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In this installment of Eyes on E-Commerce, the authors argue that states can and should apply existing law to tax issues relating to the internet and leave any efforts to change the law to Congress and state legislatures.

Introduction

In 1841 it took 110 days for news of President William Henry Harrison's death to reach Los Angeles.[1] By 1860, the relay riders of the Pony Express were able to carry messages between the East and West Coasts in about 10 days.[2] With the completion of the first transcontinental telegraph line in 1861, near instantaneous communication between the coasts became possible.

The past 150 years have revolutionized communications, resulting in a more interconnected world with greater, more frictionless interactions between people in distant places. Against this backdrop, it has been tempting for states to reach beyond their borders and assert jurisdiction over out-of-state activities enabled by the internet. Most notably, the Multistate Tax Commission and several state tax departments have attempted to eliminate P.L. 86-272's[3] protections for out-of-state companies engaged in interstate commerce — based on these companies' "activities conducted over the internet."

While the internet changed a lot, it did not change the law. And while the assault on P.L. 86-272 is relatively new, the internet itself is not, and courts are beginning to coalesce around an understanding of the jurisdictional effects of internet activities. The MTC and state tax agencies that follow the MTC's guidance are making a mistake from which the federal courts are (largely) just recovering: trying to insert a special rule for the internet into existing law (rather than relying on legislatures to enact laws addressing special characteristics of the internet), because the internet feels like a special (virtual) place.

By introducing special rules that treat internet activities as if they occur anywhere with internet access, state tax authorities are falling for the same illusion that temporarily led federal courts to measure the level of interactivity of websites to determine the extent to which their operators were availing themselves of individual state protections. In short, tax agencies and practitioners can learn from the federal courts. Applying existing law to the internet requires neither new tests nor new approaches, and if stakeholders want to change the law, that's what Congress and state legislatures are for.

P.L. 86-272 and Activities 'Within Such State'

Readers are undoubtedly familiar with P.L. 86-272 and efforts by the MTC and state revenue

[1] John H. Coatsworth et al., *Global Connections: Volume 2, Since 1500: Politics, Exchange, and Social Life in World History*, at 247 (2015).

[2] *See* National Park Service, Pony Express National Historical Trail, "A Brief History."

[3] The Interstate Income Act of 1959, 15 U.S.C. sections 381-384 (P.L. 86-272).

departments to limit its application.[4] Enacted in 1959, P.L. 86-272 was an affirmative act of Congress under its commerce clause authority to protect interstate commerce from state overreach. It was a response to the U.S. Supreme Court's decision in *Portland Cement*,[5] which industry was concerned did not specify which in-state activities were enough to create sufficient nexus for the exercise of the state's power to tax. P.L. 86-272 "was designed to define clearly a lower limit for the exercise of that power,"[6] and defines that lower limit by providing that:

> No state . . . shall have power to impose . . . a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such state by or on behalf of such person . . . are either, or both, of the following:
>
> 1. the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
> 2. the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).[7]

Since its enactment, state revenue departments have sought to limit the law's protections.[8] For the first 60 years following its passage, disputes about the scope and application of P.L. 86-272 have centered around the question of whether an out-of-state company's in-state business activity is limited to protected solicitation activity, in which case the business is immune from state net income tax; or if the in-state activities exceed protected solicitation, in which case P.L. 86-272 does not block the state from taxing an apportioned share of the out-of-state business's net income.[9]

In *Wayfair*,[10] the Court revisited its precedent interpreting the doctrine of the dormant commerce clause. In a 5-4 decision, the Court held that a South Dakota law did not violate the dormant commerce clause by requiring an out-of-state taxpayer to collect and remit the state's sales tax from in-state customers who purchased goods online. In so doing, the Court reversed its holdings in *Quill*[11] and *National Bellas Hess*,[12] which had held that some physical presence by the out-of-state company was a prerequisite for establishing sufficient nexus to require it to collect sales tax from its in-state customers and remit it to the taxing state.

