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## **Exercising Personal Jurisdiction Over Nonresident Cyberstalkers**

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### **About the Author**

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***Protective orders play an integral role in ensuring the physical safety and mental well-being of cyberstalked victims. Obtaining such protective orders, however, may prove difficult when the cyberstalker resides in a different state than the victim. This article analyzes the circumstances in which courts may exercise personal jurisdiction over nonresident cyberstalkers.***

Civil protection orders can be important to the physical safety and emotional well-being of those enduring the repeated, unsolicited communications of stalkers. When nonresident stalkers employ the Internet to harass their victims, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution may limit the victims' right to obtain civil protection orders from courts in the victims' states of residence. This article assesses the personal jurisdiction hurdles victims of nonresident cyberstalkers face when attempting to obtain civil protection orders.

### **Cyberstalking Legislation**

In 1999, recognizing the emerging threat of cyberstalking, Vice-President Al Gore requested the U.S. Attorney General to study cyberstalking and to report back with recommendations on how better to protect people from this threat. The Department of Justice's (DOJ) report explained that cyberstalking is the "kind of harassment [that] can be as frightening and as real as being followed and watched in your neighborhood or in your home."<sup>1</sup> The DOJ's 1999 study concluded that "cyberstalking is a serious problem

that will grow in scope and complexity as more people take advantage of the Internet and other telecommunications technologies."<sup>2</sup> The study emphasized that although cyberstalking does not involve physical contact, it is not necessarily more benign than physical stalking.<sup>3</sup> Although cyberstalkers usually do not present a clear and present physical danger to their victims, it is the victims' emotional and mental well-being that suffers.

In response to the expanding threat of cyberstalking, forty-six states expressly criminalized cyberstalking by amending their stalking statutes to include harassment by means of repeated "electronic communication" or communication initiated through a computer or computer network. The Colorado stalking statute was amended in 2000 to provide that:

[a] person commits harassment if, with intent to harass, annoy, or alarm another person, he or she . . . [i]nitiates communication with a person . . . by telephone, *computer, computer network, or computer system* in a manner intended to harass or threaten bodily injury or property damage.<sup>4</sup>

If a state's prosecutors do not seek to press charges against a cyberstalker, victims may seek civil protection orders that restrict or prohibit stalkers from communicating with their victims. Such protection orders have "paramount importance . . . because protection orders promote safety, reduce violence, and prevent serious harm and death."<sup>5</sup>

## Due Process

The Due Process Clause of the Fourteenth Amendment may prevent a victim from obtaining a civil protection order against a nonresident cyberstalker. Two requirements must be satisfied before a forum state may exercise personal jurisdiction over an out-of-state defendant: (1) the defendant must be amenable to service of process under the state's long-arm statute; and (2) the exercise of personal jurisdiction must comport with due process.<sup>6</sup> Certain states, such as Colorado, have enacted long-arm statutes that extend personal jurisdiction as far as the constitutional boundaries of due process; therefore, the analysis collapses into a single inquiry: Does exercising personal jurisdiction over a nonresident cyberstalker comport with the constitutional boundaries of the Due Process Clause?<sup>7</sup>

Pursuant to the Due Process Clause, a forum state may exercise personal jurisdiction over a nonresident defendant only when the defendant has certain "minimum contacts" with the forum state.<sup>8</sup> The minimum contacts test is satisfied, and a court may maintain specific jurisdiction over a nonresident defendant, when the defendant's contacts with the forum state arise from, or are directly related to, the plaintiff's cause of action.<sup>9</sup>

The defendant's contacts with the forum state arise from, or are directly related to, the plaintiff's cause of action when: (1) the nonresident defendant "purposefully avails" himself or herself to the forum state; (2) the plaintiff's injuries "arise out of" the defendant's forum-related activities; and (3) exercising jurisdiction does not offend traditional notions of fair play and substantial justice.<sup>10</sup> These three factors are analyzed below in the context of cyberstalking.

