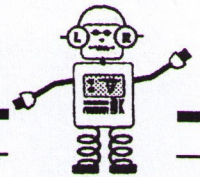


TECHNOLOGY CORNER



Stretching the bandwidth of *International Shoe*: Internet jurisdiction and bankruptcy

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For bankruptcy practitioners, the Internet as a basis for asserting jurisdiction over parties in bankruptcy proceedings presents interesting new jurisdictional issues, particularly in cross-border insolvencies.

In the cross-border insolvency context, to assert U.S. bankruptcy jurisdiction over a foreign-based entity, such entity must have had minimum contacts with the forum (which under F.R.Bank.P. 7004(f) is the entire U.S.), and the exercise of jurisdiction must be "fair and reasonable"¹ as mandated by the United States Supreme Court in *International Shoe v. Washington*.

The minimum contacts requirement is satisfied when the defendant has had such contacts, in terms of number and extent, with the forum, which would lead the defendant to expect to be sued there because the defendant has purposefully availed him or herself of the forum's laws.² Two types of personal jurisdiction can arise from a nonresident defendant's contacts with the forum: specific jurisdiction and general jurisdiction.³ For there to be general jurisdiction, contacts must be "continuous and systematic."⁴ For there to be specific jurisdiction, the nonresident defendant's contacts with the forum must give rise to a particular suit.⁵

An interesting question is whether a foreign-based entity will be subject to U.S. bankruptcy jurisdiction if its contacts with the U.S. were only via the Internet. The British Columbia Court of Appeals, the highest court of British Columbia, recently explored the outer limits of *International Shoe* and its progeny in the era of cyberspace in the international case of *Braintech, Inc. v. Kostiuik*.⁶

In *Braintech*, the respondent in the case was a technology company, in the development stage, specializing in visual recognition systems. Its corporate offices were in Vancouver, British Columbia, and its research and development facility was located in Austin, Texas.⁷ Its stock traded on the OTC market in the U.S.⁸ Braintech obtained a default judgment from a Texas state court against one **John Kostiuik**, a resident of Vancouver, British Columbia.

The Texas action was based on alleged defamation of Braintech's business as a result of certain postings about Braintech which Kostiuik e-mailed to an electronic bulletin board (maintained by **Silicon Investor**), established to facilitate discussion and exchange of information regarding technology stocks and companies.⁹ In the action it filed in Texas, Braintech asserted jurisdiction over Kostiuik under Texas' long-arm statute based on commission of a tort in Texas.¹⁰ Braintech obtained a default judgment in Texas state court based upon service on the **Texas Secretary of State**, which in turn served Kostiuik by registered mail, return receipt requested, at an address in Vancouver.¹¹

Subsequent to obtaining a default judgment in Texas, Braintech commenced an action in British Columbia to obtain a Canadian judgment against Kostiuik based on its Texas state court judgment. The British Columbia Court of Appeal framed the case as turning on whether the Texas court properly had jurisdiction over the action.¹²

The Court cogently considered the role of the Internet in its jurisdictional analysis as follows: "[i]t is apparent the 'real and substantial connection' relied upon for the assumption of jurisdiction by the Texas court is the alleged publication there of a libel which affected the interests of resident present and potential investors. This is true only if the mode of communication through the Internet supports this conclusion."¹³

The *Braintech* court, in applying the jurisdictional test set forth in a seminal U.S. case, *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*,¹⁴ reasoned that, "it is clear Kostiuik is not the operator of Silicon Investor. It is equally clear the bulletin board is 'passive' as posting information volunteered by people like Kostiuik, accessible only to users who have the means of gaining access and who exercise that means."¹⁵

The *Braintech* Court thus concluded that: "the complainant must offer better proof that the defendant has entered Texas than the mere possibility that
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Securitizing music royalty streams

David Pullman of **The Pullman Group**, who has made a name for himself by securitizing music royalty streams, has purchased substantially all the assets from the Chapter 7 of **Ronald Isley**. Ronald and his brothers, known as the **Isley Brothers**, authored such hits as "Shout," "Twist and Shout" and "It's Your Thing."