Writing for the Court, Justice Anthony Kennedy quoted his own concurrence from *Direct Marketing Association*,[13] in which he noted that "dramatic technological and social changes" had brought buyers "closer to most major retailers" than ever before, and that "between targeted advertising and instant access to most consumers via any internet-enabled device, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term."[14] Here, Kennedy gave voice (again) to the impression shared by many that ordering online feels more real or interactive than filling out a catalog order form or making a phone call. Because *Quill* stated a judge-made dormant commerce clause rule, the Supreme Court was

[4] *See, e.g.*, George Isaacson and Nathaniel Bessey, "MTC Declares War on P.L. 86-272," *Tax Notes State*, July 19, 2021, p. 211.

[5] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

[6] *Heublein v. South Carolina Tax Commission*, 409 U.S. 275, 279-280 (1972).

[7] 15 U.S.C. section 381(a).

[8] The MTC itself traces its history to the same Supreme Court decision — *Portland Cement* — that spurred Congress to enact P.L. 86-272. *See* MTC, "MTC History."

[9] *See, e.g., Heublein*, 409 U.S. 275 (maintenance of inventory in state exceeds solicitation); *Wisconsin Department of Revenue v. Wrigley*, 505 U.S. 214 (1992) (replacement of stale inventory from in-state warehouses exceeds solicitation); *Gillette Co. v. State Tax Commission*, 393 N.Y.S.2d 186 (N.Y. App. 1977), *aff'd*, 382 N.E.2d 764 (N.Y. 1978) (provision of advice by in-state sales force to in-state retailers regarding the attractive display of products does not exceed protected solicitation).

[10] *South Dakota v. Wayfair*, 585 U.S. 162 (2018).

[11] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[12] *National Bellas Hess Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967).

[13] *Direct Marketing Association v. Brohl*, 575 U.S. 1 (2015).

[14] *Wayfair*, 585 U.S. at 181 (citations omitted).

free to sideline *stare decisis* and replace it with a new one.

Though the *Wayfair* Court did not address income tax and was not asked to interpret a federal statute, the MTC nevertheless seized on Kennedy's comments about virtual presence in the age of e-commerce as an opening to undermine P.L. 86-272. In 2021 the MTC adopted its Revised Statement of Information,[15] which added a new section, "Activities Conducted Over the Internet," and articulated the following general rule: "When a business interacts with a customer via the business's website or app, the business engages in a business activity within the customer's state." By contrast, "when a business presents static text or photos on its website, that presentation does not in itself constitute a business activity within those states where the business's customers are located." The section provides numerous examples of internet activities that the MTC and its member states consider unprotected in-state business activities, which would destroy the protection of P.L. 86-272 — including responding to customer service emails or chats initiated by clicking a link on a website, or using internet cookies for analytics purposes, a feature of essentially every commercial website.

Since the MTC approved the Revised Statement of Information, several state revenue departments have taken steps to adopt the commission's general rule as policy. In 2022 the California Franchise Tax Board published TAM 2022-01 and revised its guidance in FTB Publication 1050, addressing the FTB's interpretation of P.L. 86-272. The American Catalog Mailers Association filed suit[16] to challenge the validity of this guidance, and the FTB ultimately withdrew them after the superior court ruled that the documents had not been properly adopted under the California Administrative Procedure Act and therefore constituted invalid underground regulations.[17] The New York State Department of Taxation and Finance did follow a formal rulemaking process, and in December 2023 approved regulations[18] providing that "in order to be exempt by virtue of Public Law 86-272, the activities in New York State of employees or representatives, *or activities engaged in via the Internet*, must be limited to the solicitation of orders for the sale of tangible personal property." Similarly, New Jersey has published guidance indicating that the Division of Taxation will adopt the MTC's interpretation of P.L. 86-272 in the context of internet activities.[19]

The MTC's approach, and that of revenue agencies following its lead, suffers from a fundamental defect: There is simply no statutory support for the notion that interactivity can render an out-of-state activity an in-state activity. P.L. 86-272 clearly refers to activity "within such state," not "long-distance interactions with customers within such state." As a principle of statutory construction, words in a statute should be interpreted in accord with their ordinary meaning when Congress enacted the statute.[20] The "activities within such state" under consideration by Congress in 1959 self-evidently did not include virtual activities taking place in a cyberspace that had yet to be conceptualized. Congress was considering activities conducted by sales personnel in a taxing state. Further, P.L. 86-272 was not enacted during William Henry Harrison's era, when long-distance interaction was a practical impossibility.