## ***Purposeful Availment***

The defendant's contacts with the forum state must not be random or fortuitous; instead, the defendant must purposefully avail himself or herself of the forum's jurisdiction.<sup>11</sup> The U.S. Supreme Court's analysis in *Calder v. Jones*,<sup>12</sup> a defamation case involving a California plaintiff and Florida defendants, crafted the "effects test" for determining whether a nonresident defendant who commits a tort in the forum state purposefully avails himself or herself to jurisdiction in the forum state. In *Calder*, a California plaintiff sued the *National Enquirer* and its individual writers and editors in California for publishing an allegedly libelous article. The defendants argued that the court could not exercise personal jurisdiction over them because the article was written and edited in Florida and the writers and editors had few contacts in California.<sup>13</sup> The Supreme Court disagreed, and held that the defendants had purposefully availed themselves to the jurisdiction of California.

The Court emphasized that the defendants expressly aimed their tortious conduct at the forum state when they drafted an allegedly libelous article about a California resident and her activities in California, used California sources in preparing the article, and widely distributed the article in California. Moreover, the defendants knew that the plaintiff's injury would be felt in the forum state of California, because the plaintiff resided in California and her career revolved around California's entertainment industry.<sup>14</sup> The Tenth Circuit distilled the *Calder* holding to three essential prongs, which together satisfy the "purposeful availment" requirement of the minimum contacts test: (1) the out-of-state defendant must commit an intentional action that is (2) expressly aimed at the forum state (3) with knowledge that the brunt of the injury would be felt in the forum state.<sup>15</sup>

**Intentional act.** In *Calder*, the Supreme Court explained that the defendants expressly aimed their intentional, tortious activity at California:

[T]hey knew [the article] would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation.<sup>16</sup>

As a result, the Court concluded that defendants could "reasonably anticipate being haled into court" in California.<sup>17</sup>

It is unclear, however, whether a mere intentional act is sufficient to satisfy the minimum contacts requirement. Some courts have held that an intentional act alone, even if not wrongful, is sufficient.<sup>18</sup> The Ninth Circuit reasoned that requiring an intentional act to be a wrongful act would improperly fuse the jurisdictional analysis with the merits of the underlying case.<sup>19</sup> Thus, in the context of cyberstalking, "enter[ing] the [victim's] e-mail address into the 'to' space of the e-mail" is an intentional act for purposes of the minimum contacts standard, even though it may not qualify as a wrongful act.<sup>20</sup>

One court explained that directly sending "spam" electronic communications into the forum state was an intentional act, because the defendant's e-mails "did not merely find their way" into the forum state.<sup>21</sup> In other words, the act itself, regardless of the defendant's *mens rea*, satisfies the intentional act prong of the minimum contacts standard.<sup>22</sup>

**Expressly aiming the tortious conduct at the forum state.** For a defendant to expressly aim conduct at a forum state, the "defendant's physical presence in the forum state is unnecessary when, in modern life, a substantial amount of interactions occur via telephone and *electronic communications*."<sup>23</sup> In *Haas v. Semrad*,<sup>24</sup> the court held that harassing phone calls directed at the forum state were sufficient minimum contacts for the court to exercise personal jurisdiction over the out-of-state defendant, and granted a civil protection order against the defendant. The court reasoned that "[i]t should be foreseeable to one who places a threatening phone call into a jurisdiction that he may be haled into the state to answer a petition seeking protection against him."

Similarly, in *Beckers v. Seck*,<sup>25</sup> an out-of-state defendant sent harassing letters and notes to his victim, who was located in Missouri. Although the defendant did not physically enter the state of Missouri, the court held that the defendant had sufficient minimum contacts with Missouri. According to the court, "the very contact made by [the defendant] is the basis for [the victim's] request for an order of protection" and, therefore, the defendant availed himself to jurisdiction of the forum state.<sup>26</sup> Therefore, when the tortious conduct is expressly aimed at the forum state, even though the defendant does not physically enter the state, due process should not restrict courts from exercising personal jurisdiction over nonresident defendants.

