

The 50-State Qualification Handbook, Chapter 4: Corporate Internet and E-Commerce Activity

The Internet has revolutionized the corporate world's ability to buy and sell products and services, conduct "virtual" meetings and other business operations, communicate, and otherwise transact business in foreign states. The sheer volume of sales that takes place over the Internet on any given day is unprecedented. It is no wonder then, that Internet activity has garnered considerable attention in the courtroom. As a result, corporate decision-makers are confronting myriad legal questions involving e-commerce and other Internet activities.

A corporation's gateway to the Internet is its website. From its website, a corporation can communicate with potential and existing customers, secure orders, track business activity, and conduct internal corporate activities. One significant legal issue regarding websites is whether a corporation's use of a website constitutes doing business in a state outside the one in which either the company is located or the website was created. Specifically, a corporation needs to determine whether maintaining or owning the website means it must qualify to do business in any state where either the website can be accessed or customers use the products or services offered on the site.

Currently, no statutory law addresses this issue and, as of this writing, little to no relevant case law has considered the question of whether owning or operating a website constitutes doing business for qualification purposes. Numerous court opinions, however, address a similar issue: whether a corporation's Internet activities in a foreign state constitute doing business sufficient to justify the courts of that state exercising "personal jurisdiction" over the corporation. Personal jurisdiction is a complex legal principle that refers to a court's authority to resolve a legal dispute and to render an enforceable decision as to the specific parties involved. Exploring the issue of jurisdiction with regard to websites can be useful when trying to determine a corporation's need to qualify to do business based on its website activity.¹

A good place to start when considering this issue is to understand that a state's courts can exercise personal jurisdiction over a foreign corporation that is not physically present in the state. One prerequisite is that the corporation has "minimum contacts" with the foreign state, such that its ability to be sued there "does not offend the traditional notions of fair play and substantial justice."² In certain situations, even a single or occasional act performed by the corporation can constitute "minimum contacts" sufficient to subject it to the personal jurisdiction of the foreign state's courts if the corporation purposefully and intentionally acted in the foreign state.³

¹ See generally A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. Ill. L. Rev. 71, 76–86 (2006); Scott T. Jansen, Comment, *Oh, What a Tangled Web . . . The Continuing Evolution of Personal Jurisdiction Derived from Internet-Based Contacts*, 71 Mo. L. Rev. 177, 177–91 (2006).

² *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

³ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, n.18 (1985) (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)) ("So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction."). Note that a court can exercise two types of personal jurisdiction. "General jurisdiction" can exist when the subject matter of a lawsuit is not related to a corporation's contact with a state but the contacts are "continuous and systematic." "Specific jurisdiction" refers to a lawsuit that arises out of or relates to the corporation's contact with the state and can be found even when there are only limited contacts with the

The important distinction between “transacting any business” for purposes of personal jurisdiction, and “doing business” for purposes of qualification statutes, is that “a somewhat greater quantum of business activity is required in order to compel a foreign corporation to qualify to do business within the state than that which merely renders it subject to service of process.”⁴ This means that it is easier for a corporation engaging in activities in a foreign state to satisfy the “minimum contacts” test for jurisdictional purposes than it is to satisfy the “doing business” test for qualification purposes.⁵ Logically, then, if a corporation’s contacts with a foreign state are not sufficient to justify the exercise of personal jurisdiction, a court should find that those same contacts will not trigger a corporation’s duty to qualify.⁶

It is difficult to identify the type or extent of additional contacts that will trigger the qualification requirement. Therefore, it is best to review how courts have resolved jurisdictional issues relating to website activities, and to then draw analogies that might offer guidance in the qualification context. It should be noted, however, that this is a complex legal issue concerning relatively new technology, and the law on this topic is still developing. Different courts may approach the issue differently, in part because the United States Supreme Court has yet to address the issue.⁷

Currently, most courts apply a sliding scale test tailored to Internet activities to determine the level or types of activities that will constitute “minimum contacts” for jurisdictional purposes.⁸ This sliding scale test is based on the premise that “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quantity of commercial

foreign state. Either type can serve as the basis for a lawsuit against a corporation. See generally *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); see also *ICP Solar Techs., Inc. v. TAB Consulting, Inc.*, 413 F. Supp. 2d 12 (D.N.H. 2006) (discussing general and specific jurisdiction in an Internet advertising case).

