
U.S. Court of Appeals for the Ninth Circuit Clarifies When Website Operators are Subject to Personal Jurisdiction

Courts are increasingly being asked to decide when website operators are subject to personal jurisdiction, a potentially vexing problem, because websites generally lack a specific location and can be accessed from almost anywhere in the world. In two recent decisions, the United States Court of Appeals for the Ninth Circuit has provided guidance on when website operators are subject to jurisdiction and the relevant legal test that applies in such cases.

In July 2023, in *Herbal Brands, Inc. v. Photoplaza, Inc.*, the Ninth Circuit held that selling a physical product from a website and causing the product to be delivered to the forum is sufficient to establish personal jurisdiction in the forum with regard to the sale of the product.¹ In doing so, the court joined the Second and Seventh Circuits, which have reached similar conclusions.² Several months later, in *Briskin v. Shopify*, the court held that extracting and retaining customer data and tracking online purchasers in a forum is not, by itself, a sufficient basis to establish personal jurisdiction in the forum.³

These two decisions by the Ninth Circuit were narrow and did not address other types of activities that would be sufficient to establish personal jurisdiction, including whether knowingly profiting from consumers in the forum state or having a certain threshold of sales and deliveries would confer jurisdiction, leaving those questions to be resolved in the future.

I. Background: Personal Jurisdiction Over Website Operators

To exercise personal jurisdiction over out-of-state defendants, courts typically must have specific jurisdiction or “case-linked” jurisdiction.⁴

¹ 72 F.4th 1085, 1088–89 (9th Cir. 2023), *cert. denied*, 2024 WL 218786 (U.S. Jan. 22, 2024).

² See *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 165, 171–72 (2d Cir. 2010) (holding that a defendant’s conduct was purposefully directed toward New York because the defendant offered bags for sale on its website to New York customers and shipped at least one bag to a New York customer); *NBA Properties, Inc. v. HANWJH*, 46 F.4th 614, 624–25, 627 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 577 (2023) (holding that the defendant purposefully directed its conduct at Illinois where it sold a single infringing product to an agent of the plaintiff who was an Illinois resident).

³ 87 F.4th 404, 409 (9th Cir. 2023).

⁴ Courts may also exercise general jurisdiction over out-of-state defendants, but this is relatively rare, as it requires “affiliations with the State [that] are so ‘continuous and systematic’ as to render [the out-of-state defendant] essentially at home in the forum State.” See *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014). Courts may also exercise jurisdiction by consent. See *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 138

In the internet context, courts have traditionally used the “interactivity” test first articulated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*⁵ to determine whether a website operator is subject to personal jurisdiction for online activity. The *Zippo* interactivity test considers the degree of interaction between a website and its users.⁶ Under this test, a website that exchanges information with a user, such as payment information or some other transaction, is an “interactive website” and is more likely to be subject to the exercise of jurisdiction.⁷ A website that merely posts information accessible to viewers is a “passive” website and is less likely to be subject to personal jurisdiction in the forums where users access the site.⁸

In recent years, courts have moved away from the *Zippo* test. In 2014, the U.S. Supreme Court held in *Walden v. Fiore* that a defendant could only be subject to specific jurisdiction if there was a “relationship among the defendant, the forum, and the litigation” that arises out of or relates to contacts that the “defendant *himself* creates with the *forum*.” Contacts created merely by interacting with residents of the forum are insufficient.⁹ The *Walden* Court did not address when a defendant’s virtual contacts with a forum are sufficient to subject it to jurisdiction,¹⁰ but lower courts have since attempted to apply the lessons of *Walden* in the internet context.

Courts generally agree that simply hosting a website that permits orders to take place from anywhere in the country is not sufficient by itself to give rise to personal jurisdiction over such website operators in every state.¹¹ Courts have taken varying approaches, however, when determining what additional activities give rise to personal jurisdiction.

For example, the Second and Seventh Circuits have held that hosting an interactive website and shipping a single item into a forum can confer jurisdiction over an online retailer in the forum with regard to the product sold.¹² The Fifth and Eighth Circuits require something more — such as targeted advertising in the forum — to tie the defendant to the forum.¹³ The Fourth Circuit, in contrast, has adopted a more expansive view, holding that a website operator can be sued in a forum in which its website is frequently accessed.¹⁴

(2023) (“an out-of-state corporation that *has* consented to in-state suits in order to do business in the forum is susceptible to suit there” (quoting *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93 (1917))).

