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UNCHARTERED TERRITORY: PERSONAL JURISDICTION IN THE INTERNET AGE

I. INTRODUCTION

As the Internet becomes more pervasive in the lives of Americans, the legal issues arising from this new mode of communication and commerce are endless. A South Carolina district court recently addressed the issue of the exercise of personal jurisdiction over a nonresident corporation based primarily on the maintenance of a web page in *ESAB Group, Inc. v. Centricut, L.L.C.*¹ The court held that the defendant, a nonresident corporation, was not subject to either the general or specific personal jurisdiction of the court by merely maintaining a web page and selling one electrode that allegedly infringed the plaintiff's patent.² Other federal and state courts have analyzed the issue of personal jurisdiction based on the Internet in different ways,³ and the United States Supreme Court has yet to address the issue.

The Internet began in 1969 as ARPANET, an "experimental project" of the Advanced Research Project Agency (ARPA).⁴ The Internet grew to fifty-

1. 34 F. Supp.2d 323 (D.S.C. 1999).

2. *Id.* at 329, 332-34. The patent involved covered "an improved electrode for use in connection with plasma arc torches . . . [that] are commonly utilized for cutting, welding and surface treatment of metals." *Id.* at 326.

3. *See, e.g., CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996) (stating that sending computer software, advertising on CompuServe's system in the forum state, and sending computer messages subjected the defendant to the court's jurisdiction); *State v. Granite Gate Resorts, Inc.*, No. C6-95-7227, 1996 WL 767431, at *10 (D. Minn.1996) (finding that the website alone was sufficient for jurisdiction). *But see, e.g., Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997) (finding that simply placing an infringing logo on its website was not enough to subject the defendant to the court's jurisdiction); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (holding that the maintenance of a passive website did not provide jurisdiction).

4. *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996). ARPANET was primarily used to link military computers and other computers involved in "defense-related research." *Id.* It eventually grew to include universities, corporations, and people throughout the world. *Id.* ARPANET came to be known as "DARPA Internet," and then simply the "Internet." *Id.* The Internet was at first designed to allow computers to link together for communication without "direct human involvement or control, and with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable." *Id.* This linkage would allow communications to continue in the event of a war or natural catastrophe; a network of linked computers throughout various states would provide numerous paths for the communication if one of the linked computers was destroyed. *Id.* The communication would then be re-routed automatically. *Id.* at 832. ARPANET eventually ceased to exist; however, it was replaced with a similar system linking computers globally. *Id.* This new system is "today commonly known as the Internet." *Id.*

million users in the first four years it was available to the general public.⁵ It continued to grow, reaching forty-million users in 1996, one hundred-million users in 1998, and two hundred-million users by 1999.⁶ Some experts estimate there will be one-billion users by 2005.⁷ This explosion in the number of Internet users will only add to the problem of determining personal jurisdiction in cases where website information can be accessed anywhere in the world.

The advent of the Internet creates novel problems for the courts. In particular:

The explosive rise of the Internet as a communications medium has had tremendous implications for courts faced with the application of personal jurisdiction doctrines. While other technologies have allowed people to communicate across great distances, no other medium has made such communication so inexpensive, easy to use and rapid.⁸

Thus, the nature of the Internet creates problems in applying the traditional personal jurisdiction analysis. This Note explores what level of Internet activity is enough for a South Carolina court to exercise personal jurisdiction over a nonresident defendant. Part II of this Note provides a background of the Supreme Court cases that define the exercise of personal jurisdiction by the courts today, and it also provides a detailed description of the facts and the court's holding in *ESAB Group, Inc. v. Centricut, L.L.C.*⁹ Part III analyzes the approach most likely to be taken by the South Carolina courts in light of the *ESAB Group* decision.

The Internet is referred to analogously as "a highway, consisting of many streets leading to places where a user can find information." Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 JURIMETRICS J. 575, 581 (1998) (citing *Edias Software Int'l, L.L.C. v. Basis Int'l Ltd.*, 947 F. Supp. 413, 419 (D. Ariz. 1996)). Web pages are placed on the Internet that can be accessed by individuals having the ability to connect to the network. Typically, one accesses the Internet via a computer that is permanently connected to the Internet or through a personal computer and a modem. *ACLU*, 929 F. Supp. at 832. People can pay a monthly fee to connect to the Internet by using an Internet service provider, such as America Online or Mindspring, among countless others. *Id.* at 833.

5. Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 925 (1998) (citing SECRETARIAT ON ELECTRONIC COMMERCE, U.S. DEP'T OF COMMERCE, THE EMERGING DIGITAL ECONOMY 4). [hereinafter COMMERCE DEP'T REP.]

6. *Id.* at 926 (citing *ACLU v. Reno*, 521 U.S. 844, 850 (1997)).

7. *Id.* (citing COMMERCE DEP'T REP. at 7).

8. Jason H. Eaton, Annotation, *Effect of Use, or Alleged Use, of Internet on Personal Jurisdiction in, or Venue of, Federal Court Case*, 155 A.L.R. FED. 535, 535 (1999).

9. 34 F. Supp.2d 323 (D.S.C. 1999)

II. TRADITIONAL PERSONAL JURISDICTION ANALYSIS

A. *The Basics*

In order to exercise personal jurisdiction over a party, a court must comply with the state's long-arm statute and the Due Process Clause of the Fourteenth Amendment.¹⁰ The courts can exercise one of two types of personal jurisdiction over defendants: general or specific.¹¹ A court may exercise specific jurisdiction over a defendant when the lawsuit relates to the defendant's activity within the forum state; a court will exercise general jurisdiction over a defendant when the lawsuit arises out of the defendant's activity outside of the forum state.¹²

In order to exercise general jurisdiction over a defendant, the defendant's contacts with the forum state must be "continuous and systematic."¹³ The United States Supreme Court found the defendant's contacts in *Perkins v. Benguet Consolidated Mining Co.* sufficient to give rise to general jurisdiction.¹⁴ In contrast, the Court in *Helicopteros Nacionales de Columbia, S.A. v. Hall*¹⁵ found that the defendant's contacts with the forum state were insufficient to subject the defendant to general jurisdiction.¹⁶ That particular defendant bought helicopters, sent pilots to be trained, and maintained a bank account in the forum state.¹⁷ The contacts in *Helicopteros* were not found to be continuous and systematic, though the defendant clearly had substantial contacts with the forum state.¹⁸ Based on these cases, a defendant must have a substantial presence in a forum state and probably remain there to be subject to that forum's general jurisdiction.

The original basis for the exercise of personal jurisdiction was the territorial concept provided by the Supreme Court in *Pennoyer v. Neff*.¹⁹ The

10. The question of a court's jurisdiction under the long-arm statute or Due Process Clause is integrated because "the South Carolina long-arm statute has been construed to extend jurisdiction 'to the outer limits' of due process . . . [t]he state law and due process analyses are therefore identical." *Federal Ins. Co. v. Lake Shore, Inc.*, 886 F.2d 654, 657 n.2 (4th Cir. 1989).

11. Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (clarifying the difference between general and specific jurisdiction).

12. *Id.*

13. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-48 (1952).

14. *Id.* at 448. The president of Benguet Consolidated Mining maintained an office, kept company files, held directors' meetings, and had bank accounts in Ohio. *Id.* at 447-48.

15. 466 U.S. 408 (1984).

16. *Id.* at 411.

17. *Id.*

18. *Perkins*, 342 U.S. at 438.

19. 95 U.S. 714, 720 (1877) (holding that in order to be subject to personal jurisdiction, a defendant must be within the state, waive jurisdiction, own property, or be a resident).

Court in *International Shoe Co. v. Washington*²⁰ provided the framework for the modern rule of personal jurisdiction—the “minimum contacts” test. The Court stated that “due process requires only that . . . if [the defendant] be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”²¹ The current application of the minimum contacts test was introduced in *World-Wide Volkswagen Corp. v. Woodson*,²² in which the Court held that a corporate defendant must purposefully avail itself of the privileges and benefits of the forum state so that the defendant will have notice that it may be sued in that forum.²³

