's] active participation in the bidding which resulted in the paintings' being sold to him amounted to the sustained and substantial transaction of business here. Indeed, his conduct, the business he was transacting, affected not only the plaintiff but all those who were in the auction room.[940]

This precedent is applicable to participation in online bidding or transactions in "chat" or "event" rooms. In these cases, persons actively project themselves into a "cyberspace" location and interact with other people. What is new is that the location where the transaction takes place is the computer or computers maintained by a service which connects the users involved. Thus, each personal computer involved could also be the location of the transaction.[941]

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936. *Id.* at 507.

937. *Id.*

938. N.Y. Civ. Prac. L. & R. § 302(a)(1) (McKinney 1990) (stating, in pertinent part, that "a court may exercise personal jurisdiction over any non-domiciliary . . . who . . . transacts any business within the state or contracts anywhere to supply goods or services in the state").

939. *Parke-Bernet*, 256 N.E.2d at 508-09.

940. *Id.* at 508. The court further held that jurisdiction was present based on the gallery's employee having functioned as defendant's agent during the auction. *Id.* at 509.

941. Another case involving a finding of jurisdiction based in part on use of an open telephone line (and 93 telephone calls to New York), is Otterbourg, Steindler, Houston & Rosen, P.C. v. Shreve City Apts., Ltd., 543 N.Y.S.2d 978 (App. Div. 1989). The Appellate Division reversed dismissal of a complaint for lack of jurisdiction. Plaintiff was a New York law firm that had represented Ohio defendants in a bankruptcy claim proceeding in the Southern District of New York. *Id.* at 978-79. Plaintiff was retained by a letter from defendants' Ohio counsel. Defendants switched counsel and failed to pay plaintiff fully. In granting the motion to dismiss, the New York Supreme Court held that an attorney may not assert jurisdiction over an out-of-state client based on his own actions in New York. *Id.* at 978. The Appellate Division reversed and held that there was jurisdiction over the defendants based on, inter alia, defendants' participation in a meeting in New York through one defendant's use of an

Even if jurisdiction exists, however, a case may be dismissed on the basis of the absence of venue[942] or on the *forum non conveniens* doctrine. In *Gulf Oil Corp. v. Gilbert*,[943] the Supreme Court held that a federal district court has the power to dismiss a diversity action on the basis of *forum non conveniens* in "rare cases"[944] in which the plaintiff has chosen an inconvenient forum in order to " 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."[945] The Court set forth factors to be weighed in any *forum non conveniens* determination under the headings of private and public interest.

Private interest factors listed by the Court include the party's "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive."[946] In balancing private interest factors, "the district court must scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action."[947]

Public interest factors include: administrative difficulties faced when litigation accumulates in courts that have no connection to the subject matter instead of being handled at the litigation's place of origin; imposition of jury duty on a community that has no interest in the litigation; interest in having localized controversies handled locally; and appropriateness in trying a diversity case in a forum that is familiar with the law that will govern the case.[948] In evaluating public interest factors, "the court must consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to the plaintiff's chosen forum."[949]

The foregoing principles have been applied in cases involving contacts that are analogous to the sending of an electronic mail message

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open telephone line. *Id.* at 981. At the meeting, the defendant made and responded to proposals regarding the terms of the contemplated settlement agreement and was, generally, actively involved; additionally, numerous letters and telephone calls were made to New York. *Id.* Other factors that the court relied on included defendants' settlement of the bankruptcy proceeding in New York pursuant to an agreement which provided for payments to be made in New York and for New York law to apply, retention of a New York law firm as counsel, and retention of other counsel in New York. *Id.*

942. A full discussion of venue is beyond the scope of this section of the Report.

943. 330 U.S. 501 (1947).

944. *Id.* at 509.

945. *Id.* at 508.

946. *Id.*; *accord* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241, 257-59 (1981).

947. Van Cauwenberghe v. Biard, 486 U.S. 517, 528 (1988).

948. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

949. *Van Cauwenberghe*, 486 U.S. at 528.

into a forum. For example, in *Anderson v. Board of Regents of Higher Education of Massachusetts*,[950] the defendant Board of Trustees had closed a law school in Massachusetts and sent letters of acceptance to New York which plaintiffs signed in New York.[951] The court held that there was not "a sufficient nexus between defendant's purposeful New York activities and the instant cause of action so as to justify assertion of jurisdiction."[952] In addition, the court held that since witnesses connected with defendant resided in Massachusetts, "the merely glancing contact" with New York required dismissal on the ground of *forum non conveniens*.[953] If the letters were sent via the Internet, the result should be no different.

II. Criminal Cases

In the criminal context, the doctrine of *forum non conveniens* is codified at Federal Rule of Criminal Procedure 21(b). The rule provides that "[f]or the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district."[954] Courts consider the following factors in deciding a motion for transfer: (1) location of the defendant; (2) location of potential witnesses; (3) location of events that may be in dispute; (4) location of documents that are likely to be involved; (5) possible disruption of defendant's business if the case is not transferred; (6) cost to the parties; (7) counsel's location; (8) relative inaccessibility of the trial location; (9) workload of each district involved; and (10) any other relevant factors that may affect the transfer.[955]

Whereas the location of the defendant is a very significant factor,[956] it is well-settled that "[t]he Government's convenience is . . . a factor given little weight when other considerations of convenience suggest transfer of a trial under Rule 21(b)."[957]

950. No. 93 Civ. 5162, 1994 U.S. Dist. LEXIS 13045 (S.D.N.Y. Sept. 7, 1994).

951. *Id.* at *11.