⁵ 952 F. Supp. 1119, 1124–25 (W.D. Pa. 1997).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 571 U.S. 277, 284–86 (2014) (“Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the ‘random, fortuitous, or attenuated’ contacts he makes by interacting with other persons affiliated with the State.”).

¹⁰ *Id.* at 290, n.9.

¹¹ See, e.g., *Admar International, Inc. v. Eastrock, L.L.C.*, 18 F.4th 783, 787 (5th Cir. 2021); *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1204–06 (9th Cir. 2020).

¹² See *Chloe*, 616 F.3d 158, 165, 171–72; *NBA Properties, Incorporated*, 46 F.4th 614, 624–25, 627.

¹³ See, e.g., *Admar International, Inc.*, 18 F.4th at 787–88, 788 n.1 (suggesting that the isolated sale of a single product to a forum resident would be insufficient to support the exercise of jurisdiction when the defendant did not solicit business through targeted advertising); *Brothers and Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948 (8th Cir. 2022) (holding that a delivery of a single tee shirt was not sufficient to establish Missouri’s jurisdiction).

¹⁴ See *UMG Recordings, Inc., v. Kurbanov*, 963 F.3d 344 (4th Cir. 2020).

The Ninth Circuit applies a three-part inquiry to determine if the defendant had “minimum contacts” to warrant the exercise of specific jurisdiction: “(1) the defendant must either ‘purposefully direct his activities’ toward the forum or ‘purposefully avail[] himself of the privileges of conducting activities in the forum;’ (2) the claim must be one which arises out of or relates to the defendant’s forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.”¹⁵ In *AMA Multimedia, LLC v. Wanat*, for example, a Nevada company accused a Polish national of copyright infringement, trademark infringement, and unfair competition for re-posting the company’s copyrighted videos on his own website and geolocating unique advertisements to United States-based users of the website.¹⁶ The Ninth Circuit held that operating an interactive website was not enough to justify exercising jurisdiction and went on to analyze whether the defendant purposefully directed its activities at the forum under the “effects test” from *Calder v. Jones*.¹⁷ The effects test requires a showing that the defendant “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.”¹⁸ The court in *AMA Multimedia* concluded that the defendant did not expressly aim intentional acts at the United States, because the website did not maintain a specific focus on the United States, as 80% of viewers were international.¹⁹

II. The Ninth Circuit’s Decision in *Herbal Brands*

In *Herbal Brands*, the Ninth Circuit revisited its test for establishing specific jurisdiction over website operators.²⁰ Plaintiff Herbal Brands was a direct-to-consumer health, wellness, fitness, and nutrition brand with its principal place of business in Arizona.²¹ Herbal Brands sold its products via third-party resellers who contracted to become “Authorized Sellers.”²² Defendants were New York-based unauthorized third-party resellers of Herbal Brands products, who operated two Amazon storefronts.²³ Defendants allegedly used their Amazon storefronts to sell Herbal Brands’ products without permission.²⁴ Herbal Brands estimated that the defendants made approximately 23,000 sales of its products, some of which were sold to Arizona-based customers.²⁵ After receiving three cease-and-desist letters stating that the defendants’ sales harmed Herbal Brands and subjected it to liability in its home state of Arizona due to the absence of quality control checks, the defendants continued to sell the products in Arizona

¹⁵ See *AMA Multimedia, LLC*, 970 F.3d at 1208.

¹⁶ *Id.* at 1204–06.

¹⁷ *Id.* at 1204–06, 1208–09.

¹⁸ *Id.* at 1208–09 (citing *Calder v. Jones*, 465 U.S. 783 (1984)).

¹⁹ *Id.* at 1210–12. The court assessed defendant’s contacts with the United States as a whole because it used Federal Rule of Civil Procedure 4(k)(2), known as the “federal long-arm statute,” which permits the exercise of personal jurisdiction over an out-of-state defendant when the claim against the defendant “arise[s] under federal law,” the defendant is not “subject to the personal jurisdiction of any state court of general jurisdiction,” and “the federal court’s exercise of personal jurisdiction . . . comport[s] with due process.” *Id.* at 1207–08 (“The due process analysis under Rule 4(k)(2) is nearly identical to traditional personal jurisdiction analysis with one significant difference: rather than considering contacts between [defendant] and the forum state, we consider contacts with the nation as a whole.”).

²⁰ 72 F.4th at 1088.

²¹ *Id.*

²² *Id.*

²³ *Id.* (Defendants are Photoplaza Inc., Goldshop 300 Inc., Goldshop Inc., InStock Goodies Inc., Tzvi Heschel, Shloma Bichler, and Lali Dats).

²⁴ *Id.* at 1088–89.