In addition to the purposeful availment test adopted by the court in *World-Wide Volkswagen*, a court must also analyze whether it is fair and reasonable to exercise personal jurisdiction over the defendant.²⁴ The Court in *Burger King Corp. v. Rudzewicz* stated: “Once it has been decided that a defendant purposefully established minimum contacts with the forum State, these contacts may be considered in light of other factors”²⁵ Those factors include

the burden on the defendant, the forum State’s interest in adjudicating the dispute, the plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies.²⁶

These factors can shift the scale to either side. If a defendant has purposefully availed herself of the privileges and benefits of a forum, she “must present a compelling case” that the presence of some other considerations would render jurisdiction unreasonable.²⁷

An exception to the minimum contacts rule exists in the case of torts when the harm occurs in the forum, but the tort was committed outside of the forum. In *Calder v. Jones*,²⁸ the Court found that California courts had personal

20. 326 U.S. 310 (1945).

21. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

22. 444 U.S. 286 (1980).

23. *Id.* at 297 (citation omitted).

24. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

25. *Id.*

26. *Id.* at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

27. *Id.* For example, in *Asahi Metal Indus. Co. v. Superior Court*, the Court found that the “fairness factors weighed against the exercise of personal jurisdiction.” 480 U.S. 102, 114 (1987). The plaintiff was injured on a motorcycle when the tire valve exploded that Asahi had made. *Id.* at 105-06.

28. 465 U.S. 783 (1984).

jurisdiction over two defendants that were both residents of Florida.²⁹ The Court noted that “California is the focal point both of the story and of the harm suffered.”³⁰ The defendants in *Calder* aimed their conduct at California and knew that the “effects” of their conduct would be felt in California.³¹ *Calder* demonstrates how nonresident defendants may be subject to the personal jurisdiction of the forum where the consequences of their torts occur, and the defendants should have known that the injury would occur in the forum state.

B. Personal Jurisdiction Based on the Internet

Lower state and federal courts disagree as to what degree of Internet activity is sufficient to exercise personal jurisdiction over a defendant. The court in *Weber v. Jolly Hotels*³² explained the three categories of lower court decisions. The first category involves “cases where defendants actively do business on the Internet.”³³ The courts usually find that personal jurisdiction exists in these cases due to contracts made between the residents and the defendants.³⁴ The second category involves “situations where a user can exchange information with the host computer.”³⁵ There “the exercise of jurisdiction is determined by examining the level of information that occurs on the website.”³⁶ The third category involves “passive Websites; i.e., sites that merely provide information or advertisements to users.”³⁷ In those cases courts usually do not find personal jurisdiction.³⁸ While the preceding analyses have been considered continuously in traditional contexts, the Internet presents specific new problems.

1. Courts Finding For Personal Jurisdiction

The courts that generally find the defendant’s Internet contacts sufficient to confer personal jurisdiction base their decisions on additional contacts or

29. *Id.* at 789.

30. *Id.*

31. *Id.* 784-86, 789. While in Florida, the defendants wrote and edited the allegedly libelous article for publication in a national magazine whose largest circulation included California. Shirley Jones, the plaintiff and subject of the article, was a professional entertainer living and working in California. *Id.*

32. 977 F. Supp. 327 (D.N.J. 1997).

33. *Id.* at 333.

34. *Id.* at 333 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1996)).

35. *Id.*

36. *Id.* (citation omitted).

37. *Id.* (citation omitted).

38. *Id.*

injuries occurring in the forums due to intentional torts.³⁹ However, at least one court has found that the maintenance of a website alone confers personal jurisdiction.⁴⁰

In *CompuServe, Inc. v. Patterson*,⁴¹ the Sixth Circuit held that the defendant, Patterson, was subject to personal jurisdiction in Ohio.⁴² CompuServe filed a declaratory judgment action asking the district court to find that CompuServe had not infringed the defendant's trademark.⁴³ Patterson was domiciled in Texas.⁴⁴ CompuServe, a computer information service provider, had its corporate headquarters in Ohio.⁴⁵ Patterson subscribed to CompuServe's on-line service and used it to distribute his software to third parties.⁴⁶ The court described the defendant's contacts with CompuServe:

He [defendant] subscribed to CompuServe, and then he entered into the Shareware Registration Agreement when he loaded his software onto the CompuServe system for others to use and, perhaps, purchase Then, he repeatedly sent his computer software, via electronic links, to the CompuServe system in Ohio, and he advertised that software on the CompuServe system. Moreover, he initiated the events that led to the filing of this suit by making demands of CompuServe via electronic and regular mail messages.⁴⁷