In 1959 companies regularly interacted by mail or telephone with customers, including customers in different states, and the mail-order catalog industry had been well-established for decades. P.L. 86-272 did not identify interactivity as the touchstone for its protections; rather, it defined a category of business activity —

[15] MTC, "Revised Statement of Information Concerning Practices of the Multistate Tax Commission and Supporting States Under Public Law 86-272."

[16] Two authors of this article were counsel to the American Catalog Mailers Association in the litigation.

[17] *American Catalog Mailers Association v. Franchise Tax Board*, Case No. CGC-22-601363 (Cal. Dec. 13, 2023).

[18] N.Y. Comp. Codes R. & Regs. tit. 20, section 1-2.10 (emphasis added). The association has filed a complaint seeking a declaratory judgment that the regulations violate P.L. 86-272, *American Catalog Mailers Association v. Department of Taxation and Finance*, No. 903320-24 (N.Y. Apr. 5, 2024).

[19] New Jersey Division of Taxation, TB-108(R) (Jan. 18, 2024).

[20] *See Wisconsin Central Ltd. v. United States*, 585 U.S. 274, 284 (2018) ("After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.").

solicitation of orders — that an out-of-state company could conduct *within* a state and still be protected from state income tax, so long as the company's in-state activities did not exceed solicitation.

In creating a special rule based on interactivity to try to recategorize internet activities as activities within a state under existing law, states and the MTC are acting arbitrarily, in a way that conflicts with the plain text of a federal statute. If Congress were to conclude that P.L. 86-272 should be updated to address changes in the economy since its passage, Congress — and only Congress — may do so.

By creating special rules for the internet, the MTC and these states are also succumbing to the temptation to manufacture legal exceptions to address new technology. On its own terms, the focus by the MTC and state revenue departments on interactivity to impute activities to a particular jurisdiction is misguided and unhelpful. Courts have addressed these questions beyond the tax context for many years. In particular, federal courts are coalescing around a consensus that due process requires more to create jurisdiction than substantial interactivity, and that the web's worldwide availability does not mean that a company with a website is conducting activities in every jurisdiction with internet access.

Due Process, Personal Jurisdiction, and the Internet

General Principles

Federal courts face an analogous challenge in determining which courts have authority over which defendants in which cases. Core due process principles limit where a corporate defendant (or individual) may be sued.[21] On the one hand, a business may be sued for any alleged misconduct in a jurisdiction with general jurisdiction over it (that is, its home jurisdiction) — typically meaning where it is incorporated or has its principal place of business.[22]

On the other hand, a business may be sued in a court with specific jurisdiction over it — that is, jurisdiction specifically relating to the claims asserted in the lawsuit.[23] In other words, a nonresident defendant must have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.[24] The establishment of minimum contacts with the jurisdiction must be purposeful — not random, fortuitous, attenuated, or as the result of the conduct of another party or third person.[25] It remains "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[26] Courts typically consider whether the nonresident defendant purposefully availed itself of the privilege of conducting activities in the forum and invoking the benefits and protections of the forum state's laws, whether the claim arises out of or results from the defendant's forum-related activities, and whether the exercise of jurisdiction over the defendant is reasonable.[27]

No Internet-Based General Jurisdiction

The federal courts are clear that even the most highly interactive retail website cannot be the basis for general jurisdiction.[28] Having a website cannot make a business at home in every jurisdiction with internet access. In the words of one recent opinion, "Accessibility alone cannot

[21] State law, in the form of so-called long-arm statutes, can also play a limiting role (*see Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014)), but our focus here is only on the federal due process issues that also come into play in the state and local tax context.

[22] *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915, 919 (2011); *Daimler*, 571 U.S. at 137-138.

