Internet Jurisdiction and Venue
By Peter S. Vogel

The Internet has changed life forever, and clients are conducting business around the world without a clear understanding of what laws apply or of the venue for resolution of disputes. This article will briefly describe how lawyers can better advise clients regarding Internet jurisdiction and venue.

Website terms of service (ToS): Over the years I have asked folks if they ever read ToS. Generally, my experience is that about 1 percent of people ever bother. Virtually every Internet website involves some contractual relationship between visitors and the site. ToS include restrictions on posting content and spam, limitations on liabilities and damages for the website, and jurisdiction and venue.

Another type of Internet agreement is referred to as a “click agreement” where the website user cannot acquire goods or services without “clicking to agree,” which virtually is never read. Most often one can visit a website without a click agreement, but rarely can a user acquire any goods or services without such an agreement.

Websites generally reserve the right to change any portion of their ToS without notice to users and without requiring users to agree to the new ToS. The mere continued use of ToS means the visitors agree. That is not the case with click agreements, since there is a manifest click agreement required. So when a website creates new click agreement terms, the next time users visit the site they will be required to agree to a new click agreement, whether or not they read the terms.

Internet jurisdiction and venue: Jurisdiction and venue cases rely on constitutional cases that lawyers studied in law school. There is nothing extraordinary about Internet jurisdiction except that business transactions are fundamentally different. So it’s not surprising to learn that ToS or click agreements specify jurisdiction and venue. However, where a suit is filed forces courts to determine where on the Internet the business activities took place that led to the suit, and what laws apply.

What makes the business transaction more complicated on the Internet is determining where the events take place.

For instance, when I sit at my computer in Texas connected over the Internet with Amazon and purchase a book, where was the business event? Amazon is a company based in Washington state, but the Amazon server could be in New York or California. Then Amazon ships my book from its distribution facility in Kansas. For sales tax, jurisdiction and venue purposes, it is not easy to figure.

But when disputes arise, lawyers need to evaluate the proper jurisdiction and venue to file a suit or to respond to a suit filed against a client.

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The Blue Note: In 1996, Bensusan Restaurant Corp. v. King, a trademark infringement suit over the domain name “The Blue Note,” was filed in the U.S. District Court for the Southern District of New York. Bensusan owned famous jazz music venues in New York City and other locations around the world called “The Blue Note.” Bensusan also had a federal trademark registration for “The Blue Note.”

Richard B. King opened a night club in Columbia, Mo., also known as The Blue Note. Bensusan learned that King had registered the domain name www.thebluenote.com. Ultimately the court ruled that personal jurisdiction in New York was not proper since King’s website specifically stated that “[t]he Blue Note’s Cyberspot should not be confused with one of the world’s finest jazz club[s] [the] Blue Note, located in the heart of New York’s Greenwich Village.”

Zippo v. Zippo.com: Probably the most important Internet jurisdiction case in 1997’s Zippo Manufacturing Co. v. Zippo Dot Com Inc., in which the U.S. District Court for the Western District of Pennsylvania established a sliding scale that has been adopted throughout the United States. At one end of the scale is a totally passive website that merely has information but no way to communicate. Getting jurisdiction at a passive site has not worked under Zippo. At the other end of the scale is a highly active site, which makes it easy to determine that jurisdiction would apply.

In Zippo, the defendant’s website in California sent more than 3,000 emails per day to Pennsylvania residents, so the court concluded that Pennsylvania had jurisdiction. Sites that fall in the middle of the scale require close analysis to determine how much activity warrants jurisdiction.
The 5th U.S. Circuit Court of Appeals adopted *Zippo in Mink v. AAAA* (1999). All other circuits have also adopted *Zippo* except for the 7th Circuit, which ruled in 2010’s *Illinois v. Hemi Group LLC* that the *Zippo* sliding scale was unnecessary to determine jurisdiction. In Hemi, the state of Illinois sued Hemi for allegedly selling cigarettes over the Internet to Illinois residents without paying Illinois state sales taxes.