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NOTICE AND SERVICE

''Supposing the Act has said in terms that a person sued in the island [of Tobago] had never been present in the jurisdiction, yet that it should bind him upon proof of nailing a summons at the court door; how would that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?'' — Lord Ellenborough, *Buchanan v. Rucker*, 103 Eng. Rep. 546 (1808)

''Everything old is new again.'' — Cole Porter

Virtual Jurisdiction: Does *International Shoe* Fit in the Age of the Internet?

BY RONALD J. HEDGES, KENNETH N. RASHBAUM AND ADAM C. LOSEY

As in an episode of *The Twilight Zone*, imagine, if you will, Lord Ellenborough's rhetorical inquiry updated 200 years to the era of the Internet:

Plaintiff plays piano professionally in Chicago. Defendant, a Dutch disc jockey, incorporates the plaintiff's piano music without permission or royalty payment into his mixes, which he posts on his commercial web site, hosted in the Netherlands.

Plaintiff sues in federal court in Illinois on copyright, common law contract, and tort claims. She asserts jurisdiction in that the website of the defendant may be, and frequently is, accessed from Illinois and defendant was aware of the plaintiff's residence in Illinois. The ISP hosting the DJ's web site in Amsterdam refuses to provide address information about their customers, citing Dutch and EU data privacy laws, so the plaintiff secures court permission to attempt service of process by e-mail, Facebook message, and instant message.

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This is neither science fiction nor a Civil Procedure final exam question; several recent cases address many of the issues arising in the above hypothetical. These cases, and this article, consider whether jurisdiction can be established through an Internet presence, and whether Internet communications can fairly be used to provide notice and exercise jurisdiction over the defendant.

In 1808, Lord Ellenborough considered the validity of giving notice by nailing a summons on a courthouse door. In 2008, the Supreme Court of the Australian Capital Territory considered, and allowed, personal service via a message sent on Facebook. On the other side of the world, the U.S. Court of Appeals for the Eleventh Circuit recently affirmed jurisdiction by virtue of a website, and New York's highest state court has ruled that New York may assert long-arm jurisdiction by virtue of an instant message.

While the world has changed drastically in two centuries, as Cole Porter once noted, what was once old is always new again. The same nagging jurisdictional questions from 1808 are alive and well, albeit in different form. Can one political entity assert jurisdiction over a resident of another by virtue of electronic contact? Can a brief electronic message, such as a Facebook message, sufficiently apprise a defendant of the claims asserted to satisfy due process?

Jurisdiction

Does *International Shoe* Fit the Modern Foot? The speed of international communication is frighteningly fast. Anyone hooked into the technological grid via computer or telephone can send a message to a fellow gridder in a matter of seconds. A website in Tobago, Australia, Amsterdam or Montana is as easily accessible as a website hosted by a server in your hometown.

Moreover, social networking websites such as Facebook are no longer the playgrounds of technophiles and college students. Professionals and protodigital (a term coined by Kenneth J. Withers to describe the first generation of persons to use computers in their daily lives) people from around the globe are rapidly embracing social networking technology for a rainbow of reasons, from networking to knitting.

As society has struggled to adapt to the speed and volume of information flowing through our increasingly interconnected lives, American courts and those around the world continue to wrestle with approaches to service and personal jurisdiction by means of evolving electronic media in ways which comport with, as the U.S. Court of Appeals for the Ninth Circuit articulated in 2006 in *Yahoo, Inc. v. La Ligue Contre Le Racisme et Antisemitisme,* 433 F.3d 1199, 74 U.S.L.W. 1448) (9th Cir.) (en banc), ''traditional notions of fair play and substantial justice, i.e., (they) must be reasonable.'' (hereinafter ''Yahoo'').

As the process of communication has changed radically, should the concept of due process change as well? Does the fact that websites can be accessed from anywhere suffice for near-universal jurisdiction?

The Cases. In *Yahoo,* the court upheld the district court's jurisdiction over French defendants on the basis that the defendants had obtained interim orders over Yahoo's activities in hosting a website on which Nazi memorabilia were sold. The website was hosted in California and the French defendants had obtained interim orders in France affecting the website operations in California.