⁴ *Horton v. Richards*, 594 P.2d 891, 893 n.3 (Utah 1979). See also, e.g., *Am. Express Centurion Bank v. Li Tsai*, 73 Va. Cir. 358 (Va. Cir. Ct. 2007). Also refer to the discussion of personal jurisdiction and qualification at the end of Chapter 1.

⁵ fact, states adopting the MBCA and its revisions have exempted from qualification those foreign corporations that merely own real or personal property in the state, an activity that can form the basis for personal jurisdiction under state law.

⁶ William R. Crowe, Note: *A Proposed Minimum Threshold Analysis for the Imposition of State Door-Closing Statutes*, 51 Fordham L. Rev. 1360, 1370 (1983) (suggesting that “a minimum intrastate contacts analysis would allow a state court to apply its door-closing statute fairly to a given fact situation without violating the commerce clause.”). See also, e.g., *Ryan v. Cerullo*, 282 Conn. 109, 918 A.2d 867, 2007 Conn. LEXIS 162 (2007) (court held there where there were insufficient contacts for personal jurisdiction under the state’s general long-arm statute, it follows, “*a fortiori*”, that there is no jurisdiction under the state’s corporate long-arm statute).

⁷ Crowe, 51 Fordham L. Rev. 1360, 1370.

⁸ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). But see, e.g., *Auburn Mfg. v. Steiner Indus.*, 493 F. Supp. 2d 123, 2007 U.S. Dist. LEXIS 47163 (D. Me. 2007) (“court cannot determine whether personal jurisdiction is appropriate simply by deciding whether an Internet web site is ‘passive’ or ‘interactive’ An ‘interactive’ or commercial web site may not be sufficient to support jurisdiction if it is not aimed at residents in the forum state.”); *Howard v. Mo. Bone & Joint Ctr., Inc.*, 373 Ill. App. 3d 738, 869 N.E.2d 207, 2007 Ill. App. LEXIS 414, 311 Ill. Dec. 533 (Ill. App. Ct. 5th Dist. 2007) (differs with “sliding scale”, finding that an interactive website is similar to telephone or mail communications; mere solicitation is not enough to sustain personal jurisdiction). See generally Joan K. Coston, Comment: *Embrace the New, but Don’t Forget About the Old: Asserting Personal Jurisdiction over the New Internet Age*, Summer 2007, 34 S.U.L. Rev. 249 (2007).

activity that an entity conducts over the Internet.”⁹ At one end of the scale are “passive” websites, which alone generally do not generate sufficient contacts with a foreign state to establish personal jurisdiction.¹⁰ At the other end of the scale are “active” websites, which generate sufficient business over the Internet to establish personal jurisdiction.¹¹ “Interactive” websites fall in the center of the scale, and courts determine whether to exercise personal jurisdiction over the interactive website owner on a case-by-case basis.¹² While the sliding scale is the foundation for most court decisions on this issue, many cases also consider whether the Internet activities targeted the foreign state or its residents.¹³

4.1. Passive Websites

A passive website is only used to post information. It does not actively solicit orders for goods or services or support other commercial activities. Many courts have held that the fact that the site exists and can be viewed all over the world does not, by itself, amount to the “minimum contacts” sufficient to subject the website owner to jurisdiction in every state in which viewers can access the website.¹⁴ Courts have reasoned that it would be unfair to exercise personal jurisdiction over a website owner in a particular state simply because the website was viewable in that state.¹⁵ Maintenance of a website in a particular state is generally insufficient to establish “purposeful availment” of the benefits and protections of the laws of the forum state.¹⁶

⁹ *Zippo*, 952 F. Supp. at 1124.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Spencer, *supra* note 1, at 74, 80–86. See also, e.g., *Just Enters., Inc. v. (888) Justice, Inc.*, 2007 U.S. Dist. LEXIS 9040 (W.D. Mo. Feb. 8, 2007); *Northbrook Digital LLC v. Vendio Services, Inc.*, 2008 U.S. Dist. LEXIS 54688 (D. Minn. 2008).