Patterson purposefully availed himself of the privileges and benefits of doing business in Ohio by using CompuServe to distribute his products, making contracts governed by Ohio law, and continuing to contact the Ohio office by electronic and regular mail while CompuServe was allegedly infringing his trademark.⁴⁸ The court also found that the lawsuit was a result of the defendant's Internet activities in Ohio because Patterson marketed his software there.⁴⁹ Therefore, any violation of the alleged trademarks or trade-names infringement had to have occurred "at least in part, in Ohio."⁵⁰

39. See, e.g., *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996) (upholding specific jurisdiction for trademark infringement in California when Illinois resident directed his business activities at that forum).

40. *State v. Granite Gate Resorts, Inc.*, No. C6-95-7227, 1996 WL 767431, at *10 (D. Minn. 1996).

41. 89 F.3d 1257 (6th Cir. 1996).

42. *Id.* at 1268.

43. *Id.* at 1257.

44. *Id.* at 1260.

45. *Id.*

46. *Id.* at 1264, 1266.

47. *Id.* at 1264.

48. *Id.* at 1266.

49. *Id.* at 1267.

50. *Id.*

The Sixth Circuit found the non-Internet contacts to be important in deciding that Patterson had purposefully availed himself of services in Ohio. Because his contacts were far more extensive than merely posting a website, these additional contacts combined with the Internet activities led the court to find that personal jurisdiction was proper.⁵¹

In *Heroes, Inc. v. Heroes Foundation*,⁵² the court found the defendant subject to personal jurisdiction in a trademark infringement case.⁵³ The plaintiff, Heroes, Inc., was a charitable organization in Washington, D.C. The defendant was a charitable organization in New York.⁵⁴ Both the plaintiff and the defendant were organized to help the survivors of police officers and firemen killed in the line of duty.⁵⁵ The defendant advertised in *The Washington Post* and maintained a website.⁵⁶ The defendant's newspaper ad listed a toll-free telephone number to call to make donations.⁵⁷ The court described this advertisement as "a purposeful action of the defendant" aimed at the forum state.⁵⁸ The defendant's website included this toll-free telephone number and the allegedly infringing trademarked logo.⁵⁹ The court found that the exercise of personal jurisdiction was proper due to the local newspaper advertisement and the website solicitations, but stated that it was unnecessary to decide if the website alone would be enough.⁶⁰

In *Panavision International, L.P. v. Toeppen*,⁶¹ a district court found personal jurisdiction in California when the defendant committed an intentional tort, resulting in harmful effects in California.⁶² The plaintiff, Panavision, was a Delaware limited partnership, and its principal place of business was in Los Angeles, California.⁶³ The defendant, Dennis Toeppen, resided in Illinois.⁶⁴ The defendant knowingly registered for a domain name that infringed a trademark held by Panavision and intended to interfere with Panavision's business.⁶⁵ However, "[a]t no time did Toeppen use the 'Panavision.com' name in connection with the sale of any goods or services."⁶⁶ Toeppen prevented

51. *Id.* at 1268.

52. 958 F. Supp. 1 (D.D.C. 1996).

53. *Id.* at 5.

54. *Id.* at 1.

55. *Id.* at 2.

56. *Id.* at 3.

57. *Id.*

58. *Id.* at 3.

59. *Id.* at 3, 5.

60. *Id.* at 5.

61. 938 F. Supp. 616 (C.D. Cal. 1996).

62. *Id.* at 622.

63. *Id.* at 618.

64. *Id.*

65. *Id.* at 621.

66. *Id.* at 619.