Ronald Isley's Chapter 7 has been pending over two years.

"Pullman entered into an agreement with the Chapter 7 trustee and **EMI April Music** to purchase substantially all the assets including the royalties to [songs such as these]," said **Michael Tuchin** of **Klee, Tuchin & Bogdanoff**, who represented Pullman, along with colleagues **Lee Bogdanoff** and **Martin Barash**. "He intends to move forward with a securitization of those royalty streams."

How exactly does this work?

"You put the rights to the royalty streams into a special purpose entity which issues bonds secured by the stream of royalty payments," Tuchin said. "As royalties come in, it pays down the bonds. It turns an asset that is payable over a lengthy period of time into one that is financeable so you have a pot of dollars today. From the bondholders' point of view, it's a steady stream of dollars from a group of songs that have been steady performers over many, many years."

Tuchin said singer **David Bowie** also tried to bid on some of the assets, but his bid was viewed as too contingent. One of the assets of the Isley estate is a multimillion dollar judgment against Bowie for infringing on the rights to the song, "Love is a Wonderful Thing." That judgment is on appeal.

Deborah Grassgreen of **Pachulski, Stang, Ziehl, Young & Jones** represents Isley. **Don Zakarin** of **Pryor, Cashman, Sherman & Flynn** represents April EMI Music.

someone in that jurisdiction might have reached out to cyberspace to bring the defamatory material to a screen in Texas. There is no allegation or evidence that Kostiuk had a commercial purpose that utilized the highway provided by the Internet to enter any particular jurisdiction."

"It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin board could be obtained."

"The allegation of publication fails as it rests on the mere transitory, passive presence in cyberspace of the alleged defamatory material. Such a contact does not constitute a real and substantial presence."¹⁶

In the cross-border insolvency context, Internet ties with a U.S. forum may help those seeking to establish bankruptcy jurisdiction over foreign entities satisfy the necessary minimum contacts requirement. Alternatively, failure to be mindful of Internet jurisdictional issues could create a trap for the unwary for those representing foreign entities seeking to defend against a claim of U.S. bankruptcy jurisdiction.

These issues will be explored in greater detail in a panel program on "The Internet's Effect on Jurisdiction and Venue in Bankruptcy Cases." The program, scheduled for March 23, 2000, will occur as part of the **American Bar Association Business Law Section** Spring Meeting in Columbus, Ohio.

¹ *In re Schwinn Bicycle Co.*, 190 B.R. 599, 614 (Bankr. N.D. Ill. 1995); see also, *In re A & W Publishers, Inc.*, 39 B.R. 666, 667 (Bankr. S.D.N.Y. 1984).

² *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987).

³ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, n.8 (1984).

⁴ *Id.*

⁵ *Id.*

⁶ 1999 B.C.D. Civ. J. 110; 1999 B.C.D. Civ. J. LEXIS 2020, application for leave to appeal to the Canadian Supreme Court pending.

⁷ *Braintech*, supra n.1 at *9.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at *10.

¹¹ *Id.* at *12-13.

¹² *Id.* at *16.

¹³ *Id.* at *28.

¹⁴ 952 F. Supp. 1119 (W.D.Pa. 1997).

¹⁵ *Braintech*, supra n.1 at *31-32.

¹⁶ *Id.* at *32 (emphasis omitted). The authors note that a search using the search term "Braintech" in the search engine "Excite" resulted in links to the Silicon Investor site and to postings indicating a 1996 date from "John C. Kostiuk," which is the same name as the defendant's name in the *Braintech* case. Thus, if these are in fact the postings which led to the *Braintech* lawsuit, rather than being transitory as the *Braintech* Court concluded, they appear rather permanent, unlike an online chat-room conversation.