²⁵ *Id.*

and nationally.²⁶ Defendants did not affirmatively try to prevent customers in Arizona from purchasing the Herbal Brands products available on their storefronts.²⁷

Herbal Brands brought claims for trademark infringement, unfair competition, and false advertising under the Lanham Act, and for tortious interference with contracts and business relationships under Arizona law in the U.S. District Court for the District of Arizona.²⁸ Defendants did not submit evidence or affidavits to contradict Herbal Brands' allegations and moved to dismiss for lack of personal jurisdiction in June 2021.²⁹ The District Court granted the motion to dismiss in November 2021, finding Herbal Brands had failed to show that the defendants expressly aimed their conduct at Arizona.³⁰ Herbal Brands appealed to the Ninth Circuit.³¹

The Ninth Circuit reversed and concluded that there was jurisdiction.³² Applying *Walden* and *Calder*, the court held that the defendants purposefully directed their activities at Arizona by committing an intentional act, expressly aimed at Arizona, causing harm that Defendants knew was likely to be suffered in Arizona.³³ Specifically, the court found that the defendants committed an intentional act by selling Herbal Brands' products to Arizona customers and knew that their actions caused harm to Herbal Brands in Arizona due to the cease-and-desist letters that informed the defendants of this fact.³⁴

The Ninth Circuit further found that the defendants "expressly aimed" their conduct at Arizona because the defendants operated an interactive website "in conjunction with 'something more.'"³⁵ Selling infringing products via an interactive website and causing the infringing products to be delivered to forum residents was the necessary "something more" to establish "express aiming" by the defendants.³⁶ As the court explained, a defendant "purposefully direct[s]" its conduct at a forum such that "the exercise of [specific] personal jurisdiction may be appropriate" if, as part of the normal course of business, the defendant "sells a physical product via an interactive website and causes that product to be delivered to the forum."³⁷

The court described its ruling as "narrow," stating that it did not address other jurisdictional questions based on different facts, such as whether the outcome would be different if a defendant did not sell directly to consumers, but instead to a third party with no knowledge of that third party's intent to sell to a particular forum.³⁸

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1089.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1097.

³³ *Id.* at 1090–91 ("The *Calder* effects test asks 'whether the defendant: (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state'" (quoting *Will Co. v. Lee*, 47 F.4th 917, 922 (9th Cir. 2022))).

³⁴ *Id.* at 1091.

³⁵ *Id.* at 1092.

³⁶ *Id.* at 1092–94. The court also held that Herbal Brands' claims of harm arose out of the defendants' conduct of selling products to Arizona residents, and that the exercise of jurisdiction would be reasonable. *Id.* at 1096–97.

³⁷ *Id.* at 1088.

³⁸ *Id.* at 1093–96.

III. The Ninth Circuit's Decision in *Shopify*

In *Shopify*, plaintiff Brandon Briskin, a California resident, purchased fitness apparel from the website of California-based retailer IABMFG while present in California.³⁹ IABMFG's website used software from defendant Shopify, Inc., a Canadian, web-based platform, to process customer orders and payments.⁴⁰ Allegedly unbeknownst to plaintiff, Shopify obtained, analyzed, stored, and shared plaintiff's personal identifiable information and credit card information, as it does for all customers that use its merchants' websites.⁴¹ Shopify also installed cookies onto plaintiff's iPhone, the device on which he made the purchases, connected to his browser, and shared plaintiff's information with its business partners.⁴²

In August 2021, plaintiff filed a putative class action in the U.S. District Court for the Northern District of California, alleging that Shopify deliberately concealed its involvement in the transaction and thus violated California privacy and unfair competition laws.⁴³ The court dismissed the complaint for lack of personal jurisdiction.⁴⁴ Plaintiff appealed.⁴⁵

The Ninth Circuit affirmed the dismissal. It held that when a nationwide, web-based payment platform is "indifferent" to the location of customers, extracting and retaining customer data, without more, does not subject the platform to specific jurisdiction in the forum where the purchase was made.⁴⁶

Applying the *Calder* effects test to assess purposeful direction, the court held that Shopify committed intentional acts by "generating payment forms, executing code on consumers' devices, creating consumer profiles, processing consumer information, installing cookies, and sharing payment information" and that plaintiff had sufficiently alleged that Shopify caused "privacy-related harm" in California.⁴⁷ The court's decision, however, turned on whether Shopify "expressly aimed" its activities at California.⁴⁸

The Ninth Circuit reviewed its prior case law addressing jurisdiction over websites and gleaned three principles from it.⁴⁹ First, a broadly accessible web-based platform knowingly profiting from users in the forum state is not, by itself, enough to demonstrate that a platform "expressly aim[ed]" its activities at the forum.⁵⁰ Second, a web-based platform satisfies the express aiming requirement where the platform has a "forum-specific focus," by actively

³⁹ *Shopify*, 87 F.4th at 409.