Panavision from using its trademarked name for its website because he had already registered for that domain name.⁶⁷ He demanded money from Panavision to give up the registered domain name.⁶⁸

The court used the “effects test,” of *Calder v. Jones*,⁶⁹ to decide if purposeful availment existed in this tort case.⁷⁰ Toeppen directed his activities at the forum state, California, by intentionally registering a domain name, knowing that Panavision would be injured in California.⁷¹ The injury occurred in the forum state, which Toeppen should have easily foreseen because California is where Panavision primarily does business.⁷² Toeppen’s Internet contacts were minimal in this case because he merely posted a website. However, Toeppen registered a trademarked domain name and attempted to sell it to the owner of the trademark. Thus, the court found personal jurisdiction.⁷³

Although the exception to the general rule, at least one court has found personal jurisdiction based on a passive website when the company merely maintained a web page with advertisements. In *State v. Granite Gate Resorts, Inc.*,⁷⁴ the Minnesota Attorney General sued Granite Gate Resorts for deceptive trade practices, false advertising, and consumer fraud.⁷⁵ Granite Gate is an Internet service provider, and it has a website advertising gambling services.⁷⁶ The district court held the defendant subject to personal jurisdiction in Minnesota.⁷⁷ The court focused on the nature of the Internet advertising to find personal jurisdiction over the defendant, stating “[o]nce the Defendants place an advertisement on the Internet, that advertisement is available 24 hours a day, seven days a week, 365 days a year to any Internet user until the Defendants take it off the Internet.”⁷⁸ The court held the advertisements should have been enough to put the defendant on notice that it may be sued in Minnesota, and thus, the defendant had met the purposeful availment requirements for personal jurisdiction through its activities that were directed at Minnesota.⁷⁹ This view is only followed by a minority of courts. The flaw with this reasoning is that

67. *Id.*

68. *Id.* He had previously registered domain names of other well-known companies with the intent of selling the domain names to those companies. *Id.*

69. *Id.* at 621 (citing *Calder v. Jones*, 465 U.S. 783, 789 (1984) (finding that personal jurisdiction is proper when the effects of a person’s conduct cause an injury in the forum state)).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. No. C6-95-7227, 1996 WL 767431 (D. Minn. 1996).

75. *Id.* at *1.

76. *Id.* at *2.

77. *Id.* at *10.

78. *Id.* at *6.

79. *Id.* at *11.

under this rule, Granite Gate Resorts could be sued anywhere that a person can access its website—virtually anywhere in the world. This rule would allow for an interpretation that would virtually destroy the traditional requirements for a court's exercise of jurisdiction over a defendant.

2. Courts Finding Against Personal Jurisdiction

In *Bensusan Restaurant Corp. v. King*,⁸⁰ a district court in New York found no personal jurisdiction over the defendant. The plaintiff, Bensusan Restaurant Corporation, sued King in New York for allegedly infringing its trademark, "The Blue Note."⁸¹ King resided in Columbia, Missouri, where he "own[ed] and operate[d] a 'small club' . . . called 'The Blue Note.'"⁸² The plaintiff, a New York corporation, founded a jazz club in New York City, also called "The Blue Note," and owned other jazz clubs around the world by the same name.⁸³

King created a website to advertise his club to Missouri residents.⁸⁴ Anyone could access the website regardless of location. He posted information about his club on the website, including the dates when various bands would be playing, locations to purchase tickets, and a telephone number for charging tickets.⁸⁵ King would not mail tickets ordered by telephone, but required that they be picked up in Missouri.⁸⁶ The website had a logo that allegedly infringed the plaintiff's trademark.⁸⁷

The court found that King did not meet the purposeful availment requirements.⁸⁸ "King has done nothing to purposefully avail himself of the benefits of New York. King, like numerous others, simply created a Website and permitted anyone who could find it to access it."⁸⁹ This reasoning is consistent with the holdings of a majority of courts that have analyzed the issue of personal jurisdiction in which the defendant's only contact is a passive website.⁹⁰ Otherwise, anyone with a website would be subject to personal jurisdiction anywhere the website could be accessed.

In *Cybersell, Inc. v. Cybersell, Inc.*,⁹¹ the Ninth Circuit also held the defendant was not subject to personal jurisdiction in Arizona by merely placing

80. 937 F. Supp. 295 (S.D.N.Y. 1996).

81. *Id.* at 297.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 301.

89. *Id.*

90. *See Cybersell, Inc. v. Cybersell Inc.*, 130 F.3d 414, 418 (9th Cir. 1997).