The Ninth Circuit's decision laid the groundwork for a Florida federal court's exercise of personal jurisdiction by virtue of a website accessible in Florida in *Licciardello v. Lovelady*, 2008 US App LEXIS 21376 (11th Cir. Dec. 10, 2008). The defendant, a Tennessee resident and the former personal manager of the plaintiff, a Florida musician, used the plaintiff's trademarked name and likeness, implying an endorsement by the plaintiff. The court held that the website was a sufficient basis for jurisdiction in that it was accessible from Florida, plaintiff's residence, and that the actions of the defendant could reasonably be presumed to have an impact in Florida.

There were sufficient contacts in this regard, the court concluded, to satisfy the due process notions of *International Shoe.* Yet, websites are accessible from virtually anywhere on the globe.

The issue of jurisdiction on the web is tangled indeed, as witnessed by the discussions in *Yahoo,* supra, and *Liccardiello*, and even more so with other Internet-based communications. An instant message was deemed a sufficient contact with the forum state, New York, to afford long-arm jurisdiction in *Deutsche Bank Sec., Inc. v Montana Bd. of Invs,* 7 N.Y.3d 65 (N.Y. 2006), while a single e-mail message regarding a contract of hire was ruled insufficient for a Louisiana court to exercise jurisdiction in *Hanks v. Kinetics*, 878 So.2d 782 (3d Cir. 2004).

Electronic Service

Electronic service of process (via e-mail) is already permitted in many U.S. jurisdictions, albeit only under court direction.

It appears that, as technology evolves, courts labor to keep up, resulting in jurisprudential inconsistencies. In the era of electronic communications, jurisdiction and methods of service are intertwined, raising significant due process issues. Notice requirements are a fertile area for such disputes. Are notice requirements of due process—affording the defendant sufficient advice of the claims—determined by how often the defendant uses or visits a site? Can text messages and Twitter afford adequate notice, given the limited number of characters (140 in Twitter) available?

A method of service of process comports with constitutional notions of due process if the method of service is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Electronic service of process (via e-mail) is already permitted in many U.S. jurisdictions, albeit only under court direction.

Mixed Decisions. In 2000, the United States Bankruptcy Court for the Northern District of Georgia was the first U.S. court to authorize e-mail service, three years after the U.K. had done so in its courts. Others U.S. courts have followed suit.

Some courts have authorized e-mail service, others have held that such service does not satisfy constitutional due process. As business communications become more truncated to meet the demands of the electronic vehicles, one must question whether traditional notions of notice will evolve as well.

In the oft-cited U.S. case on electronic service, *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1013 (9th Cir. 2002), the court summed up the standards, and the controversy:

> ''[w]e acknowledge that we tread upon untrodden ground. The parties cite no authority condoning service of process over the Internet or via e-mail, and our own investigation has unearthed no decisions by the United States Courts of Appeals dealing with service of process by e-mail and only one case anywhere in the federal courts. Despite this dearth of authority, however, we do not labor long in reaching our

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> decision. Considering the facts presented by this case, we conclude not only that service of process by e-mail was proper—that is, reasonably calculated to apprise RII of the pendency of the action and afford it an opportunity to respond—but in this case, it was the method of service most likely to reach RII. To be sure, the Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond.
>
> . . . In proper circumstances, this broad constitutional principle unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance.''

The *Rio* court, in its decision, acknowledged the necessity of adapting traditional concepts of due process to the information age. Admittedly, *Rio* is from the Ninth Circuit, the home of Silicon Valley. The *Rio* decision may have blazed the path towards the inevitable acceptance of electronic service, but not all courts are following its lead.

Reasonability. Some courts, while still applying the ''reasonability'' test from *Rio*, have concluded that service via e-mail does not satisfy due process concerns in situations where there is a reasonable chance the e-mail would not reach the defendant. In *Ehrenfeld v. Salim A Bin Mahfouz*, 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005), the court refused to authorize e-mail service, as the defendant's e-mail address was ''apparently only used as an informal means [of communication]'' and thus was not a reliable enough channel of communication to ensure that the defendant would receive the e-mail. Courts that have reached similar conclusions to *Ehrenfeld* did so based on the defendants' use of the medium rather than the medium itself.

Factual Inquiry. To be sure, many of the decisions directing electronic service turn on facts such as repeated attempts of the defendants to evade traditional service. The discrepancies between the holdings in *Deutsche Bank* and *Hanks,* supra, may be explained by the fact that there was a long history of instant message contacts between the parties in *Deutsche Bank* while in *Hanks* there was a sole e-mail missive.