Cases where the stalker does not know, and has no way of knowing, that the alleged victim is located in the forum state are distinguishable from *Haas* and *Beckers*. In such circumstances, courts have held that the defendant had not expressly targeted the forum state. In *Becker v. Johnson*,<sup>27</sup> for example, a nonresident defendant left harassing voice and text messages on his victim's phone. At the time of sending the harassing communications, however, the defendant was not aware that the victim was located in the forum state of Florida. The court held that, because the defendant did not purposefully target the forum state when sending the text messages, the minimum contacts test was not satisfied, and the forum state lacked personal jurisdiction over the defendant.

Although the Florida court conceded that "[t]elephonic, electronic, or written communications to Florida from an outside state can establish personal jurisdiction without the need that the defending party have a physical presence in the state," the court explained that personal jurisdiction was lacking, because the defendant did not know, and had no way of knowing, that the plaintiff was receiving the harassing text messages in Florida. The plaintiff's mobile telephone number did not contain a Florida area code, and the plaintiff never mentioned that she was moving to Florida.<sup>28</sup> Therefore, the defendant did not expressly target Florida when sending the harassing communications.

In the context of electronic mail, courts have not followed the rationale of *Becker*. In *Verizon Online Services, Inc. v. Ralsky*,<sup>29</sup> nonresident defendants sent millions of unsolicited messages<sup>30</sup> to an Internet service provider that had seven servers in the state of Virginia, imposing substantial burdens on the servers' capacity. The defendants argued that they did not expressly aim the tortious conduct at Virginia, because they did not know the geographic location of the Internet servers when they sent the electronic messages. The court conceded that the defendants could not discern the geographic destination of the e-mail simply by the e-mail address, nor could the defendants discern the location of the server processing the e-mail.

Even though the defendants did not know the geographic location of the servers when sending the electronic communications, the court held that the nonresident defendants expressly aimed the spam communications at the forum state of Virginia. The court emphasized that the nature and quality of the e-mail messages caused a tort in Virginia and, thus, Virginia maintained manifest interest in providing its residents with a convenient forum for redressing injuries.<sup>31</sup>

Similarly, states have a manifest interest in providing their residents with a convenient forum for obtaining civil protection orders against nonresident cyberstalkers. As the *Verizon Online* court noted, a state's interest in exercising personal jurisdiction over a defendant takes on a stronger role in tort cases than in other contexts, such as contract disputes.<sup>32</sup> Thus, providing a forum for victims may override the fact that a nonresident cyberstalker does not know, and has no way of knowing, in which state his or her victim is located when the cyberstalker sends the harassing communication(s).

The *Verizon Online* court also emphasized that the defendants actively sent unsolicited e-mails through the plaintiff's servers, rather than passively posting materials on a website.<sup>33</sup> Thus, the defendants should have expected to be haled into any state in which they committed a tort, because "[a]ny other result would grant spammers like defendants carte blanche to spam with impunity."<sup>34</sup> Cyberstalkers who send harassing electronic communications to their victims similarly actively target the forum state, and should expect to be haled into the forum state to answer for their tortious conduct. If a cyberstalker merely posts harassing content on a website, however, the cyberstalker likely is not expressly targeting the forum state and, thus, the forum state may not exercise personal jurisdiction over the cyberstalker.

Similarly, in *Marycle, LLC v. First Choice Internet, Inc.*,<sup>35</sup> e-mail recipients and the recipients' Internet service provider brought an action against an out-of-state Internet marketing company and its president for distributing spam e-mails to the recipients' e-mail accounts, in violation of Maryland's Commercial Electronic Mail Act. The defendants argued that the Maryland court lacked personal jurisdiction because the defendants did not know where recipients would open the e-mails and, therefore, the defendants did not expressly target Maryland when sending the spam messages.

The Maryland court disagreed, noting that defendants' position "has little more validity than one who contends he is not guilty of homicide when he shoots a rifle into a crowd of people without picking a specific target, and someone dies."<sup>36</sup> Defendants cannot plead lack of purposeful availment simply because the nature of the Internet does not allow the nonresident defendants to know the geographical location of their e-mail recipients.<sup>37</sup> Moreover, the court explained that, where a nonresident defendant commits a tort in the forum state, the threshold for purposeful availment is lower than it would be in a contract dispute.<sup>38</sup>

Although *Verizon Online* and *Marycle* involve the tort of sending spam electronic communications, they are instructive regarding personal jurisdiction in the context of sending harassing electronic communications into a forum state. Both cases hold that whether the defendant knows the geographic location of the Internet servers or the e-mail recipients is not determinative in deciding whether the defendant expressly targeted the forum state. The fact that the defendant committed a tort in the forum state, rather than breached a contract, for example, lowers the personal jurisdiction threshold.