91. 130 F.3d 414 (9th Cir. 1997).

an allegedly infringing logo on its web page.⁹² The plaintiff was incorporated in Arizona, and the defendant was a Florida corporation.⁹³ The defendant's contacts with Arizona were minimal; it merely posted an "essentially passive home page on the web, using the name 'Cybersell.'" ⁹⁴ The court found that the defendant did not direct its activities at the forum state by maintaining a passive website.⁹⁵ This court's holding is consistent with a majority of courts that find that a defendant must do something more than maintain a passive website to be subject to a forum court's personal jurisdiction.

C. *ESAB Group, Inc. v. Centricut, L.L.C.*⁹⁶

In *ESAB Group* a federal district court held that maintaining a web page that could be viewed in South Carolina did not subject the nonresident defendant corporation to personal jurisdiction in that state.⁹⁷ The plaintiff's principal place of business was in Florence, South Carolina, but it was incorporated in Delaware.⁹⁸ ESAB developed, manufactured, and sold welding and cutting equipment.⁹⁹ The defendant, Centricut, was incorporated in New Hampshire with its principal place of business in West Lebanon, New Hampshire.¹⁰⁰ Centricut manufactured and sold replacement parts for welding and cutting equipment.¹⁰¹ Additionally, Centricut sold replacement parts for machines made by ESAB.¹⁰²

ESAB owned a patent that "cover[ed] an improved electrode for use in connection with plasma arc torches."¹⁰³ These torches are commonly used for "cutting, welding, and surface treatment of metals."¹⁰⁴ The electrode is "surrounded by a layer of oxidizing gas" that is supposed to increase the "service life [of the torch by] . . . preventing the typical rapid oxidation of a particular copper component of the electrode."¹⁰⁵ ESAB accused Centricut of

92. *Id.* at 415.

93. *Id.*

94. *Id.* at 419.

95. *Id.* ("In short, Cybersell FL has done no act and has consummated no transaction, nor has it performed any act by which it purposefully availed itself of the privilege of conducting activities, in Arizona, thereby invoking the benefits and protections of Arizona law.")

96. 34 F. Supp.2d 323 (D.S.C. 1999).

97. *Id.* at 331.

98. *Id.* at 326.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

patent infringement for selling electrodes covered by the patent.¹⁰⁶ In its defense, Centricut claimed the allegedly infringing electrodes had not yet been sold or offered for sale.¹⁰⁷ However, the court found the electrodes were offered for sale in Centricut's Internet catalog.¹⁰⁸

A month after ESAB filed its summons and complaint, Superior Machine Company bought the allegedly infringing electrode.¹⁰⁹ It did so through an unsolicited telephone call to Centricut after viewing the Internet catalog.¹¹⁰ This was the first and only time that Superior had done business with Centricut. The same day the order was placed, Centricut shipped the electrodes.¹¹¹ Two days after Superior's order, ESAB served Centricut with the complaint.¹¹²

Centricut transacted its business entirely by mail, telephone, and facsimile.¹¹³ Less than one percent of its customers were in South Carolina.¹¹⁴ Centricut "use[ed] account managers, sales personnel, outside regional representatives and telemarketers to contact customers and potential customers . . ."¹¹⁵ Centricut's sales staff made "numerous contacts" with South Carolina residents.¹¹⁶ Centricut had a website on the Internet that included product information and allowed customers to place orders.¹¹⁷ To place an order, customers were first required to set up an account by telephoning Centricut to get a customer ID and password.¹¹⁸ Centricut employees had only been to South Carolina once for a previous lawsuit.¹¹⁹ Also, Centricut did not have any employees in South Carolina.¹²⁰ The court found that Centricut's contacts were not sufficient to subject it to general or specific personal jurisdiction.¹²¹ Centricut was somewhere between the interactive sites, where personal jurisdiction generally exists, and the passive sites, where personal jurisdiction generally does not exist.¹²² The court concluded that Centricut did not aim its commercial activities specifically at South Carolina.¹²³ Due to the

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 332.

113. *Id.* at 326.

114. *Id.*

115. *Id.* at 326-27.

116. *Id.* at 327.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 329.

122. *Id.* at 330.