¹⁴ See, e.g., *Nutrition Physiology Corp. v. Enviros Ltd.*, 87 F. Supp. 2d 648 (N.D. Tex. 2000) (holding that websites that do not allow viewers to order products online are passive); *Havey v. Stahler*, 616 S.E.2d 642 (N.C. App. 2005) (holding that, although a Vermont furniture store website provided a history of the store, a brief description of the furniture, and allowed users to order a catalog, the website was passive because viewers could not purchase furniture on-line and because the website did not target North Carolina residents); *Hudson v. University of Puerto Rico*, 2010 U.S. Dist. LEXIS 27201 (D. Minn. Mar. 23, 2010) (finding that the website was passive because it was a blog that simply provided information and did not allow readers to exchange information with the host computer); *But see Telco Communs. v. An Apple a Day*, 977 F. Supp. 404, 407 (E.D. Va. 1997) (finding that “posting a Web site advertisement or solicitation constitutes a persistent course of conduct, and that the two or three press releases rise to the level of regularly doing or soliciting business. . . .”); *Communs. Depot, Inc. v. Verizon Communs., Inc.*, Cause No. IP 01-1587-C H/K, 2002 U.S. Dist. LEXIS 14727 (S.D. Ind. July 17, 2002).

¹⁵ See, e.g., *Shamsuddin v. Vitamin Research Prod.*, 346 F. Supp. 2d 804, 808 (D. Md. 2004) (“personal jurisdiction does not exist because a defendant’s Internet activity is ‘passive,’ such as where the defendant merely posts information on a website which is accessible to users in foreign jurisdictions.”) (citing *Zippo*, 952 F. Supp. At 1124); *Bensusan Rest. Corp. v. King*, 937 F. Supp. 295, 299 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25 (2d Cir. 1997) (“the mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in [the forum state]”); *Spuglio v. Cabaret Lounge*, 344 Fed. Appx. 724 (3d Cir. Pa. 2009) (plaintiff’s ability to access information about a business, including its location and directions, via an Internet search engine (Google) does not subject that business to personal jurisdiction anywhere in the country).

¹⁶ *Cybersell, Inc. v. Cybersell, Inc.*, 130 F. 3d 414, 420 (9th Cir. 1997); see also Spencer, *supra*, note 1, at 80–81.

Therefore, the general rule is that owning a passive website, without more, will not subject the owner to personal jurisdiction outside of the state where the website is created and maintained.¹⁷

For example, a federal court located in New York declined to exercise personal jurisdiction over an out-of-state defendant who was sued for an alleged trademark infringement on his website.¹⁸ In that case, the owners of a New York jazz club, The Blue Note, sued the owner of a Missouri jazz club with the same name. The Missouri club owner maintained a website that featured a logo similar to that of The Blue Note club and that offered information about the Missouri club, including an events calendar and ticketing information. Emphasizing that the Missouri website owner never mailed tickets to New York or otherwise solicited business in New York, the court determined that “[c]reating a site, like placing a product into the stream of commerce, may be felt nationwide — or even worldwide — but, without more, it is not an act purposefully directed toward the forum state,” which in this case, was New York.¹⁹

In another case, an Arizona court held that it would be unfair to exercise personal jurisdiction over a Florida website advertiser who had no contact with, and no activity specifically directed at, Arizona. In the case, a Florida company advertised its services over the Internet using an Arizona company’s allegedly protected service mark.²⁰ The court found that it could not exercise jurisdiction over the defendant, based primarily on the fact that the defendant had not conducted commercial activity over the Internet. Specifically, the court noted that the defendant did not encourage Arizonans to access the site and no sales were made to Arizonans. The defendant’s website was “essentially a passive home page,” even though interested viewers could hyperlink to email the defendant.²¹ The court also noted that “anyone, anywhere could access that home page and thereby learn about the services offered” could not lead to the conclusion that the defendant directed its sales efforts toward Arizona.²²

It is important to note that under a long-arm statute a court can exercise personal jurisdiction over a foreign corporation if it conducts tortious activities in the foreign state.²³ Therefore, if a

¹⁷ See generally Susan Nauss Exon, *A New Shoe Is Needed To Walk Through Cyberspace Jurisdiction*, 11 Alb. L.J. Sci. & Tech 1, 13 (2000) (explaining that a majority of courts “have found that a passive website cannot purposefully direct itself to any one place” to fulfill the purposeful availment criterion of personal jurisdiction).

¹⁸ *Bensusan*, 937 F. Supp. at 295.

¹⁹ *Id.* at 301. See also *Universal Grading Serv. v. eBay, Inc.*, 2009 U.S. Dist. LEXIS 49841 (E.D.N.Y. June 10, 2009).

²⁰ *Cybersell*, 130 F. 3d at 414.

²¹ *Id.* at 419.