[23] *See, e.g., Rano v. Sipa Press Inc.*, 987 F.2d 580, 588 (9th Cir. 1993).

[24] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

[25] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

[26] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

[27] *See, e.g., Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2003).

[28] *See, e.g., GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349-1350 (D.C. Cir. 2000); *Trintec Industries Inc. v. Pedre Promotional Products Inc.*, 395 F.3d 1275, 1281 (Fed. Cir. 2005).

sustain our jurisdiction. If it could, lack of personal jurisdiction would be no defense at all."[29]

Zippo and Its Discontents

The more difficult question for federal courts has been whether and when operating a website constitutes a purposeful availment by a business of the laws of a forum state. The seminal *Zippo* case,[30] decided in the early days of the internet, tried to answer this question by categorizing websites along a continuum. A purely passive website — imagine a sports blog with text and images — would not constitute purposeful availment simply because it was accessible in a particular state. However, a highly interactive website — such as a retail website accepting orders — would constitute purposeful availment. That left a sizable gray area in the middle for websites allowing users to exchange some information with the website — including the same sports blog with a comments section.

Regardless, the *Zippo* framework led courts into a cul-de-sac: a determination of personal jurisdiction based on the case-by-case analysis of the interactivity of a website as a whole. As a result, the *Zippo* framework has been frequently criticized, with some arguing that the test improperly assigns a linear continuum to an essentially nonlinear question. A website's interactivity may differ in various functions, interactive in some areas and not others.

Others have argued that *Zippo* fails to provide predictable answers in all but the simplest cases. Because most websites fall into the gray area, the test provides little guidance. Most relevantly, the test divorces the determination from the context of actual litigation, suggesting that a court may exercise personal jurisdiction in a case involving a highly interactive website regardless of whether the website had any ties to the underlying cause of action. In this regard, *Zippo* arguably treated the distinction between general jurisdiction and specific jurisdiction as a second continuum, along which the mere existence of a highly interactive website could be enough to establish personal jurisdiction — a conclusion stated in terms of personal jurisdiction despite looking a lot more like a new category of "virtual" general personal jurisdiction. This error may have been excusable in 1997, when browsing online felt something like bringing the world to your kitchen table. But in practice, it is unsustainable — because the internet is, in this regard, no more transformative than a telephone, radio, television, or cellphone.

Recent judicial opinions have begun to course-correct, treating the internet as a potential basis for personal jurisdiction in those cases in which a website has something to do with the claims, and not in others. First, courts recognize that, *Zippo* notwithstanding, the internet did not collapse the distinction between general and personal jurisdiction. If a defendant can be sued anywhere its interactive website is accessible, then it can be sued in any jurisdiction in the country.[31] "Merely running a website that is accessible in the forum state does not constitute purposeful availment required to establish personal jurisdiction under longstanding principles of due process."[32]

Second, courts are declining to find personal jurisdiction based on the existence of an interactive website that has nothing to do with the claims. The Supreme Court was clear: "The plaintiff's claims, we have often stated, must arise out of or relate to the defendant's contacts with the forum."[33] In a recent copyright case against the Rolling Stones, the Fifth Circuit Court of Appeals declined "to hold that making music available on the internet is sufficient to establish specific personal jurisdiction in Louisiana."[34] The accessibility of the internet in Louisiana (and everywhere), without more, could neither tie the defendant to the forum nor the copyright infringement claim, which was unmoored from any conduct in that state.

Third, the converse is true. A court may not find specific personal jurisdiction in a website case based on a physical presence in the forum

[29] *Johnson v. TheHuffingtonPost.com Inc.*, 21 F.4th 314, 320 (5th Cir. 2021).

[30] *Zippo Manufacturing Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

[31] *Johnson*, 21 F.4th at 323-324.

[32] *Admar International Inc. v. Eastrock LLC*, 18 F.4th 783, 787-788 (5th Cir. 2021).

[33] *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1025 (2021).

