

1 Jurisdiction Defined

Objectives

After completing this chapter, the student should be able to:

- Define the concept of jurisdiction;
- Explain the difference between subject matter jurisdiction and personal jurisdiction;
- Define the four different types of personal jurisdiction;
- Describe the difference in interactivity between an active and a passive website; and

Understand the criteria necessary to obtain jurisdiction over an Internet business.

A Learning Story

K.T. Bird is a Michigan resident. She recently purchased a custom-made car online from Wheelz, Inc., an Indiana company. A month after delivery, certain defects appeared in the car, including doors that would not properly close, a radiator leak, as well as various mechanical problems. Estimated repair costs were \$12,000. Bird's friends have told her she had a "lemon" on her hands.

The purchase price of the car was \$31,033. The car was delivered directly to Bird's home by a car hauler and Bird paid for the car in full. Delivery was included in the purchase price. Bird wants to sue Wheelz. Because this was an Internet transaction involving residents from two different states, what options does Bird have? In other words, can she sue Wheelz in Michigan, or is she required to file a lawsuit against Wheelz in Indiana?

1.1 Overview

Technology and the Internet¹ have dramatically changed the way people interact with one another. The ability to electronically access, store, and transmit information presents people with many new ways to communicate. Email is now a standard business communication tool, and has also changed the way people conduct business. Technology has also created a new type of business called **electronic commerce**, which involves the purchase or sale of products and services over the Internet.

In 1995, less than 1% of the world's population had access to the Internet. However, it is estimated by the end of 2014 that the number of Internet users will reach 3 billion, or approximately 40% of the world's population.² With so many users online, disputes are inevitable. Social connections are made and crimes are committed online, just as they are in a face-to-face environment. Consumers increasingly make legal contracts on the Internet for services, such as travel arrangements. Estimates are that "the web will account for or influence 59% of U.S. retail purchases by 2018."³

All these communications can lead to disputes and potential litigation. These disagreements can involve not only individuals in the United States, but in other countries. How and where these disputes are resolved is not often clear.

Jurisdiction⁴

The legal authority of a court to decide a certain type of dispute. It is also used as a synonym for venue, meaning the geographic area over which the court has territorial jurisdiction to decide disputes.

Figure 1-1

Whenever there is a dispute between two or more parties, the parties can resolve their differences using a private agreement. If their conflict cannot be settled, then the individuals or companies involved have the option to sue each other in court. When the problem takes place with a face-to-face transaction, the law is clear which court has **jurisdiction**, namely the authority to hear the case. Typically, the **plaintiff** (the person or company suing) institutes a lawsuit where the transaction took place, or where the party being sued (the **defendant**) resides or does business. However, with disputes based on Internet transactions, it may not be clear where to sue.

With an Internet contract, the answer to the question where to sue is often found on a company's website under a section called "**terms of use**" (also called terms of service or terms and conditions), which specifies how disputes are handled. Consumers do not often realize, but consumers agree to these terms when they make a purchase. The agreement may also include a "**forum selection clause**" or "**choice of law clause**" that states who can sue whom and in what court. Typically, the consumer agrees to the "terms of use" as a condition to purchasing the product or services. These types of agreements often favor the seller rather than the consumer, and usually require lawsuits to be filed in the state where the vendor is located. Many of these agreements also include an **arbitration** provision that is mandatory in many online contracts.

Sample Terms of Use Language

You agree to resolve any dispute you have with Wheelz Inc. in a state or federal court located in Battle Ground, Indiana, and to submit to the personal jurisdiction of the courts located in Tippecanoe County, Indiana for litigating all such disputes.

Figure 1-2

Absent an agreement how a dispute is to be handled, statutes or laws determine where a lawsuit can be filed and in which court. As noted earlier, jurisdiction is the *authority of a court* to hear a controversy and render a decision to resolve a disagreement.

The United States has two main court systems: federal and state. However, each state also has their own court system. When considering the District of Columbia and the U.S. territories (U.S. Virgin Islands, Guam, the Commonwealth of Puerto Rico, Northern Mariana Islands, and American Samoa), there are well over 50 court systems⁵ in the United States.

Two elements are involved with jurisdiction and the Internet: **subject matter jurisdiction** and **jurisdiction over the person (personal jurisdiction)**.⁶ The discussion of these two concepts will clarify and answer the question how to determine where to file a lawsuit in an Internet based dispute.