**Brunt of the injury.** Lastly, the "brunt of the injury" must be felt in the forum state. The brunt of the injury test overlaps somewhat with the expressly aiming standard discussed above, because, if the defendant expressly aims his or her conduct at the forum state, the harm likely will be felt in the forum state.<sup>39</sup> However, the overlap is not complete. The expressly aiming test focuses on a defendant's intentions, and the brunt of the injury test focuses on where the alleged harm actually is felt by the plaintiff.<sup>40</sup>

A victim who receives harassing electronic communications endures the injury where the communications are received. The injury is not felt in cyberspace, but rather in the state where the victim receives the harassing communication.<sup>41</sup> The *Verizon Online* court emphasized that the harm of sending spam messages does not occur in cyberspace, but "in the forum state of Virginia where the [spam] harmed a substantial portion of [the plaintiff's] e-mail servers by impairing its e-mail delivery system and leading to delays and consumer complaints."<sup>42</sup> Similarly, in the context of cyberstalking, the injury occurs where the victim receives the harassing communication.

### ***Plaintiff's Claims "Arise out of" Defendant's Contacts With the Forum State***

The "arising out of" test asks whether the defendant's contact with the forum state is causally related to the plaintiff's action. As previously noted, in the cyberstalking context, it is the defendant's contact with the forum state that leads the plaintiff to seek a protection order in the first instance. In *Beckers*,<sup>43</sup> a stalking case where the plaintiff sought a civil protection order, the court reasoned that "the very contact made by [the defendant] is the basis for [the victim's] request for an order of protection," and, therefore, the plaintiff's cause of action arose out of the defendant's contacts with the forum state. Thus, in the context of stalking—and similarly, cyberstalking—it is the defendant's contacts with the forum state that cause the plaintiff to seek a civil protection order.

### ***Notions of Fair Play and Substantial Justice***

In deciding whether the exercise of personal jurisdiction offends the notions of fair play and substantial justice, courts consider, *inter alia*, the forum state's interests in resolving the dispute weighed against the burden on the defendant.<sup>44</sup> Adjudicating the tort of cyberstalking is of great importance to forum states, as is clearly indicated by the initiative of forty-six states to enact some form of cyberstalking statute. The Colorado General Assembly, for example, emphasized the great physical and emotional danger of stalking, and the importance of issuing civil protection orders against dangerous stalkers.<sup>45</sup>

Moreover, the burden on the defendant is not so great as to trump the interests of the forum state.<sup>46</sup> In *Marycle*,<sup>47</sup> the out-of-state defendant argued that jurisdiction was not proper in Maryland because the burden on the defendant of determining the residency of an e-mail recipient is too great. The court disagreed; it clarified that the burden was not to determine where the victim resides but rather to avoid sending deceptive communications into the forum state in the first place. Similarly, refraining from sending harassing communication into a forum state is not an undue burden, regardless of whether the defendant knows the geographic location of his or her victim.<sup>48</sup> Thus, the notions of fair play and substantial justice likely are not a valid roadblock to obtaining a

civil protection order, even when the out-of-state defendant never physically enters the forum state.

## Enforcing Protection Orders

Assuming the forum state court issues a protection order against the nonresident defendant, the next obstacle is enforcing the order. Since 1994, the Violence Against Women Act's full faith and credit provision (Full Faith and Credit Provision) has required every jurisdiction in the United States to recognize and enforce valid protection orders.<sup>49</sup> The Full Faith and Credit Provision provides that, when a protective order is issued by a court that has jurisdiction over the parties, and the person against whom the order is sought is given reasonable notice and opportunity to be heard, all other states must enforce the order "as if it were the order of the enforcing State. . . ."