[34] *Fernandez v. Jagger*, No. 23-30909, at 3 (5th Cir. Aug. 8, 2024).

that has no ties to the underlying cause of action. Thus, the Third Circuit Court of Appeals recently held that a Pennsylvania court lacked jurisdiction over Georgia-based Papa Johns, accused of wiretapping through software on its website.[35] Despite the presence of 85 restaurants, "Papa Johns' in-state restaurant sales and marketing activities, as alleged in the complaint, [we]re insufficiently related to [the plaintiff's] wiretapping claims" to permit the exercise of personal jurisdiction.[36]

Ninth Circuit Exceptionalism?

Recent developments suggest that the Ninth Circuit Court of Appeals may be contemplating a return to the future promised by *Zippo*. In a 2023 case, the plaintiff (an Arizona company) sued the defendants (New York businesses) over products sold by the defendants that allegedly infringed the plaintiff's trademark.[37] The defendants' sales of the allegedly infringing product included online sales to Arizona. On that record, the Ninth Circuit held that if a website was interactive and offered "something more" — which could be online sales in the forum — the website operator could be considered to have expressly aimed its conduct at the forum, thus subjecting it to personal jurisdiction.

Earlier this year, the Ninth Circuit appeared to be cabining the rule in line with other circuits. In *Shopify*, a panel of the Ninth Circuit held that even if a website was interactive and had sales into a particular state, there still needed to be a forum-specific focus to the website's operation that created a substantial connection to the state.[38] Otherwise, the court reasoned, every online seller would be subject to personal jurisdiction in every forum. On the specific facts of that case, the Ninth Circuit found that Shopify, an online payment processing platform, was not subject to specific personal jurisdiction in California based on its offices and fulfillment centers in the state and contracts with California businesses because the California privacy law claims at issue related to Shopify's online data processing, not any of its contacts with the state.

Recently, however, the entire Ninth Circuit vacated the panel decision and reheard the case en banc. The en banc court clearly was wrestling with the issue but seemed to be leaning (to the limited extent oral argument is predictive of results) toward finding personal jurisdiction in California. Regardless, the exact ruling and its scope will not be clear for months.

The Internet Does Not Have Special Legal Status

Questions about personal jurisdiction can be complex and nuanced. The experience of the federal courts teaches, however, that the development of the internet did not actually create new complexities or special nuances that required the kind of doctrinal change *Zippo* proposed. Having a website, whether ultrapassive or hyperinteractive, does not make a business "at home" in every jurisdiction with internet access. Having a website that sells goods into a state becomes relevant to the jurisdictional calculus to the extent those sales are related to the underlying cause of action. The same could have been said decades earlier of telephone or catalog sales. Although remote sales may have exploded in recent decades, that expansion need not — and did not — cause a corresponding explosion in the law of due process.

Conclusion

In 1841 it took more than three months to get a message from the District of Columbia to California. Twenty years later, the same message could be transmitted in a moment. Yet this advance in communication technology did not change the content or meaning of the message. Similarly, the internet has changed neither existing laws nor the meaning of duly enacted federal statutes. State revenue departments should let go of the misguided notion that out-of-state activities can be deemed in-state activities merely because of an internet that enables interactivity. To the extent changes wrought by the internet make it appropriate to develop a different standard than the one embodied in P.L. 86-272, that is the job of Congress, not states. Further, as the federal courts have learned in recent years, applying existing standards in the

[35] *See Hassan v. FullStory Inc.*, 114 F.4th 181 (3d Cir. 2024).

[36] *Id.* at 195.

[37] *Herbal Brands v. Photoplaza Inc.*, 72 F.4th 1085 (9th Cir. 2023).

[38] *Briskin v. Shopify Inc.*, 87 F.4th 404 (9th Cir. 2024).

internet age is not impossible and does not lead to absurd results.

Yes, remote sales have grown exponentially with the rise of e-commerce. Congress or state legislatures may decide to change the rules in response. In the meantime, however, courts and administrative agencies already have the tools to resolve disputes in existing law. If anything, these experiments in measuring physical presence in terms of virtual interactivity demonstrate that now, more than ever, we need legislatures to do the work of legislating. ■