²² *Id.* The court stated that the defendant had “done no act and consummated no transaction, nor had it purposefully availed itself of the privilege of conducting activities in Arizona, thereby invoking the benefits and protections of Arizona law.” *Id.* The court stated that the defendant had “done no act and consummated no transaction, nor had it purposefully availed itself of the privilege of conducting activities in Arizona, thereby invoking the benefits and protections of Arizona law.”

²³ A long-arm statute is a state’s codification of the “minimum contacts” requirement necessary to exercise personal jurisdiction. The statute sets out the specific situations in which a state’s court may exercise jurisdiction over a nonresident person or entity. If the long-

corporation conducts tortious activity through a passive website, the website owner could be subject to jurisdiction in a foreign state, particularly the state where the harm occurred.²⁴ Further, when a foreign corporation intentionally directs its tortious conduct toward a specific jurisdiction, however, a court can, and likely will, exercise personal jurisdiction.

For example, in a case involving an underlying tort claim of trademark infringement, the Ninth Circuit applied a standard torts analysis to conclude that a foreign website owner had engaged in “something more” than the mere posting of a passive website.²⁵ In this case, the out-of-state defendant was a “cyber-pirate” that had registered the plaintiff corporation’s name as a domain name on the Internet, and then attempted to sell the domain name to the corporation. The Ninth Circuit found that the defendant had engaged in a scheme to extort money from the corporation, knowing it would have the effect of injuring the plaintiff in California, where the corporation had its principal place of business. Accordingly, the Ninth Circuit held that the defendant had intentionally aimed its conduct at California, and thus was subject to personal jurisdiction there.

However, where allegedly tortious conduct is not directed toward a particular state, it is less likely a court will exercise personal jurisdiction. For example, a psychiatrist brought a defamation action in Pennsylvania against a rival website owner who had posted allegedly defamatory statements.²⁶ The Pennsylvania court declined to exercise personal jurisdiction over the website owner because the website owner never targeted or solicited Pennsylvania residents, and because the allegedly defamatory statements were not intended for commercial gain.²⁷ The court reasoned that the primary effect of the harm was not located in Pennsylvania because the defamatory statements pertained not to the plaintiff’s psychiatry practice in Pennsylvania, but to his international reputation as an advocate against health care fraud.²⁸

arm statute allows a court to extend jurisdiction, the court must also confirm that jurisdiction would be constitutional. For example, Delaware’s long-arm statute, Del. Code Ann. tit. 10, § 3104, states that:

[A] court may exercise personal jurisdiction over any nonresident [which includes a corporation], or a personal representative, who in person or through an agent:

- (1) Transacts any business or performs any character of work or service in the State;
- (2) Contracts to supply services or things in this State;
- (3) Causes tortious injury in the State by an act or omission in this State;
- (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
- (5) Has an interest in, uses or possesses real property in the State; or
- (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

²⁴ But, in *Telebyte v. Kendaco*, 105 F. Supp. 2d 131 (E.D.N.Y. 2000), a New York corporation could not sue a Washington Internet service provider in New York, even though its Internet site contained an infringing mark, because the site was created in Washington.

²⁵ *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998).

²⁶ *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999).

²⁷ *Id.* at 728.

²⁸ *Id.* at 728–29, 731. See also *Gorman v. Jacobs*, 2009 U.S. Dist. LEXIS 9326 (E.D. Pa. 2009); *Doe I v. Ciolli*, 611 F. Supp. 2d 216 (D. Conn. 2009).

Similarly, a Texas court held that operating an Internet message board used to discuss the oil and gas industries did not subject a California corporation to jurisdiction in Texas for alleged defamatory statements made on the message board. The plaintiff, a Texas oil company, argued that any corporation that operates an oil and gas message board should anticipate being sued in Texas, the largest oil and gas state in the country. The plaintiff oil company also argued that employees of the defendant corporation moderated and, at times, offered opinions on the message board. However, the court found that the corporation only managed the message board, that the message board did not focus exclusively on oil and gas companies in Texas, that comments made by the defendant corporation's employees were not the ones at issue, and that the message board was not a commercial site designed to transact business. Therefore, the court found that there was not a sufficient nexus between the defendant corporation's website and Texas to establish jurisdiction over the defendant corporation. The court explained that if there had been evidence that the website was intended specifically to solicit business and create binding contracts with residents of Texas, it likely would have found that the website produced significant commercial activity in Texas sufficient to create a nexus with Texas, and subject the corporation to jurisdiction there.²⁹

