

# Personal Jurisdiction & Digital Food Marketing

## State Law Approaches to Address Digital Food Marketing to Youth



Personal jurisdiction refers to a “court’s power to bring a person into its adjudicative process.”<sup>1</sup> Personal jurisdiction over corporations and individuals is determined through an analysis of a defendant’s “minimum contacts” with a forum state. A court can exert its power to adjudicate when a defendant has purposely availed itself “of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws, ’...[including] acts intentionally directed toward the forum state with knowledge that effects would result there.”<sup>2</sup> In order to satisfy due process requirements, exertion of personal jurisdiction also must be reasonable and in accord with fair play and substantial justice.

Personal jurisdiction is further categorized into specific jurisdiction and general jurisdiction. “Specific jurisdiction exists when there is a connection between the forum and the acts of a nonresident defendant generating the controversy.”<sup>3</sup> The connection can take the form of an action by the defendant within the forum to wrong the plaintiff, or the use of “the mails or another mode of communication as a substitute for actually going to the forum.”<sup>4</sup> Business activity within a forum state is a typical reason for the exertion of personal jurisdiction over a defendant.<sup>5</sup> Where business activity stems from the acts of a business affiliated with an out-of-state defendant, courts will first make a legal determination as to whether an agent-principal relationship exists. If such a relationship is found, “courts will attribute the affiliate’s contacts [with the forum state] to the defendant” to determine whether personal jurisdiction exists.<sup>6</sup> While not discussed here, state long-arm statutes should also be consulted.

### The Zippo Test

The evolution of digital technologies has greatly complicated personal jurisdiction because the minimum

contacts framework is difficult to apply to Internet actors using a communication medium that is nationally accessible and can be used to simply post information or to contact specific individuals, execute sales contracts, deliver software or facilitate communication between people all over the country. In 1997, a judicial doctrine known as the “Zippo test” was developed to establish personal jurisdiction over online actors.<sup>7</sup> The test uses a sliding scale to evaluate “the level of interactivity and commercial nature of the exchange of information that occurs” between a website and a consumer in a forum state to determine whether an actor has purposefully availed him or herself of the benefit of a state’s laws.<sup>8</sup>

There are a number of factors courts take into consideration to determine whether the exercise of personal jurisdiction over a defendant conducting business online is proper, including:

- The level of business activity conducted in the forum state
- Property ownership within the forum state
- Advertising and solicitation of forum residents
- Internet presence<sup>9</sup>

Internet presence is gauged by the amount of traffic on a given website by forum state residents, whether the site uses cookies, acceptance of payments, tailoring content for forum state residents, maintaining a chat feature, transmitting products or services, and the use of a location-sensitive gateway to bar forum residents from accessing the website.<sup>10</sup> The same factors can be applied to mobile sites and the downloading and subsequent use of mobile applications (apps).<sup>11</sup>

Under Zippo, an entity that actively conducts business via its website to persons in a forum state will be subject to personal jurisdiction in the state (“active sites”), while

an entity that merely provides a passive website that makes information available but does not interact with consumers will not (“passive sites”).<sup>12</sup> Websites that fall in the middle are said to be in the “gray zone” and courts seek to determine whether a defendant “purposefully directed its activities towards the forum state” and will look to whether the defendant “targeted the forum with advertising ... or other emblems of a forum presence.”<sup>13</sup>

## The Business of Marketing Foods and Beverages

Personal jurisdiction is highly fact-specific and case law with respect to internet commerce is inconsistent at best. Mobile commerce has yet to even work its way into major civil procedure texts. Food and beverage sales and marketing, however, have some unique characteristics that provide insight into personal jurisdiction issues that may arise with respect to digital food marketing.

Packaged food and beverage companies maintain sophisticated distribution systems that ensure consumers have access to their products in convenience stores, grocery stores, dollar stores, big box stores and via vending machines.<sup>14</sup> Quick service and fast casual restaurant chains work to ensure that their franchisees are located strategically and with sufficient density to capture large numbers of consumers within a given state. Packaged food and beverage companies enter into slotting fees and in-store marketing arrangements with food retailers, and restaurant franchisees are subject to elaborate contracts. Typically a portion of franchise fees are earmarked for marketing to be executed by the franchisor. In short, the business model demands extensive business contacts in each state where products are sold, and a series of principal-agent relationships. If successful, substantial revenues are derived from product sales to citizens of each forum state. This level of business activity in and of itself should be sufficient to establish personal jurisdiction over nonresident food industry defendants when they use digital means to market products to child and teen consumers in a given forum state.

## Additional factors supporting the exercise of personal jurisdiction of food industry defendants

Digital food marketing encompasses a vast range of tactics and techniques and food companies use digital means to: execute contests, sweepstakes, instant-win games and coupon offers; deliver branded content to young consumers; interact with consumers; and foster peer-to-peer marketing. One of the major shortcomings of the Zippo test is that it was designed to address websites, and since its development there has been an explosion of the use of mobile devices.