123. *Id.*

proximity of the summons and complaint to Superior's order, the court evidently agreed with the defendant that ESAB asked Superior to place an order for the electrodes; thus, the court disregarded that sale because the order was placed to manufacture jurisdiction.¹²⁴

ESAB's argument rested on the fact that South Carolina customers could place orders over Centricut's website.¹²⁵ The court found no merit in ESAB's argument that Centricut's website was an offer to sell.¹²⁶ It went on to add that even if the website constituted an offer to sell, ESAB failed to present any evidence that the offers were made in South Carolina by a customer actually visiting the website.¹²⁷ Centricut's contacts were minimal, as the website was the main contact considered in the specific jurisdiction analysis.¹²⁸ Because the court had already decided that Centricut's contacts were not "continuous and systematic" to support the exercise of general jurisdiction, no personal jurisdiction existed.¹²⁹

III. ANALYSIS

It is unclear what approach South Carolina will follow to determine the exercise of personal jurisdiction over a nonresident defendant based on the presence of Internet contacts. The *ESAB Group* court declined to follow a minority of jurisdictions that have held that the presence of a passive website can confer personal jurisdiction over a nonresident defendant. It appears that South Carolina will follow the majority of courts and find jurisdiction only when additional contacts are present beyond the passive website. South Carolina has a strong interest in assuring that its citizens have the ability to seek relief when they are injured by nonresidents by ensuring that South Carolina residents can bring their suits in the state's courts.

Legal scholars have suggested different approaches to the problem. Professor Howard B. Stravitz suggests that courts should focus on the fairness factors in the *Burger King* case and require a very low threshold to satisfy the minimum contacts requirement.¹³⁰ Under this approach, it would merely take anything more than a passive website to satisfy the minimum contacts

124. *Id.* at 333.

125. *Id.* at 331 ("Plaintiff relies solely on the national and international nature of the Internet to demonstrate that Centricut's website had the potential to reach and solicit South Carolina residents.").

126. *Id.* at 333.

127. *Id.*

128. *Id.*

129. *Id.* at 329.

130. See Stravitz, *supra* note 5, at 940.

requirement.¹³¹ This method is based on evaluating the fairness to a defendant in having to litigate in a foreign jurisdiction.¹³² Professor Martin H. Redish suggests that the purposeful availment test is outdated, and the Supreme Court needs to formulate a more modern basis for the exercise of personal jurisdiction based on the Internet.¹³³ However, it seems unlikely that the Supreme Court will abandon the purposeful availment test to develop a new standard simply for the Internet.

As indicated in *ESAB Group*, South Carolina will likely require additional contacts for personal jurisdiction in Internet cases. Because the *ESAB Group* court merely held that the maintenance of a passive website alone is not enough to confer personal jurisdiction, the question of what degree of content is sufficient to trigger personal jurisdiction is an open one. In essence, the *ESAB Group* decision does not give any practical guidance as to what will be sufficient to constitute purposeful availment in South Carolina with regard to use of the Internet. As demonstrated by a majority of courts, the most logical solution for attorneys trying to predict a South Carolina court's holding is to look at the contacts found in other jurisdictions, in addition to the websites other jurisdictions have found sufficient to confer personal jurisdiction.

IV CONCLUSION

The problem of purposeful availment by Internet use looms large as the Internet becomes more pervasive and widespread. As of yet, there is no clear approach to the problem in ascertaining personal jurisdiction over nonresident defendants. Websites can be seen by anyone with access to the Internet, anywhere in the world. However, nonresident defendants surely cannot be subject to nationwide jurisdiction and possibly worldwide jurisdiction simply by posting a website. Clearly, nonresident defendants can be subject to personal jurisdiction in South Carolina through intentional torts directed at South Carolina where the injury occurs in the state. That rule will only apply in a limited number of cases, but it is not a solution to the overall problem.

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131. *Id.* ("Shifting emphasis to the second-branch convenience factors will allow jurisdiction to be asserted unless the chosen forum is fundamentally unfair.")

132. *Id.*

133. *See* Redish, *supra* note 4, at 601. ("[T]he technological impact of the Internet in many cases renders purposeful availment an all but meaningless concept from the perspective of out-of-state defendant activity, and imposes an unacceptably high barrier to the interests of both in-state plaintiffs and the states themselves.")

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