952. *Id.* at *12.

953. *Id.* at *13; *accord* PaineWebber Inc. v. Westgate Group, Inc., 748 F. Supp. 115, 119 (S.D.N.Y. 1990) (holding that company's frequent telephone calls and telecopies to New York and one meeting in New York during which a modification of an agreement was memorialized did not constitute sufficient contacts with New York to amount to "transacting business" within the meaning of New York's long-arm statute).

954. Fed. R. Crim. P. 21(b).

955. *See* Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 243-44 (1964); United States v. Keuylian, 602 F.2d 1033, 1038 (2d Cir. 1979).

956. *See* United States v. Russell, 582 F. Supp. 660, 662 (S.D.N.Y. 1984) (transferring a trial to Memphis, Tennessee, where defendants resided, stating that "[a]s a matter of policy . . . wherever possible, defendants should be tried where they reside" because of the hardship of having to stand trial away from home).

957. United States v. Gruberg, 493 F. Supp. 234, 243 (S.D.N.Y. 1979); *see also* United States v. McDonald, 740 F. Supp. 757, 762 (D. Alaska 1990) ("The primary

As the government continues to bring cases involving use of the Internet under various criminal statutes and theories, previously untested jurisdictional issues may continue to arise. For example, in *United States v. Maxwell*,[958] an Air Force Colonel was court-martialed for communicating indecent language to another member of the armed forces via computer and for violating federal law by using his personal computer "(1) to receive or transport visual depictions of minors engaged in sexually explicit conduct and (2) to transport in interstate commerce, for purpose of distribution, visual depictions of an obscene, lewd, lascivious or filthy nature."[959] He distributed this material on America Online.[960] Relying on an informant, the government obtained a search warrant and seized information in nine America Online computers, and subsequently, the Colonel's computer.[961] The Air Force Court of Military Appeals held that the electronic transmission of obscene visual images through the use of an online computer service is a violation of 18 U.S.C. § 1465.[962] The court upheld use of an "Air-Force wide" community standard for determining whether the transmissions were obscene, because the transmissions "were sent by computer to various locations around the nation."[963] Interesting questions about the extraterritorial reach of the statute and the applicable community for determining the obscenity standard could have arisen had the Colonel been stationed outside the United States and sent his transmissions to non-Air Force personnel abroad. This issue is thus still open.

concern of Rule 21(b) is to 'minimize the inconvenience to the defense.'" (citing 2 Charles A. Wright, Federal Practice and Procedure § 343, at 260 (1982))).

958. 42 M.J. 568 (C.M.A. 1995).

959. *Id.* at 573 (citations omitted).

960. *Id.* at 574.

961. *Id.* at 574-75.

962. *Id.* at 580. The relevant portion of the statute states:

> Whoever knowingly transports in interstate or foreign commerce for purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, photograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1465 (1988).

963. *Maxwell*, 42 M.J. at 581.

Likewise, the first wire fraud prosecution[964] involving electronic bulletin boards in *United States v. LaMacchia*[965] left unresolved jurisdictional questions. There, defendant, a student at the Massachusetts Institute of Technology ("MIT") allegedly set up an electronic bulletin board using MIT's computer network, encouraged his correspondents to upload copyrighted software applications to it, and transferred these applications to a second encrypted address where the applications could be downloaded by other users.[966] The court dismissed on the grounds that the wire fraud statute did not extend to infringement of copyrighted material.[967] No issue of jurisdiction or *forum non conveniens* was raised, presumably because the indictment was rendered in the district where the defendant resided and where the computer facilities he utilized were located. Future cases, however, may involve prosecutions in districts where some or all of the defendants do not reside, and consequently, such jurisdictional issues may arise.

Thus, the *forum non conveniens* doctrine, codified at Rule 21(b), provides a safeguard against hardship to defendants from being prosecuted in distant jurisdictions based on messages sent via online information services or electronic bulletin boards.[968]

Although existing precedents are likely to provide sufficient guidance concerning jurisdiction and *forum non conveniens* issues within the U.S., extraterritorial jurisdiction over persons outside the U.S. and substantive issues such as defining which jurisdiction's "community standard" will apply under obscenity laws may pose the greatest challenges to the imagination of jurists.

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964. The wire fraud statute is codified at 18 U.S.C. § 1343 (1988). In relevant part, it provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Id.

965. 871 F. Supp. 535 (D. Mass. 1994).

966. *Id.* at 536.

967. *Id.* at 545.

968. *See* United States v. Russell, 582 F. Supp. 660, 664 (S.D.N.Y. 1984) (noting that "[a]lthough certain electronic messages and funds passed through New York, their passage through this, the commercial center of the United States (and perhaps the world), can hardly be considered an uncommon or significant event" sufficient to create a local interest in retaining a trial in New York rather than transferring the case to Memphis).