Under Zippo, websites that are used to conduct sales to forum state residents are typically found to be “active” websites whereas “informational websites viewable from the forum state as well as everywhere else usually do not support personal jurisdiction....”<sup>15</sup> Food company websites accessed on desktop computers or as mobile sites on handheld devices typically are not used to execute actual online sales of food products to children and teens, but a 2009 study of food company websites with child-directed areas found that 55% of them contained an online store selling branded merchandise.<sup>16</sup>

Food company websites and apps and other social media platforms like Facebook are widely used to execute instant-win games, sweepstakes, contests, loyalty programs and other promotions. Instant-win games, sweepstakes and contests are subject to state laws and are only allowable as exemptions to state illegal lottery laws. Loyalty programs and rewards are subject to statutory protections (e.g., gift card regulations) and state common law protections such as the doctrine of escheat. When a food company uses digital media to conduct these activities, the company purposefully avails itself of the ability to do business within the forum state.<sup>17</sup> Allowing citizens of the forum state to create a user profile and enter or redeem codes via a website or to download an app onto one’s smartphone or tablet is interactive in nature.<sup>18</sup> Moreover, sweepstakes and contests are marketed to consumers in the forum state

via food packaging and traditional media like radio and television. Digital marketing with these features meet Zippo's "active" criteria.

Food company-maintained websites and mobile apps directed to young children typically contain advergames (games that integrate branded food products), branded downloads, opportunities to interact with spokescharacters, virtual worlds and the ability to enter codes featured on food packaging to access exclusive digital content. Food company websites that maintain online stores would likely be found to be "active" websites. Websites and apps that are solely branded content-delivery-oriented likely fall within the gray zone of Zippo's sliding scale. Children's food marketing websites and mobile apps contain many interactive features that are used to determine personal jurisdiction.<sup>19</sup> A 2009 study of food company websites with child-directed areas found that 69% allowed children to register or create an account (as compared to just 37% of food company websites without a child-directed area) and 61% had a member sign-in.<sup>20</sup> Food companies also heavily promote their child-directed digital marketing on food packaging and on television, which amounts to targeting child consumers in the forum state.

## Conclusion

Since the development of the Zippo test, the Internet has taken on a major role in advertising and commerce. With respect to digital food marketing, the extensive business activities of food, beverage and restaurant companies that sell food in a given state, combined with the use of traditional media and product packaging to promote digital marketing campaigns targeting child and teen consumers in the forum state all militate towards findings of personal jurisdiction over out-of-state food company defendants that employ digital food marketing tactics with children and teens.

## Endnotes

- <sup>1</sup> BLACK'S LAW DICTIONARY (9th ed. 2009).
- <sup>2</sup> KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 249-250 (3d ed. 2012) (citing *Hansen v. Denckla*, 357 U.S. 235, 253 (1958)).
- <sup>3</sup> GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 79 (4th ed. 2012).
- <sup>4</sup> *Id.*
- <sup>5</sup> KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 261 (3d ed. 2012)
- <sup>6</sup> *Id.* at 263.
- <sup>7</sup> *Zippo Mf. Co v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).
- <sup>8</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Zippo Mf. Co v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).
- <sup>9</sup> 59 AM. JUR. 3D *Proof of Fact* §13 (2013) (Proof of minimum contacts with forum state such that exercise of personal jurisdiction is appropriate; checklist).
- <sup>10</sup> 59 AM. JUR. 3D 1 *Proof of Fact* §13 (2013).
- <sup>11</sup> See, e.g., Joanna Sibilla Taatjes, *Note: Downloading Minimum Contacts: The Propriety of Exercising Personal Jurisdiction Based on Smartphone Apps*, 45 CONN. L. REV. 357 (2012).
- <sup>12</sup> *Zippo Mf. Co v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).
- <sup>13</sup> MICHAEL L. RUSTAD, INTERNET LAW IN A NUTSHELL 74 (Thomson Reuters 2009).
- <sup>14</sup> For an excellent description of the soda industry supply chain see Christine Fry et al., *Breaking Down the Chain: A Guide to the Soft Drink Industry* (2011), [http://changelabsolutions.org/sites/phpnet.org/files/Beverage\\_Industry\\_Report-FINAL\\_20110907.pdf](http://changelabsolutions.org/sites/phpnet.org/files/Beverage_Industry_Report-FINAL_20110907.pdf)
- <sup>15</sup> KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 267 (3d ed. 2012).
- <sup>16</sup> Anna E. Henry & Mary Story, *Food and Beverage Brands that Market to Children and Adolescents on the Internet: A Content Analysis of Branded Web Sites*, 41 J. OF NUTRITION EDUC. & BEHAVIOR 353, 356 (2009).
- <sup>17</sup> Kevin M. Clermont, Principles of Civil Procedure 267 (3d ed. 2012).
- <sup>18</sup> Joanna Sibilla Taatjes, *Note: Downloading Minimum Contacts: The Propriety of Exercising Personal Jurisdiction Based on Smartphone Apps*, 45 CONN. L. REV. 357 (2012).
- <sup>19</sup> For a checklist of factors used to determine minimum contacts with a forum state to support the exercise of personal jurisdiction over a defendant see, 59 AM. JUR. 3D 1 *Proof of Fact* §13 (2013).
- <sup>20</sup> Anna E. Henry & Mary Story, *Food and Beverage Brands that Market to Children and Adolescents on the Internet: A Content Analysis of Branded Web Sites*, 41 J. OF NUTRITION EDUC. & BEHAVIOR 356 (2009).