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litigation against service providers. With such a standard, the service providers incur liability any time any one of its subscribers notified it that he or she was bothered by another party's posting. Consequently, deciding what information was derogatory, defamatory or offensive burdens providers. Again, the court concluded that such a consequence of notice liability was contrary to Congress's intent to encourage self-regulation.

### *Court Also Rejected Claim That § 230 Cannot Be Applied Retroactively*

Zeran argued that the law did not apply retroactively in this case because the cause of action predated it. Congress enacted the CDA and it became effective February 8, 1996. Zeran filed his claim on April 23, 1996, nearly a year after the original posting of the defamatory message. The court, however, disagreed with Zeran. The court decided that Congress felt so strongly about the need to protect free speech on the Internet and the need to encourage self-regulation that Section 230 immediately applied on any claim brought forward since its enactment.

The court also examined this case in light of the framework of *Landgraf v. USI Film Prods.*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). The decision in *Landgraf* asserted that for pre-enactment events, the courts must decide whether Congress effectively stated what the statute's reach should be. In applying this to Section 230, the Fourth Circuit ruled that Congress unquestionably designed the statute to apply to any claim filed after the statute's enactment, even if the cause of action occurred prior to that date. Thus, the court concluded that retroactivity was not an issue in this case.

After considering Congress's purpose in enacting Section 230 and examining the language of the statute, the Fourth Circuit ruled that liability did not extend to AOL for offensive material posted on their service by a third party. The court determined that AOL was a publisher and that Section 230 protected AOL. Thus, the Fourth Circuit affirmed the judgment on the pleadings in favor of AOL.

***CLR***

# Posting Information on Internet Does Not Establish Personal Jurisdiction

*by Zachary Raimi*

The rise of the Internet, which has dramatically changed the way people communicate and conduct business, has impacted the law and legal proceedings. In ***Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997)**, the Ninth Circuit held that an Arizona court could not exercise personal jurisdiction over a Florida corporation, which advertised over the Internet, when it used Plaintiff's trademark on an Internet site. The court determined that, even though Internet users could access the company's web page in Arizona, a company may not be sued unless it takes affirmative steps to avail itself to the laws and benefits of that state.

### *Two Companies — With Same Name — Clash Over Trademark Infringement, Jurisdiction*

On January 9, 1996, Cybersell, Inc. ("Cybersell AZ"), an Arizona corporation, sued Cybersell, Inc., a Florida corporation ("Cybersell FL"), in a federal district court in Arizona. Cybersell AZ alleged that Cybersell FL engaged in "trademark infringement, unfair competition, fraud, and RICO violations." Cybersell FL sought dismissal for lack of personal jurisdiction. The court granted Cybersell FL's motion, and Cybersell AZ appealed to the Ninth Circuit.

The lawsuit traces its history to May 1994, when Cybersell AZ was incorporated to provide Internet advertising and marketing services. On August 8, 1994, Cybersell AZ applied for the service mark

"Cybersell." The Patent and Trade Office approved its application in October 1995. From August 1994 to February 1995, Cybersell AZ maintained a web page using the "Cybersell" mark. Subsequently, the company removed the page for reconstruction.

Unaware of Cybersell AZ's existence, two Florida residents created Cybersell FL in the summer of 1995. This company provided consulting services for businesses. Cybersell FL developed a web page which included: (1) information about the company; (2) a local Florida phone number; (3) and a large banner that read, "'Welcome to CyberSell!'" At this time, Cybersell AZ did not have a web page, and the Patent and Trade Office had not yet approved its application for a service mark.

On November 27, 1995, a Cybersell AZ principal discovered Cybersell FL's web page and sent an e-mail to the company informing it of Cybersell AZ's existence and ownership of the "Cybersell" mark. Cybersell responded to this by changing its name and removing the Cybersell logo from its web page. However, the web page still included a "'Welcome to CyberSell!'" message.

About six weeks later, Cybersell AZ filed suit in Arizona "alleging trademark infringement, unfair competition, fraud, and RICO violations." On the same day, Cybersell FL filed suit for declaratory judgment for Cybersell AZ's use of the "Cybersell" name in the United States District Court for the Middle District of Florida. The Florida court transferred the suit to the Arizona court, which consolidated the two cases. Then, Cybersell FL moved to dismiss the case for lack of personal jurisdiction, and the court granted Cybersell FL's motion. The Ninth Circuit Court of Appeals upheld the lower court's dismissal.

### *Court Used Recent Internet Cases for Background*

As a case of first impression, the court began its analysis with the examination of two recent decisions from other circuits that represented "opposite ends of the spectrum." In *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996), the Sixth Circuit held that a defendant who used the Internet to conduct business in another state was subject to personal jurisdiction in that state. CompuServe displayed software files that Patterson electronically transmitted to the computer company. CompuServe sold the products and then sent the money to Patterson. After a dispute, CompuServe filed for declaratory judgment in Ohio. The court sustained jurisdiction over Patterson because it reasoned that he "reached out to Compuserve's Ohio home." *Cybersell Inc. 130 F.3d* at 417. Accordingly, he "purposefully availed" himself of the benefits of Ohio law. *Id.* at 417.

