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ALS Scan, Inc. v. Digital Service Consultants, Inc.:
**Technology Cannot Eviscerate Constitutional Limits on State Power to Exercise
Jurisdiction Over a Defendant**

By: Ronald K. Voss

In a case of first impression, the United States Court of Appeals for the Fourth Circuit held technology could not eviscerate constitutional limits on a State's power to exercise jurisdiction over a defendant living outside of the State. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (2002). In so holding, the court ruled the district court could not, consistent with due process, exercise judicial power over an out-of-state entity that caused injury in Maryland through electronically transmitting information via the Internet. *Id.*

ALS Scan, Inc. ("ALS"), a corporation located in Columbia, Maryland, created and marketed adult photographs for distribution over the Internet. Digital Service Consultants ("Digital"), a Georgia corporation, operated as an Internet Service Provider ("ISP") for Alternative Products, Inc., ("Alternative"), an Internet advertising and sales company. ALS asserted that Digital, together with Alternative, appropriated copies of hundreds of ALS' copyrighted photographs and placed them on its websites, thereby gaining revenue from them through membership fees and advertising. ALS thus averred that Digital and Alternative had infringed its copyrights within Maryland and elsewhere by selling, publishing, and displaying its

copyrighted photographs.

ALS commenced an action for copyright infringement against Digital in the United States District Court for the District of Maryland. Digital filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2), asserting the district court lacked personal jurisdiction. The court granted Digital's motion. ALS thereafter appealed. The court accepted the appeal to determine whether a person electronically transmitting information via the Internet to Maryland, whereby causing injury in the State, is subject to the jurisdiction of a Maryland district court.

The court began its analysis by recognizing that applying traditional due process principles governing a State's jurisdiction over persons outside the State based on Internet activity required "some adaptation of those principles, [as] the Internet is omnipresent. *ALS Scan*, 293 F.3d 707 at 712. The court concluded, "as a general principle, [if] a person's act of placing information on the Internet subjects that person to personal jurisdiction in each state in which the information is accessed, [then the fundamental concept] that a state has geographically limited judicial power, would no longer exist." *Id.*

Consequently, the court opined that, "under current Supreme Court

jurisprudence, despite advances in technology, State judicial power over persons appears to remain limited" [to two types]. *Id.* at 712. These limitations encompass persons within the State's boundaries as well as those outside of the State, but who have established minimum contacts with the State. *Id.*

The court further reasoned that until the due process concept of personal jurisdiction is reconceived and rearticulated by the Supreme Court addressing increases in technology, a new standard must be developed. *Id.* The court resolved that this new standard should set forth limited circumstances when it can be determined that an out-of-state entity, "through electronic contacts, has conceptually entered . . . and established those minimum contacts in the . . . state via the Internet for jurisdictional purposes." *Id.*

Focusing on the requirements for establishing specific jurisdiction, which necessitate purposeful conduct directed at the State, and that the plaintiff's claims arise from that purposeful conduct, the court adopted the model set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). *ALS Scan*, 293 F.3d at 714. In *Zippo*, the court concluded that "the likelihood that personal jurisdiction can be constitutionally exercised is

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directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.” *Id.* (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

The *Zippo* model concentrated on differentiating between those websites that are “active” and subsequently susceptible to creating jurisdiction, and those websites that are passive, which do not generate personal jurisdiction over the out-of-state entity. *ALS Scan*, 293 F.3d at 714. With these guidelines, the court resolved that the exercise of jurisdiction is determined by examining the level of Internet activity that occurs and the nature of the commercial exchange of information on the website. *Id.* The court concluded that if a defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of files over the Internet, those acts involve an “active” website -- thereby creating personal jurisdiction. *Id.* In contrast, the court declared that a passive website that does little more than make information available to those who are interested in it, is not grounds for the exercise of personal jurisdiction. *Id.*

In adopting the *Zippo* model, the court set forth that a “State may, consistent with due process, exercise judicial power over a person outside the State when that person (1) directs electronic activity into the State; (2) with the manifested intent of engaging in business or other interactions within the state; and (3) that activity creates, in a person within that State, a

potential cause of action cognizable in the State’s courts.” *Id.* Under these guidelines, the court ruled that a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. *Id.*

Applying the new standard, the court concluded that Digital’s activity was, at most, passive, and therefore did not trigger the exercise of judicial power of a Maryland court. *ALS Scan*, 293 F.3d at 714. The court further reasoned that Digital did not direct its electronic activity specifically at any target in Maryland; it did not manifest an intent to engage in a business or some other interaction in Maryland; and none of its conduct in creating a website necessitated a cause of action in Maryland. *Id.* at 715.

The decision of *ALS Scan*, promulgates that many courts have recognized that the standards used to determine the proper exercise of personal jurisdiction may evolve as technology progresses. However, the decision ensures that it will nonetheless remain clear that technology cannot bulldoze the constitutional walls that limit a state’s power to exercise jurisdiction over an entity.

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