4.2. Active Websites

An active website serves as a gateway for conducting business over the Internet between the website owner and residents of a particular state. Courts will exercise personal jurisdiction over a corporate website owner that knowingly and repeatedly transmits computer files over the Internet to residents of a foreign state or repeatedly sells any products or services to residents of a specific state via its website.³⁰

One of the best illustrations of jurisdictional analysis as it affects active websites comes from the same case that articulated the sliding scale test: *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*³¹

In that case, *Zippo Dot Com*, a California corporation, provided an Internet news service to subscribers, approximately 3,000 of whom were Pennsylvania residents. The plaintiff, *Zippo Manufacturing Corporation*, maker of Zippo lighters, sued *Zippo Dot Com* for trademark violations. The court concluded that by choosing to enter into contracts with Pennsylvania residents, the California corporation purposefully availed itself of doing business in

²⁹ *Triple Diamond Energy Corp. v. Venture Research Inst.*, 2008 U.S. Dist. 51587 (N.D. Tex. 2008). See also *Xcentric Ventures, LLC v. Bird*, 2010 U.S. Dist. LEXIS 14731 (D. Ariz. Feb. 4, 2010) (holding that, intentionally posting a defamatory statement on the Internet with knowledge of where the defamed individual resides, and without showing that defendants expressly directed their defamatory statements at the forum state, does not amount to "express aiming" and is insufficient to justify the assertion of personal jurisdiction against the defendant). But see *Higher Balance, LLC v. Quantum Future Group, Inc.*, 2008 U.S. Dist. LEXIS 94362 (D. Ore. 2008) (defamatory comments intentionally aimed at a party known to be a resident of the forum state).

³⁰ See *Zippo Mfg Co.*, 952 F. Supp. 1119, at 1124 (citing *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996)). Compare with the discussion below on "interactive websites" to see how courts view single sales over the Internet.

³¹ *Zippo*, 952 F. Supp. 1119 (W.D. Pa. 1997).

Pennsylvania, such that it was not unreasonable for it to be sued.³² The court found that Zippo Dot Com “repeatedly and consciously chose to process Pennsylvania residents’ applications and to assign them passwords. Zippo Dot Com knew that the result of these contracts would be the transmission of electronic messages into Pennsylvania . . .” such that the contracts were not merely “fortuitous,” as the company argued.³³

In 2007, two courts failed to adopt the Zippo test. In the first, a Missouri corporation was sued in Illinois for damages arising out of injuries connected with athletic training services rendered in Missouri.³⁴ The Illinois court dismissed the case based on lack of jurisdiction, rejecting outright the plaintiff’s argument that the defendant’s ownership of an interactive website, accessible to Illinois residents, supported jurisdiction in Illinois. The court disagreed with the “sliding scale” approach adopted in Zippo, explaining that the web page’s level of interactivity was irrelevant, and comparing interactive and passive websites to telephone, mail, radio or magazine ads, long held by Illinois courts to be mere advertisements or solicitations, and thus, not sufficient to sustain personal jurisdiction.

In the second,³⁵ an unfair trade practices action, a Maine corporation brought suit against a defendant corporation in Illinois, whose only contact with Maine was through a website. The court rejected jurisdiction over the defendant based on the website connection, explaining that “[a] court cannot determine whether personal jurisdiction is appropriate simply by deciding whether an Internet web site is ‘passive’ or ‘interactive.’ Even an ‘interactive’ or commercial website may not be sufficient to support jurisdiction if it is not aimed at residents in the forum state. . . .”

A different question arises in the context of an online auction site. In this case, a California resident purchased an automobile from a Wisconsin corporation through eBay, and subsequently brought suit in California, alleging that the car was not in the condition described in the auction listing. The court held that the eBay seller did not seek to do business in California and there were insufficient contacts to justify personal jurisdiction over the defendant corporation in California. This conclusion was based largely on the fact that this was a one-time sale to a random purchaser who happened to reside in California, that the Wisconsin corporation did not use eBay as a platform for broader commercial activity, that there were no ongoing obligations between the parties, and that the contract of sale did not require the defendant corporation to engage in any substantial business in California. Therefore, the defendant did not meet the sufficient minimal contacts for the plaintiff to establish jurisdiction over the defendant corporation in California.³⁶

³² *Id.* at 1123, 1126.

³³ *Id.* at 1126.