In contrast, the Second Circuit held that a defendant who advertised or posted information on the Internet was not subject to jurisdiction in every state merely because the Internet had the potential to reach every jurisdiction. In *Bensusan Restaurant Corp. v. King*, 1936 F.Supp. 295 (S.D. N.Y. 1996), *aff'd* 126 F.3d 25 (2d Civ. 1997) King owned a jazz club in Missouri with the same name as a club in New York. The New York club sued King for trademark infringement in New York; King objected to the court's jurisdiction. The court reasoned that since King's web page offered information about its club, and little else, he did not "purposefully avail himself of the benefits of New York." The court distinguished King, who posted information about his club on the Internet, from Patterson, who sent software to CompuServe and used the company to market his software.

### *Cybersell FL did not Purposefully Avail Itself of Arizona Law*

The district court, sitting in diversity jurisdiction, ruled that it was bound by Arizona law. The Arizona Rules of Civil Procedure allow courts to assert jurisdiction over defendants "to the maximum extent" allowed by the state and federal jurisdictions. 16 ARIZ. R. CIV., 4.2(a).

Before analyzing the factual situation of the case, the court established a three-part test to determine whether it could exert personal jurisdiction over defendants who were domiciled in other states. The test was a compilation of many prior cases that explored jurisdictional issues. Part one asked whether the defendant's act or transaction in a particular state demonstrated that he "purposefully availed" himself of the benefits and privileges of a state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Part two sought to determine whether the cause of action arose out of the defendant's activities within the forum state.

And, part three required that the "exercise of jurisdiction must be reasonable."

Cybersell AZ relied on several cases for support, but the court found the cases unpersuasive because the holdings were broader than Cybersell AZ suggested. For example, Cybersell AZ relied on an Arizona case where the court stated that a defendant should not "escape traditional notions of jurisdiction" because of modern technology. *EDIAS Software International, L.L.C. v. BASIS International Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996).

In *EDIAS*, Plaintiff claimed that Defendant promulgated advertisements and defamatory assertions via the Internet. Defendant had a contract with Plaintiff, and it solicited business in the Arizona, the forum state. Additionally, Defendant's employees traveled to Arizona for business engagements with Plaintiff. Hence, Defendant's contact with the forum state was not limited to Internet correspondences.

The Ninth Circuit distinguished this case from the present one. Unlike the defendant in *EDIAS*, Cybersell FL's only contact with Arizona was the information it posted on its web page. As a result, the court found *EDIAS* unpersuasive for Cybersell AZ.

Instead, the Ninth Circuit determined that Cybersell FL took no steps to "purposefully avail" itself of Arizona's benefits, whereas the defendant in *EDIAS* did. The court found that Cybersell FL did not conduct any commercial activity over the Internet in Arizona. Cybersell FL did not form contracts with anyone in the state. Moreover, the court found that the company did not actively encourage Arizona residents to use its site, there was no evidence that Cybersell FL pursued business in Arizona, Cybersell FL did not advertise in Arizona, and it derived no any income from Arizona.

The court also noted that Arizona citizens had no interaction with Cybersell FL's web page. Not one person in Arizona "hit Cybersell FL's web site." Cybersell FL never sent electronic messages to people or companies in Arizona. Moreover, there was no evidence that any Arizonan had enlisted Cybersell FL's web assistance. Essentially, Cybersell FL's presence in Arizona was negligible.

The court concluded that posting information on the Internet without taking steps to purposefully avail oneself of the laws of the forum state did not establish personal jurisdiction. Since the court concluded that Cybersell FL's contacts with Arizona did not amount to purposeful activity in the state, the court stopped its analysis without examining the second and third prongs of its test. The case did not change any preexisting laws about personal jurisdiction simply because this case involved an Internet. Instead, the court demanded the same level of minimum contacts that it would in other cases. Accordingly, the court concluded that Cybersell FL did not establish the requisite minimum contacts with Arizona, and affirmed the lower court's dismissal.

**CLR**

# Medical Buyer Fails to Prove that Letter Evidenced a Valid Requirements Contract

*by Karina Zabicki*

In ***Orchard Group, Inc. v. Konica Medical Corp.*, 135 F.3d 421 (6th Cir. 1998)**, the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court holding: (1) when a principal allows its agent to modify existing contracts, confirm contracts and conclude contract negotiations between the principal and third parties without further approval, the doctrine of apparent authority will bind the principal to the contract formed by its agent; (2) the letter sent by the Konica Medical Corporation agent to an Orchard Group Incorporated agent was not a valid contract because it neither contained a quantity term in compliance with the Statute of Frauds, nor met the definition of a "requirements contract" because nothing in the letter indicated how a quantity term could be implied; and (3) the letter