Yet, as the media of business communication evolve, one can expect that the definitions of Notice and opportunity to respond for purposes of due process analysis will change as well. For guidance, in the absence of consistency by the courts, one must look to the facts of the given matter as well as the subject medium's technology.

Service Via Facebook

The Australian Ruling. Viewed through this lens, the Australian court's ruling is not particularly shocking. An Australian law firm attempting to effectuate service of a default judgment tried repeatedly (and failed) to serve two Australian defendants with an order of default judgment in person. Notably, the two defendants had been served in person regarding the foreclosure proceeding that led to the default judgment, but failed to appear in court to defend the matter.

Moreover, the defendants had ''public'' Facebook profiles, meaning that they voluntarily allowed anyone to seek them out and contact them via Facebook; no ''privacy controls'' had been implemented by the defendants.

Facebook incorporates an internal message system that is simply an internal e-mail server. Notice via e-mail has been ordered by many other courts and the Australian court only authorized service via Facebook's private e-mail server in conjunction with two other methods of service.

Eventually the court ordered that service of the default judgment be effectuated by three methods: (1) leaving a sealed copy of the order of default judgment at the Defendants' last known addresses; (2) sending a copy of the order of the default judgment via e-mail to the second defendant; and (3) sending a *private* message via computer to the Facebook page of both defendants informing the defendants of the entry and terms of default judgment.

Sending a private message via Facebook is the same as sending an e-mail via a private e-mail server. Facebook incorporates an internal message system that is simply an internal e-mail server. Notice via e-mail has been ordered by many other courts and the Australian court only authorized service via Facebook's private e-mail server in conjunction with two other methods of service.

Could It Work In the U.S.? In fact, under Fed. R. Civ. P. 4(f)(3) and per *Rio*, service via Facebook's private e-mail server could well be ordered by a U.S. court. The due process concerns for a Facebook message are the same as the due process concerns for e-mail; it would boil down to whether a court felt that a Facebook message is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

This may turn on how often the user checks the Facebook message center. The notice requirement might be satisfied by showing that the user checks Facebook frequently. This would not be difficult to ascertain, as Facebook displays the last time a user logged on as well as various other informational blurbs that would demonstrate a user's frequency of activity (e.g., if the user posts on another user's Facebook wall, the posting is dated; if the user comments on another user's uploaded photo or written note, the posting is dated).

A Facebook wall posting allows a user to post messages, documents, and Internet links on another user's Facebook ''wall,'' which is a space on every user's profile page that allows others to post messages for the user and the world-at-large to see. Although Facebook wall postings are truly sui generis, they are analogous to postings on a virtual bulletin board (or a court house door) that is accessible to anyone with an internet connection, and they can link to postings on other bulletin boards, hold large documents, photos, and videos.

Perhaps a more intriguing question is whether service via a public wall posting on Facebook passes Constitutional muster. Satisfying the notice requirement via

a public posting on a Facebook wall would likely be easier than doing so with a private message or e-mail. Facebook wall postings are dated on the user's wall where they are posted, the user has the ability to disable the wall or control who can see posted messages, and the user has the ability to delete or further comment on wall postings.

Assuming that the user allows a wall posting by a party attempting to effectuate service, it would be far easier to show that the user received actual notice. If the user logs onto Facebook and views his or her profile, the user would not be able to ignore a public wall posting. It is immediately made clearly visible to the user. By default the user would receive an e-mail to the e-mail account tethered to the user's Facebook registration notifying the user of the posting and including a portion of the text of the posting. The friends and family of the user would be able to view the notice, making it more likely that the user would learn of the notice through collateral sources, much like service of process by publication a ''newspaper of general circulation.''

Privacy Issues. Yet, here, service considerations may butt heads with privacy concerns. It is thus likely that the user receiving notice via public posting on the user's Facebook page would delete the posting after reading it, as the user would not want an embarrassing legal notice cluttering his or her Facebook page. This deletion would serve as compelling evidence that the user was actually notified.

Since a Facebook user chooses to allow wall posting and to allow make them public, and thus invites the world at large to communicate publicly with the user, privacy issues would likely be foreclosed by the user's actions.

Conclusion

As noted in *Deutsche Bank*, supra, instant messages and, by extension, other forms of communication, once the province of students, are increasingly utilized in commercial settings. While some courts have considered compelling efficiency arguments in favor of allowing electronic service (costs, speed, etc.), most courts have not kept pace with the rapid development of communications media.

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