Based on the Full Faith and Credit Provision, protection orders must be accorded full faith and credit among the fifty states, notwithstanding the failure to comply with any requirement that the order be registered or filed in the enforcing state.<sup>50</sup> Thus, a protective order issued in the issuing state that meets the requirements of the Full Faith and Credit Provision is enforceable in the enforcing state, even though the order was not registered or filed in the enforcing state.

For example, if a victim obtains a civil protection order from a Colorado court restraining a California cyberstalker, that order is enforceable in California. If the cyberstalker violates the order by continuing the stalking, he or she could be held in contempt in California, or even prosecuted there for the crime of violating the protection order.

## Conclusion

"Each new development in communications technology brings new challenges to applying the principles of personal jurisdiction."<sup>51</sup> The increased use of the Internet and e-mail accounts has brought a new challenge to applying the principles of personal jurisdiction, specifically in the context of cyberstalking. As this article explains, civil protection orders are necessary for the emotional and physical well-being of the victims of cyberstalkers and, thus, the importance of providing a forum to such victims weighs in favor of exercising personal jurisdiction over nonresident cyberstalkers. As long as the out-of-state cyberstalker aims his or her harassing communications at the forum state and the victim receives the communication in the forum state, personal jurisdiction should not operate as an obstacle to reaching the merits of a civil protection order.

## Notes

1. See U.S. Department of Justice (DOJ), "1990 Report on Cyberstalking: A New Challenge for Law Enforcement and Industry," available at [www.usdoj.gov/criminal/cybercrime/cyberstalking.htm](http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm).
2. *Id.* Notably, however, there is a lack of precise data regarding the prevalence and growth of cyberstalking. The lack of data is due partly to the fact that many victims of cyberstalking do not report the conduct to law enforcement, and partly because law enforcement agencies have not had adequate training in how to deal with cyberstalking.

See Goodno, "Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws," 72 *Mo. L.Rev.* 146, 156 (2007).

3. DOJ, *supra* note 1.

4. CRS § 18-9-111(1)(e) (emphasis added).

5. CRS § 13-14-102(1)(a).

6. See *Trujillo v. Williams*, 465 F.3d 1210, 1217 (10th Cir. 2006).

7. See *Archangel Diamond Corp. v. Lukoil*, 123 P.3d 1187, 1193 (Colo. 2005).

8. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

9. The minimum contacts standard also is satisfied, and a court may maintain general jurisdiction over a nonresident defendant, based on the defendant's "continuous and systematic" contacts with the forum states. See *Trujillo*, *supra* note 6 at 1218 n.7. Specific jurisdiction is more relevant than general jurisdiction to cyberstalking, because the plaintiff's cause of action directly relates to the defendant's contacts with the forum state. In other words, the stalker's contact with the forum state (*i.e.*, sending harassing electronic communications into the forum state) is directly related to the plaintiff's cause of action. Accordingly, this article focuses on specific jurisdiction rather than general jurisdiction.

10. See *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008), quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

11. See *Burger King*, *supra* note 10 at 475.

12. *Calder v. Jones*, 465 U.S. 783 (1984).

13. *Id.* at 785-86.

14. *Id.* at 789-90.

15. See *Dudnikov*, *supra* note 10 at 1072.

16. *Calder*, *supra* note 12 at 789-90.

17. *Id.* at 790.

18. See *Yahoo! Inc. v. Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1208 (9th Cir. 2000) ("we do not read *Calder* necessarily to require in purposeful direction cases that all [or even any] jurisdictionally relevant effects have been caused by wrongful acts").