1.2 Subject Matter Jurisdiction

Subject matter jurisdiction is the authority of a *specific* court to hear a particular type of dispute. Often times, the law is very clear and only one type of court can hear a case. This is referred to as a court having **exclusive jurisdiction** over a matter. For example, only federal courts resolve patent and bankruptcy disputes.

A federal trial court will also handle any dispute involving a federal statute, the U.S. Constitution, or a treaty. In addition, federal courts can review any dispute over \$75,000 when there is **diversity of citizenship**. Diversity of the citizenship means the plaintiff and the defendant reside or do business in different states. Diversity of citizenship also applies to parties outside the United States.⁷ If a dispute does not meet the criteria for federal court jurisdiction, a lawsuit should be filed in a state court.

Sometimes, both the federal and a state court will have **concurrent jurisdiction** over a matter. In that case, the attorney for the plaintiff must determine which court location would be more beneficial to his or her client. For example, a court in close proximity to the plaintiff’s home or business would be more convenient and cost effective for the client as well as his or her attorney.

| Subject Matter Jurisdiction for the Federal Court system | Subject Matter Jurisdiction for the State Court system |
|---|--|
| <ul style="list-style-type: none"> • Cases that deal with the constitutionality of a law; • Cases involving the laws and treaties of the U.S.; • Ambassadors and public ministers; • Disputes between two or more states; • Admiralty law; • Patent law; and • Bankruptcy. | <ul style="list-style-type: none"> • Most criminal cases, probate (involving wills and estates); and • Most contract cases, tort cases (personal injuries), family law (marriages, divorces, and adoptions), etc. <p>State courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court. The Supreme Court may choose to accept or refuse such appeals.</p> |

Figure 1-3⁸

1.3 Personal Jurisdiction

Personal jurisdiction is known as “jurisdiction over the person.” In other words, a court that has personal jurisdiction over a person or company can require that party to appear in its court.

When the both parties live or do business in the same state, that state has personal jurisdiction over the litigants and the authority to require their appearance in court. A person can also consent to be subject to the personal jurisdiction of a state court. When the parties live in different states, (or different countries), the question as to what court has personal jurisdiction becomes more complex. In the federal courts, Rule 4 of the Federal Rules of Civil Procedure, which requires a federal court to follow the state law on personal jurisdiction where the court is located,⁹ governs personal jurisdiction.

When the dispute is with an electronic business (e-business), courts look at the characteristics of the company’s website to determine whether it “operates” within the state’s boundaries. In addition to physical presence within a state, a court may acquire personal jurisdiction over a non-resident defendant based on the state’s **long arm statute**, which will be discussed below.



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Jane, Chinese architect

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1.4 Long Arm Statute

A long arm statute is a state law that allows a court to claim personal jurisdiction over an out of state party *who performs an act or transaction within the state*. State laws differ, but the concept is the same: allow the local court to acquire personal jurisdiction over a non-resident defendant based on the defendant's contacts within the state.

For example, in Michigan, state law Michigan Compiled Laws (MCL) 600.705 provides jurisdiction over an individual when any of the following relationships exist:

- 1) The transaction of any business within the state.
- 2) The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort.
- 3) The ownership, use, or possession of real or tangible personal property situated within the state.
- 4) Contracting to insure a person, property, or risk located within this state at the time of contracting.
- 5) Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant.
- 6) Acting as a director, manager, trustee, or other officer of a corporation incorporated under the laws of, or having its principal place of business within this state.
- 7) Maintaining a domicile in this state while subject to a marital or family relationship which is the basis of the claim for divorce, alimony, separate maintenance, property settlement, child support, or child custody.¹⁰

Most states, such as Michigan, have not revised their laws to provide for Internet disputes for transactions taking place within its state boundaries. However, other states' statutes specifically provide for Internet disputes. For example, Virginia's long arm statute Va. Code Ann. § 8.01-328.1, provides that "using a computer or computer network located in the Commonwealth (with Virginia being a Commonwealth) shall constitute an (appropriate) act" giving a Virginia court personal jurisdiction for Internet disputes.¹¹

A court will always be concerned that the out of state party is afforded **due process** of the law. Due process of law means a person must be given notice and the opportunity to be heard by a tribunal before action may be taken by a court.

If a business's connection to a state is unclear in an Internet disputes, courts may look at other criteria called **minimum (minimal) contacts** and **personal availment**.

