



# Personal Jurisdiction and the Internet

An Article discussing the factors that US courts consider in determining whether a foreign company's website may subject it to personal jurisdiction in the US.

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The internet has allowed companies to expand their market base into many countries with minimal effort. However, they may not realize that their commerce with customers in the US may subject them to the jurisdiction of US courts even if they have no other contacts in the US. Although this area of the law continues to evolve, the current US trend is to permit the exercise of jurisdiction over a company whose website allows a buyer to complete a transaction, but not over one whose site is informational only. This Article discusses the factors that US courts consider in determining whether a foreign company's website may subject it to personal jurisdiction in the US.

## PERSONAL JURISDICTION: BASIC LEGAL FRAMEWORK

The jurisdiction of US federal and state courts is a complicated subject beyond the scope of this Article. Generally, US courts may exercise personal jurisdiction over foreign defendants under one of two theories:

- General jurisdiction.
- Specific jurisdiction.

### General Jurisdiction

General jurisdiction allows US courts to hear claims against a defendant that either:

- Is physically present within the forum state, such as a company that maintains an office and phone listing there.
- Engages in continuous and systematic business activities within the forum state, even if the defendant does not have a physical presence there.

A defendant that is subject to general jurisdiction in the forum state may be sued there for any domestic cause of action occurring anywhere in the world.

### Specific Jurisdiction

Specific jurisdiction allows US courts to hear claims against a defendant who is not present within the forum state, if both:

- The defendant has "minimum contacts" with the forum.
- Those contacts give rise to the plaintiff's claims.

In most cases, the minimum contacts necessary for jurisdiction are contained in each state's long arm statutes (so named because they allow states to exercise jurisdiction over defendants who are physically outside of the state's boundaries). The application of these statutes is limited, however, by the Due Process Clause of the Fourteenth Amendment of the US Constitution. Under the Due Process Clause (as interpreted by the US Supreme Court), the forum court's exercise of jurisdiction must be reasonable given the defendant's contacts with the forum.

A defendant that is only subject to specific jurisdiction in the forum state may be sued there only for wrongdoing related to its contacts with that state.

## WHEN INTERNET ACTIVITY MAY SUBJECT A FOREIGN COMPANY TO US JURISDICTION

The US Supreme Court has not yet decided when a foreign company's internet activity may subject it to personal jurisdiction in the US. However, various lower courts have addressed this issue. In determining whether a company's internet activity may subject it to personal jurisdiction in a particular forum, courts apply the traditional legal framework for deciding personal jurisdiction questions (see *Personal Jurisdiction: Basic Legal Framework* ([www.practicallaw.com/1-502-4095](http://www.practicallaw.com/1-502-4095))). Courts have, however, identified a spectrum of internet activity that may (or may not) provide sufficient contacts to subject a foreign company to jurisdiction in the US. This spectrum consists of:



- Interactive websites.
- Passive websites.
- Mid-range websites.

### Interactive Websites

Interactive websites allow visitors to purchase goods or services online or otherwise enter into a binding relationship with the web host. Courts are most likely to find jurisdiction over a foreign company whose website is interactive. In determining whether to exercise personal jurisdiction over a foreign defendant based on its internet activity, courts consider both the:

- Level of interactivity that the website allows.
- Number of residents from the forum state who have interacted with the website.

Evidence that the foreign company uses the website to solicit business in the forum state (for example, by requesting its visitors to provide an e-mail address or other marketing information) may also weigh in favor of finding personal jurisdiction.

### Passive Websites

On the other end of the spectrum, a passive website merely advertises or posts information and is unlikely to subject a foreign company to US jurisdiction. A website is truly passive when there is no available method to contact the web host online. A passive site often provides traditional contact information (such as the host's telephone number and address) that requires a visitor to contact the host in the host's home jurisdiction. Generally, a US customer's ability to access passive websites does not give rise to a finding of personal jurisdiction because these websites do not demonstrate that the company "purposely availed" itself of the privilege of doing business in the US (a requirement for personal jurisdiction under the due process analysis). In addition, a passive website does not constitute "presence" within the US.

### Mid-range Websites

In the middle of the spectrum, mid-range websites fall short of allowing a customer to purchase goods or services online, but do allow for some information to be exchanged.

Examples of mid-range website features include:

- Links to the company's e-mail address.
- Electronic messaging systems such as "chatting" functions.
- The ability to send proposed online orders or reservations, but not actually place a binding order online.
- Links to local affiliates inside the forum jurisdiction who may complete the transaction.

Whether a US court may exercise jurisdiction over a foreign company based on its mid-range website depends on the specific facts of the case. Courts generally consider the level of interactivity and the commercial nature of the information being exchanged. The plaintiff may also have to show a connection between its underlying legal claim, the website and the forum jurisdiction.

## AVOIDING UNINTENTIONAL EXPOSURE TO US JURISDICTION

Foreign companies can avoid unintentionally exposing themselves to jurisdiction in the US by planning ahead. For example, a foreign company can reduce its jurisdictional exposure by prohibiting customers in the US from completing transactions through its website (and prominently stating this on its website). If a foreign company is sued in a US court and the company's website is its only connection to the US, the company should evaluate whether to ask the court to dismiss the case for lack of personal jurisdiction. If the company chooses to seek dismissal on jurisdictional grounds, it must articulate (and defend) several aspects of its internet activity, including:

- The function and mechanics of its website.
- Any promotion of its website to US customers.
- The actual usage of its website by US customers.

In addition, the company must develop a persuasive affidavit (or declaration) from a knowledgeable company witness that explains the limited function of the company's website. The witness should be someone who would be effective testifying live, because he may be deposed by plaintiff's counsel and possibly have to appear to testify at a court hearing.