³⁴ *Howard v. Mo. Bone & Joint Ctr., Inc.*, 373 Ill. App. 3d 738, 869 N.E.2d 207, 2007 Ill. App. LEXIS 414 at *13, 311 Ill. Dec. 533 (Ill. App. Ct. 5th Dist. 2007).

³⁵ *Auburn Mfg., Inc. v. Steiner Indus.*, 2007 U.S. Dist. LEXIS 47163 at *16–17.

³⁶ *Boschetto v. Hansing*, 539 F.3d 1011 (9th Cir. 2008).

Online universities have generally been held to be subject to personal jurisdiction in forum states where the university has advertised and accepted enrollment from students in that state. A federal district court in Ohio held that an Arizona-based online university was subject to personal jurisdiction in Ohio in an action by a student who alleged that she had been misled into signing up for the wrong classes by representatives of the university. In its decision, the Court stated that the university had “purposefully availed itself” of doing business with residents of the forum state by allowing students to use the university’s website to enroll in classes, receive course assignments, and order textbooks which are shipped to their homes from Arizona. In finding personal jurisdiction, Court also considered that the university had been in contact with approximately 1,000 Ohio residents and had repeated contacts with the plaintiff in this case.³⁷

4.3. Interactive Websites

Interactive websites are hybrid sites that contain elements of both passive and active websites. Interactive websites allow users to exchange information with the website creator, order products, make reservations, and conduct other business, often with a credit card. The owner of an interactive website will not necessarily be subject to the personal jurisdiction in a foreign state.³⁸ To make this jurisdictional determination, most courts look at “the level of interactivity and commercial nature of the exchange of information that occurs on the website,”³⁹ as well as whether the website owner targeted or aimed its efforts at the foreign state.⁴⁰

A website that facilitates the online purchase of a product is interactive because the parties can exchange information. However, courts have found that a website owner is not subject to personal jurisdiction in a foreign state unless a resident of the state has actually purchased the website owner’s product, or the website owner has specifically targeted residents of the foreign state.⁴¹ In other words, the test is not whether the website has the potential to reach people in

³⁷ *Perrow v. Grand Canyon Educ., Inc.*, 2010 U.S. Dist. LEXIS 9538 (S.D. Ohio Jan. 15, 2010). See also *Watiti v. Walden Univ.*, 2008 U.S. Dist. LEXIS 43217 (D.N.J. 2008); but see *Kloth v. Southern Christian Univ.*, 320 Fed. Appx. 113 (3d Cir. 2008) (no personal jurisdiction over online university where the university only had contact with two students in the forum state, and the university was unaware that the plaintiff resided in the forum state).

³⁸ *Snowney v. Harrah’s Entertainment*, 35 Cal. 4th 1054, 1063–64 (Cal. Sup. Ct. 2005); *Shamsuddin*, 346 F. Supp. 2d at 816–17; *Apollo Galileo USA P’ship v. American Leisure Holdings, Inc.*, 2009 U.S. Dist. LEXIS 11112, *11 (N.D. Ill. Feb. 11, 2009) (“courts have consistently refused to exercise jurisdiction based solely on the fact that reservations can be placed and purchased through a website”).

³⁹ *Zippo*, 952 F. Supp. at 1124.

⁴⁰ See *Spencer*, *supra* note 1, at 81. However, as noted in *Snowney* and *Shamsuddin*, there is some disagreement among the courts as to what level of website interactivity can confer personal jurisdiction. In addition, how a court makes the “targeting” assessment can differ from court to court. See generally *Spencer*, *supra* note 1.

⁴¹ *Just Enters., Inc. v. (888) Justice, Inc.*, 2007 U.S. Dist. LEXIS 9040 (W.D. Mo. Feb. 8, 2007) (website intentionally targeted Missouri residents). See *The Boppy Co. v. Luvee Prod. Corp.*, 2004 U.S. Dist. LEXIS 26475 (D. Colo. 2004) (holding that single purchase of a product by plaintiff’s counsel, and maintenance of website, which could be viewed by Colorado residents, was not enough to extend personal jurisdiction over the website creator in that state, even though the website was interactive, because the company did not seek out Colorado customers specifically); *Slocum Enter., Inc. v. New Generation Devices*, 2004 U.S. Dist. LEXIS 17044 (D. Or. 2004); *Millennium Enters., Inc. v. Millennium Music, L.P.*, 33 F. Supp. 2d 907 (D. Or. 1999) (although defendant maintained a website that allowed users to purchase products, jurisdiction would be improper because no transactions took place with Oregon residents and website owner made no deliberate and repeated attempts to target residents of Oregon through its website).