⁴⁰ *Id.* at 409–10.

⁴¹ *Id.*

⁴² *Id.* at 410.

⁴³ *Id.* ("The complaint defined the proposed class as '[a]ll natural persons who, between August 13, 2017 and the present, submitted payment information via Shopify's software while located in California'").

⁴⁴ *Id.* at 410–11.

⁴⁵ *Id.*

⁴⁶ *Id.* at 409.

⁴⁷ *Id.* at 412; *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011) (citing *Calder*, 465 U.S. 783 ("the *Calder* effects test")).

⁴⁸ *Shopify*, 87 F.4th at 412–13, 416–17 ("[u]nder *Walden*, it is the defendant's contacts with the forum state, not the plaintiff's, that matter, and it is the defendant's contacts with the state itself, and not persons there, that must drive the inquiry;" "Petitioner's actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections" (quoting *Walden*, 571 U.S. at 289)).

⁴⁹ *Id.* at 417–420.

⁵⁰ *Id.* at 417, 419 ("Were it otherwise, 'every time a seller offered a product for sale through an interactive website, the seller would be subjecting itself to specific jurisdiction in every forum in which the website was visible.'" (quoting *Herbal Brands, Inc.*, 72 F.4th at 1091)).

targeting the forum or cultivating “an audience in the forum.”⁵¹ Citing *Walden*, the court explained that there must be “prioritization,” “differentiation,” or “focused dedication” of the forum state and “something substantial beyond” a platform’s mere internet presence.⁵² Third, how the platform structures its business is relevant to the inquiry.⁵³ For example, a platform employing third parties without controlling their actions is less indicative of a platform “expressly aiming” activities at the forum because it invites “a greater degree of attenuation between the plaintiff’s injuries and the [platform’s] jurisdictional contacts.”⁵⁴

Applying these principles, the Ninth Circuit concluded that Shopify had not expressly aimed its activities at California, as Shopify’s platform did not reflect a forum-specific focus.⁵⁵ Plaintiff did not allege that Shopify prioritized, cultivated, targeted, or attempted to appeal to California users, or altered its information collection based on users’ locations.⁵⁶ Shopify is accessible nationwide, regardless of the location of the merchant or customer, and plaintiff would have had the same injury if he had not been in California, as Shopify extracts personal data from customers “*wherever located*.”⁵⁷ Plaintiff’s injuries were “entirely personal to him” and would follow him wherever he resided.⁵⁸

IV. Conclusion

The Ninth Circuit in *Herbal Brands* and *Shopify* continued the trend of courts moving away from the traditional *Zippo* test for determining whether there is jurisdiction over a website operator and provided guidance on the circumstances in which website operators can be subject to jurisdiction. In the Ninth Circuit, the direct sale of a product purchased from a website into the forum is enough to subject a website operator to jurisdiction with regard to the product purchased. Collecting customer data of a forum resident, by itself, however, is not enough to establish personal jurisdiction. But the Ninth Circuit suggested that extraction and retention of consumer data might qualify as express aiming in conjunction with a web-based platform that is “set up differently” than the one at issue here.⁵⁹ The court’s analysis indicated that an online payment platform that extracts and retains consumer data while also placing a “physical” product in a forum, focusing its efforts on a specific location, or interacting directly with consumers may be sufficient to trigger personal jurisdiction.

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⁵¹ *Id.* at 419–20 (“This express aiming can be shown in different ways, such as through the subject matter of the website, . . . the defendant’s advertising, . . . or other aspects of its business model” (citing *AMA Multimedia, LLC*, 970 F.3d at 1210–11; *Mavrix Photo, Inc.*, 647 F.3d at 1230–31; and *Will Co.*, 47 F.4th 917 at 923–25)).

⁵² *Id.* at 420 (citing *Walden*, 571 U.S. at 284).

⁵³ *Id.* (citing *AMA*, 970 F.3d at 1211).

⁵⁴ *Id.*

⁵⁵ *Id.* at 422.

⁵⁶ *Id.*

⁵⁷ *Id.* at 422–23.

⁵⁸ *Id.* (quoting *Picot v. Weston*, 780 F.3d 1206, 1215 (9th Cir. 2015)).

⁵⁹ *Id.* at 434.

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