1.5 Minimum Contacts

What are minimum contacts? Minimum contacts means the party being sued (defendant) must have some type of significant activity that connects the defendant to the state where the lawsuit will be filed. If a court does not have these minimal contacts, jurisdiction over the person or the property may not be established.

How do minimum contacts relate to Internet transactions?¹² The U.S. Supreme Court¹³ in *International Shoe v. State of Washington*, 326 U.S. 310 (1945), has held that with the minimum contacts test, that there must be “sufficient contacts or ties to make it reasonable and just” for a court to establish personal jurisdiction over a party¹⁴ and that due process requirements have been met.

Suppose for example, you meet a person through an online dating site. You never meet in person, but you develop a relationship online. You live in Pennsylvania and the other person lives in Florida. Eventually, you agree to meet one another, and you send money to your new friend for airfare to fly to Pennsylvania. However, this acquaintance takes the money for the ticket and you never hear from this person again. To recover the ticket money, you decide you would like to sue. The question is where do you file? If you file a lawsuit in Pennsylvania, the court will ask what is the basis for personal jurisdiction over your former friend. In other words, what contacts does he or she have with the State of Pennsylvania? Unfortunately, the level of contact is very small. In the alternative, the Florida courts would have clearly have jurisdiction over the dispute, as your acquaintance is a resident of that state.

Some state courts have expanded the minimum contacts standard and established an “**effects test**” described in the U.S. Supreme Court case of *Calder v. Jones*, 465 U.S. 783 (1984).¹⁵ In *Calder*, the Court held a state court could establish personal jurisdiction over a defendant in cases in which the defendant targets an action at a particular state or forum. For example, suppose that Wheelz, Inc. sends out an email to 5000 potential customers in Ann Arbor, Michigan that describes their custom car manufacturing services. That type of marketing focus would demonstrate the company is targeting Michigan customers and would establish jurisdiction under the “effects test.”

1.6 Purposeful Availment

Federal courts on the other hand, do not universally follow either the minimum contacts test or the effects test, but rather the **Zippo test** based on *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 119 (W.D. Pa. 1997).¹⁶ In *Zippo*, the court followed a standard called **purposeful availment**. This means, to determine personal jurisdiction, a court will review a company’s website to establish whether the company’s website is active or passive. An **active website** would allow a user to order products or services and establish personal jurisdiction. On the other hand, a **passive website** would only present information or advertising. Typically exchanging information with a host computer is insufficient activity to satisfy the purposeful availment standard, and establish personal jurisdiction.

What about international disputes? The law differs across the world, as each country has its own set of regulations and laws, so there is no single established standard.

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Four Main Types of Personal Jurisdiction

- The defendant is domiciled or does business within the state.
- The defendant consents to the jurisdiction of the court.
- The defendant is traveling within the geographical boundaries of the state.
- The defendant has minimal contacts with the state.

Figure 1-4

Let's now look at a few fact scenarios. Suppose that several Nevada residents invest in a web company called "BigBuck\$Charlie." The company is a scam, and the investors lose all the money they have invested. The Company website is registered to a person incarcerated in a New Hampshire prison, and hosted by an Internet Service Provider in Texas. Can the Nevada residents sue BigBuck\$Charlie in Nevada? The answer is probably no. The company did not have offices in Nevada, did not operate in Nevada, and owned no property in the state. If the website was informational (passive), then there is no personal jurisdiction. If the website is mixed (informational with some interactive e-business), jurisdiction will depend on the level of interactivity the parties had with the web company.

The Court Speaks

Impulsaria LLC v. United Distribution Group LLC, File No 1:11-CV-1220, (W.D. Mich. 2012)¹⁷

Facts:

Plaintiff Impulsaria was the owner of a federal trademark STIFF NIGHTS,¹⁸ a dietary supplement marketed to men. It also owned a distinctive trade dress (see Chapter Three) for STIFF NIGHTS and had copyrighted material in its packaging for the product. Due to concerns by the FDA that the product contained a controlled substance, the Plaintiff stopped manufacturing the product in June 2010, and in August 2010, the Plaintiff recalled any product produced before the June date. However, when the Plaintiff reintroduced the product back into the market, it notified the FDA that a counterfeit product was also being produced, and in fact, only the counterfeit STIFF NIGHTS product that contained the illegal substance. It was during the June to August timeframe, that the Plaintiff discovered its prior distributors were selling a counterfeit version of the product, identical to its packaging and representing it to be its brand. In a Complaint filed with the court, the Plaintiff alleged that "the counterfeit products have 'a package and external image and language identical to that offered by Impulsaria;' that because of the similarity of the marks, consumers 'are likely to be and actually have been deceived, mistaken, and confused as to the source of the STIFF NIGHTS;' and that these acts have damaged Plaintiff's business reputation and have diluted Plaintiff's goodwill in its trademark." (Memorandum Opinion, p. 3)