a particular state, but rather, whether the website owner has actually and deliberately used its website to reach out to residents of a particular state.⁴² Further, a potential plaintiff cannot create a basis for personal jurisdiction by purchasing a product through a website solely for the purpose of establishing a basis for an infringement action.⁴³

Tortious conduct on an active website creates a basis for personal jurisdiction if the website provides a sufficient link between the entity selling products through the site and the individuals in the forum state. A Delaware corporation was subject to jurisdiction in Connecticut under the state's long-arm statute for selling allegedly infringing products on its website. In deciding that the website was active, the court focused on the fact that the corporation did not have a physical store and that there was no human interaction involved in purchasing products from the website.⁴⁴

Similarly, a website that permitted consumers to purchase cigarettes in violation of three state statutes subjected the corporation to jurisdiction in Illinois. The court pointed to the facts that there were six separate sales to Illinois residents over a two-year period and that the website had the capability to exclude selling into certain states (the website would not allow sales to New York residents). Also, the suit arose directly from the Illinois-related activities of the corporation.⁴⁵

In a New Hampshire case, a California corporation was sued for using a Canadian company's photographs as part of the California company's website advertising.⁴⁶ To determine whether it would be proper to exercise personal jurisdiction over the California corporation, the New Hampshire court analyzed the level of interactivity between the company's website and New Hampshire's residents. The California corporation did not target New Hampshire residents and also did not sell to New Hampshire residents. Accordingly, the court found that the website's level of interactivity was so low that the website was, in fact, acting as a passive website. Therefore, the court would not exercise personal jurisdiction over the California corporation.⁴⁷

Additionally, a New York court refused to confer personal jurisdiction in that state where customers were not specifically targeted. In this case, defendants sold Indian music ringtones on their website. The plaintiffs argued that the defendants sought to target New Yorkers because many Indians live in New York. The court disagreed and held that the mere availability of an

⁴² *Dagesse v. Plant Hotel N.V.*, 113 F. Supp. 2d 211 (D.N.H. 2000) (holding that the website was interactive, but that plaintiffs failed to provide evidence that the website owner had used its website to conduct business with New Hampshire residents).

⁴³ *Chloe v. Queen Bee of Beverly Hills, LLC*, 571 F. Supp. 2d 518 (S.D.N.Y. 2008), 630 F. Supp. 2d 350 (S.D.N.Y. 2009).

⁴⁴ *Indiaweekly.com, LLC v. Nehaflix.com*, 2008 U.S. Dist. LEXIS 18056 (D. Conn. 2008).

⁴⁵ *Illinois v. Hemi Group, LLC*, 2008 U.S. Dist. LEXIS 80503 (C.D. Ill. 2008).

⁴⁶ *ICP Solar*, 413 F. Supp. 2d at 12, 21–22.

⁴⁷ *Id.* at 18.

Internet site to a group of individuals does not, without more, constitute “purposeful availment” to those customers.⁴⁸

Similarly, a Pennsylvania court determined that where a foreign corporation’s website merely provides a means to convey and exchange information, and residents of the forum state cannot enter into contracts or purchase services via that website, the interactions between the company and residents of the forum are not considered to be “substantial and continuous.” To conclude otherwise would effectively allow any corporation with a passive website to be subject to general jurisdiction in every state, and would impose little restraint on the court’s ability to exercise jurisdiction over every entrepreneur offering goods or services for sale on the Internet.⁴⁹

In another case, a Nevada casino was not subject to jurisdiction in Illinois in a tort action brought by a patron who had fallen at the casino. The plaintiff claimed that because the Nevada casino had a website that the patron could view from her home in Illinois, the casino had sufficient contacts with Illinois to be sued there. The court disagreed. Its conclusion was based on the nature of the plaintiff’s cause of action and the fact that the casino’s website only provided information. The court explained that because the website was passive, and the information was not directed at Illinois residents, the casino did not have sufficient minimal contacts with Illinois for the plaintiff to establish jurisdiction over the casino there.⁵⁰

Many courts have found that businesses that have benefited from contacts with a state can be subject to personal jurisdiction in that state. For example, a hotel website that advertised its close proximity to a particular state and provided on its website driving directions to the hotel on the hotel’s website was subject to personal jurisdiction in that state.⁵¹ However, merely deriving financial benefit from a foreign state does not necessarily result in a court’s finding that a defendant is subject to personal jurisdiction. Courts may also assess the amount of financial benefit a corporation receives from a foreign state.