19. *Id.*

20. See *Verizon Online Servs., Inc. v. Ralsky*, 203 F.Supp.2d 601, 612 (E.D.Va. 2002).
21. See *Marycle, LLC v. First Choice Internet, Inc.*, 890 A.2d 818, 833 (Md.Ct.Spec.App. 2006).
22. Notably, however, certain courts have taken the stance that, under *Calder*, the intentional act must be tortious for the nonresident defendant to purposefully avail himself or herself. See, e.g., *Marten v. Godwin*, 499 F.3d 290, 297 (3d Cir. 2007).
23. See *Haas v. Semrad*, No. L-06-1294, 2007 WL 1653032 at \*3 (Ohio Ct.App. June 8, 2007) (emphasis added).
24. *Id.* at \*4.
25. *Beckers v. Seck*, 14 S.W.3d 139, 143 (Mo.Ct.App. 2000).
26. *Id.* See also *McNair v. McNair*, 151 N.H. 343, 349-51 (2004); *Brown v. Bumb*, 871 So.2d 1201, 1205 (La.Ct.App. 2004) (state exercised personal jurisdiction in civil protection action when out-of-state defendant's only contact with the petitioner was threatening telephone calls and letters).
27. *Becker v. Johnson*, 937 So. 2d 1128, 1131 (Fla.Dist.Ct.App. 2006).
28. *Id.*
29. *Verizon Online*, *supra* note 20 at 604.
30. Such unsolicited messages have been coined "spam," which is defined as "unsolicited e-mail, often of a commercial nature, sent indiscriminately to multiple mailing lists, individuals, or newsgroups." See [www.merriam-webster.com/dictionary/spam](http://www.merriam-webster.com/dictionary/spam).
31. *Verizon Online*, *supra* note 20 at 617, quoting *Burger King*, *supra* note 10 at 473.
32. *Id.*
33. *Id.* See also *Internet Doorway, Inc. v. Parks*, 138 F.Supp.2d 773, 777 (S.D.Miss. 2001) ("the active as opposed to passive nature of e-mail weighs in favor of finding personal jurisdiction" in the forum where the e-mail is received); *Novak v. Benn*, 896 So. 2d 513, 519 (Ala.Civ.App. 2004) (Alabama court lacked personal jurisdiction over nonresident defendants who allegedly posted defamatory messages on an Internet forum site that was accessible by "practically every person whose computer has access to the Internet," because the defendants did not actively target the forum state).
34. *Verizon Online*, *supra* note 20 at 612. See also *Internet Doorway*, *supra* note 33 at 779 (Mississippi court exercised personal jurisdiction over a nonresident defendant who sent spam e-mails all over the world, because the defendant "had to have been aware that the e-mail would be received in numerous fora, including Mississippi").
35. *Marycle, LLC*, *supra* note 21 at 821.

36. *Id.* at 835.

37. *Id.*

38. *Id.*, quoting *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F.Supp. 456, 469 (D.Mass. 1997) (quotations omitted).

39. See *Dudnikov*, *supra* note 10 at 1074-75.

40. *Id.*

41. See *Verizon Online*, *supra* note 20 at 618.

42. *Id.*

43. *Beckers*, *supra* note 25 at 143. See also *McNair*, *supra* note 26 at 350 (the defendant's threatening telephone calls are the same acts on which the protective order was based; thus, the contacts relate to the cause of action).

44. See *Dudnikov*, *supra* note 10 at 1080. See also *Verizon Online*, *supra* note 20 at 621.

45. See CRS § 13-14-102(1)(a). See also *Verizon Online*, *supra* note 20 at 617 ("[a] state's interest in exercising personal jurisdiction over a tortfeasor takes on a stronger role than in other contexts such as a contract dispute," because torts involve wrongful conduct that a state seeks to deter).

46. See *Marycle, LLC*, *supra* note 21 at 835 (the burden on an out-of-state defendant who sent deceptive spam electronic communications into the forum state is merely to avoid sending such deceptive messages, a burden that is trumped by the state's interest in protecting its residents from deceptive electronic communications).

47. *Id.*

48. See *Verizon Online*, *supra* note 20 at 622 (permitting nonresident defendants who sent electronic spam messages into the forum state to avoid jurisdiction in the forum state "simply because they claim they were unaware that [the plaintiff's] e-mail servers were located in [the forum state] would be fundamentally unfair").

49. See 18 U.S.C. § 2265.

50. 18 U.S.C. § 2265(d)(2). Moreover, if the victim does register a foreign protection order with an enforcing state, the party against whom a protection order has been issued cannot be notified that the order has been registered with that state. 18 U.S.C. § 2265(d)(1).

51. *Verizon Online*, *supra* note 20 at 604.