There were four Defendants in this case: Blake King, E&A Video and Magazine, Inc., Top5supps.com, and SLK Distributors. Defendants filed a motion to dismiss Plaintiff's complaint based on a lack of personal jurisdiction.

Court¹⁹

Government entity authorized to resolve legal disputes. Judges sometimes use “court” to refer to themselves in the third person, as in “the court has read the briefs.”

Figure 1-5

Discussion:

In its opinion, the Court held that the “plaintiff must establish ‘with reasonable particularity’ sufficient contacts between Defendant and the forum state to support jurisdiction.” (p. 3)

“Personal jurisdiction over a defendant exists ‘if a defendant is amenable to service of process under the forum state’s long-arm statute and if the exercise of personal jurisdiction would not deny the defendant due process’... The due process ‘minimum contacts’ inquiry is satisfied if the defendant meets the following criteria:

First, the defendant must purposefully avail himself of the privilege of acting in the focus state or causing consequence in the forum state. Second, the cause of action (legal claim) must arise from the defendant’s activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of the jurisdiction over the defendant reasonable...” (p. 3)

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Plaintiff alleged “that the Court has jurisdiction over all four Defendants ‘because they are formed under the laws of the State of Michigan, maintain a principal place of business within this judicial district, or conduct business within the judicial district.’” The Plaintiff also alleged that “the Defendants are ‘manufacturers, importers, wholesalers, distributors of general merchandise and/or cash and carry stores selling, offering for sale and active Internet sites selling and/or distributing products within the state of Michigan.’” (p. 5)

“Defendant King contends that the Court lacks personal jurisdiction over him. King has presented evidence that he is a resident of the State of Tennessee, that he does not own any property in Michigan, and that he has never been to Michigan, except, possibly, to change planes or during a layover.” (p. 5).

However, King admitted “that any contact he has had with the State of Michigan has been solely through business transactions” conducted by BL Supplements, who is the owner of the domain name www.tops5supps.com.

Conclusion:

“The Court has held in the past ‘where personal jurisdiction is based on an interactive commercial website, courts require something more than the mere accessibility of the website by residents of the forum state to demonstrate that the defendant directed its activity towards the forum state. King has not denied that Tops5 has done business in the state.’ In fact, King noted in his affidavit that any contact he has had with the State of Michigan has been solely through business transactions conducted by BL, the online retailer of dietary supplements that operates and owns the domain name www.top5supps.com. Because King has not come forward with an evidence to challenge Plaintiff’s assertion that he is doing business in his district through the Top5 website, the Court is satisfied that Plaintiff has met its burden of making a prima facie showing that the court has personal jurisdiction over Defendant King.” (p. 6).

Questions:

1. If King had not admitted he had business contacts through his BL Supplements Company, what would the Plaintiff have to prove for the court to find personal jurisdiction over the Defendant?
2. Defendant SLK was a Georgia company, and it did business in Michigan by selling STIFF NIGHTS in “the normal stream of commerce.” SLK was never registered as a Michigan company, never conducted business in Michigan, had no employees in Michigan, or maintained personal or real property in the state. It never shipped products in Michigan, never had any account or paid taxes in the Michigan, and has never been sued in the State. Should the Court take personal jurisdiction over SLK?

1.7 Summary

In this chapter, you learned about the concept of jurisdiction, and the legal criteria to determine which court can hear an Internet dispute.

A court must have both subject matter and personal jurisdiction over the parties. Personal jurisdiction for a state court can be obtained by residency within a state, operating a business or owning property within a state, or by consent. Personal jurisdiction for a federal court is based on the laws of the state where the court is located. Most states have long-arm statutes that allow a state court to establish personal jurisdiction beyond operating or owning property in a state. If a long arm-statute does not provide for personal jurisdiction, a party can argue that minimum contacts exist with the forum state, or that purposeful availment exists in its business operations.