For example, in a patent infringement case, a Michigan court found that a single Internet sales transaction representing a small portion of the company’s total revenue did not justify the exercise of personal jurisdiction over a company.⁵² In that case, the court addressed a patent infringement claim. The sole connection between the company and Michigan involved the sale of approximately \$4,000 worth of a product, which represented less than 0.25 percent of the

⁴⁸ *Jash Raj Films (USA), Inc. v. Dishant.com LLC*, 2009 U.S. Dist. LEXIS 116431 (E.D.N.Y. Dec. 15, 2009); *Royalty Network, Inc. v. Dishant.com LLC*, 638 F. Supp. 2d 410 (S.D.N.Y. 2009).

⁴⁹ *Nationwide Contractor Audit Serv., Inc. v. National Compliance Mgmt. Servs., Inc.*, 2008 U.S. Dist. LEXIS 45370 (W.D. Pa. 2008); *See also Cossaboon v. Maine Med. Ctr.*, 2009 DNH 38, 2009 U.S. Dist. LEXIS 29905 (D.N.H. Mar. 31, 2009) (no personal jurisdiction where hospital’s website merely provides general information, accepts donations and registration information for hospital events).

⁵⁰ *Linehan v. Golden Nugget*, 2008 U.S. Dist. LEXIS 83619 (N.D. Ill. 2008).

⁵¹ *Snowney v. Harrah’s Entertainment, Inc.*, 112 P.3d 28 (Cal. 2005), *cert denied*, 126 S. Ct. 659 (2005).

⁵² *McGill Tech. Ltd. v. Gourmet Tech., Inc.*, 300 F. Supp. 2d 501 (E.D. Mich. 2004).

company's annual sales. The court determined that this level of contact failed to satisfy the "minimum contacts" requirement for the exercise of personal jurisdiction.

Similarly, in another patent infringement case, a Louisiana court ruled that it did not have jurisdiction over a company that ran an interactive website that generated over \$32,000 in sales from Louisiana customers.⁵³ Although the sales resulted from what was likely hundreds of transactions originating in Louisiana, the sales represented only .00008 percent of the company's total sales. Therefore, the Louisiana court held that the "minimum contacts" required for the exercise of personal jurisdiction were not present in this case.

In stark contrast, a California federal court held that a New York corporation that sold a spam elimination service through its website was subject to personal jurisdiction. There, the sole purpose of the website was to promote and sell the service. Four percent of the company's customers lived in California and that generated \$1,200 in annual sales, which represented about 4 percent of the corporation's revenue.⁵⁴

Courts have used factors other than the amount of sales generated by customers in the forum state in its decision whether to assert personal jurisdiction over a defendant. For example, one federal court in Connecticut based its decision solely on the interactivity of the defendant's website. In that case, the court conferred personal jurisdiction over a defendant that operated a website that sold wine to customers nationwide. Defendant's estimated sales from Connecticut residents were a mere one quarter of one percent of the defendant's estimated yearly revenue. Additionally, state law prevented defendant from shipping wine into Connecticut. Nonetheless, the court conferred personal jurisdiction over the defendant because any Connecticut resident could purchase wine from the defendant's website, even if it could not be shipped to the customer's address in Connecticut.⁵⁵

⁵³ *Hockerson-Halberstadt, Inc. v. Propet USA, Inc.* 2003 U.S. App. LEXIS 7277 (Fed. Appx. Apr. 1, 2003).

⁵⁴ *Webzero, LLC v. Clicvu, Inc.*, 2008 U.S. Dist. LEXIS 33124 (C.D. Cal. 2008). See also *Willyoung v. Colorado Custom Hardware, Inc.*, 2009 U.S. Dist. LEXIS 91557 (W.D. Penn. Sept. 30, 2009).

⁵⁵ *ICG America, Inc. v. Wine of the Month Club, Inc.*, 2009 U.S. Dist. LEXIS 77151, *11 (D. Conn. Aug. 28, 2009). See also *Food Sciences Corp v. Nagler*, 2010 U.S. Dist. LEXIS 27236 (D.N.J. Mar. 22, 2010) (a small number of sales to residents of the forum state resulting from the ordinary operation of a business' website can be sufficient for jurisdiction).