

KELLEY DRYE

RECENT DEVELOPMENTS IN JURISDICTION OVER INTERNET-RELATED CLAIMS

Introduction

Two recent and directly inconsistent court decisions in Australia and the United States highlight the increasingly unsettled nature of jurisdiction over materials published on the Internet. In the first case, *Dow Jones & Company Inc. v. Gutnick* (“*Dow Jones*”), the High Court of Australia ruled that Australia the appropriate forum for deciding a defamation claim brought by an Australian businessman and based on an article published in *Baron’s Online*, a U.S.-based Dow Jones publication, despite the fact that Dow Jones had no “bricks and mortar” contracts in Australia. Less than one week later, in *Stanley v. New Haven Advocate*, the United States Court of Appeals for the Fourth Circuit moved in the opposite direction, finding that two Connecticut newspapers and their staffs could not be sued in a Virginia court for posting allegedly defamatory articles on their Web sites.

While neither court reached a conclusion on the substantive defamation claims, their contrasting opinions on where such cases may be tried raise serious risks for online publishers and all firms with Web-based commercial operations. As a result, until U.S. and international private law evolve on this issue, Web sites should consider creating or modifying their Internet terms and conditions to clearly identify and limit the jurisdictions in which users of their online services may bring suit.¹ While such an approach may not be dispositive, the existence of *de facto* consent to a forum selection clause would be a powerful factor in objecting to foreign jurisdiction.

A brief summary and analysis of the two opinions is set forth below. As always, feel free to call us if you have any questions or would like to further explore any of the issues raised in this advisory.

Dow Jones & Company Inc. v. Gutnick

In *Dow Jones*, Dow Jones & Company, a Delaware corporation with business headquarters in New York, posted an allegedly defamatory news story about Joseph Gutnick, a Victoria, Australian citizen and businessman, on its *Baron’s Online* Web site. Dow Jones has no operations or assets in Australia and the servers used to maintain *Baron Online’s* publications are all located in New Jersey. Under traditional U.S. personal jurisprudence – at least as applied to non-Internet activities – the lack of “minimum contacts” to a venue would preclude a finding of personal jurisdiction. However, under the Supreme Court Rules of Victoria (Australia), at least with respect to defamation claims, personal jurisdiction may be established if the plaintiff alleges that the harm occurred in Victoria.

¹ The material provided in this client advisory is for informational purposes only and should not be construed as legal advice.

On December 10, 2002, the High Court of Australia unanimously dismissed with costs Dow Jones' appeal of a lower court decision finding that Dow Jones was required to defend a defamation suit filed by Mr. Gutnick in an Australian court. Specifically, the High Court affirmed that (1) the Supreme Court of Victoria (Australia) was an appropriate forum for the trial, and (2) the defamation claim should be governed by Australian law.

In reaching both conclusions, the key question considered by the High Court was where the allegedly defamatory information was published. Under Australian defamation law, the location of publication is based on where the information is accessed and comprehended by the reader or listener. Thus, the High Court concluded, because information posted on the Internet is not available in comprehensible form until accessed by the reader, publication of the *Baron's Online* article occurred in Australia, where the material was viewed and potential harm to the plaintiff's reputation occurred.

Initially, the *Dow Jones* decision was thought by many to subject online publishers to libel actions anywhere their material is accessed or downloaded. However, because the decision conflicts with applicable U.S. constitutional law, it is unlikely for several reasons that this decision will have any lasting practical effect on U.S. companies with no contact to foreign jurisdictions. First, because Dow Jones has no assets or operations in Australia, the judgment cannot be enforced to any practical effect in Australia. Second, in the U.S. where Dow Jones has its assets, it is unlikely that a court would enforce the *Dow Jones* judgment because of its fundamental conflict with U.S. personal jurisdiction jurisprudence. For instance, the federal courts refused to enforce a French judgment against Yahoo!, based on sales to French citizens of Nazi memorabilia unlawful there, on similar grounds. Finally, although apparently not raised as a defense in *Dow Jones*, many U.S. online publisher Web sites include domestic choice of law provisions in their binding "terms of use" agreement that may serve to limit the extraterritorial reach of international courts.

Young v. New Haven Advocate

In *Young v. New Haven Advocate*, the Fourth Circuit was faced with the question of whether two Connecticut newspapers and members of their staffs subjected themselves to personal jurisdiction in Virginia by posting on the Internet news articles discussing Connecticut's policy of housing prisoners in Virginia and, in the process, allegedly defaming the warden of a Virginia prison. The Court concluded that because the newspapers and their staffs did not intentionally direct their Internet activity to Virginia, there was no basis for jurisdiction. The court reasoned that the newspapers did not post materials on the Internet with the obvious intent of targeting Virginia readers and thus could not have reasonably anticipated being haled into a Virginia court to defend the veracity of statements made in the articles.

Unlike *Dow Jones*, which focused on the location of the alleged defamation victim, the Fourth Circuit concentrated on where the intended audience of the allegedly defamatory publication was located. As part of this analysis, the Court looked at other content included on the newspapers' Web sites including weather reports, traffic information and advertisements -- all of which, the Court concluded, were decidedly aimed at a Connecticut audience. In reversing the lower court's decision, the Court made clear that the act of placing the information on the Internet did not by itself subject online publishers to personal jurisdiction in each state where the information may be accessed.

Conclusion and Recommended Course of Action

Dow Jones and *Young v. New Haven Advocate* demonstrate the lack of uniformity among courts of different countries (even among and between common law countries) regarding personal jurisdiction for Internet-related claims. While these issues are far from settled, *Young v. New Haven Advocate* and other cases before various U.S. Courts of Appeal indicate a preference for the forum with the strongest connection to the claim or that is best positioned to control or regulate the activity. On the other hand, a number of state courts and some federal courts have taken a more expansive view to jurisdiction over Internet activities when the conduct in question, such as gambling or pornography, is involved. Jurisdictional issues arising from international claims are even more troublesome as international private law is still evolving.

Until a more consistent approach evolves under U.S. and private international law, online publishers may attempt to lessen their exposure by adopting policies that limit the extraterritorial reach of out-of-state and international courts, especially where the company has no or insignificant connections to the forum state. Although it is uncertain whether it would have affected the outcome in *Dow Jones*, online publishers should consider creating or modifying their Internet terms and conditions to make clear that any legal actions resulting from materials accessed or downloaded from their Web sites will be governed by the laws of the online publisher's venue of choice. In addition, while online publishers cannot and should not be expected to make themselves aware of the libel laws in every country, *Dow Jones* underscores the need to at least be apprised of libel and jurisdictional laws where the company has significant assets or operations in the country.

If you have any questions or comments about this client advisory, please contact **Glenn B. Manishin** at (703) 918-2322 or gmanishin@kelleydrye.com, or **Andrea Pruitt Edmonds** at (703) 918-2380 or aedmonds@kelleydrye.com.