1.8 Key Terms

| | | |
|--------------------------|------------------------|-----------------------------|
| Active website | Effects test | Personal jurisdiction |
| Arbitration | Electronic commerce | Plaintiff |
| Choice of law | Exclusive jurisdiction | Passive website |
| Concurrent jurisdiction | Forum selection clause | Purposeful availment |
| Defendant | Jurisdiction | Subject matter jurisdiction |
| Diversity of citizenship | Long arm statute | Terms of use |
| Due process | Minimum contacts | Zippo test |

1.9 Chapter Discussion Questions

1. The U.S. Federal Court system has exclusive jurisdiction over what types of cases?
2. What is the difference between subject matter jurisdiction and personal jurisdiction?
3. Give an example in interactivity in an active and a passive website.
4. Define purposeful availment.
5. What is a long arm statute?
6. What are the four different types of personal jurisdiction?
7. What is the Zippo test?
8. What are minimum contacts?
9. Based on the case learning story involving K.T. Bird and Wheelz, Inc., can Bird sue Wheelz in Michigan or is she required to file a lawsuit against the company in Indiana?
10. What is a forum selection clause?

1.10 Additional Learning Opportunities

For more information on the U.S. court systems, please see Chapter 2 of *Introduction to American Law* at <http://bookboon.com/en/introduction-to-the-american-legal-system-ebook>.

1.11 Test Your Learning

1. What court has jurisdiction over a dispute *between two states* (such as Indiana and Ohio)?

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- A. an Indiana state court
 - B. an Ohio state court
 - C. an Indiana or Ohio state court
 - D. a federal court
2. What is personal jurisdiction?
- A. The authority of a court to subpoena witnesses in a dispute.
 - B. The authority of a court to hear a dispute, based on minimum contacts the defendant has with a state.
 - C. The ability of a court to hear a real estate dispute.
 - D. The ability of an attorney to serve a party with court papers.
 - E. The ability of an attorney to appear before a court.
3. A federal court has exclusive jurisdiction over which type of case?
- A. divorce
 - B. custody
 - C. bankruptcy
 - D. contract dispute
 - E. product liability



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4. A long arm statute allows a state to exercise personal jurisdiction over a nonresident individual or company who has caused damage in that state.
 - A. True
 - B. False

5. Jurisdiction means a court has the power, right, or authority to interpret and apply the law.
 - A. True
 - B. False

6. Which of the following factors are evaluated when determining jurisdiction over an e-commerce website?
 - A. whether a website is informational
 - B. whether a website allows online ordering
 - C. whether a website solicits customers from a particular state
 - D. A and B
 - E. all of the above

7. Long arm statutes can grant personal jurisdiction of a person who lives outside a state's boundaries.
 - A. True
 - B. False

8. Which of the following would NOT be purposeful availment and subject a company to a state's jurisdiction?
 - A. the posting of information about a product
 - B. the selling of merchandise to a consumer
 - C. an email to a customer
 - D. an advertisement targeted to Michigan residents
 - E. a company blog that solicits customer feedback on products

9. Paul E. Photographer, a Wyoming resident, uploads a photo of 16-year-old Mary Carrie to his Flickr™ account. He took the photo with her permission while visiting an Orlando, Florida beach during "spring break." Subsequently, an Australian company downloaded and edited her photo and used it in an ad campaign. The 16 year old who lives in Texas sues the Australian company. Does the Texas Court have jurisdiction over the Australian company? Based on your understanding of "minimal contacts," what should be the Court's decision?
 - A. The "minimum contacts" between the Australian company and the state of Texas were sufficient for the lawsuit to be successful.

- B. The lawsuit will be unsuccessful because the Defendant (Australian company) did not “purposely avail itself to conduct business in Texas.”
 - C. The lawsuit will be unsuccessful because the Defendant (Australian company) did not “purposely avail itself to conduct business in Texas,” and the litigation did not arise out of defendant’s activities in Texas.
 - D. The lawsuit will be unsuccessful because the Defendant (Australian company) did not “purposely avail itself to conduct business in Texas,” the litigation did not arise out of defendant’s activities in Texas, and jurisdiction in Texas was not something foreseeable.
10. The *Zippo* test looks at
- A. effects test
 - B. forum selection clause
 - C. general jurisdiction
 - D. minimum contacts
 - E. purposeful availment

Test Your Learning answers are located in the Appendix.

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